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A Proposition With a Powerful Punch: The Legality and Constitutionality of NCAA Proposition 48

*Kevin M. McKenna**

I. INTRODUCTION

Hey, fine, you are great athletes, but if you want to go to a quality school and you want to compete, you are going to have to start to read a book; you are going to have to write, you are going to have to do things that you are not comfortable with.¹ Joseph V. Paterno, head football coach, Pennsylvania State University.

The course of action before the delegates of the 1983 National Collegiate Athletic Association Convention² was, in not so eloquent

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1. See NCAA, Proceedings of the Annual Convention of the National Collegiate Athletic Association, 116 (1983) [hereinafter NCAA Proceedings (1983)].

2.

[The] National Collegiate Athletic Association [hereinafter "NCAA"] is a private non-profit association organized in 1905. [The] NCAA consists of approximately 900 members. Membership is open to four-year institutions which meet certain academic standards. Allied and Associate membership is open to athletic conferences, associations, and other groups interested in intercollegiate athletics [The] NCAA operates pursuant to a constitution and bylaws adopted by the membership and subject to amendment, . . . by the membership at annual conventions. When the annual convention is not in session, policy is established and directed by the NCAA Council of 22 members elected by the entire membership at the annual convention. [The] NCAA has a professional staff located at its headquarters in Shawnee Mission, Kansas. Some 80 employees execute NCAA policy under the supervision of [an executive director].

Board of Regents of the Univ. of Okla. v. National Collegiate Athletic Ass'n, 546 F. Supp. 1276, 1282 (W.D. Okla. 1982), *aff'd in part, rev'd and remanded in part*, 707 F.2d 1147 (10th Cir. 1983), *cert. granted*, 463 U.S. 1311. The NCAA's Constitution, bylaws, and procedures are set out at length in its manual, National Collegiate Athletic Association, 1982-1983 NCAA Manual [hereinafter cited as NCAA Manual].

terms, simple: either put up or shut up.³ Close to 100 Division I college presidents and chancellors—something unprecedented in recent NCAA history—were in attendance. Issues relating to academic standards were the primary reason most of these presidents and chancellors were present.⁴ And, as Lattie Coor of the University of Vermont urged, the time was now or never.

If we fail to act on these issues today, we will state more profoundly than ever before to the public and to all who have an interest in intercollegiate athletics that we cannot and will not take a step to insist that athletes must be students before they can be intercollegiate athletes.⁵

Having averted their eyes from the exploitation of athletes for years, this gathering of university presidents and chancellors finally decided that they had seen enough.⁶ Proposition 48, which requires incoming freshman student-athletes to have at least a 2.0 high school grade point average and a 700 on the Scholastic Aptitude Test in order to be eligible to compete in intercollegiate sports during their first years, was ratified by the Convention.⁷

The results have had measurable impact. To wit, as of August 8, 1986, the following:

Three hundred and ninety-seven (397) athletes who were awarded scholarships were ineligible to compete their freshmen seasons.⁸

Fourteen of the 47 players on the *Parade* magazine All-America football team were ineligible.⁹

Fifteen of the nation's top 50 basketball players were ineligible.¹⁰

Ten of Oklahoma University's 23 football recruits were ineligible.¹¹

The University of Cincinnati lost the services of six of its basketball recruits.¹²

3. See NCAA Proceedings (1983), *supra* note 1, at 119.

4. *Id.*

5. *Id.*

6. *Id.* In the words of Dr. Harry Edwards, who teaches the Sociology of Sports at Cal-Burkley, "There are thousands of athletes being passed through college without regard for academic progress. That is exploitation, not assistance." Mulligan, *Sudden Impact, Grades In on Proposition 48, 397 Athletes Affected So Far*, Philadelphia Daily News, Aug. 12, 1986, at 77, Col. 1.

7. See NCAA Proceedings (1983), *supra* note 1, at 119.

8. See Mulligan, *supra* note 8, at 78, Col. 1. *Id.* This figure includes 224 football players, 120 basketball players and 53 who played other sports. *Id.*

9. *Id.* The list of the top 50 was compiled from a consensus of scouting services. *Id.*

10. *Id.*

11. *Id.*

12. *Id.*

Football teams in the Southeastern Conference lost a total of 23 players to ineligibility;¹³

Notre Dame lost three football players¹⁴ and one basketball player,¹⁵

Austin Peay lost three football players and four basketball players.¹⁶

Two of the finest high school basketball players in the Philadelphia area, both of them bound for Big 5 schools, did not play as freshmen.¹⁷

Despite the adoption of Proposition 48, two questions persist. First, does it actually discriminate against minorities and others from poor socio-economical backgrounds? Second, given the number of athletes sidelined by Proposition 48, why have none of them challenged its legality?

II. THE BYLAW

In January, 1983, the Division I schools of the NCAA promulgated Proposition 48, NCAA 5-1-(j) (hereinafter "Bylaw").¹⁸ The Bylaw provides:

Effective August 1, 1986, in order to be eligible for practice, participation in regular-season competition and athletically related financial aid during the first academic year in residence, a student entering a Division I NCAA member institution directly out of high school must have:

(i) Graduated from high school with a minimum grade-point average of 2.000 (based on a maximum of 4.000) in a core curriculum of at least 11 academic full-year courses, including at least three in English, two in mathematics, two in social science and two in natural or physical science (including at least one laboratory class, if offered by the high school) as well as a 700 combined score on the SAT verbal and math sections or a 15 composite score on the ACT, or;

(ii) Presented more than the minimum standard set forth in the preceding paragraph for either the core-curriculum grade-point average or required test score, in which case eligibility may be established during the specified time periods on the basis of the following eligibility indices:

For those freshmen entering subsequent to August 1, 1986 and prior to August 1, 1987:

13. *Id.* Similarly, Mid-Eastern Athletic Conference teams lost 27.

14. *Id.*

15. *Id.* Keith Robinson of Buffalo did not qualify. *Id.*

16. *Id.*

17. *Id.* Ivan Brown from Monsignor Bonner in Drexel Hill, PA sat out at St. Joseph's University while Roman Catholic's Earnest Pollard did the same at Temple University. *Id.*

18. See NCAA Proceedings (1983), *supra* note 1, at 124.

GPA	SAT	ACT
2.2000-above	660	13
2.100-2.199	680	14
2.000-2.099	700	15
1.990-1.999	720	16
1.800-1.899	740	17 ¹⁹

The intent of the Bylaw was two-fold. In the words of Southern Methodist University's Donald Shields:

We have the opportunity to say to our potential student-athletes, secondary school districts and their leadership that beginning in the fall of 1986, we expect our competing student-athletes to be able to demonstrate basic minimum academic competencies as evidenced first by satisfactory completion of a very modest and yet well-balanced high school core-curriculum and, secondly, by reasonable, minimum performance standards in essential verbal and mathematics skills on nationally administered examinations.²⁰

A closer look at the record of the Convention Proceeding concerning the debate over the proposed adoption of the Bylaw reveals that discussions only vaguely related to raising academic standards for the student-athlete.²¹ The debate actually centered on whether the Bylaw (then designated as Proposal No. 48) discriminated against traditionally black institutions.

19. See NCAA, NCAA Guide for the College-Bound Student Athlete, February 1986, at 14. According to The Guide's introduction:

The information contained in this publication is designed to provide a general summary of NCAA rules and regulations in easy-to-read form to prospective student-athletes, high school and junior college officials, representatives of NCAA member institutions, and other interested individuals. These guidelines relate primarily to the recruiting and eligibility of prospective student-athletes as well as to the financial aid they are permitted to receive. Please note that these rules do not apply to an individual's eligibility for high school or junior college participation. *Id.*

20. NCAA Proceedings (1983), *supra* note 1, at 103. Shields also stated: It seems clear to many of us that in these days of increasing national concerns about inadequate academic standards in our secondary schools and colleges that this legislation is not only appropriate but indeed is necessary to preserve the organizational integrity of the NCAA as well as the institutional integrity of our member institutions.

Id.

Ironically, Shields represented a school which approximately four years later became the first institution to receive the "Death Penalty" from the NCAA as part of sanctions imposed for improprieties relating to its football program. Moore, *SMU Football Program Is Sentenced to 'Death'*. Wilmington News Journal, Feb. 28, 1987, p. CL1, at 2-3.

21. See NCAA Proceedings (1983), *supra* note 1.

As might be expected, the representatives from the predominately black colleges and universities opposed the Bylaw.²² According to Grambling State University's Joseph B. Johnson,²³ "the alleged academicians who formulated this proposal which 'sought' to determine the fate of so many student-athletes eliminated a very important segment of Division I historically black institutions."²⁴ Johnson explained that the American Council on Education (ACE) failed to conduct an impact study of the potential effect of the proposed changes on Blacks and other minority athletes.²⁵ In addition, Johnson stated:

The committee's proposal, ladies and gentlemen, discriminates against student-athletes from low-income and minority-group families by introducing arbitrary SAT and ACT cutoff scores as academic criteria for eligibility. The ACE committee's proposal is based upon academic conjecture rather than empirical data. I asked the question and no one answered: "Why are we not setting standards for all of the NCAA instead of just Division I?"²⁶

This question was echoed by Frederick S. Humphries of Tennessee State University.²⁷ According to Humphries

If the urgency to address the academic issue is one that is felt among Division I institutions and not among Division II and III institutions, as we seem to be indicating in this Convention today, then cannot that logic be further extrapolated to say only among some institutions of Division I? And if it is an urgency for some institutions in Division

22. *Id.* For example, representatives from Delaware State University, Grambling State University, North Carolina A & T, Southern University and Tennessee State University all addressed the convention in opposition to the Bylaw. *Id.*

23. *Id.* at 103. Johnson also represented the Southwestern Athletic Conference and the National Association of Equal Opportunity in Higher Education. *Id.*

24. The "alleged academicians" Johnson referred to were members of the Ad Hoc Committee of the American Council on Education. *Id.* at 104. In Johnson's opinion, the Ad Hoc Committee was also "seeking to infringe upon the eminent domain of college and university presidents as well as the hallowed provinces of colleges and universities board of trustees, regents and school systems." *Id.*

25. *Id.* According to Johnson, the ACE proposal put the blame on the victim in that it shifted the total responsibility for academic success to the student athlete rather than the institution. *Id.*

26. *Id.* Johnson relinquished the floor answering the question with one of his own. Johnson stated: "The question has not been answered. I leave this thought to you, those of you who did not answer. 'They came after the Jews and I said nothing; they came after the Catholics and I said nothing; they came after the Blacks and I said nothing. Then they came after me and there was no one there to say anything.'" *Id.* at 104-05.

27. *Id.* at 110-11.

I, is it not then fair to say that that urgency be addressed by those institutions who are so involved rather than the application of inequality that we who work in higher education would never allow in any other aspect of our institutional life?²⁸

Jesse N. Stone, Jr. of Southern University also spoke out against the Bylaw.²⁹ In his address to the Convention, Stone stressed that everyone present supported strongly and believed in excellence in education as well as academics.³⁰ However, Stone felt that this excellence should not be achieved with one sweeping piece of legislation thereby depriving minority athletes of the chance to compete both academically and athletically.³¹ Stone stated:

I stand here today out of a deep concern for those athletes who are not present and who are not participating in athletics today whose faces are clear to me and whose race is therefore known. I am speaking of that body of highly talented athletes who want the opportunities to display their talents as they seek the opportunity for higher education. They are asking, I think, not to be cut off.³²

28. *Id.* at 111. Humphries pointed out that a principle of inequity exists in the NCAA. *Id.* In support of his position, Humphries noted the adoption of Proposition No. 20, which was tailored for *each* of the I-A football-playing conferences. *Id.* This raises a poignant question. If the member institutions of the NCAA are unequal under certain circumstances, why should they be equal in all other aspects of the NCAA?

29. *Id.* at 107.

30. *Id.* Stone added:

I suppose that if at Southern University we believed that we needed to raise our standards so that the athlete who came to Southern University would have more done for him than we would do it, whether you did it at the other institutions or not. I want to emphasize with that statement the fact that institutions are, in fact, free, if I read the rules correctly, to raise their standards beyond that which is required for NCAA competition.

Id.

31. *Id.* James A. Castaneda of Rice University offered a different interpretation. Castaneda stated: "It seems to me that the protective stance adopted in the name of minorities could in the long run be prejudicial to those very minorities." *Id.* at 106.

32. *Id.* As James H. Zumberge of the University of Southern California explained:

The preeminence of academics over athletics has been emphasized by the NCAA through constant use of the term student-athlete. This name traditionally has been used to designate those students who are awarded grants-in-aid as a means of acquiring the college education while at the same time representing a member institution in intercollegiate athletic events. Over the years, the athletic grant-in-aid program administered by the NCAA has opened a door to a college education for thousands of individuals who otherwise would have been denied passage through that door because of economic or other circumstances.

Id.

In support of his position, Stone reminded his colleagues what Arnold Palmer, on hand to receive an award, had said to the Convention one day earlier.³³ Palmer, a golf legend, had admitted to the Convention that he had not been the best student at Wake Forest but that next to his parents, his alma mater had the greatest influence on him.³⁴

To many, there was no substantive basis or substantive data to support the adoption of the Bylaw as criterion which would enhance the academic achievement or the academic assuredness or program toward a degree by the activities that were specified.³⁵

In fact, the presidents of traditionally black institutions took particular exception to the SAT score as part of the eligibility requirements.³⁶ For example, Luna I. Mishoe of Delaware State College said that the SAT arbitrarily penalizes a large number of students, minorities and non-minorities alike, simply on the basis of socioeconomic background.³⁷ In support of his position, Mishoe explained:

Students of low socioeconomic backgrounds score 100 points less than other students, and this has nothing to do with intellectual retention to do college work. It is based on external factors. We feel that those students, minorities and nonminorities, should not be penalized for those external reasons.³⁸

According to Edward B. Fort of North Carolina A & T State University, hundreds, if not thousands of youths, including black and rural isolated white youths have been excluded from an opportunity to participate in Division I sports because of the SAT.³⁹ He

33. *Id.* at 108.

34. *Id.* According to Stone,

[Palmer] gave Wake Forest the major portion of the credit for his success. I, for one, do not know a lot about Arnold Palmer; but I am glad that Wake Forest didn't test him out before he had an opportunity to demonstrate the kind of professional that he could become. That is all I am asking you to do here today, not to test out and not to wash out and not to deny the opportunities to these young men and young women that our nation so long ago promised.

Id.

35. NCAA Proceeding (1983), *supra* note 1, at 108-11.

36. *Id.*

37. *Id.* at 110.

38. *Id.* According to Mishoe, one-half of the students he referred to—minorities and nonminorities score less than 700 on the SAT scale. *Id.* A perfect score on the SAT would be 1600. See *American Testing Service*, Princeton, NJ.

39. NCAA Proceeding (1983), *supra* note 1, at 110.

also predicted this exclusion would continue if, in fact, the SATs become the yardstick for the determination of academic standards.⁴⁰ Fort warned the delegation that "if this body continues along this path of potential self-destruction on this issue, it will have done so because it placed its dependence in this arena of the application of academic standards on an aptitude testing mechanism whose very validity repeatedly has been challenged by empirical evidence of numerous studies."⁴¹

In conclusion, Fort stated:

I have seen black youths and white youths during my career as an urban school superintendent and as a university chancellor desecrated by the revelation that a questionable SAT score prevented that youngster from finding his or her place in the sun. You see, in the final analysis, try as we might to avoid it, it has unfortunately become a black-and-white issue. The bottom line ultimately is apparently one of the color of a majority of the kids who take the floor as a "final four" or the omnipotency of the combatants in the Cotton Bowl.⁴²

Joseph V. Paterno, head football coach at Penn State University, was a staunch proponent of Proposition 48.⁴³ Paterno noted that unfortunately the debate over Proposition 48 had come to a point where the Convention was "talking black and white."⁴⁴ Paterno

40. *Id.*

41. One of the empirical studies referred to at the convention was the 545 page research volume accumulated in 1980 by the Ralph Nader report. *Id.* According to the Nader Report "ETS and SAT aptitude tests on the average predict grades only eight to fifteen percent better than random prediction with a pair of dice." *Id.* Fort quoted at length from the Nader Report stating:

The SAT does not just discriminate between the rich and the poor, or as ETS-SAT representatives frequently describe the situation 'the affluent and the disadvantaged,' it is not simply a matter of penthouse versus tenement. The ETS and SAT scores discriminate not only against the rich and minority of America but also between the rich and the majority of Americans. That is, the members of the working and middle classes, black and white. The SAT discriminates among virtually all levels of the country's classic structure across both income and the occupation.

Finally, it says, the more money a person's family makes, the higher that person tends to score. I would suggest to you that the empirical evidence on the screen is such that it would be inappropriate, if not immoral, for this body to place its eggs in a basket of question as it relates to the issue of SAT.

Id. at 109.

42. *Id.* at 108.

43. *Id.* at 114.

44. *Id.* Paterno also expressed regrets that not one black coach was present at the convention to describe what had gone on with black athletes in predominantly white colleges. *Id.*

admonished the representatives from the predominately black institutions by stating:

I am really surprised that so many black educators have gotten up here and kind of sold their young people down the river. You have sold them short. I think you have underestimated what great competitors the young black people are today in all areas, football, basketball, athletics and other areas. If it takes 700 in the SAT to compete and we give them time to be prepared, they will be prepared.⁴⁵

Paterno also told the Convention that one of the reasons why athletes fail in the class room is because they are ill-prepared academically.⁴⁶ Paterno then illustrated his point with the following scenario.⁴⁷ Once in the classroom, these athletes soon realize they are out of their league; they cannot compete, he explained.⁴⁸ Soon their pride will not permit them to go to that particular class.⁴⁹ Eventually, they begin to cut class and just cop out.⁵⁰

Conversely, Paterno stated that once athletes have some success in the classroom, they blossom and begin to take pride in what they have done in the classroom. They look forward to class; they become motivated. Paterno then explained:

Motivation is just the question of having some success. People have to be motivated. Let them have success at some place down the line

45. *Id.* However, Paterno did state:

I cannot in any way argue with these great black educators who lead our black schools, because I have no feelings and I have had no experiences on what goes on at your institutions. I do have 33 years of experience in institutions which are predominantly white, and I have had great black athletes who have made our program succeed.

Id.

46. *Id.* at 115-16. Paterno said, "[A]s you look out there, more of our black athletes are frustrated later in life because they are not prepared for a life away from athletics, because they never got what they should have from their college experience." *Id.* at 116.

47. *Id.* at 115.

48. *Id.* He further explained:

They have never gotten the thrill of developing some intellectual curiosity. They never have been comfortable computing, they never have had an opportunity to fulfill their potential because it started back when they were kids at 12, 13 and 14 when they showed that great athletic ability and nobody went in there and said, 'Hey, fine, you are great athletes, but if you want to go to a quality school and you want to compete, you are going to have to start to read a book; you are going to have to write, you are going to have to do things that you are not comfortable with.'

Id. at 116.

49. *Id.*

50. *Id.*

and you build from that. Unfortunately, we have not done that for so many of the kids that we have had in the last 15 years.⁵¹

Paterno also told the Convention that the situation at hand was not a racial one.⁵² Instead, he viewed it simply as exploitation.⁵³ In Paterno's words, "We have raped a generation- and-a half of young black athletes."⁵⁴

The Reverend Edmund P. Joyce of the University of Notre Dame also favored passage of the Bylaw.⁵⁵ Reverend Joyce stated: "Much has been said about the possible discriminatory effect of using minimum test scores.⁵⁶ I don't feel all that expert in this area,"⁵⁷ he added, "but I find it hard to believe that the distinguished presidents who have sponsored Proposal No. 48 would do anything deliberately discriminatory."⁵⁸ Reverend Joyce also told the Convention that he felt that the opponents to Proposition 48 were trying to hang their hats on the SAT in an attempt to prevent its adoption.⁵⁹ Reverend Joyce stated:

I think, ladies and gentlemen, that we must guard against using the test-score argument as an excuse to prevent a much-needed reform from being initiated. If, indeed, substantial and empirical evidence can be brought forth within the next few years calling into serious question the propriety of a 700 SAT score, today's legislation can be modified. After all, it is not scheduled to go into effect until August 1986. But I do urge the membership to delay this reform no longer. Let us bite

51. *Id.* at 115.

52. *Id.* Paterno did concede, however, that it had been a race problem for the last 15 years. *Id.*

53. *Id.* In addition, Paterno stated:

We do not want to ruin them. I, for one, do not want to do that. I do not want to exploit them, and I do not want to bring kids into our program and give them expectations that they can do certain things and then frustrate them in such a way that they become disillusioned.

Id. at 116.

54. *Id.* at 115. He continued:

We have taken kids and sold them on bouncing a ball and running with the football and that being able to do certain things athletically was going to be an end in itself. We cannot afford to do that to another generation. We cannot afford to have kids come into our institutions and not be prepared to take advantage of what the great education institutions in this country can do for them.

Id.

55. *Id.*

56. *Id.*

57. *Id.*

58. *Id.*

59. *Id.*

the bullet today and take the action which will make meaningful the term student-athlete.⁶⁰

III. CONSTITUTIONAL LIMITATIONS AND THE BYLAW

Given the number of athletes who were sidelined by the Bylaw, it is surprising that not one has challenged its legality in a court of law. Upon further reflection, however, it becomes evident that a law suit challenging the legality of the Bylaw would be difficult to commence and even more difficult to win. Under the most typical case scenario, a black athlete declared ineligible would challenge the Bylaw as violative of the equal protection clause of the fourteenth amendment. However, before the athlete would have a chance at proving that a fourteenth amendment violation existed, the athlete first would have to get over the threshold question of whether state action existed.⁶¹

The requirement of state action draws a line between "private" and "public" conduct.⁶² "Private" conduct is beyond the reach of constitutional restraint, while "public" conduct must meet the requirements of the Constitution.⁶³ "Public" conduct is the clearer of the two, for when a governmental agency adopts rules pursuant to its own procedures and implements them without private involvement, this constitutes state action.⁶⁴

60. *Id.* Many of the presidents from black institutions discussed the possibility of passing Proposition 48 with allowances for petitions of exceptions from those standards for institutions that found such petitions necessary. *Id.* at 123. Each year the NCAA would publish these petitions. *Id.* It was suggested that such a system would set higher standards of eligibility which approximately 95 percent of the Division I institutions could meet. *Id.* At the Convention, the Reverend J. Donald Monan of Boston College explained the ultimate effect of the exception. *Id.* He stated:

The exceptions would prevent this legislation from having disproportionately negative consequences on historically black schools or others that seek an exemption. It would meet any objections about invasions of autonomy. Lastly, it would hold up a target for 100 percent of the Division I institutions to meet. This suggestion did not become an amendment, but it indicated that mechanisms are available that would do the imperative job of raising academic standards without creating unbridgeable chasms between our historically black colleges and others.

Id.

61. J. Nowak, *Constitutional Law* 497-99 (1983). For an analysis of the NCAA and state action, see McKenna, *Age Limitations and the NCAA: Discrimination or Equating Competition?*, 31 *St. Louis U.L.J.* 1, 6 (1987).

62. Nowak, at 497-99.

63. *Id.*

64. *Id.*

Yet, when a private organization acts, the line of demarcation becomes less clear. When a private organization acts, the existence of state action ultimately depends upon whether the circumstances fit one of several rationales for the application of constitutional restraint to private entities.⁶⁵ The various rationales include the following: Has the private entity assumed a "public function?"⁶⁶ Does a "symbiotic relationship" or "nexus" exist between the private organization and the government such that the private organization ought to be subject to the same restraints as the government?⁶⁷ Is the impact of the private organization's activity upon rights so significant that the restraint is necessary in order to preserve those rights?⁶⁸ Most of the courts considering this issue have held that actions by the NCAA constitute state action and are subject to the limitations of the fourteenth amendment.⁶⁹

In *Buckton v. National Collegiate Athletic Association*,⁷⁰ the Massachusetts District Court labeled NCAA action as state action because the NCAA performed public functions and had a symbiotic relation with public entities.⁷¹ In *Associated Students, Inc. v. National Collegiate Athletic Association*,⁷² the Ninth Circuit became the first

65. *Id.*

66. *Id.* at 502-05.

67. *Id.* at 516-18.

68. *Id.* at 513-23.

69. *But, see* McDonald v. National Collegiate Athletic Association, 370 F. Supp. 625 (C.D. Cal. 1974). In *McDonald*, athletes who had competed in basketball on behalf of a state university brought action against the university and the NCAA of which the university (Long Beach State) was a member. *Id.* at 626. The athletes challenged the declarations of their ineligibility for further participation in intercollegiate athletics and sought a preliminary injunction. *Id.* The court held that the action by the NCAA in imposing penalties upon the university for infractions of its bylaws, resulting in the university's declaring athletes ineligible to participate in athletics, did not involve state action. *Id.* at 631. Thus, the athletes had no due process right to a hearing before the NCAA. *Id.* at 632.

70. 366 F. Supp. 1152 (D. Mass. 1973).

71. *Id.* at 1156-57.

72. 493 F.2d 1251 (9th Cir. 1973). In *Associated Students*, a students' organization of the California State University—Sacramento and individual students alleged that the NCAA 1.600 Rule resulted in an unreasonable classification. *Id.* at 1252. Based on the district court's decision in *Parrish v. National Collegiate Athletic Association*, 361 F. Supp. 1220, 1225 (W.D. La. 1973), the Ninth Circuit held that the NCAA's enforcement activities were "state action." *Id.* Yet the court also found that the Rule's classification was reasonably related to the purposes for which it had been enacted. 493 F.2d at 1254-55. According to evidence offered by the NCAA, the Rule was adopted to reduce the possibility of exploiting young athletes by recruiting those who would not be representative of the student body and probably would not graduate. *Id.* at 1255. *See also* text *infra*.

federal appellate court to find such state action.⁷³ Less than a year later the Court of Appeals for the District of Columbia followed suit in *Howard University v. National Collegiate Athletic Association*.⁷⁴ In *Howard University*, the court examined the size, influence and wealth of the NCAA.⁷⁵ The court ultimately concluded that private institutions following the policies of the NCAA had engaged in the requisite degree of state action to require constitutional restraint.⁷⁶

Finally, in *Parrish v. National Collegiate Athletic Association*,⁷⁷ the Fifth Circuit concluded that there was state action because the NCAA performs a public function regulating intercollegiate athletics.⁷⁸ The decisions in *Howard University*, *Associated Students* and *Parrish* have been most persuasive.⁷⁹ For instance, the First Circuit relied on these three cases involving the NCAA and found governmental action in *Rivas Tenorio v. Liga Atletica Interuniversitaria*.⁸⁰ The addition of the *Rivas Tenorio* decision only strengthened the foundation for finding state action, a fact reflected when the Eighth Circuit cited with approval, all four cases in *Regents of the University of Minnesota v. National Collegiate Athletic Association*.⁸¹

Arguably, the Supreme Court's decisions in *Blum v. Yaretsky*,⁸² *Lugar v. Edmonson Oil Co.*⁸³, and *Rendell-Baker v. Kohn*,⁸⁴ have

73. 493 F.2d at 1255.

74. 510 F.2d 213 (D.C. Cir. 1975) for a complete discussion of *Howard University*, see text *infra*.

75. *Id.*

76. *Id.* at 216-20.

77. 506 F.2d 1028 (5th Cir. 1975). In *Parrish*, the NCAA's 1.600 Rule was challenged once again, this time by Centenary's Robert Parrish, who later starred on the Boston Celtics of the NBA. *Id.* The Fifth Circuit upheld the Rule because it passed "constitutional muster" under the traditional "minimum rationality" standard. *Id.* at 1034.

78. *Id.*

79. See text and accompanying notes, *infra*.

80. 554 F.2d 492 (1st Cir. 1977). For a discussion of *Rivas Tenorio*, see *infra* note 65.

81. 560 F.2d 352 (8th Cir. 1977). In *Regents of the University of Minnesota*, the University and some of its agents and faculty members brought an action challenging the act of the NCAA in placing the University's athletic teams on indefinite probation for its refusal to find three Minnesota student athletes ineligible. *Id.* at 354. In finding the existence of "state action" the court stated: "We, like the First Circuit in *Rivas Tenorio*, . . . agree with the analysis and conclusion of Judge Tamm for the District of Columbia Circuit in *Howard University* . . ." *Id.* at 365.

82. 457 U.S. 991 (1982). In *Blum*, respondents, representing a class of medical patients, challenged decisions by nursing homes in which they resided, to discharge

narrowed the reach of the state action doctrine.⁸⁵ Arguably, this narrowing will not foreclose the application of the state action principle to the NCAA.⁸⁶ For instance, in her article *The New NCAA Rules of the Game: Academic Integrity or Racism?*,⁸⁷ Professor Linda Greene argued that the recent state action trilogy could be distinguished on the facts alone.⁸⁸ Greene stated: "None of the recent

or transfer patients without notice or an opportunity for a hearing. *Id.* at 993. The Court held that respondents failed to establish "state" action in the facility-initiated discharges and transfers to lower levels of care and thus, failed to prove violation of the fourteenth amendment rights. *Id.* at 1012. In short, the extensive governmental funding and regulation of nursing homes did not make the transfer decisions "state" action. *Id.* at 1005-12.

83. 457 U.S. 922 (1982). In *Edmonson Oil Co.*, respondents filed suit in Virginia state court on a debt owed by petitioner and sought prejudgment attachment of certain property belonging to petitioner. *Id.* at 924. A writ of attachment was issued and executed with a hearing set for 34 days after the levy. *Id.* This resulted in the trial judge dismissing the attachment for respondents' failure to establish the alleged statutory grounds for attachment. *Id.* at 925. Petitioner then brought a § 1983 claim in the federal district court alleging that, in attaching his property, respondents had acted jointly with the state to deprive him of his property without due process of law. *Id.* Ultimately, the Supreme Court agreed, holding: The statutory scheme obviously is the product of state action, and a private party's joint participation with state officials in the seizure of disputed property is sufficient to characterize that party as a "state actor" for purposes of the fourteenth amendment. *Id.* at 941-42.

84. 457 U.S. 830 (1982). In *Rendell-Baker*, petitioners, a former vocational counselor and teacher at a privately operated school for maladjusted high school students brought separate actions in district court under 42 U.S.C. § 1983. *Id.* at 834-35. The petitioner claimed that since public funds accounted for 90% of the school's operating budget and the school had to meet certain state regulations to receive the funds, this constituted state action. *Id.* Thus, petitioners claimed they had been discharged by the school in violation of their first, fifth and fourteenth amendment rights. *Id.* In relying on *Blum*, the Court held that the school's receipt of public funds did not make the discharge decisions acts of the state. *Id.* at 840.

85. In finding state action with regard to NCAA action, most courts have based their decisions on the state support received by the private university of the NCAA. *See, Associated Students, Inc.*, 493 F.2d at 1254-55 and *Spath v. National Collegiate Athletic Association*, 728 F.2d at 28. Thus, if the *Blum* decision, finding that mere receipt of public funding does not constitute state action, is extended to cases involving the NCAA, any state action argument will have to be similar to those theories accepted in *Parrish*, 506 F.2d 1028 (the NCAA performs a traditional public-governmental function); *see also Howard University* 510 F.2d 213. (state action based on size, wealth and influence of NCAA).

86. *See Greene, The New NCAA Rules of the Game: Academic Integrity or Racism?* 28 St. Louis U.L.J. 101 (1983).

87. *Id.*

88. *Id.* at 125. Professor Greene stated:

The Court's recent decision involved the application of the state action doctrine to varied fact situations: (1) to a private school that was both state regulated and funded, (2) to a private nursing home that was both state regulated and

decisions was unanimous. A careful reading of the various majority, plurality, concurring, and dissenting opinions merely reinforces the view that findings of state action are likely to be based on factual idiosyncrasies rather than clear principles."⁸⁹ If there is a common thread running through these cases it is this: "If the state explicitly approves the rules complained of and cooperated in their implementation, then sufficient state action may exist to impose constitutional restraint."⁹⁰

In applying the recent Supreme Court decisions involving state action to the NCAA, the courts of appeal have reached different results. In *Arlosoroff v. National Collegiate Athletic Association*,⁹¹ the Fourth Circuit held that adoption of the Bylaw was not state action.⁹² In its opinion the court found that it is not enough, in order to find state action, that an institution is subsidized and highly regulated by the state.⁹³ According to the court's decision, if the state in its regulatory or subsidizing function does not order or cause the action complained of, and the function is not one traditionally reserved to the state, then there is no "state action".⁹⁴ In reaching

funded, and (3) to a corporation that utilized state law attachment procedure to seize property for the payment of an overdue debt. (footnotes omitted).

Id. at 124-25.

89. *Id.* at 125.

90. *Id.* Professor Greene suggested that this principle seemed responsible for the finding of state action in *Edmonson Oil Co.*, 457 U.S. 922 (1982), and for the absence of it in *Blum*, 457 U.S. 991 (1982), and *Rendell-Baker*, 457 U.S. 830 (1982). 29 St. Louis U.L.J. at 125 note 122. In *Edmonson Oil Co.*, the Court stated: "[W]e have consistently held that a private party's joint participation with state officials in the seizure of disputed property is sufficient to characterize that party as a 'state actor' for purposes of the fourteenth amendment." 457 U.S. at 941.

91. 746 F.2d 1019 (4th Cir. 1984). Arlosoroff was an Israeli citizen. *Id.* at 1020. After his discharge from the Israeli Army in March 1979 at age 22, he participated in 17 amateur tennis tournaments. *Id.* He was also a member of the Israeli Davis Cup Team. *Id.* In August of 1981, Arlosoroff enrolled at Duke University. *Id.* During his freshman year, Arlosoroff became the team's number one singles player while leading the Blue Devils to the Atlantic Coast Conference Championship. *Id.* He was later selected to the All-American Tennis Team. *Id.* After his freshman year, though, the NCAA declared him ineligible for further competition of the basis of NCAA Bylaw 5-1-(d)-(3). *Id.*

92. *Id.* at 1021.

93. *Id.* at 1022. The court noted that there was no suggestion that the representatives of the state institutions joined together to vote as a block to effect adoption of the Bylaw over the objection of private institutions. *Id.*

94. *Id.* The court stated:

The NCAA serves the common need of member institutions for regulation of athletics while correlating their diverse interests. Through the representatives of all of the members Bylaw 5-1-(d)-(3) was adopted, not as a result of

its decision, the Fourth Circuit found that the notion of "state action" fostered in *Howard University* and *Parrish* had been rejected by the Supreme Court in *Rendell-Baker* and *Blum*.⁹⁵

In *Spath v. National Collegiate Athletic Association*,⁹⁶ the United States Court of Appeals for the First Circuit chose not to pursue the question.⁹⁷ Instead, the court noted that while the weight of authority would support the plaintiff's position that the NCAA is sufficiently state connected to incur 42 U.S.C. § 1983 liability,⁹⁸ "recent trends have limited that concept . . .".⁹⁹ The court then skirted the issue by stating: "Since Lowell at least, as a state funded university, may be a state actor, we move, instead, to Spath's particular merits."¹⁰⁰

In *Butts v. National Collegiate Athletic Association*,¹⁰¹ the Third Circuit Court of Appeals failed to discuss the issue of "state ac-

governmental compulsion, but in the service of the common interests of the members. The adoption of the Bylaw was private conduct, not state action.

Id.

95. *Id.* at 1021. In no uncertain terms the court stated: "*Rendell-Baker, Blum* and *Jackson v. Metropolitan Edison, Co.*, not *Lugar*, control here." *Id.* at 1022. In *Jackson*, 419 U.S. 345 (1975), the petitioner alleged that termination of her electricity constituted state action. *Id.* at 347-48. The Court noted that it had found state action present in the exercise by a private entity of powers traditionally exclusively reserved to the state. *Id.* at 352. Yet, the Court held that Pennsylvania was not sufficiently connected with the challenged termination of electricity by merely granting the power company a monopoly to make the respondent's conduct attributable to the state for the purposes of the fourteenth amendment. *Id.* at 358-59.

96. 728 F.2d 25 (1st Cir. 1984). For a complete discussion of *Spath*, see *infra*, notes 109-10 and accompanying text.

97. *Id.* at 28.

98. *Id.*, citing *Rivas Tenorio v. Liga Atletica Interuniversitaria*, 554 F.2d 492 (1st Cir. 1977). In *Rivas Tenorio*, Colombian citizens brought an action against a Puerto Rican athletic association, contending that they were deprived of equal protection by virtue of one of the association's rules. *Id.* at 493. The rule in question prohibited non-Puerto Rican student-athletes from participating in annual competitions if they entered member institutions after their 21st birthday. *Id.* After the district court dismissed the complaint, the First Circuit reversed, holding that the athletic association's regulations represented action "under color of" Commonwealth law. Therefore, the regulation in question should have been subjected to strict constitutional scrutiny because of its facial discrimination against aliens. *Id.* at 494.

99. *Spath*, 728 F.2d at 28 (citing *Rendell-Baker*, 457 U.S. 830 (1982); *Blum*, 457 U.S. 991 (1982)).

100. *Spath*, 728 F.2d at 28.

101. 751 F.2d 609 (3d Cir. 1984). In the district court though, Judge Fullam found the First Circuit's opinion in *Spath* very persuasive. In *Butts v. National Collegiate Athletic Association*, 600 F. Supp. 73 (E.D. Pa. 1984), Judge Fullam concluded:

Virtually every contention advanced by plaintiff in this action has been considered, and firmly rejected, by the First Circuit Court of Appeals in *Spath*

tion."¹⁰² This was particularly surprising since the Third Circuit Court of Appeals was familiar with and, in fact, cited Greene's article.¹⁰³ Until the Supreme Court finally addresses the issue of state action and its applicability to the NCAA, Greene's article seems to represent the most pragmatic viewpoint. As Greene emphasized:

Subjecting the NCAA to the reach of the Constitution would not be inconsistent with recent Supreme Court decisions. Those decisions have not undermined the principle that closely intertwined joint ventures between private and public entities must abide by constitutional principles. Even if the foregoing principle is limited by the tentatively emerging requirement that the state must explicitly approve of private rules and cooperate in their implementation, it is nonetheless appropriate to subject the NCAA to the constitutional limitations.¹⁰⁴

IV. JUDICIAL SCRUTINY

If an athlete challenged the present Bylaw, it would not be the first time that NCAA eligibility requirements have come under attack.¹⁰⁵ This was especially true of the NCAA 1.600 Rule which was the subject of numerous lawsuits.¹⁰⁶ The 1.600 Rule required that NCAA-affiliated schools grant athletic scholarships to applicants who could "predict"—on the basis of their high school grade point average or class rank and their grade on one of two standardized

v. National Collegiate Athletic Association, 728 F.2d 25 (1st Cir. 1984). In light of this precedent, plaintiff's burden of showing a likelihood of success on the merits is indeed a heavy one. The First Circuit's opinion is persuasive, and I have no reason to suppose that the Court of Appeals for the Third Circuit would reach a different conclusion.

600 F. Supp. at 74.

Thus, one can assume one of two things. Either Judge Fullam sidestepped the issue as did his colleagues in the First Circuit or he believed "state action" existed. The fact that he reached the merits of the case only strengthens these two alternatives.

102. *Butts*, 751 F.2d at 612. In the opinion, Judge Higginbotham quoted at length from Professor Greene's article. *Id.*

103. *Id.*

104. See *Greene*, *supra* note 86, at 127.

105. For an analysis of the NCAA age limitation requirements, see *McKenna*, *supra* note 61.

106. Bylaw 4-6-(b)-(1) was amended at the NCAA annual convention on January 13, 1973, at which time the requirement that a student predict a 1.600 grade point average before being declared eligible to participate in intercollegiate athletics was replaced by a requirement that a student need only graduate from high school with a 2.00 in order to be declared eligible to participate in athletics. This amendment would not become effective until the 1974-75 academic year and until that time, the 1.600 Rule would continue to be enforced by the NCAA.

achievement tests—a minimum 1.600 grade point average during their first year in college.¹⁰⁷

Under the NCAA prediction tables, a student-athlete's grade point is estimated on the basis of a formula utilizing (1) either high school grades or rank in high school class and (2) a score on a scholastic aptitude examination (either the SAT or the ACT).¹⁰⁸ If a student had no score reported on either the SAT or ACT, it was impossible for him to predict a 1.600 grade point average as required under the 1.600 Rule, whatever his high school grade point average or rank was.¹⁰⁹

Subsequent to the adoption of the 1.600 Rule, Official Interpretation 418 (O.I. 418) of the Rule was adopted.¹¹⁰ A pertinent part of O.I. 418 provides: "A student-athlete who practices or participates while ineligible under the provisions of Bylaw 4-6-(b)-(1) [the 1.600 Rule], shall be charged with the loss of one year of practice and varsity eligibility by his institution for each year gained improperly which shall be the next year the student is in attendance"¹¹¹ For example, in *Associated Students, Inc. v. National Collegiate Athletic Association*,¹¹² a students' organization of the California State University at Sacramento and individual students alleged that the NCAA 1.600 Rule resulted in an unreasonable classification.¹¹³

107. See *Parrish v. NCAA*, 506 F.2d 1028, 1030. Specifically, the NCAA 1.600 Rule stated:

A member institution shall not be eligible to enter a team or individual competitors in an NCAA-sponsored meet, unless the institution in the conduct of all its intercollegiate athletic programs: (1) limits its scholarship or grant-in-aid awards (for which the recipient's athletic ability is considered in any degree), and eligibility for participation in athletics or in organized athletic practice sessions during the first year in residence to student-athletes who have predicted minimum grade point averages of at least 1.600 (based on a maximum of 4.000) as determined by the Association's national prediction tables or Association-approved conference or institutional tables. NCAA Bylaw 4-6(b)(1), A. 175.

108. See *Associated Students, Inc. v. NCAA*, 493 F.2d 1251, 1253.

109. *Id.*

110. Under the NCAA Constitution, article six, § 2 (1972), the NCAA Counsel is empowered to make official interpretations of the constitution and bylaws which are binding after they are published and circulated to the membership.

111. *Id.*

112. 493 F.2d 1251.

113. *Id.* at 1252. The eleven individual plaintiffs were student-athletes who were admitted to CSUS under the California Administrative Code, Title V, § 40759(b), commonly referred to as the "Four Percent Rule." *Id.* Students admitted under that program are not required to take standard achievement tests such as the Scholastic Aptitude Test (SAT) or the American College Test (ACT) in order to

The district court held that the actions of the NCAA, prohibited by the injunction,¹¹⁴ violated the equal protection clause of the fourteenth amendment of the United States Constitution.¹¹⁵

The district court concern was not with the 1.600 Rule per se, but rather with the 1.600 Rule as interpreted by O.I.418.¹¹⁶ The court found, bearing in mind that the central purpose of the 1.600 Rule was to insure that the individual who participates in intercollegiate athletics is capable of succeeding academically at the college level, this new classification was overinclusive and not rationally related to the objective of the Rule.¹¹⁷

The court based its findings on the fact that the 1.600 Rule declared ineligible not only those student athletes who failed to predict a minimum 1.600 grade point average and who have not yet completed their first year in college, and not only those student athletes who failed to achieve a minimum 1.600 grade point average for the first

qualify for admission. *Id.* Instead, they are admitted on the basis of such factors as economic need, motivation and maturity. *Id.* In the opinion of the University, each of the plaintiff-athletes had the potential to succeed academically at the college level, notwithstanding deficiencies in their educational background which would normally have prevented their admission under the usual standards. *Id.*

114. *Id.* The district court granted a preliminary injunction prohibiting the defendants-appellants, (NCAA), from enforcing its freshman eligibility Rule 1.600, only as to the plaintiffs- appellees Lopez and Martinez, and also restraining the NCAA from penalizing the California State University at Sacramento (CSUS) for its failure to disqualify the plaintiffs from athletic participation for one year. *Id.* The district court also held that plaintiff, Associated Students, Inc., did not have standing in this action, and did not grant the injunction as to the other nine individual plaintiffs for the reason that the year of ineligibility imposed against them had expired. *Id.*

115. *Id.* In so holding, the district court stated that the NCAA's enforcement activities were "state action" and therefore subject to the standards of the fourteenth amendment. The court also determined that the preliminary injunction would not alter the *status quo ante litem*. *Id.*

116. *Id.* at 1253. See note 100 and accompanying text, *supra*.

117. *Id.* The court found that the NCAA classification system did not meet the guidelines set forth in *Reed v. Reed*, 404 U.S. 71 (1971). *Id.* at 1255. In *Reed*, the Supreme Court stated:

In applying that clause, this Court has consistently recognized that the fourteenth amendment does not deny to states the power to treat different classes of persons in different ways. (citations omitted). The equal protection clause of that amendment does, however, deny to states the power to legislate that different treatment be accorded to persons placed by a statute into different classes on the basis of criteria wholly unrelated to the objective of that statute. A classification 'must be reasonable, not arbitrary, and must rest upon some ground of difference having a fair and substantial relation to the object of the legislation, so that all persons similarly circumstanced shall be treated alike.' *citing Royster Guano Co. v. Virginia*, 253 U.S. 412, 415 (1920).

year in college, but additionally those student athletes who demonstrated by the conclusion of the first year that they had the ability to achieve academic success by actually earning at least a 1.600 grade point average.¹¹⁸

The district court stated:

Once a student has an earned grade point average achieved over a reasonable period of time, then it is unreasonable, in light of the purposes of the Rule, to impose sanctions against the student athlete based on the fact that he failed to predict a certain grade point average. Instead, any sanctions imposed should be predicated on the actual grade point average attained by the student.¹¹⁹

The Ninth Circuit disagreed with the lower court and reversed finding that the 1.600 Rule's classification was reasonably related to the purposes of the Rule for which it was enacted.¹²⁰ The court conceded, "It may be that in the application of the Rule unreasonable results may be produced in certain situations, which is not unusual in the application of a generalized rule such as the one here."¹²¹

However, the court noted that one of the purposes of the official interpretation of the 1.600 Rule was to prevent member schools from granting scholarships to student-athletes who do not show a possibility of attaining a degree after taking part in the prescribed testing procedures before entering college¹²² and that the plaintiff's theory¹²³ of retroactive eligibility would prevent effective enforcement.¹²⁴ The court explained:

In order to meet that objective, determination of the eligibility of a student-athlete must be made at the time of the student's application

118. *Id.*

119. *Id.*

120. 493 F.2d 1251.

121. *Id.*

122. *Id.*

123. *Id.* The Ninth Circuit explained:

According to plaintiffs' theory and the decision of the lower court, all member schools could recruit athletes without giving any examination to them, or those athletes whose examinations did not predict successful graduation, and then if they did obtain a higher grade point average than 1.600 after the first year in school, they would be entitled to participate in NCAA sponsored athletics thereafter. Such a situation would prevent effective enforcement of the 1.600 Rule which we believe to be rational in order to achieve NCAA's objective. *Id.* at 1256.

124. *Id.* The court stated that the plaintiff's theory "would also permit ineligible students to engage in first year athletics along with those who proved to be eligible during the first year which, in effect, would destroy the purpose of the 1.600 Rule." *Id.*

and certification. If determination of eligibility is made at a later date, the classification would be destroyed. Such a procedure would allow colleges to recruit ineligible athletes with the hope that they would meet graduation prediction standards after their first year in college so as to become eligible for athletics during their college life.¹²⁵

Less than a year later, the Fifth Circuit faced a similar question in *Parrish v. National Collegiate Athletic Association*.¹²⁶ In 1973, Robert Parrish¹²⁷ and his teammates had requested preliminary and permanent injunctions against the NCAA to prevent it from applying the 1.600 Rule against them and declaring them ineligible to play on the Centenary basketball team.¹²⁸ Although four of his teammates were parties to the suit, it was quite obvious that Parrish was the "center of attention." As the district court stated:

A conservative evaluation of the evidence presented by plaintiffs shows that most of it pertained to Parrish and this suit probably would not have been brought had it not been for this man's particular prowess on the basketball court. Defendants' evidence is based almost entirely upon Parrish's situation, and very little on those of his co-plaintiffs.¹²⁹

In order to meet the requirements of NCAA's 1.600 Rule, Parrish took the ACT twice, his score being an 8.¹³⁰ This score caused most colleges to "back off" because they felt Parrish could not fulfill the 1.600 requirement.¹³¹ Yet, Centenary's athletic department told Parrish and his teammates that they had been recruited by Centenary in conformance with the NCAA's rules.¹³² The NCAA warned Cente-

125. *Id.*

126. 506 F.2d 1028 (1975).

127. *Parrish v. NCAA*, 361 F. Supp. 1220 (1973). Parrish, 7'1" in height, was designated a "super-athlete." *Id.* He was recognized during his last high school year by national magazines, newspapers, and sports columnists as probably the number one or number two leading basketball prospect in the United States, in the manner of Wilt Chamberlain and Lew Alcindor. *Id.* Parrish was named to several All-American high school teams and chosen by the Basketball News as the number one high school graduate basketball player in the country. *Id.* Of course, he was recruited, even courted, by almost every major college in the nation. *Id.*

128. 361 F. Supp. 1220 (1973).

129. *Id.* at 1223.

130. *Id.* As the court stated: "Regrettably, before achieving such prominence, he had been somewhat deprived, both educationally and economically; and probably began to aspire ambitiously toward a full higher education only after 'the baskets began to swish.'" *Id.*

131. *Id.*

132. *Id.* With this in mind the Fifth Circuit stated: "In fact, however, the department almost certainly knew that appellants did not qualify under the 1.600 rule." *Id.*

nary, both before and after the college admitted the appellants on athletic scholarships, that the young men could not be granted athletic eligibility because of the Rule.¹³³ However, Centenary failed to heed the warnings and the NCAA applied sanctions against it.¹³⁴ These sanctions meant that unless Centenary declared the players ineligible for basketball, the school could not play in any NCAA sponsored tournaments or in any NCAA sanctioned televised games.¹³⁵ The school declined to challenge this decision through the NCAA's own appeals procedure,¹³⁶ but also refused to declare the players ineligible.¹³⁷

When it appeared that Centenary's basketball team would be invited to a postseason tournament, the players requested a permanent injunction forbidding the NCAA from enforcing its sanctions against Centenary.¹³⁸ The district judge granted a temporary restraining order and extended it once,¹³⁹ but the players permitted it to dissolve when

133. The district court stated:
[The] NCAA, knowing that he was going to be a highly recruited prospect, had familiarized itself with Parrish's high school record before the summer of 1972, well prior to his being signed to an athletic scholarship contract by Centenary. During June of 1972, the NCAA received information that Centenary was going to sign Parrish, and one of its representatives, Berst, called then Coach Wallace and asked him how Parrish was going to predict a 1.600 score. Wallace replied that the school was going to convert the ACT test score to an SAT score, whereupon Berst informed him that this was prohibited by the Rules. Subsequently, the NCAA advised Centenary through its coaching staff and its Director of Athletics (who has "resigned" since the controversy arose), orally and by written correspondence, that the College could not convert ACT scores to SAT scores. As "water runs from a duck's back," these warnings fell on deaf ears and failed to prevent Centenary's Athletic Department successfully from proceeding with its efforts to sign Parrish upon a scholarship contract.

Id.

134. *Id.* The court detailed the sanctions in a footnote. The court stated: The NCAA placed Centenary on indefinite probation for incorrectly certifying appellants as eligible for basketball scholarships and other financial aid. Centenary could reduce the duration of its probation from indefinite to two years by "conducting its inter-collegiate athletic program in accordance with all requirements and interpretations of NCAA bylaw 4-6-(b)(1) [1.600 Rule]. App. at 57. *Id.*

135. *Id.*

136. *Id.* The NCAA appeals process is only available to member institutions and not to individual athletes.

137. *Id.* As a result, Parrish and his teammates continued to participate in regular season athletics. *Id.*

138. *Id.* at 1221.

139. *Id.* The district court acted pursuant to Rule 65(b) of the Federal Rules of Civil Procedure. *Id.*

Centenary's team received no postseason invitations.¹⁴⁰ A hearing was then held on the declaratory and injunctive aspects of the case.¹⁴¹ Following the hearing, the district court held that the constitutional challenge of the 1.600 Rule did not raise a substantial federal question under the civil rights statutes § 8 U.S.C. § 1343 and 42 U.S.C. § 1983.¹⁴² The court also found that the 1.600 Rule had a rational relationship to legitimate state purposes and therefore was not in violation of the equal protection clause.¹⁴³ Finally, the district court held that there had been no denial by the NCAA of due process.¹⁴⁴

On appeal, the players conceded that no fundamental right was involved.¹⁴⁵ However, in an attempt to have the court apply a strict scrutiny test, the players argued that the 1.600 Rule impermissibly discriminated against some vaguely defined class.¹⁴⁶ Although the court appeared partially receptive to at least two of the players' theories,¹⁴⁷ it quickly noted that their entire case lacked probative evidence as to actual discrimination.¹⁴⁸ The court stated:

True, appellants offered the testimony of two witnesses to the effect that the achievement tests used to predict probable success during the

140. *Id.*

141. *Id.*

142. *Id.* at 1225. The court relied on *Mitchell v. Louisiana High School Athletic Association*, 430 F.2d 1155 (5th Cir. 1970). The *Mitchell* court stated: A claimed denial of equal protection by state action does arise under the Constitution and would normally be within the district court's jurisdiction under 28 U.S.C. § 1343, unless unsubstantial or frivolous The classification made by the eligibility regulation is neither inherently suspect nor an encroachment on a fundamental right. On the other hand, it is grounded in, and reasonably related to, a legitimate state interest. *Id.*

143. *Id.* at 1226-28. The court noted: [the players] also presented evidence to show that the SAT and ACT tests discriminated against all of them in some form. One (Parrish) came from a minority group, one from a rural school, etc. This type of evidence was rejected as having no weight in *Murray v. West Baton Rouge Parish School Board*, 472 F.2d 438 (5th Cir. 1973). *Id.* at 1226.

144. *Id.* at 1228. The district court also opined that the 1.600 Rule did not deprive any player of "his right to associate with any particular group, i.e., the right to associate with those persons competing in interscholastic athletic events." *Id.* at 1229.

145. 506 F.2d at 1033.

146. *Id.* An examination of the "appellant's briefs and their contentions at oral argument suggests at least seven potential suspect classes: (1) blacks; (2) cultural minorities; (3) the educationally deprived; (4) persons of less than average intelligence; (5) late achieving students; (6) student athletes; and (7) impecunious student athletes." *Id.*

147. *Id.* The court noted that except for "blacks" and "persons of less than average intelligence", suggested classes were neither traditionally suspect nor did they possess the features usually associated with "suspectness." *Id.*

148. *Id.*

first year in college were culturally biased in that they were geared for white middle class students. Conclusory allegations however, are no substitute for a factual showing of actual discriminatory intent or effect.¹⁴⁹

Consequently, the court applied the traditional "minimum rationality" standard.¹⁵⁰

The court of appeals agreed with the district court, finding that the 1.600 Rule was rationally related to a legitimate state purpose and thus passed constitutional muster.¹⁵¹ The Fifth Circuit also dismissed the players' due process contention as unavailing. After noting that the privilege of participating in athletics fell outside the protection of the law, the court stated:

[A]ppellants . . . have lost only the opportunity to play in NCAA sponsored tournaments and televised games. Whatever the status of the alleged right to participate in interscholastic athletics, in the present circumstances we discern no "property" or "liberty" interest of which appellants have been deprived because of the NCAA's enforcement of its 1.600 Rule against Centenary.¹⁵²

Finally, in *Howard University v. National Collegiate Athletic Association*,¹⁵³ a private university and one of its star soccer players sought injunctive and declaratory relief against the NCAA alleging that the organization's enforcement of the Foreign Student¹⁵⁴ and

149. *Id.*

150. *Id.* at 1034.

151. *Id.*

152. *Id.* The court also stated that appellants wisely abandoned at oral argument their attempt to create a property interest out of the alleged injury to their hoped-for careers in professional basketball from the inability to gain tournament experience and television exposure. Both the injury and the career are far too speculative to establish a property interest as defined in *Roth*. Moreover, appellants concede that their athletic scholarships, assuming for the moment that these would constitute a property interest requiring due process protection, Cf. *Wright v. Arkansas Activities Ass'n*, *supra*, 501 F.2d at 27, remain in full effect. Hence, the NCAA's actions have caused no deprivation with regard to them. *Id.*

153. 510 F.2d 213 (D.C. Cir. 1975).

154. *Id.* The "Foreign-Student Rule" states:

Any participant in a National Collegiate Athletic Association event must meet all of the following requirements for eligibility He must not previously have engaged in three seasons of varsity competition after his freshman year, it being understood that: . . . Participation as an individual or as a representative of any team whatever in a foreign country by an alien student-athlete in each twelve-month period after his nineteenth birthday and prior to his matriculation at a member institution shall count as one year of varsity

1.600 Rules had violated their constitutional rights.¹⁵⁵ An NCAA investigation had revealed that two of Howard University's student-athletes had participated in the 1971 NCAA soccer championship in violation of the Foreign Student Rule.¹⁵⁶

The United States District Court for the District of Columbia found that the Foreign Student Rule violated equal protection because it created an unjustifiable alienage classification.¹⁵⁷ However, the court upheld the NCAA 1.600 Rule finding it "reasonably and narrowly related to the legitimate objectives and purposes of the association."¹⁵⁸ Both parties filed cross appeals to the United States Court of Appeals for the District of Columbia.¹⁵⁹ While the court of appeals found that the Foreign Student Rule discriminated against foreign student-athletes, it upheld the 1.600 Rule.¹⁶⁰ The court found the Ninth Circuit's reasoning in *Associated Students, Inc. v. National Collegiate Athletic Association* persuasive.¹⁶¹ The court held that the 1.600 Rule was not invalid as denying equal protection because it

competition.

Id. at 215.

In addition to the "Foreign Student Rule" and "1.600 Rule" the NCAA's "Five Year Rule" was also challenged in *Howard*. *Id.* The Five Year Rule forbade member institutions to permit student-athletes to represent them in intercollegiate athletic competitions unless they completed their eligibility within five calendar years; e.g., they are given five years in which to compete in up to four varsity seasons in any one sport. *Id.* at 221-22.

155. The University and the players alleged that the rule violated equal protection because it created an unjustifiable alienage classification. *Id.* at 220, 222.

156. *Id.* at 215. The investigation was probably instituted in January 1972 when the NCAA staff received a letter attaching a Washington Post sports article suggesting possible inquiry into the Howard soccer program. *Id.* The Post's article featured Keith Aqvi, the 25 year-old freshman star of the soccer team. *Id.* Howard University won the NCAA soccer championship in 1971 after finishing third in 1970. *Id.*

157. *Howard University*, 367 F. Supp. 926, 930 (D.C. 1973) *aff'd*, 510 F.2d 213 (D.C. Cir. 1975). Though the court acknowledged that the NCAA was properly concerned with preventing older players coming from abroad and dominating championship competition, it believed there was a less restrictive means. *Id.* As stated by the court: "To meet a felt need, the Association has, in effect, 'thrown the baby out with the bath.'" *Id.*

158. *Id.*

159. *Howard University*, 510 F.2d at 214. Howard University appealed that part of the district court's decision upholding the Five Year Rule and the 1.600 Rule. *Id.*

160. *Id.* at 222.

161. *Id.* at 221. For a discussion of *Associated Students*, see *infra* note 112 and accompanying text.

was reasonably adapted to the objectives of reducing recruitment and exploitation of young athletes.¹⁶²

V. STATISTICAL ANALYSIS

Given the decisions in *Associated Students, Inc., Parrish* and *Howard University*, it is unlikely that the Bylaw could be successfully challenged. Through the years, courts have firmly held that the rules of the NCAA, especially those regarding academic eligibility of athletes, are reasonably related to the objectives of the association.¹⁶³ Although most of the courts will find "state action," it is evident that they will go no further.

Since plaintiff players have no opportunity of prevailing in court, their only chance of redress would appear to lie with their respective institutions. As members of the NCAA, the institutions most effected by the Bylaw could lobby for an amendment or a special exception.¹⁶⁴ In order to mount a successful challenge, however, the schools opposing the Bylaw must present some kind of statistical data such as the type listed below which shows that the Bylaw has a disproportionate impact. For example, the Conference Report Card¹⁶⁵ that follows clearly shows that the Bylaw had a greater impact on the traditionally black institutions. The Report Card is the result of a survey of NCAA Division I and I-AA colleges and universities that

162. *Id.* The court stated:

One primary objective of the Rule is to prevent member schools from granting scholarships to individuals who do not have a realistic chance of obtaining a degree. To effectuate that objective, the eligibility determination obviously must be made at the time of the student's application and certification. To adopt appellants' theory would permit member institutions to recruit ineligible athletes with the hope (or expectation) that they might meet prediction standards after their first year in college and thus become eligible for athletics during the remainder of their college career. In order to prevent such a complete undermining of the Rule's legitimate objective, O.I. 418 requires ineligibility for an improperly certified athlete, regardless of his college academic record. A penalty need not be the best that might have been provided, but only reasonably related to the Rule's purpose. We think that the 1.600 Rule, as interpreted by O.I. 418, meets that test. *Id.*

163. See *supra* notes 105-62 and accompanying text.

164. NCAA Const. Art. 5, § 1C (1978-79). In certain circumstances, the NCAA has the power to grant exemptions and exceptions to its rules. *Id.* The courts are unclear as to whether an athletic association must provide a hardship exception. See J. Rapp, *Educational Law*, § 3.09 [4] [a] at 3-164 (1986).

165. See Mulligan, *supra* note 6, at 76.

were affected by the Bylaw.¹⁶⁶ The following represents the number of recruits, as of August 8, who were ineligible to compete in the two major revenue-producing sports during the 1986-87 season¹⁶⁷ and is organized on the basis of the schools' basketball conference membership. The football ineligible recruits are included in the basketball conferences for simplicity.

TABLE B

School	Football	Basketball	School	Football	Basketball
Atlantic Coast Conference			Metro Conference		
Clemson	6	1	Cincinnati	1	6
Duke	0	0	Florida State	5	1
Georgia Tech	1	0	Louisville	1	0
NC State	1	0	Memphis State	3	1
North Carolina	1	0	S. Carolina	1	0
Wake Forest	1	0	S. Mississippi	1	2
Maryland	2	0	Va. Tech	0	0
Virginia	2	0	TOTAL	12	10
TOTAL	14	1			
Atlantic 10 Conference			Mid-American Conference		
Temple	1	1	Ball State	1	1
St. Joseph's	—	1	Bowling Green	NA	NA
West Virginia	1	1	C. Michigan	0	0
Duquesne	—	0	E. Michigan	1	1
George Washington	—	0	W. Michigan	0	1
Massachusetts	0	0	Kent State	2	0
Penn State	0	0	Miami Univ.	0	0
Rhode Island	0	0	N. Illinois	4	1
Rutgers	0	0	Toledo	1	2
St. Bonaventure	—	0	Ohio Univ.	1	0
TOTAL	2	3	TOTAL	10	6

166. *Id.* The figures were originally obtained by Daily News staffers Kevin Mulligan and Mary Ellen Guld in a month long telephone survey of NCAA Division I athletic departments. They were later updated by the author. The figures include athletes who have accepted Division I scholarships and will be ineligible their first years; athletes who will pay their own way in their (ineligible) freshman years, and retain four years eligibility; and scholarship athletes who have chosen to go to junior college rather than sit out their first years.

167. *Id.*

Big East Conference			Mid-Eastern Athletic Conference		
Syracuse	3	1	Bethune-Cookman	10	2
Pittsburgh	2	1	Coppin State	2	2
St. John's	—	0	Delaware State	12	2
Boston College	0	0	Morgan State	1	1
Providence	—	1	Md.-Eastern Shore	0	1
Georgetown	—	0	S. Carolina St.	0	2
Villanova	0	0	N. Carolina A & T	2	0
Seton Hall	—	0	Howard Univ.	0	0
Connecticut	0	0	TOTAL	27	10
TOTAL	5	3			

Big Eight Conference			Missouri Valley Conference		
Missouri	0	3	Bradley	0	1
Colorado	3	2	Creighton	0	0
Iowa State	0	0	Drake	0	0
Kansas	1	1	Illinois St.	0	0
Kansas State	1	1	Indiana State	NA	2
Oklahoma	10	1	S. Illinois	0	2
Okla. State	4	0	Tulsa	0	0
Nebraska	0	0	Wichita State	1	0
TOTAL	19	8	TOTAL	1	5

Big Sky Conference			Ohio Valley Conference		
Boise State	0	0	Youngstown St.	3	0
Idaho State	0	0	Akron	3	2
Idaho	1	0	Austin Peay	3	4
Montana	0	0	E. Kentucky	NA	NA
Montana State	0	0	Middle Tenn.	5	0
Nevada-Reno	0	1	Morehead St.	0	0
Northern Arizona	—	0	Murray State	3	1
Weber State	0	0	Tenn. Tech.	3	0
TOTAL	1	1	TOTAL	20	7

Big Ten Conference			Pacific Coast Athletic Association		
Illinois	3	2	Fresno State	4	0
Indiana	1	1	Cal-Fullerton	9	2
Iowa	1	1	Nevada-Las Vegas	3	1
Michigan	1	2	Long Beach St.	NA	NA
Michigan St.	1	1	Utah State	0	0
Minnesota	2	1	San Jose State	1	1
Northwestern	0	0	Univ. of the Pacific	0	0
Ohio State	1	1	New Mexico State	0	0
Purdue	2	0	TOTAL	17	4
Wisconsin	0	0			
TOTAL	12	9			

Metro Atlantic Athletic Conference			Pacific 10 Conference		
Fairfield	—	0	Arizona St.	2	1
Fordham	—	1	Arizona	2	0
Holy Cross	0	0	California	0	1
La Salle	—	0	UCLA	0	0
Manhattan	—	0	Oregon	4	0
St. Peter's	—	NA	Oregon State	NA	NA
Iona	—	0	Southern Cal.	1	1
TOTAL	0	1	Stanford	0	0
			Washington	0	0
			Washington St.	0	0
			TOTAL	9	3

Southeastern Conference			Southern Conference		
Auburn	6	2	Appalachian State	1	0
Florida	2	1	The Citadel	0	0

Georgia	5	1	Davidson	0	0
Kentucky	0	1	E. Tennessee St.	0	0
Louisiana State	2	1	Furman	0	0
Mississippi St.	3	0	Marshall	0	1
Tennessee	0	1	Tenn.-Chattanooga	1	1
Alabama	5	1	Va. Military Inst.	0	0
Vanderbilt	0	0	W. Carolina	2	0
TOTAL	23	8	TOTAL	4	2

Southland Conference			Southwest Conference		
Arkansas St.	0	0	Arkansas	1	0
Lamar	3	3	Baylor	1	0
La. Tech.	2	2	Houston	7	1
McNeese St.	4	1	Rice	0	0
NE La.	NA	0	Southern Meth.	0	0
N. Texas St.	2	1	Texas	3	1
SW La.	3	1	Texas A & M	0	0
Tex.-Arlington	—	0	Texas Christian	4	0
TOTAL	14	8	Texas Tech	NA	2
			TOTAL	16	4

Sun Belt Conference			West Coast Athletic Conference		
NC-Charlotte	—	3	Gonzaga	—	0
Va. Commonwealth	—	1	Loyola-Marymount	—	1
S. Fla.	0	1	Pepperdine	0	3
Jacksonville	—	2	Univ. Portland	0	2
Alabama-Birm.	—	1	St. Mary's	—	0
W. Kentucky	NA	1	San Diego	—	0
S. Alabama	NA	NA	San Francisco	—	0
Old Dominion	—	1	Santa Clara	0	0
TOTAL	0	10	US International	—	1
			TOTAL	0	7

Western Athletic Conference			Major Independents		
Air Force	0	0	Notre Dame	3	1
Hawaii	4	1	Univ. Miami (Fla.)	5	0
Brigham Young	1	0	Army	0	0
Colorado St.	0	0	Navy	0	0
San Diego St.	1	0	DePaul	—	2
Texas-El Paso	1	2	Dayton	—	1
Utah	1	1	Cleveland St.	—	0
Wyoming	0	0	Marquette	—	0
New Mexico	2	1	Detroit	—	2
TOTAL	10	5	TOTAL	8	6

TOTAL	Football 224	Basketball 121
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The survey reveals that the conference most effected by the Bylaw was the Mid-Eastern Athletic Association Conference (MEAC) which had 37 athletes declared ineligible.¹⁶⁸ The MEAC lost the services of 27 football and 10 basketball players.¹⁶⁹ This is not surprising since the MEAC is comprised of eight traditionally black institutions.¹⁷⁰ However, it should be noted that 22 of the 27 ineligible football players were from only two schools in the conference, Bethune-Cookman and Delaware State. The conference with the next highest total of ineligible athletes was the Southeastern Conference which had 31 athletes sidelined.¹⁷¹ The difference between the two leading conferences is deceptive though since the SEC is comprised of ten institutions, two more than the MEAC.¹⁷² Therefore, a better indicator of just how wide the gap actually is between the historically black schools and others is the Big Eight Conference.¹⁷³ The Big Eight conference lost 19 football recruits and 8 basketball players for a total of 27 ineligible athletes.¹⁷⁴ In other words, MEAC had ten more athletes declared ineligible than a conference of comparable

168. *Id.*

169. *Id.*

170. *Id.* The MEAC is composed of the following schools: Bethune-Cookman, Copin State, Delaware State, Howard University, Maryland Eastern Shore, Morgan State, North Carolina A & T and South Carolina State. *Id.*

171. *Id.* Alabama, Auburn, Florida, Georgia, Kentucky, Louisiana State, Mississippi State, Tennessee and Vanderbilt are members of the SEC.

172. *Id.*

173. *Id.* The Big Eight consists of Colorado, Iowa State, Kansas, Kansas State, Missouri, Nebraska, Oklahoma and Oklahoma State. *Id.*

174. *Id.*

size.¹⁷⁵ However, the gap widens appreciably once the MEAC is compared to other eight-member conferences.¹⁷⁶ The Atlantic Coast Conference (ACC)¹⁷⁷ had only 15 ineligible athletes while the Big Sky Conference lost just 1 athlete to the Bylaw.¹⁷⁸ The results from a survey of last year's senior high school basketball players and how the Bylaw affected them is also striking.¹⁷⁹

The following is a list of the top 50 high school basketball recruits,¹⁸⁰ the schools they chose to attend, their eligibilities, and the options they chose pursuant to the Bylaw.¹⁸¹

The survey reveals that 14 out of the 50 players (28%) surveyed did not qualify.¹⁸² Of those 14 non-qualifiers, 13 or 92.8% were black.¹⁸³ This figure is tempered somewhat by the fact that 41 of the 50 top players were also black.¹⁸⁴ However, the percentage of black non-qualifiers is still disproportionate to the number of white non-qualifiers. For instance, one out of every three top black recruits (33.3%) did not qualify compared to only 1 out of every 9 white basketball players (1.1%).¹⁸⁵

Player	Race	Hometown	College	Status	Option
1. JR Reid	B	Virginia Beach	N. Carolina	Qualifier	—
2. Terry Mills	B	Romulus, Mich.	Michigan	Non-qualifier	3 yrs.
3. Rumeal Robinson	B	Cambridge, Mass.	Michigan	Non-qualifier	3 yrs.
4. Rex Chapman	W	Owensboro, Ky.	Kentucky	Qualifier	—
5. Tony Pendleton	B	Flint, Mich.	Iowa	Non-qualifier	JC
6. Dwayne Bryant	B	New Orleans	Georgetown	Qualifier	—
7. Fess Irvin	B	Gonzales, La.	LSU	Qualifier	—
8. Scott Williams	B	Hacienda, Calif.	N. Carolina	Qualifier	—
9. Larry Rembert	B	Orrville, Ala.	Alabama-Birm.	Qualifier	—
10. Sylvester Gray	B	Arlington, Tenn.	Memphis St.	Non-qualifier	3 yrs.
11. Derrick Coleman	B	Detroit	Syracuse	Qualifier	—

175. *Id.*

176. *Id.*

177. *Id.* The ACC consists of Clemson, Duke, Georgia Tech., Maryland, North Carolina, North Carolina State, Virginia and Wake Forest. *Id.*

178. *Id.* The Big Sky Conference consists of the following institutions: Boise State, Idaho State, Idaho, Montana, Montana State, Nevada-Reno, Northern Arizona and Weber State. *Id.* Note, Northern Arizona does not field a football team. *Id.*

179. *Id.*

180. *Id.*

181. *Id.*

182. *Id.*

183. *Id.*

184. *Id.*

185. *Id.*

12. Nick Anderson	B	Chicago	Illinois	Non-qualifier	4 yrs.
13. Ron Huery	B	Memphis, Tenn.	Arkansas	Qualifier	—
14. Keith Robinson	B	Buffalo	Notre Dame	Non-qualifier	3 yrs.
15. Earl Duncan	B	S. Monica, Calif.	Syracuse	Non-qualifier	3 yrs.
16. Brian Oliver	B	Smyrna, Ga.	Ga. Tech.	Qualifier	—
17. Stacy Augmon	B	Pasadena, Calif.	UNLV	Non-qualifier	JC
18. Duane Schintzius	W	Brandon, Fla.	Florida	Qualifier	—
19. Felton Spencer	B	Louisville, Ky.	Louisville	Qualifier	—
20. Mark Randall	W	Englewood, Col.	Kansas	Qualifier	—
21. Chris Brooks	B	New York	West Virginia	Non-qualifier	3 yrs.
22. Ricky Jones	B	Pendleton, S.C.	Clemson	Qualifier	—
23. Alsa Abdeinaby	B	Bloomfield, NJ	Duke	Qualifier	—
24. Anthony Allen	B	Port Arthur, Texas	Georgetown	JC Transfer	—
25. Steve Hood	B	Hyattsville, MD	Maryland	Qualifier	—
26. Steve Thompson	B	Los Angeles	Syracuse	Qualifier	—
27. Marcus Broadnax	B	Fort Walton, Fla.	St. John's	Qualifier	—
28. Mark Tillmon	B	Washington	Georgetown	Qualifier	—
29. Lionel Simmons	B	Philadelphia	La Salle	Qualifier	—
30. Willie Burton	B	Detroit	Minnesota	Non-qualifier	3 yrs.
31. Peter Chilcutt	W	Tuscaloosa, Ala.	N. Carolina	Qualifier	—
32. Lavertis Robinson	B	Chicago	Cincinnati	Non-qualifier	JC
33. Keith Smith	W	Portland, Ore.	California	Qualifier	—
34. Derrick Miller	B	Savannah, Ga.	Kentucky	Qualifier	—
35. Kevin Pritchard	W	Tulsa, Okla.	Kansas	Qualifier	—
36. Rodney Taylor	B	Columbia, S.C.	Villanova	Qualifier	—
37. Karl James	B	Baltimore	UNLV	Qualifier	—
38. Larry Smith	B	Alton, Ill.	Illinois	Qualifier	—
39. Chris Munk	B	San Francisco	Southern Cal.	Qualifier	—
40. Barry Bekkedam	W	Radnor, Pa.	Villanova	Qualifier	—
41. Phil Henderson	B	Crete-Monee, Ill.	Duke	Qualifier	—
42. Cheyenne Gibson	B	Memphis, Tenn.	Memphis St.	Non-qualifier	JC
43. Frantz Voloy	B	South Orange, NJ	Seton Hall	Qualifier	—
44. Elander Lewis	B	Albany, NY	St. John's	Qualifier	—
45. Louis Banks	B	Camden	Cincinnati	Non-qualifier	3 yrs.
46. David Minor	W	Cincinnati	Indiana	Qualifier	—
47. Kevin Walker	B	Brea, Calif.	UCLA	Qualifier	—
48. Greg Foster	B	Oakland	UCLA	Qualifier	—
49. Mike Christian	B	Denver	Ga. Tech	Qualifier	—
50. Robert Coyne	W	Denver	Kansas	Non-qualifier	Undec.

Given these statistics, traditionally black institutions could make an even stronger argument at the next NCAA convention in favor of amending the Bylaw.¹⁸⁶ The statistics could possibly persuade

186. See *supra* note 60 and accompanying text.

already receptive delegates.¹⁸⁷ The amendment would either exempt those black institutions in part or in whole.¹⁸⁸ It would also meet any objections about invasions of autonomy.¹⁸⁹

VI. CONCLUSION

Hopefully, the passage of the Bylaw has signaled a new era in the proud heritage of the NCAA. True, the Bylaw has had a disproportionate impact on minorities—an impact that the next convention must address.¹⁹⁰ However, given the rampant cheating and exploitation throughout our universities and colleges, it is about time that the NCAA shed its blinders. Unfortunately, the enactment of the Bylaw is a sad commentary on the present state of college athletics.

187. See NCAA Proceedings (1983). As Father Joyce of Notre Dame stated: (black universities) It is not within this latter group of institutions that rampant abuses have taken place or where the reform of the exploitative system is needed too badly. Indeed, from a personal point of view, I would like to see these schools exempted from legislation that violates their sense of fairness.

Id. at 124.

Mr. Witte added:

Then we will be precluded from considering amendments that I find more realistic in terms of the debate today. It seems to me that what we have boiled this down to an issue over the validity of the test scores. It is true, as Father Joyce says, that no one has a discriminatory intent; but it is unquestioned that there will be an enormous discriminatory effect. All of the statistics reveal that. It seems to me then, that since we have in mind a formula which is of an extremely dubious validity and which no one has in fact spoken in favor of today or shown its validity or legitimacy as a method of depriving persons of these opportunities, we should vote down No. 48 and consider those proposals with exceptions.

Id.

188. *Id.*

189. *Id.* Father Joyce said "I think, too, that it is most distressing and unfortunate that the debate gives the impression that predominantly white colleges are interfering with the internal educational policies of some splendid black institutions."

190. The Bylaw will also have a positive impact on Division II schools in that it will enable those institutions to retain more quality athletes who might have gone on to play at the Division I level if not for the Bylaw. *Id.* at 113. Bob Moonman of the Central Intercollegiate Athletic Association stated:

This would be great for Division II and for the black schools in Division II. We would get some of our athletes back. I have said this before on this floor. I was in a basketball tournament about three years ago; and the athletic director for a southern institution said to me, "I have not seen this many whites playing basketball all year." So we are going to get some athletes back, maybe. *Id.* at 113.

Should the institution of higher learning really need a rule to stop themselves from exploiting college athletes?¹⁹¹

I don't know which is my best team. I will find out who my best team is when I find out how many doctors, lawyers and good husbands and good citizens have come off every one of those teams.¹⁹²

Knute Rockne

191. As Moorman stated:
[I]t disturbs me when someone gets up and says they want to have something to stop exploitation. Do you need a rule to stop it? You do not have to exploit them (athletes). You do not need a rule to exploit them. I know for a fact that there are lots of institutions in the NCAA that are not abiding by—and I am talking about Division I—the 2,000 now. They work every means of getting a joker in who does not know two and two. So now you are going to get a rule that someone is going to break again. Let us get something more realistic.

192. *Id.* at 115.

