THE NCAA'S INVOLVEMENT IN SETTING ACADEMIC STANDARDS: LEGALITY AND DESIRABILITY

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I. INTRODUCTION

On January 7, 1992, the National Collegiate Athletic Association (NCAA)[1] convened its annual convention in Anaheim, California.[2] The organization increased its minimum academic require-

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1. The NCAA is a voluntary association of over 1,000 members which include colleges, universities, conferences, associations, and other educational institutions. Banks v. NCAA, 746 F. Supp. 850, 852 (N.D. Ind. 1990). The NCAA is a not-for-profit association which was organized in 1905. Board of Regents of Univ. of Okla. v. NCAA, 546 F. Supp. 1276, 1282 (W.D. Okla. 1982), *aff'd in part, rev'd in part*, 707 F.2d 1147 (10th Cir. 1983), *aff'd*, 468 U.S. 85 (1984). The NCAA operates under a Constitution and Bylaws which are adopted by the membership and are subject to amendments at the NCAA's annual convention. *Id.* An executive director supervising approximately 80 employees executes NCAA policy. *Id.*

2. *See generally* NCAA, 1992 NCAA CONVENTION PROCEEDINGS (Wallace I. Renfro &

ments for students participating in athletics on the major college level.[3] The topic once again created a firestorm of debate and dispute over whether the standards result in unequal treatment or have an unequally harsh impact on black athletes.[4]

Are the NCAA's current academic requirements for student-athletes working to preserve the integrity of intercollegiate athletics? Are those requirements a necessary part of the NCAA mission? Do those requirements effect discrimination against black student-athletes? Is it necessary or justifiable for the NCAA to punish individual student-athletes in order to maintain the academic integrity of big-time college sports? As the NCAA tightens its academic standards, the resulting impact on individuals affected most — student-athletes enrolled at colleges and universities across the United States, and high school student-athletes who aspire to participate in intercollegiate athletics — must be assessed.

This article will first examine the background of the NCAA's attempt to regulate the academic standards of collegiate athletes. It will then focus on possible equal protection challenges to the NCAA academic standards and the likelihood such challenges could succeed. The article will examine possible challenges under federal statutory law including the civil rights legislation and will explore recent Congressional proposals in this area. Common law challenges, especially private tort actions, will then be discussed. The article will conclude with a goal oriented solution to eliminate the perception of discrimination effectuated by the NCAA academic standards.

II. BACKGROUND

The debate over the NCAA's role in protecting the academic integrity of student-athletes has raged for years. The issue first, and perhaps most notably, vaulted into national prominence in 1982 when Professor Jan Kemp filed suit against her employer, the University of Georgia.[5] Professor Kemp's action alleged that the university fired her because she openly protested the favorable

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Michael V. Earle eds., 1992) [hereinafter 1992 CONVENTION] (containing the proceedings of the 86th Annual Convention).

3. NCAA OPERATING BYLAWS art. 14.02.9.2, *reprinted in* NCAA, 1993-94 NCAA MANUAL (Laura E. Bollig ed., 1993) [hereinafter NCAA BYLAWS].

4. Telephone Interview with Dan Dutcher, Employee, NCAA Legislative Services Division (Oct. 1, 1991).

5. Kemp v. Ervin, 651 F. Supp. 495 (N.D. Ga. 1986).

treatment of student-athletes.[6]

At the time Kemp filed suit, the NCAA required student-athletes to have graduated from high school with an overall grade point average (GPA) of 2.0 on a 4.0 scale in order to be eligible for participation in intercollegiate athletics.[7] Student-athletes who did not meet this standard in high school could not compete athletically in their first year of college.[8] Students who fell below their university's requirements for good academic standing could not compete until their grades were brought back to that level.[9] Whether eligible or not, any student-athlete could receive an athletic scholarship. And for many, those scholarships were the only means through which to finance higher education.

The system failed to achieve its goal. Instances of schools allowing student-athletes to neglect academic pursuits in order to participate in sports were numerous and well publicized.[10] Athletes routinely flaunted the academic opportunities of higher education and concentrated solely on athletics.[11]

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6. *Id.* at 498. Professor Kemp's civil rights action, brought under 42 U.S.C. § 1983, alleged that the university deprived her of employment rights because of her decision to exercise freedom of speech. *Id.* Under 42 U.S.C. § 1983, Kemp was entitled to a federal cause of action because the university, acting as a state actor, deprived her of constitutional civil rights under the color of state law. 42 U.S.C. § 1983 (1988). A jury subsequently awarded Kemp $2.5 million in compensatory and punitive damages. *Kemp*, 651 F. Supp. at 498. The breakdown of the award was as follows: $1.5 million in punitive damages from the school's Vice President for Academic Affairs, Virginia Trotter; $800,000 in punitive damages from Trotter's assistant, Leroy Ervin, for whom Kemp worked and by whom she was fired; $79,680.95 in lost wages; $200,000 in compensatory damages for mental distress; and one dollar for damages to her professional relationship. *Id.*

7. NCAA, 1983 NCAA CONVENTION PROCEEDINGS app. at 35 (1983) [hereinafter 1983 CONVENTION]; Mark Asher, *Presidents Play the Numbers; Debate Over SAT, Grades*, WASH. POST, June 30, 1991, at B1.

8. 1983 CONVENTION, *supra* note 7, app. at 35; Asher, *supra* note 7, at B1.

9. NCAA OPERATING BYLAWS arts. 14.01.1, 14.02.5, *reprinted in* NCAA, 1991-92 NCAA MANUAL (Laura E. Bollig ed., 1991).

10. Ross v. Creighton Univ., 740 F. Supp. 1319 (E.D. Ill. 1990). Functional illiterates such as Kevin Ross of Creighton University attended college for four years simply to play basketball. *Id.* at 1322. Dexter Manley did the same in the football program at Oklahoma State University. Asher, *supra* note 7, at B1.

11. In 1981, a survey revealed that of the male athletes who entered college in the fall of 1975, only fifty-two percent had graduated within five years. Ron Waicukauski, *The Regulation of Academic Standards in Intercollegiate Athletics*, 1982 ARIZ. ST. L.J. 79, 94 (1982). This study included results from 46 schools selected at random by the NCAA. *Id.* The results are no doubt skewed as the institutions with the least favorable graduation rates are those that declined to respond to the survey. *Id.* The results must be discounted accordingly.

Another study revealed that of the professional basketball players who had attended four-year colleges and universities, only 30% had actually received a bachelor's degree. *Id.* at

Both institutions and athletes tended to focus on the financial rewards of athletic success and ignored the dangers of academic failure. The students most affected tended to be persons of color. The institutions tolerated poor academic performance if a player achieved national prominence for his/her athletic accomplishments.[12] Multi-million dollar professional contracts allowed both universities and student-athletes to ignore inadequate intellectual achievement. For the best athletes, the chance to participate in intercollegiate sports is worth more than an academic degree.[13]

For those who concluded their college career without the opportunity to play professional sports the results were vastly different. Left without an education, a degree, or an opportunity to participate in professional sports, these former student-athletes often felt exploited by the schools for which they played.[14]

The *Kemp v. Ervin*[15] lawsuit tipped over an unsteady iceberg. Partly in response to that case, the NCAA began to take a greater interest in the academic performance of its student-athletes. The full NCAA membership passed Proposition 48 in January, 1983, and it took effect in August, 1986.[16] The rule toughened the aca-

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12. *See* Harry Edwards, *Educating Black Athletes,* ATLANTIC MONTHLY, Aug. 1, 1983, at 31 (noting how colleges and universities have gained tremendous revenues at the expense of student-athletes who have not received a proper education). Most of the student-athletes who were exploited for their athletic talents were black. *Id.*

13. Linda S. Greene, *The New NCAA Rules of the Game: Academic Integrity or Racism?*, 28 ST. LOUIS U. L.J. 101, 137 (1984) (describing the economic stake many student-athletes have in preforming in college sports).

14. *Ross,* 740 F. Supp. at 1322.

15. 651 F. Supp. 495 (N.D. Ga. 1986). *See supra* notes 5-6 and accompanying text for a description of the *Kemp* case.

16. 1983 CONVENTION, *supra* note 7, app. at 35. Proposition 48 became NCAA Bylaw 5-1-(j) and is now contained in NCAA Bylaw article 14.3. NCAA, NCAA RESEARCH REPORT, REPORT 92-02 at 5 (Martin T. Benson ed., Aug. 1993).

Report 92-02 is one of currently eight separate reports that the NCAA has published. The reports are part of an ongoing study of Proposition 48. For clarity purposes, this article will refer to these reports by the appropriate report number. A complete listing of the reports is as follows:

NCAA, NCAA ACADEMIC PERFORMANCE STUDY, REPORT 90-01 (J. Gregory Summers ed., Jan. 1991) [hereinafter REPORT 90-01];

NCAA, NCAA ACADEMIC PERFORMANCE STUDY, REPORT 91-01 (Martin T. Benson ed., June 1991) [hereinafter REPORT 91-01];

NCAA, NCAA ACADEMIC PERFORMANCE STUDY, REPORT 91-02 (Martin T. Benson ed., July 1991) [hereinafter REPORT 91-02];

NCAA, NCAA RESEARCH REPORT, REPORT 91-03 (Martin T. Benson ed., Sept. 1991) [hereinafter REPORT 91-03];

demic requirements which each student-athlete must meet in order to be eligible.[17]

The NCAA justified the requirements of Proposition 48 as an effort to show that academic values should be the first priority in intercollegiate sports.[18] It hoped the measure would maintain the integrity of the NCAA and colleges and universities as academic institutions.[19] The requirements, however, have been assailed by presidents and coaches of historically black colleges[20] who charge that they discriminate unfairly against black athletes.[21] Specifically, the opponents point to the use of standardized tests, the results of which have been shown to exhibit a racial bias.[22]

NCAA, NCAA RESEARCH REPORT, REPORT 91-04 (Martin T. Benson ed., Sept. 1991) [hereinafter REPORT 91-04];

NCAA, NCAA RESEARCH REPORT, REPORT 91-05 (Martin T. Benson ed., Oct. 1992) [hereinafter REPORT 91-05];

NCAA, NCAA RESEARCH REPORT, REPORT 92-01 (Martin T. Benson ed., Aug. 1993) [hereinafter REPORT 92-01];

NCAA, NCAA RESEARCH REPORT, REPORT 92-02 (Martin T. Benson ed., Aug. 1993) [hereinafter REPORT 92-02].

17. Under Proposition 48 a student-athlete must have achieved a minimum GPA of 2.0 on a 4.0 scale within a specified high school curriculum designated by the NCAA to be college preparatory. 1983 CONVENTION, *supra* note 7, app. at 35. In its current form, Proposition 48 requires that a student maintain a 2.0 GPA in 11 core courses. NCAA BYLAWS, *supra* note 3, art. 14.3.1.1(a). The core course curriculum must include three years of English, two years of mathematics, two years of social science, two years of natural or physical science including one laboratory class if one is offered, and two years of additional academic courses. *Id.* In addition, Proposition 48 requires student-athletes to score a minimum of 700 combined (out of a possible 1600) on the verbal and math sections of the Scholastic Aptitude Test (SAT) or a 17 (out of 36) on the American College Testing Service equivalent (ACT). *Id.* art. 14.3.1.1(b). Student-athletes who do not meet each of these requirements are ineligible to participate athletically in their first year of college. *Id.* art. 14.3.1. Note that Proposition 48 applies only to student-athletes who participate at the Division I or Division II level. *Id.* Division III athletes are exempt from the rule. *Id.*

18. Greene, *supra* note 13, at 103-04.

19. NCAA, HISTORY OF BYLAW 5-1-(j) at 1 (Sept. 8, 1989) [hereinafter HISTORY OF BYLAW].

20. Greene, *supra* note 13, at 104 (providing a thorough list of traditionally black, Division I colleges).

21. *Id.* at 104, 111-15. *See* Gordon S. White, *NCAA's High Aims Turn Into Rights Controversy*, N.Y. TIMES, Jan. 16, 1983, § 5, at 4 (noting that "[t]he presidents of the 16 predominantly black universities strongly criticized the new rule on the ground that it was 'discriminatory and patently racist'").

22. Greene, *supra* note 13, at 112; White, *supra* note 21, § 5, at 4; Joseph Johnson, President of Grambling State University, noted that "[t]he rule discriminates against student-athletes from low-income and minority-group families by introducing arbitrary S.A.T. and A.C.T. criteria for eligibility." White, *supra* note 21, § 5, at 4. In 1993, the average for all students taking the SAT was 902, while the average for black students taking the test was 741. THE COLLEGE BOARD, COLLEGE-BOUND SENIORS OF 1993: INFORMATION ON STUDENTS

Significantly, Proposition 48 allowed students who met the high school grade point average, but not the minimum standardized test score requirement, to receive an athletic scholarship.[23] Such students became known as partial qualifiers.[24] Once enrolled, a partial qualifier could receive academic assistance during his/her freshman year on campus. Most received private tutoring and other scholastic help that allowed them to attain a 2.0 college grade point average. Such students were then eligible to compete athletically in their sophomore year. Perhaps not surprisingly, given the preferential treatment of student-athletes, most of the freshmen declared ineligible for failure to meet the Proposition 48 requirements became eligible to compete the following year.[25]

The controversy exploded in 1989 with the NCAA's adoption of Proposition 42.[26] Proposition 42 bars a university from granting athletic scholarships to students who do not meet both the minimum high school grade point average in the core curriculum and the minimum standardized test score requirement.[27] Students who meet the high school GPA requirement and fail to meet the standardized test requirement are now eligible only for financial aid available to other students, not athletic scholarships.[28]

Proposition 42 essentially states that student-athletes who do not completely meet the NCAA's academic requirements must find a way to finance their own college education. It has led to more noticeable and more vehement protests than Proposition 48.[29]

WHO TOOK THE SAT AND ACHIEVEMENT TESTS OF THE COLLEGE BOARD 4 (Aug. 19, 1993) [hereinafter COLLEGE BOARD].

23. Asher, *supra* note 7, at B1.

24. NCAA BYLAWS, *supra* note 3, art. 14.02.9.2 (defining a partial qualifier for Division I). A partial qualifier could not compete in his/her freshman year and would have only three subsequent years of eligibility remaining. Asher, *supra* note 7, at B1.

25. William F. Reed, *A New Proposition; An NCAA Rule Deemed Unfair to Minorities Drew Angry Reactions, and a Walkout*, SPORTS ILLUSTRATED, Jan. 23, 1989, at 16.

26. The NCAA originally rejected Proposition 42 on January 10, 1989, by a vote of 159-151, but one day later the NCAA reversed itself and passed Proposition 42 by a vote of 163-154. *How the Balloting Went*, N.Y. TIMES, Jan. 18, 1989, at A21; Reed, *supra* note 25, at 16. The Proposition is now codified in article 14.3.2 of the NCAA Bylaws.

27. NCAA BYLAWS, *supra* note 3, art. 14.3.2.1.1.

28. *Id.* When Proposition 42 first passed, it did not allow a student-athlete to receive need-based financial assistance. Thomas Boswell, *Defanging 42 Smart Move*, WASH. POST, Jan. 10, 1990, at F1. At the urging of representatives of many black colleges, the NCAA amended Proposition 42 in 1990 to allow need-based financial assistance. *Id.*

29. *See* B. G. Kelly, *The Fire Never Dies*, INSIDE SPORTS, Jan. 1994, at 63 (discussing Temple University basketball coach John Chaney's criticism of Proposition 48). Chaney termed the measure "antipoor and antiblack". John Chaney, *A Slap At Blacks*, SPORTS ILLUS-

These protests are designed to call attention to the fact that the majority of students impacted by the regulation are black.[30] Protestors of the Bylaw declared that those students were the ones least likely to be able to finance an education on their own.[31] Making matters worse is the fact that financial assistance for students is becoming more scarce.[32]

The current NCAA rules have the potential to deny an education to a student-athlete who had been admitted into an NCAA college or university. It is no longer sufficient for a student to be admitted into college and granted an athletic scholarship. Now the student must satisfy the NCAA's idea of academic eligibility — an idea that includes minimum scores on the standardized tests. For a student-athlete who expects his/her athletic ability to help finance a college education, that source of funding has become contingent on meeting the NCAA's — not just the college or university's — standard for admission. Those who challenge the NCAA argue that when an institution is willing to educate and to help finance the education of a student-athlete, the NCAA ought not get involved.[33]

TRATED, Jan. 23, 1989, at 19. Georgetown University basketball coach John Thompson walked off the court in protest and refused to coach his team for two games immediately following the vote approving Proposition 42. William C. Rhoden, *Thompson's Protest Intensifies Debate*, N.Y. TIMES, Jan. 16, 1989, at C3.

30. Rhoden, *supra* note 29, at C3. After the Proposition was passed, John Thompson noted that he would not coach until something had been done to provide minority student-athletes with appropriate opportunity to attend college. *Id.* Thompson has since returned to coaching.

31. *Id.* One national magazine editorialized that many of our nation's student-athletes "come from impoverished backgrounds, and the kind of aid they would remain eligible for, primarily federal Pell grants, would not cover all college costs the way that athletic scholarships do." Alvin P. Sanoff, *When Is the Playing Field Too Level?*, U.S. NEWS & WORLD REPORT, Jan. 30, 1989, at 68.

32. Reed, *supra* note 25, at 16. While colleges may assist student-athletes in their efforts to find alternative means of financial assistance, "Prop 42 will go into effect at a time when federal financial aid for education is drying up; there will be fewer dollars for deserving, underprivileged youngsters who have excelled in the classroom, much less for academically marginal athletes." *Id.*

33. *See* Kelley, *supra* note 29, at 63. Temple basketball coach John Chaney stated:

> The NCAA says it's concerned about the integrity of education. Hell, image is what it's concerned about. If you're a school like Temple, which is not afraid to take a chance on a kid, give him an opportunity to get an education — and that's what I'm all about, opportunity — [the NCAA] begins to look at you with its nose turned up, saying, 'Well, Temple is not as academic as others. They're taking in the sick and the poor.' It's like the Statute of Liberty turning her ass and saying to the sick, the poor, the tired, 'Get the hell out.'

Id. See also David Aldridge, *Thompson Sure He Made the Right Move*, WASH. POST, Jan. 16, 1989, at C18. Thompson stated, "If these kids today [who can play basketball well enough to

As part of its decision to pass Proposition 42, the NCAA agreed to embark on a five-year study to determine its impact on the student-athlete and to answer some of the challenges raised by its opponents.[34] Yet even before the study is complete, the NCAA has acted to stiffen the standards it first set out in Proposition 48.[35] Each time, the predominantly black institutions opposed the efforts of the NCAA to strengthen the requirements. Their efforts have been drowned out by the majority of the Association.

Proposition 48 has had extensive impact in rendering athletes ineligible. The partial qualifier rule has cost several thousand student-athletes a year of eligibility.[36] Of these individuals, an overwhelming percentage have failed to qualify due to the standardized test criteria, rather than the high school GPA provision.[37] Although a few scholars have attempted to devise a plan of attack against the use of standardized tests in NCAA requirements,[38]

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get a scholarship but don't qualify for one under Propositions 48 and 42] don't get that opportunity [at an education], who will they look to?" *Id.*

34. *See supra* note 16. The complete results of that survey are not yet in and are not expected until 1995. Interview with Todd Petr, NCAA Assistant Director of Research (Oct. 23, 1991). Representative Cardiss Collins (D-IL) has recently made the accusation that the NCAA study, *see supra* note 16, may be tainted. Steve Wieberg, *NCAA Urged to Delay Prop 48 Changes*, USA TODAY, Dec. 14, 1993, at C1. The charge is based on information that several members of the panel which conducts research for the NCAA may be involved with extremist groups that believe in genetic engineering to increase the proportion of "socially more successful" people in society. *Id.*; Bryan Burwell, *'Scary' Views Impair NCAA Study*, USA TODAY, Dec. 14, 1993, at C8.

35. NCAA BYLAWS, *supra* note 3, art. 14.02.9.2 (raising the minimum GPA requirement from a 2.0 to a 2.5, effective August 1, 1995); NCAA BYLAWS, *supra* note 3, art. 14.3.1.1(a) (increasing the core curriculum number of courses from 11 to 13, effective August 1, 1995); NCAA BYLAWS, *supra* note 3, art. 14.3.1.1(b) (raising the required ACT score from 15 to 17).

36. *Partial Qualifiers Decrease*, NCAA NEWS, Mar. 31, 1993, at 21 [hereinafter *Partial Qualifiers Decrease*]; *Partial-Qualifier Rate Grows in Division II*, NCAA NEWS, Apr. 15, 1992, at 14 [hereinafter *Partial-Qualifier Rate Grows*]; *Enrollment Trends for Partial Qualifiers Switch*, NCAA NEWS, May 8, 1991, at 3 [hereinafter *Enrollment Trends*].

37. In 1989, 85.4% of Division I partial qualifiers failed to attain the test-score requirement. *Enrollment Trends*, *supra* note 36, at 3. The figure dropped to 80.2% in 1990. *Id.* In 1991, 79.3% of the Division I partial qualifiers failed to meet the test score component. *Partial-Qualifier Rate Grows*, *supra* note 36, at 1. The figure dropped again in 1992 to 62.7%. *Partial Qualifiers Decrease*, *supra* note 36, at 21.

38. *See* Greene, *supra* note 13, at 123-27 (arguing that the NCAA could and should be classified as a state actor under state action doctrine and thus subject to constitutional limitations in an appropriate factual situation); Ray Yasser, *The Black Athletes' Equal Protection Case Against the NCAA's New Academic Standards*, 19 GONZ. L. REV. 83, 87-90 (1983) (stating that the majority of cases addressing the issue of whether NCAA action constitutes "state action" have found that it does); Kevin M. McKenna, *A Proposition with a Powerful Punch: The Legality and Constitutionality of NCAA Proposition 48*, 26 DUQ. L. REV. 43, 53 (1987) (noting that although on its face a suit challenging Propositions 48 and 42 seems attractive,

these plans seem largely outdated given a recent United States Supreme Court decision.[39]

In January, 1992, the NCAA increased academic standards for freshman eligibility and lessened the emphasis placed on standardized test scores.[40] It did this through the use of a sliding scale.[41] Under this method, students who have higher grade point averages can qualify for freshman athletic eligibility notwithstanding lower test scores.[42] Lessening the impact of the standardized tests, however, may not be enough for critics who contend that any use of those tests is discriminatory.

While the NCAA is intent on stiffening its academic eligibility requirements, certain facts remain undisputed. A disproportionately high percentage of the football and basketball players who have been denied a year of eligibility by Proposition 48 are black.[43]

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the state action doctrine has been narrowed and proving that the NCAA is a state actor will be difficult); Brian L. Porto, Note, *Balancing Due Process and Academic Integrity in Intercollegiate Athletics: The Scholarship Athlete's Limited Property Interest in Eligibility*, 62 IND. L.J. 1151, 1154 (1987) (stating that the NCAA could be found to be a state actor, and its actions subject to constitutional scrutiny because its member institutions consist of both public and private schools joined in a mutually beneficial and symbiotic relationship).

39. NCAA v. Tarkanian, 488 U.S. 179 (1988). For a description of the *Tarkanian* case see *infra* notes 50-60 and accompanying text.

40. The new rule, which will take effect on August 1, 1995, raises the minimum core course grade point average from 2.0 to 2.5. NCAA BYLAWS, *supra* note 3, art. 14.3.1.1(a). It raises the number of core courses a prospective student-athlete must take in high school from 11 to 13, including three years of English, two years of mathematics, two years of natural or physical science, two years of social science, and four years of additional courses. *Id.* art. 14.3.1.1(b). In addition, it allows student-athletes affected by Proposition 48 to retain four years of collegiate athletic eligibility provided they continue to make progress toward a college degree. 1992 CONVENTION, *supra* note 2, app. at A-63.

41. Beginning August 1, 1995, freshmen may establish eligibility by utilizing the following eligibility index table:

CORE GPA	SAT	ACT
2.5 & above	700	17
2.4	740	18
2.3	780	19
2.2	820	20
2.1	860	21
2.0	900	21

NCAA BYLAWS, *supra* note 3, art. 14.3.1.1.1.

42. A high school student who has a 2.0 core GPA must get a 900 on the SAT or 21 on the ACT to be eligible. A student-athlete with a 2.5 GPA will need to score a 700 on the SAT or 17 on the ACT in order to qualify. *See id.* (effective August 1, 1995).

43. Ralph Wiley, *Hardaway; A Daunting Proposition*, SPORTS ILLUSTRATED, Aug. 12, 1991, at 26. According to the 1990 report by the Knight Foundation Commission on Intercollegiate Athletics, over 86% of football and basketball players who were subject to Proposition 48 were black. *Id.*

In defense of the NCAA requirements, the standards they set for college athletes could be characterized as almost ridiculously low.[44] The NCAA raises legitimate questions of whether a student who cannot meet such low standards belongs in college. Nevertheless, if it continues to use standardized tests to determine academic and athletic eligibility, the NCAA could be charged with intentionally discriminating against black athletes. Alternatively, the NCAA rules could be found to have an impermissible discriminatory impact. Constitutional challenges to the NCAA procedure and to its Bylaws are one possible result. Another is Congressional legislation of certain controls on the NCAA. Each of these options has legal merit. The desirability of each requires an analysis of whether intervention by the NCAA into the academic arena is productive or justifiable.

III. EQUAL PROTECTION CHALLENGES TO PROPOSITIONS 48 AND 42

The most obvious avenues of legal action for those who oppose the NCAA's academic standards as racially biased would be under the Equal Protection Clause of the Fourteenth Amendment to the United States Constitution[45] and under federal civil rights laws.[46] A challenge brought under either of these provisions would require the plaintiff to establish that through state action his/her constitu-

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44. MURRAY SPERBER, COLLEGE SPORTS, INC. 218 (1990). A student scores 400 points on the SAT (200 on the verbal section and 200 on the math section) simply by signing his/her name and answering one question. *Id.* To meet the NCAA minimum of 700, a student must correctly answer only "13 out of 60 math questions and 24 out of 85 verbal" questions — roughly 25 percent. *Id.*

45. Section 1 of the Fourteenth Amendment states in pertinent part:

> No state shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor shall any State deprive any person of life, liberty, or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws.

U.S. CONST., amend. XIV, § 1.

46. 42 U.S.C. § 1983 creates a cause of action whenever an actor acting under color of state law denies an individual a constitutionally protected right. Section 1983 states in pertinent part:

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

42 U.S.C. § 1983 (1988).

tional rights were violated. A plaintiff would also need to prove that the NCAA standards constitute illegal discrimination on the basis of race. On the right facts, such a case could succeed.

A. State Action Requirement

A challenge of the NCAA rules on equal protection grounds under 42 U.S.C. section 1983 would require that the NCAA be classified as a state actor.[47] If the NCAA is a private actor, a constitutional challenge against it would fail. Much has been made of the impact of the state action doctrine on legal challenges to Propositions 48 and 42.[48] Most of the legal literature examining the subject has taken great pains to establish that the actions of the NCAA do constitute state action.[49] However, most of this literature was written before the United States Supreme Court declared, in *NCAA v. Tarkanian*,[50] that, on the facts of that case, the NCAA was not a state actor.[51] In a five to four decision, the United States Supreme Court held that the NCAA was not acting under color of state law when it influenced the disciplinary action against Tarkanian.[52] The Court reasoned that the state university never gave the NCAA direct authority to discipline its employees;[53] that the university

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47. Shelley v. Kraemer, 334 U.S. 1, 13 (1948) (finding that protections of the Fourteenth Amendment do not extend to private conduct abridging individual rights no matter how egregious that conduct may be). *See* Lugar v. Edmondson Oil, Co., 457 U.S. 922 (1982).

Also, 42 U.S.C. § 1983, on its face applies only to those who act under color of state law. 42 U.S.C. § 1983 (1988). In NCAA v. Tarkanian, 488 U.S. 179 (1988), the Supreme Court noted that "the under-color-of-law requirement of 42 U.S.C. § 1983 and the state action requirement of the Fourteenth Amendment" can be equivalent when considering the NCAA's liability. *Id.* at 182 n.4.

48. *See supra* note 38.

49. *See, e.g.*, Greene, *supra* note 13, at 125-27; Yasser, *supra* note 38, at 88, 90.

50. 488 U.S. 179 (1988).

51. *Id.* at 199. *Tarkanian* involved a § 1983 claim by Jerry Tarkanian, the head basketball coach of the University of Nevada at Las Vegas (UNLV), a public university. After an NCAA investigation of the basketball program at UNLV revealed violations of NCAA rules, the NCAA suspended the program for two years and threatened additional sanctions unless the school suspended Tarkanian as coach. *Id.* at 186. Faced with that choice, UNLV suspended Tarkanian although it disagreed with the decision of the NCAA. *Id.* at 187. Tarkanian sued and claimed that the NCAA and UNLV acted jointly and that the final action committed by UNLV — the suspension — converted the conduct of the NCAA into state action. *Id.* at 191-92. He charged that the NCAA could not effect his suspension without providing due process. *Id.* at 188-90.

52. *Id.* at 199.

53. *Id.* at 184.

retained the freedom to leave the NCAA;[54] and that the university did not delegate any state powers to the Association.[55]

The *Tarkanian* decision imposes a tough, though not insurmountable, burden to any legal challenge to the NCAA's academic requirements. The dissent in *Tarkanian* argued that there are times when the actions of the NCAA could be sufficiently engaged in the challenged action such that the acts of the NCAA would constitute state action.[56]

Those wishing to challenge Proposition 48 or 42 under the state action doctrine need not go this far. Even the *Tarkanian* Court acknowledged that while the NCAA may not be a state actor, those member institutions that are state-run colleges and universities clearly are state actors.[57]

Public colleges and universities have routinely been held to be state actors in cases involving constitutional challenges.[58] It is also important to note that the Nevada Supreme Court relatively early in the *Tarkanian* litigation found that the NCAA was a necessary party to Tarkanian's suit, and held that the litigation could not proceed without the NCAA.[59] Notwithstanding the United States Supreme Court decision that Tarkanian could not recover against the NCAA, some of the coach's claims against UNLV — the public institution — survived.[60]

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54. *Id.* at 194-95.

55. *Id.* at 195-96.

56. *Id.* at 200-02 (White, J., dissenting) (citing Dennis v. Sparks, 449 U.S. 24, 27-28 (1980)). *See* Evans v. Newton, 382 U.S. 296, 299 (1965) (stating that conduct of a private actor "may become so entwined with governmental policies or so impregnated with a governmental character as to become subject to the constitutional limitations placed upon state action").

57. *Tarkanian*, 488 U.S. at 192-93. As the *Tarkanian* Court noted, "A state university without question is a state actor. When it decides to impose a serious disciplinary sanction . . . it must comply with the terms of the Due Process Clause of the Fourteenth Amendment to the Federal Constitution." *Id.* The *Tarkanian* Court also wrote that "[i]n performing their official functions, the executives of UNLV unquestionably act under color of state law." *Id.* at 183.

58. *See, e.g.*, Martin - Trigona v. University of N.H., 685 F. Supp. 23, 24 (D.N.H. 1988) (holding that University of New Hampshire is a state actor for purposes of a § 1983 claim when it issued invitations to democratic presidential candidates to take part in a debate the university was hosting).

59. University of Nev. v. Tarkanian, 594 P.2d 1159, 1165 (Nev. 1979). The Supreme Court of Nevada holding, that the NCAA was a necessary party, gave rise to the subsequent *NCAA v. Tarkanian* case.

60. Tarkanian dropped his suit in 1990 when the NCAA dropped its demand that he be suspended. Steve Wieberg, *Tark in Hot Water Again*, USA TODAY, June 5, 1991, at C1 (David

If a challenge to Proposition 48 or 42 can be brought successfully against a public college or university, the suit would diminish, if not eliminate, the NCAA's ability to enforce its current academic standards. This is because if one NCAA member public institution were legally prevented from implementing Proposition 48 or 42, challenges to the implementation of the rules at other public institutions could be expected to follow. Soon, no public institution could implement the Bylaws which contain Propositions 48 and 42.

If left uncorrected, this would allow public NCAA schools to provide athletic scholarships to students not meeting the current Proposition 48 requirements while denying that opportunity to private schools. This would give the public schools a competitive athletic advantage.[61] It would leave the NCAA divided into two tiers of institutions — a first tier of athletically superior schools which admit Proposition 48 student-athletes, and a second tier with higher academic standards, but fewer athletic victories. Faced with such a situation, the NCAA might well conclude that Proposition 48 no longer makes good sense in producing quality on-the-field competition.[62] As the Court of Appeals for the Ninth Circuit recognized, the NCAA must be able to enforce its policies and regulations uniformly or it cannot enforce them at all.[63] Thus, the state

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Leon Moore contributing). Tarkanian subsequently agreed to resign as coach after the 1991 season. The legal ramifications of the *Tarkanian* litigation continue to this day. *Cf.* NCAA v. Miller, No. 92-16184, 1993 U.S. App. LEXIS 30119, at *1 (9th Cir. Nov. 23, 1993).

61. The win-loss record of schools that do not admit Proposition 48 athletes in athletic competition is inferior to those schools that do. Northwestern University is one such example. It is the only Big Ten Conference university that does not admit Proposition 48 athletes. From 1984 through 1991, Northwestern won only eight of fifty-one football games against Big Ten opponents. William N. Wallace, *Northwestern Harvests Its Vintage '91 'Grapes,'* N.Y. TIMES, Oct. 28, 1991, at C3. In 1993, Northwestern was winless in Big Ten football competition.

62. HISTORY OF BYLAW, *supra* note 19, at 1. The goal of producing equal on-the-field competition has at times been cited by the NCAA as a reason for its regulation of academic standards. *Id.*

63. *NCAA v. Miller*, No. 92-16184, 1993 U.S. App. LEXIS 30119, at *15. The Ninth Circuit held a Nevada statute to be unconstitutional when it required the NCAA to provide certain procedural due process protections to individuals and institutions which were accused of NCAA infractions. *Id.* at *22. In holding that the Nevada statute was a per se violation of the Commerce Clause, the court stated:

> In order to avoid liability under the Statute, the NCAA would be forced to adopt Nevada's procedural rules for Nevada schools. Therefore, if the NCAA wished to have the uniform enforcement procedures that it needs to accomplish its fundamental goals and to simultaneously avoid liability under the Statute, it would have to apply Nevada's procedures to enforcement proceedings throughout the country.

Id. at *15.

action requirement would not preclude a successful legal challenge to Proposition 48. It simply means that a public institution implementing the standard, rather than the NCAA itself, may be the better defendant.

In addition, as the United States Supreme Court noted in *Tarkanian*, institutions unhappy with the NCAA rules are free to leave the organization.[64] If, whether because of lawsuits or a general opposition to the NCAA's imposition of academic regulations, a group of nationally prominent schools were to leave the NCAA, the organization would suffer severely.[65] Such a plan has been hinted at by officials at top NCAA institutions.[66] However, it has not, as yet, posed a serious threat to the NCAA.

B. Discrimination on the Basis of Race

Once the state action hurdle is overcome, a challenge to Proposition 48 or 42 could be tried on the merits. Equal protection challenges to facially neutral regulations like the NCAA academic standards are divided into two categories. Under a strict scrutiny standard, a defendant must show that its actions or policies are closely related to furthering a compelling interest.[67] By contrast, under a rational basis review, a regulation will be upheld as long as it conceivably bears some rational relationship to a valid policy goal.[68]

State actions which intentionally discriminate against a protected class are afforded strict scrutiny review.[69] The Court has limit-

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64. NCAA v. Tarkanian, 488 U.S. 179, 194-95 (1988).

65. The members of the 63-school College Football Association (CFA) staunchly opposed a move in 1991 by the University of Notre Dame to negotiate its own television contract. Leonard Shapiro, *Now, Notre Dame's Golden Season; Flouting Irish Football Returns Pumped up by Breakaway TV Contract*, WASH. POST, Sept. 5, 1991, at B1. Notre Dame's contract forced a renegotiation of the CFA's pending deals with the American Broadcasting Company (ABC) and The Entertainment and Sports Programming Network (ESPN) and downgraded the contracts by about $50 million. *Id.*

66. *See* Reed, *supra* note 25, at 16. UCLA Athletic Director Peter Dalis "suggeste[d] that the universities that have shied away from partial qualifiers — his school, Stanford and Notre Dame, among others — may break off from the NCAA and play among themselves." *Id.*

67. Cleburne v. Cleburne Living Ctr., Inc., 473 U.S. 432, 440 (1984) (stating that "laws [that] are subjected to strict scrutiny . . . will be sustained only if they are suitably tailored to serve a compelling state interest").

68. *Id.* (stating that "[t]he general rule is that legislation is presumed to be valid and will be sustained if the classification drawn by the statute is rationally related to a legitimate state interest").

69. City of Richmond v. J.A. Croson Co., 488 U.S. 469, 493 (1989); Washington v. Davis,

ed its list of protected classes to race, ethnic identity, national origin, legitimacy and gender.[70] Conduct or measures which intentionally deprive individuals of a fundamental right or interest also justify strict scrutiny.[71] Under the Constitution, a fundamental right may be explicitly or implicitly protected.[72] Significantly, an education is not a fundamental right explicitly or implicitly protected by the Constitution.[73]

Absent a fundamental right, a fundamental interest, or a protected class, a claim of discrimination will receive only rational basis review. The case law is clear that where the discriminatory action is unintentional, but results in a discriminatory impact, rational basis review is the proper standard.[74] A plaintiff would prefer the higher standard of strict scrutiny review. To get there, however, the plaintiff must show discriminatory intent.

1. Discriminatory Intent and Strict Scrutiny Review

In *Washington v. Davis*,[75] the United States Supreme Court established that discrimination must be intentional in order to trigger strict scrutiny.[76] At issue in *Washington v. Davis* was whether a civil service examination given to police candidates was racially discriminatory under the Equal Protection Clause of the Constitution.[77] The Court acknowledged that the test did have a disproportionate impact on blacks.[78] The Court, nevertheless, up-

426 U.S. 229, 246 (1976).

70. *See, e.g.*, Coral Constr. Co. v. King County, 941 F.2d 910, 931 (9th Cir. 1991); Associated Gen. Contractors of Cal., Inc. v. City and County of San Francisco, 813 F.2d 922, 939 (9th Cir. 1987). The Supreme Court has afforded discrimination based on gender a quasi-strict scrutiny — a type of review somewhere between strict scrutiny and minimum rational review. *Associated Gen. Contractors*, 813 F.2d at 939-42.

71. San Antonio Ind. Sch. Dist. v. Rodriguez, 411 U.S. 1, 17 (1973).

72. *Id.* An example of an explicit fundamental right is the First Amendment freedom of speech. *Id.* at 34 n.75. The right of procreation is an example of an implicit constitutional right which stems from privacy rights protected by the Constitution. *Id.* at 34 n.76.

73. *Id.* at 35.

74. Washington v. Davis, 426 U.S. 229, 244-45 (1976) (overruling previous cases which state that proof of discriminatory racial purpose is unnecessary in making out an equal protection violation).

75. 426 U.S. 229 (1976).

76. *Id.* at 246. The Court declined to apply strict scrutiny analysis implying that inquiry beyond the rational basis test was unnecessary. *Id.*

77. *Id.* at 238-39. The test at issue in *Washington v. Davis* was the District of Columbia's "Test 21." The test was given to police recruits and was "designed to test verbal ability, vocabulary, reading and comprehension." *Id.* at 234-35 (quoting Davis v. Washington, 348 F. Supp. 15, 16 (D.D.C. 1972)).

78. *Id.* at 246. The District Court for the District Of Columbia found that the number of

held the test because there was not a discriminatory purpose in its implementation.[79]

Washington v. Davis has been interpreted as holding that disparate results on a standardized test are not alone sufficient to evidence discriminatory intent.[80] But the Supreme Court's decision left open the possibility that the use of a test that is known to be discriminatory can be evidence of discriminatory intent.[81]

In *Dixon v. Margolis*,[82] the Northern District of Illinois held that discriminatory intent could be inferred where defendants continued to use tests they knew were discriminatory and did not seek proof that the tests were rationally related to job performance.[83] The *Dixon* court, in essence, reasoned that the continuing use of a test that has discriminatory impact could factually rise to a level of discriminatory intent.[84]

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blacks on the District of Columbia police force was disproportionate to the number living in the city; it admitted that a higher percentage of blacks than whites regularly fail the test; and that the test had not been determined to be a reliable measure of subsequent job performance. *Id.* at 235.

79. *Id.* at 246. The *Washington v. Davis* Court stated, "Nor on the facts of the case before us would the disproportionate impact of Test 21 warrant the conclusion that it is a purposeful device to discriminate against Negroes and hence an infringement of the constitutional rights of respondents as well as other black applicants." *Id.*

80. United States v. Lulac, 793 F.2d 636, 646 (5th Cir. 1986).

81. *Id.* at 647. In *Village of Arlington Heights v. Metropolitan Housing Development Corp.*, the Supreme Court wrote:

> Determining whether invidious discriminatory purpose was a motivating factor demands a sensitive inquiry into such circumstantial and direct evidence of intent as may be available. The impact of official action — whether it 'bears more heavily on one race than another' — may provide an important starting point . . . .
>
> The historical background of the decision is one evidentiary source . . . . The specific sequence of events leading up to the challenged decision also may shed some light on the decisionmaker's purposes . . . .
>
> The legislative or administrative history may be highly relevant . . . .

Village of Arlington Heights v. Metropolitan Hous. Dev. Corp., 429 U.S. 252, 266-68 (1977) (citations omitted) (footnotes omitted).

82. 765 F. Supp. 454 (N.D. Ill. 1991).

83. *Id.* at 460. *Dixon* was a case where minority members of the Illinois State Police force brought a class action suit against the department for "violation of the equal protection clause of the Fourteenth Amendment pursuant to 42 U.S.C. § 1983." *Id.* at 455. The plaintiffs alleged that black police officers were passed over for promotions in favor of white police officers. *Id.* at 454. Their claim was based on the test given to police officers by the State Police Merit Board to gauge their readiness for promotion. *Id.* at 457. Both parties acknowledged that white candidates routinely performed better on the test than black candidates. *Id.* at 456-57

See Commonwealth of Pa. v. Flaherty, 760 F. Supp. 472, 485 (W.D. Pa. 1991) (noting that the use of a discriminatory test can evidence discriminatory purpose, though holding that it did not in this case because of the city's affirmative action programs).

84. *Dixon*, 765 F. Supp. at 460. The *Dixon* court wrote in pertinent part:

A challenge to NCAA Proposition 48 could be analyzed under the *Dixon* reasoning. The NCAA knows now and knew at the time it decided to use the standardized tests as a measure of academic ability that the tests were racially biased.[85] The NCAA's own Academic Requirements Committee recommended that standardized test scores not be used to set athletic eligibility requirements because of the racial biases of the test scores.[86] The Educational Testing Service (ETS) and the NCAA worked to find an alternative use for the test scores.[87] The president of the ETS, which designs the SAT, even cautioned the NCAA against using that test to determine athletic eligibility.[88] Many coaches and institutions raised the point during the NCAA's debate of the issue.[89] Nevertheless, the NCAA decided to use the tests to set academic standards.

In *Groves v. Alabama State Board of Education,*[90] the Middle District of Alabama rejected the use of the ACT as a determinate of admission to an undergraduate teaching program.[91] The *Groves* court noted that while the ACT was a valid predictor of a student's ability to succeed in college, it bore no rational relationship to a student's ability to be a qualified teacher.[92]

The *Groves* court opined that the arbitrary selection of a cutoff score, with knowledge of the likelihood of disparate impact and without a legitimate educational justification, made the use of the

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> There is also evidence that members of the Merit Board believed the tests were discriminatory. Nevertheless, the Merit Board continued to use the tests and never requested that [the test designer] provide information as to whether the tests were validly related to job performance. A trier of fact could infer from this evidence and the adverse impact evidence that defendants continued to use the tests as a means of intentionally discriminating against blacks. That is not a necessary inference to draw, but it is a possible and reasonable one and therefore is a sufficient basis for finding there to be a disputed factual issue as to defendants' discriminatory intent.

Id. (footnotes omitted).

85. *See* Greene, *supra* note 13, at 117 (noting that the committee that developed what became Proposition 48 knew that the use of standardized tests would have a disparate racial impact).

86. Asher, *supra* note 7, at B1.

87. Danny Robbins, *Convention Supports Prop. 42, but Makes Modification*, L.A. TIMES, Jan. 9, 1990, at C6.

88. Tim Layden & Manny Topol, *Prop 48: Off the Mark*, NEWSDAY, June 17, 1990, at 28 (Michael Dobie contributing).

89. Robbins, *supra* note 87, at C6. Georgetown Athletic Director Frank Rienzo said bluntly "this [SAT] criteria is discriminatory, and we should abandon it completely." *Id.*

90. 776 F. Supp. 1518 (M.D. Ala. 1991).

91. *Id.* at 1531. The Alabama State Board of Education had attempted to use a cutoff score of 16 on the ACT for admission into a teaching program. *Id.* at 1530.

92. *Id.* at 1531.

test more likely the result of intentional discrimination.[93] The court found such discrimination may be intentional under the law without being an overtly conscious decision to discriminate on the part of the defendants.[94]

The history behind the adoption of the NCAA Proposition 48 regulations is also suspect and lends itself to the inference of purposeful discrimination.[95] The committee that originally developed Proposition 48 lacked representation from blacks, from historically black colleges or universities, or from black secondary institutions.[96] This exclusion was effected despite the fact that the members of the committee had every reason to expect that the regulations they were proposing would have their most significant impact on black students and black athletes.[97] A black was not appointed

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93. *Id.* at 1532 n.32.

94. *Id.* The *Groves* opinion acknowledged:

> It may appear 'commonsensical' to a white employer that blacks do worse on tests, simply because 'commonsensical' racist stereotyping supports the idea that blacks are typically inferior. The failure of the employer to attempt to validate the test systematically results from the fact that bigoted common sense *implicitly* validates the test's outcome. Perversely, if a text [sic] excludes blacks its results may even be thought to confirm the accuracy of the testing mechanism.

Id. (quoting Mark Kelman, *Concepts of Discrimination in "General Ability" Job Testing*, 104 HARV. L. REV. 1158, 1168 (1991)). The *Groves* court went on to state:

> The ready manner in which the [committee] adopted the [cutoff score of 16 on the ACT], with full knowledge of its probable adverse racial impact and without any reasonable effort at validation, supports this conclusion. The court is convinced, therefore, that the cut-off score was not only the "functional equivalent" of race, it was more likely than not an actual product of intentional discrimination.

Id. (citation omitted).

95. Greene, *supra* note 13, at 117-21 (providing a detailed analysis of the argument that Proposition 48 was developed and passed to intentionally exclude black athletes from intercollegiate sport).

96. *Id.* at 113. Proposition 48 was originally developed by an Ad Hoc Committee of the American Council on Education. *Id.* at 105-11. That committee was chaired by Derek Bok, former president of Harvard University, and included forty college and university presidents, the president and executive vice president of the American Council on Education and a representative of the Association of American Universities. *Id.* at 106.

97. *Id.* at 113-21. Green quotes Sheldon Hackney, president of the University of Pennsylvania and a member of the Ad Hoc Committee, as saying that the committee

> thought about [the differential effect on black schools] and knew there would be those who would charge that the proposal was a racist proposal, so the Committee felt very carefully about doing something that would elicit that charge . . . and felt that it was good for everybody and it was worth going through the argument.

Id. at 118.

Indeed, at the NCAA Convention which debated Proposition 48, so much of the debate centered on the racial implications of the measure that Pennsylvania State University football coach Joe Paterno commented that the convention had started "talking black and white."

to the committee until the eleventh hour prior to the vote on Proposition 48.[98] This serves to further illustrate that the NCAA was aware of the racial implications of its actions and chose to ignore them.

The NCAA's adoption of academic standards, which arguably have a disparate impact on black students and black athletes, and its adoption of those measures without the representation of the individuals and institutions likely to feel the greatest impact, is evidence of the disparity between black and white in the NCAA. The NCAA's most logical response to these charges is that the SAT and ACT are adequate measures of subsequent academic ability and are the best means available.[99] But when that decision is made by white university presidents and approved by the NCAA membership — a majority of which is white — in a vote largely split along racial lines, that decision must be suspect. The law that aims to remedy and deter discrimination ought to provide a remedy to those who would challenge the NCAA academic standards simply because of how those standards were developed and implemented.

2. Discriminatory Impact Without Discriminatory Intent: Rational Basis Analysis

A challenge to Propositions 48 and 42 could also succeed under rational basis review. To succeed under this standard, a plaintiff needs to show that the discriminatory action has a disproportionate impact on the members of a protected class — in this case, race — and that the measure or conduct has no rational relationship to the purpose it aims to achieve.[100] The debate over Propositions 48, 42, and, indeed, over all other academic requirements for participation in intercollegiate athletics, has focused on the need to preserve

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Id. at 119.

98. *Id.* Luni I. Mishoe, a black, was appointed to the committee that developed Proposition 48 little more than one week before the NCAA Convention met to vote on Proposition 48 and after most of the specifics of Proposition 48 had been worked out. *Id.* Mishoe's comments to the 1983 NCAA Convention are printed in 1983 CONVENTION, *supra* note 7, at 110.

99. *See infra* note 116.

100. United States Dep't of Agric. v. Moreno, 413 U.S. 528, 529, 538 (1973) (noting that where Congressional purpose in adopting the Food Stamp Act of 1964, 7 U.S.C. §§ 2011-2030 (1988), was to increase the availability of food necessities to low income households and to promote United States agriculture, a provision excluding from the program any household consisting of an individual who is unrelated to another household member served no rational purpose and therefore could not survive rational basis review).

academic integrity in intercollegiate competition.[101] This is the NCAA's stated purpose.[102] It is the purpose for which it must establish a rational basis. If a plaintiff can establish that neither Proposition 48, nor Proposition 42 furthers that purpose, the NCAA standards may fail rational basis review.

A challenge to the NCAA's academic standards must focus on the disparate impact of the standardized tests.[103] Both supporters and opponents of the NCAA academic standards acknowledge the need to preserve academic integrity in intercollegiate athletics. However, the use of the standardized tests to achieve that goal has drawn much fire from coaches and athletic directors alike.[104]

Documentation proves that black students have traditionally scored lower on the SAT than their white counterparts.[105] This fact has held constant over the last seventeen years.[106] In addi-

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101. HISTORY OF BYLAW, *supra* note 19, at 4.

102. *See id.*

103. In their rhetoric, Thompson, Chaney, and others have harped on the denial of educational opportunity to black student-athletes as the major harm effected by the NCAA standards. *See supra* notes 29-33 and accompanying text. While this denial is a real result, it is unlikely that it would give rise to a legal claim.

Virtually all case law on the subject has held that the right to participate in intercollegiate athletics is not a right with which the Constitution is concerned. *See, e.g.*, Parish v. NCAA, 506 F.2d 1028 (5th Cir. 1975). The United States Court of Appeals for the Tenth Circuit noted that "unless clearly defined constitutional principles are at issue, the suits of student-athletes displeased with high school athletic association or NCAA rules do not present substantial federal questions." Wiley v. NCAA, 612 F.2d 473, 477 (10th Cir. 1979), *cert. denied*, 446 U.S. 943 (1980).

Wiley involved a challenge to the NCAA rule denying eligibility based on financial reward. *Id.* at 474. The plaintiff, a member of the University of Kansas track team, lost his eligibility when the money he received through an athletic scholarship and an educational loan exceeded NCAA requirements for amateurism. *Id.* The *Wiley* court refused to rule on the issue, citing the lack of a federal question. *Id.* at 477. Most other courts faced with this issue have agreed. *See, e.g., Parish*, 506 F.2d at 1034 (holding that participation in intercollegiate athletics is not a property or liberty interest protected by the Constitution); Mitchell v. Louisiana High Sch. Athletic Ass'n., 430 F.2d 1155, 1157-58 (5th Cir. 1970) (noting that participation in intercollegiate sports is left to the states to protect and falls outside the protections of constitutional due process); Hawkins v. NCAA, 652 F. Supp. 602, 610-11 (C.D. Ill. 1987) (agreeing with the position that "there is no constitutionally protected property interest in gaining tournament experience or media exposure"); Fluitt v. University of Neb., 489 F. Supp. 1194, 1203 n.5 (D. Neb. 1980) (stating that participation in intercollegiate sports "is not by itself a constitutionally protected property interest"). *But see* Hall v. University of Minn., 530 F. Supp. 104 (D. Minn. 1982) (granting a preliminary injunction that required the University to admit the student-athlete into a degree program and declare him eligible for his final varsity basketball season even though he had no intention of earnestly pursuing a degree, but rather desired to enhance his chances of obtaining a "no-cut" NBA contract).

104. *See* Robbins, *supra* notes 87, 89, at C6.

105. *See supra* note 22.

106. SAT Verbal and Math Scores Averaged by Ethnic Group:

tion, courts have noted that standardized tests impact more harshly on blacks than on whites.[107]

The data on partial qualifiers is perhaps the greatest indicator of the racial disparity the use of the tests has effected in intercolle-

SAT Verbal	1976	1989	1990	1991	1992	1993
American Indian	388	384	388	393	395	400
Asian American	414	409	410	411	413	415
Black	332	351	352	351	352	353
Mexican American	371	381	380	377	372	374
Puerto Rican	364	360	359	361	366	367
Other Hispanic	NA	389	383	382	383	384
White	451	446	442	441	442	444
Other	410	414	410	411	417	422
SAT Mathematical						
American Indian	420	428	437	437	442	447
Asian American	518	525	528	530	532	535
Black	354	386	385	385	385	388
Mexican American	410	430	429	427	425	428
Puerto Rican	401	406	405	406	406	409
Other Hispanic	NA	436	434	431	433	433
White	493	491	491	489	491	494
Other	458	467	467	466	473	477

COLLEGE BOARD, *supra* note 22, at 4. Statistics for 1983, 1987, and 1988 have been omitted.

107. Groves v. Alabama State Bd. of Educ., 776 F. Supp. 1518, 1529 (M.D. Ala. 1991) (evaluating use of ACT test and finding that the impact of the ACT "falls more harshly on blacks than whites to a sufficiently substantial degree"). Interestingly, according to a research report compiled by Consumer Advocate Ralph Nader, "'[E]TS and SAT aptitude tests on the average predict grades,' that is grades relative to how these kids will do once they enter the prebaccalaureate arena, 'only eight to 15 percent better than random prediction with a pair of dice.'" 1983 CONVENTION, *supra* note 7, at 109 (comments of Edward B. Fort of North Carolina A&T State University quoting a research report conducted by Ralph Nader). "'The SAT discriminates among virtually all levels of the country's classic structure across both income and occupation.'" Id.

There are those who argue that the score discrepancies are misleading because any cultural bias in the test would be reflected only on the verbal section and not on the mathematics portion of the test. *See* Steve Sailer, *How Can Bias Infect the Math Scores on Standardized Tests?*, CHRISTIAN SCIENCE MONITOR, Nov. 28, 1990, at 20 (editorial). But this distinction appears meaningless with respect to the legitimacy of the NCAA academic requirements. Even if only the verbal scores could be demonstrated to reflect a cultural bias, the use of those scores creates a significantly disparate impact on minority student-athletes.

The NCAA requires student-athletes to score a 700 on the combined verbal and math portions of the test. NCAA BYLAWS, *supra* note 3, art. 14.3.1.1(b). That means that a student-athlete must correctly answer roughly thirty seven of the 145 questions on the test each year. SPERBER, *supra* note 44, at 218. The test contains approximately 85 verbal questions and 60 mathematics problems. *Id.* A cultural bias on the verbal part of the test, therefore, hampers black students ability on 85 of those questions. *Id.* In other words, while white students have a fair chance on the entire exam, cultural bias impedes black students on approximately one-half of the SAT. This distinction demonstrates a racially disparate impact even if only the verbal half of the SAT can be demonstrated to exhibit racial bias.

giate athletics. Overwhelmingly, partial qualifiers are denied the opportunity to participate in intercollegiate athletics on the basis of substandard SAT scores rather than low grade point averages.[108] This fact illustrates that the NCAA's use of the test scores is directly responsible for the greater number of black student-athletes who are denied eligibility by the NCAA academic requirements.

One major statistic the NCAA points to in its defense relates to the percentage of black athletes participating in intercollegiate athletics. Proposition 48 has not substantially changed the percentage of black athlete participation.[109] This consistency in the numbers arguably indicates that Proposition 48 requirements have had little impact on black student-athletes. In other words, while many more black athletes than white athletes may fall victim to Proposition 48, those who are not allowed to participate in intercollegiate athletics because of the rule are being replaced on the athletic field and in college classrooms by student-athletes of the same race. Taken literally, this would seem to go a long way towards dispelling notions that Proposition 48 has a discriminatory impact.

In fact the argument has been made that Proposition 48 insures that deserving students receive scholarships without diminishing the number of black student-athletes in collegiate sports.[110] Such an argument is difficult to document since the NCAA does not require its institutions to report the race of the students to whom it offers athletic scholarships. The numbers that are available are somewhat skewed because participation in these NCAA surveys is voluntary. A different number of schools elected to participate each year, and no doubt those institutions with the worst records did not respond. It may be assumed that those schools which did not re-

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108. *See supra* note 37.

109. Asher, *supra* note 7, at B1 (noting that Proposition 48 has not had the effect of eliminating black athletes from NCAA competition). Of the 11,835 prospective Division I student-athletes included in a 1991 NCAA study, 2836 or roughly 24% were black. NCAA, *Enrollment Trends*, *supra* note 36, at 3. Statistics included responses from 83.8% of NCAA Division I schools. *Id.* at 1. With respect to 3,383 black and white 1984 and 1985 prospective student-athletes, 25.2% were black. REPORT 92-01, *supra* note 16, at 8. *But see* Steve Wieberg, *Proposition 48 Plays to Mixed Reviews*, USA TODAY, July 2, 1993, at C1 (stating that "[b]lacks accounted for 27.1% of all incoming scholarship athletes from 1983-85, only 23.5% in 1986 [after Proposition 48 went into effect]").

110. Arthur Ashe, *Is Proposition 48 Racist?*, EBONY, June 1989, at 139. Former tennis star Arthur Ashe, who was a major proponent of Proposition 48, argued that the NCAA requirements have not diminished the number of black students receiving scholarships. *Id.* Rather, he contended, they have only insured that those who do receive the scholarships are truly deserving. *Id.*

spond offered relatively few scholarships to black athletes. Nevertheless, the consistency of black student-athlete participation suggests that scholarships taken from black athletes who fail to meet the Proposition 48 requirements are being given to other black student-athletes.[111]

However, the consistency of black participation before and after Proposition 48 does not preclude the possibility that more minorities would be receiving athletic scholarships if the NCAA academic regulations were not a factor. Despite the great pool of athletic talent generated in black America, black athletes get an extremely low percentage of the athletic scholarships given out in the United States.[112] If the test scores were not a determinative factor, black student-athletes may indeed receive athletic scholarships in greater proportion to their number and talent.[113]

Nevertheless, under rational basis analysis, the disparity between black and white student-athletes on the test scores does not offend the Constitution or 42 U.S.C. section 1983 if the test scores accurately fulfill the purpose for which they are used.[114]

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111. In the 1990-1991 academic year 2,836 grants were awarded to black Division I student-athletes who met Proposition 48. *Enrollment Trends*, *supra* note 36, at 3. For the 1991-1992 academic year, 2,797 black Division I student-athletes, who met Proposition 48, were awarded grants. *Partial-Qualifier Rate Grows*, *supra* note 36, at 14. The number rebounded, however, to 3,103 for the 1992-1993 academic year. *Partial Qualifiers Decrease*, *supra* note 36, at 21.

112. Edwards, *supra* note 12, at 31 (stating that black athletes get less than one-tenth of the athletic scholarships awarded in the United States). Societal forces push many blacks to athletics and the predominately false hope of playing in the National Football League (NFL), National Basketball Association (NBA) or Major League Baseball (MLB). *Id.* Collegiate institutions take advantage of the situation by granting scholarships to athletes who may not graduate or graduate with worthless degrees. *Id.* Proposition 48 was a flawed reaction to this exploitation. *Id.* The flaw was in the rule's reliance on standardized tests. *Id.*

113. *Cf.* Groves v. Alabama State Bd. of Educ., 776 F. Supp. 1518, 1528 (M.D. Ala. 1991). The *Groves* court found that the use of the standardized ACT exam discouraged blacks from trying to enter a career in education when they were unsuccessful in getting the required score. *Id.* Black athletes may be similarly discouraged from pursuing higher education if they fail to meet the NCAA SAT requirement the first time they take the test or if they feel they will not have a chance to get the required score. *See* Barry Temkin, *Pressure, Thy Name Is Test Day*, CHI. TRIB., June 8, 1990, at C14 (noting that Marcus Liberty, a former basketball player at the University of Illinois, thought about giving up trying to achieve 700 on the SAT).

114. *Groves*, 776 F. Supp. at 1529. The *Groves* court grappled with whether failure to attain a 16 on the ACT exam was a legitimate means of barring applicants from teaching programs. *Id.* at 1530. In borrowing from Title VII of the Civil Rights Act of 1964, 42 U.S.C. §§ 2000(e) to 2000(e)-17 (1988), the court found that standardized test scores must yield an appropriate and meaningful inference about the qualifications necessary to succeed in a program. *Id.* at 1529-30.

To withstand rational basis review, the NCAA would have to show a rational relationship between setting a minimum score on the SAT or ACT and the preservation of integrity in intercollegiate athletics.[115] The use of the tests in college admission procedures is a necessity that has not been challenged. The tests have demonstrated the ability to predict future college achievement.[116] But the use of the tests as predictors of future academic ability and thus as a tool for selecting applicants for admission is far easier to justify than the use of the tests to preserve the academic integrity of college sports.[117]

In *Groves v. Alabama State Board of Education*[118] the District Court for the Middle District of Alabama struck down the application of the ACT to serve a goal for which it was not designed.[119] The decision stressed the reckless manner in which the defendants selected the ACT cutoff score. The school board's action in *Groves* mirrors the NCAA's unnecessary use of the tests to preserve the academic integrity of intercollegiate athletics. While the ACT and SAT are arguably reliable predictors of a student's ability to succeed in college, choosing a score of 700 as a cutoff does not bear any rational relationship to a student's ability to balance academics and intercollegiate athletics.[120]

When a college or university has chosen to admit a student, the institution vouches for the student's academic qualifications. To declare that student ineligible because he or she does not meet an

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115. *See id.* The NCAA has indicated that academic integrity in intercollegiate competition is the primary reason for setting minimum SAT or ACT scores for athletic eligibility. HISTORY OF BYLAW, *supra* note 19, at 4. Under a *Groves* analysis, the NCAA would be required to establish that a minimum of 700 on the SAT and 17 on the ACT are rationally related to maintaining academic integrity in intercollegiate athletics. *Groves*, 776 F. Supp. at 1530-31.

116. *See*, Sharif By Salahuddin v. New York State Educ. Dep't., 709 F. Supp. 345, 352 (S.D.N.Y. 1989). *Sharif* involved a challenge to the exclusive use of the SAT to determine eligibility for New York state merit scholarships. *Id.* at 353. The court stated that "[t]he ability of the SAT to serve this purpose has been statistically 'validated.'" *Id.*

117. *See* Larry Ames, *Why Use SAT? No Alternative*, BOSTON GLOBE, Feb. 25, 1989, at 68. Indeed, it was because the test can predict only academic ability and not motivation or individual characteristics that the ETS "strongly oppose[d] the use of the SATs to determine athletic eligibility." *Id.* (quoting Greg Anrig, President of the ETS).

118. 776 F. Supp. 1518 (M.D. Ala. 1991).

119. *Id.* at 1531.

120. *Cf. id.* at 1530-31. The *Groves* court wrote, "Indeed, what is known about the validity of the ACT indicates that it is intrinsically unsuited to be used as an absolute criterion, particularly to determine future teaching ability, something far afield from its narrow, intended role in college admissions decisions." *Id.* at 1531.

arbitrary cutoff on a standardized test is to effectuate an unreasonable disparate impact on minorities.[121] This may be because many students study harder when allowed to participate in athletics than they would otherwise. For whatever reason, it is logical that as admissions criteria are raised, graduation rates will increase proportionately. Therefore, allowing an increase in graduation rates to validate tougher admission standards is circular reasoning.[122] If students who do not meet Proposition 48 standards graduate nonetheless, then, the NCAA's argument that it must use the test to control admission is baseless.

While tougher academic standards do result in higher graduation rates overall, the standards deny the opportunity to graduate to numerous student-athletes.[123] The increase in graduation rates might actually be the result of reverse discrimination. NCAA studies reflect a trend whereby less qualified black male athletes graduated at a better rate than their better qualified counterparts.[124]

Professors have argued that these statistics reflect little more

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121. *Id.* The *Groves* Court wrote that such an arbitrary use of these scores "bears no logical let alone significant relationship" to the criteria it purports to measure. *Id.* Such an arbitrary standard (the NCAA's designation of 700 as its minimum as opposed to some other number) is exactly the rationale used by the *Groves* court to declare Alabama's use of the standardized tests invalid. *Id.*

122. Kelly, *supra* note 29, at 63. With respect to Proposition 48, Temple's John Chaney stated:

> What has happened over the years is that the NCAA has increased the academic standards and therefore eliminated a large number of black kids — those on the fence, those who come from a disadvantaged background, those from broken homes — from the opportunity of getting an education. Before, they were admitting 50, graduating 10, losing 40, but still giving an opportunity to those 40 who didn't make it. Now, they admit 10, graduate maybe seven or eight, and boast a 70% or 80% graduation rate. The information not given out is that we're admitting fewer blacks.

Id.

123. REPORT 92-02, *supra* note 16, at 16; REPORT 92-01, *supra* note 16, at 6. The graduation rate for 1984-85 prospective student-athletes was 48.2%. REPORT 92-01, *supra* note 16, at 6. That figure increased to 56.5% for 1986 prospective student-athletes. *Id.* Blacks, however, made up a substantially smaller proportion of the 1986 group as compared to the 1984-85 group. *Id.* Black representation dropped from 25.2% to 17.9%. *Id.* Thus, numerous potential black student-athletes were denied the opportunity to graduate. *See* Wieberg, *supra* note 109, at C1 (stating that 706 fewer blacks accepted athletic scholarships in 1986 than in 1985).

124. REPORT 91-02, *supra* note 16, at 14 . An NCAA study of athletes in the classes of 1984 and 1985 found that only 25% of black male athletes in men's revenue generating sports actually graduated within five years of enrollment. *Id.* The NCAA reported that in the classes of 1984 and 1985, the number of students who would not have met Proposition 48's academic standards, but did in fact go on to graduate, was statistically significant. REPORT 91-04, *supra* note 16, at 20.

than the favoritism showed by those who grade student-athletes.[125] Student-athletes, by virtue of their value to the university on the playing field, receive special attention. They are encouraged by coaches and institutional standards to keep their grades up in order to stay on the team. However, these numbers may also illustrate the motivation and work ethic among student-athletes not present among other students.

In truth, much of the evidence on whether the NCAA requirements achieve their stated purpose is anecdotal.[126] It is these isolated stories of motivation that the NCAA looks to in support of Proposition 48's effectiveness.

Even with these occasional Proposition 48 success stories, there should be concern. Some of the athletes the NCAA touts in these stories may not have been able to attend college under today's Proposition 42 standard.[127] Student-athletes who attended college as a partial qualifier and thereafter successfully graduated might not have had the opportunity under Proposition 42 unless they qualified for institutional financial aid which is not from an athletic source.[128]

Proposition 48 has not stopped that many qualified student-athletes from competing on the college level.[129] But by denying these students the right to play competitively or to practice with their teams,[130] the rule takes away a major part of their daily

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125. *See supra* notes 5-6 and accompanying text.

126. *See* Bob Ryan, *Rumeal Under Prop. 48: Rumeal Under Prop. 42: New Legislation Would Make Robinson a Nonentity*, BOSTON GLOBE, Jan. 27, 1989, at 41. In 1986, Rumeal Robinson entered the University of Michigan on an athletic scholarship. *Id.* He did not meet the Proposition 48 requirements, however, and was forced to sit out that year. *Id.* Robinson credited Proposition 48 with his success in the classroom. *Id.* Rumeal Robinson stated, "I took my classes very seriously. A lot of players only take about 13 hours as a freshman. I took 20." *Id.*

127. *Id.* As a partial qualifier, Robinson would not have received the athletic scholarship that allowed him to enroll at the University of Michigan in his freshman year. *Id.* Instead, he would have been forced to seek alternative, need-based financial assistance. NCAA BYLAWS, *supra* note 3, art. 14.3.2.1.1. Robinson would have graduated with a student loan debt — not a problem for a player with an NBA contract, but a big risk for the college athlete whose future is uncertain. Perhaps this is enough of a deterrent to alter a decision of whether to enroll.

128. *See* NCAA BYLAWS, *supra* note 3, art. 14.3.2.1. Under the NCAA Bylaws a partial qualifier must qualify for financial assistance based on need only. *Id. See also id.* art. 15.02.3.1 (defining the sources of institutional financial aid).

129. Diane Pucin, *A Touchy Proposition*, PHILA. INQ., Jan. 27, 1989, at D4 (stating that of the student-athletes who have sat out their freshman year under Proposition 48, 79% have returned to play in their sophomore year).

130. Proposition 48 denies the student-athlete the chance to participate competitively as

lives.[131] A student-athlete enters college at the age of seventeen or eighteen and may live away from home for the first time. When the athlete is stigmatized as a Proposition 48 student and is denied the chance to play competitive sports on the level at which he/she is capable, the difficulty is compounded.[132]

Nor has Proposition 48 helped college athletes on the playing field. The majority of those who have been subject to the measure and forced to forego their freshman year of eligibility have evidenced a negative impact in their athletic performance.[133] It is a rare occurrence when an athlete claims that sitting out their freshman year actually helped them as an athlete during the ensuing years.[134]

While a student's athletic progress in the absence of Proposition 48 can be no more than mere speculation, many have observed that an athlete's inability to participate in his/her freshman year costs them a crucial year of development of their athletic skills.[135] For an extremely talented athlete, playing college basketball or football is a necessary step toward a professional career. By denying them the ability to develop as a college player, the NCAA may be costing students significant earning potential as a professional athlete.

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well as the right to practice with his/her team as a freshman. NCAA BYLAWS, *supra* note 3, art. 14.3.2.1.1.

131. Pucin, *supra* note 129, at D4. Temple's Michael Harden stated that he cried "every day for two weeks. I was far away from home, and a big part of my life wasn't available. It would have been much easier if I could have practiced." *Id.*

132. *Id.* Treg Lee, who was a Proposition 48 student-athlete at Ohio State, spoke about the year he spent away from athletics. He stated, "I walked around a lot last year with my head down. There was a stigma attached. I was a Prop and everyone knew it. My support group was taken away, too. I've always been part of a team and that was gone. It was very hard." *Id. See* Temkin, *supra* note 113, at C14 (describing the stigma that attaches to a Proposition 48 athlete).

133. *See*, Pucin, *supra* note 129, at D4. Former University of Illinois basketball player Marcus Liberty entered college in 1987 after being judged by many as the top high school basketball player in the nation. *Id.* But after sitting out his freshman year, Liberty's talent never reached its expected potential. *Id.*

134. Ken Denlinger, *On Paper, Proposition 48's Roster Impressive, but Time Will Tell Final Result*, WASH. POST, Apr. 1, 1989, at D5. It is interesting to note that University of Michigan basketball player Rumeal Robinson is perhaps the only Proposition 48 victim who has been quoted as saying that spending his freshman year on the bench may even have helped his later performance on the court. *Id.* Robinson felt that "sitting in the stands allowed him to see things he'd never seen on the floor .... [And that this] would help him become a better player." *Id.*

135. Pucin, *supra* note 129, at D4 (describing how the athletic potential of Temple's Michael Harden, Ohio State's Treg Lee and Illinois' Marcus Liberty was negatively affected by sitting out their freshman year in accordance with Proposition 48).

Another serious problem with the relationship between the NCAA standards and academic integration of college sports is the impact of the regulations on other students. A Proposition 48 student who receives need-based student loans, rather than an athletic scholarship, in one or more years takes those loans away from a student who may be academically superior. Colleges and universities with highly powered athletic programs will always find a financial means to enroll star athletes.[136] If that means includes need-based financial assistance, it could cost the school a more academically deserving student. Nothing would seem to fly more in the face of the NCAA's interest in preserving academic integrity.

But perhaps the single most important factor to consider in evaluating the NCAA's academic standards ought to be a determination of the impact of the standards on primary and secondary school students. Regardless of the stated goals of the NCAA, setting academic standards for entering freshman athletes at a level above that required by institutions of higher education has little effect on student-athletes who are already in college.[137] As such, the NCAA academic requirements are justified only by the impact of the standards on the study habits of primary and secondary school students.

As with the impact of the NCAA regulations on collegiate student-athletes, much of the evidence regarding the impact of Propositions 48 and 42 on high school students is anecdotal. Noteworthy student-athletes consistently testify to the usefulness of the measures. These stories are of only moderate value because only successful student-athletes are likely to receive the public attention that would bring their stories to the news media.

Although there is a serious lack of solid statistical evidence in this area, two articles have concluded that the NCAA academic standards are not motivating high school student-athletes.[138] Fur-

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136. SPERBER, *supra* note 44, at 225-26.

137. Propositions 48 and 42 only impact entering freshmen. NCAA BYLAWS, *supra* note 3, art. 14.3.2.1.

138. Neil H. Greenberger, *For Star Athletes, Senior Season Is Another Education*, WASH. POST, Oct. 22, 1991, at E3. According to some high school student-athletes in the Washington D.C. area, student-athletes generally do not consider the SAT and the academic requirements of Proposition 48 until their senior year. *Id.* By the last year of high school it is probably too late to take the necessary steps to meet Proposition 48 requirements. *See id. See also* Layden & Topol, *supra* note 88, at 28 (noting that Proposition 48 may be failing to increase the consciousness of secondary school systems and the academic quality of secondary school athletes).

thermore, the standardized test results do not support the inference that the NCAA standards have had a positive effect on secondary or primary education of student-athletes.[139] As a result, the NCAA cannot take credit for increasing high school test scores or for motivating high school student-athletes. For high school upperclassmen facing low scores on the standardized tests, it can be argued that any education a college or university can provide is better than the complete lack of education such a student is likely to experience without the opportunity provided by an athletic scholarship.

In reviewing whether the Proposition 48 standard is rationally related to preserving academic integrity in college sports, the existence of less restrictive means of achieving the same goal is also relevant.[140] In this case, the NCAA would seem to have many less restrictive means of ensuring academic integrity in intercollegiate sports without employing racially discriminatory tests.

The NCAA could limit its eligibility test to grade point averages only. Student-athletes would have to meet the high school GPA requirement to compete in their freshman year of college, but the test score required for admission could be left to the college. Alternatively, the NCAA could punish those schools that artificially inflate grades, but do away with the test score requirement. The NCAA could also eliminate freshman eligibility for varsity sports entirely.[141] Proposals to abolish freshman eligibility have been discussed among intercollegiate athletic participants.[142] Either of these proposals would eliminate the need for the use of standardized test scores or any other high school criteria as a gauge of student ability or performance. It would eliminate the need to use standardized test scores to determine freshman academic eligibility

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139. In the eight years since the NCAA implemented Proposition 48, the average SAT verbal score has declined by seven points. COLLEGE BOARD, *supra* note 22, at 4. While from 1987 to 1993 the average verbal score of black students taking the test has increased by two points, *id.*, this increase is largely attributable to the dramatic increase in the average score compiled by black women since 1980. THE COLLEGE BOARD, THE CLASS OF 1991: A STATISTICAL PORTRAIT OF STUDENTS WHO TOOK THE SAT AND ACHIEVEMENT TESTS 13 (Aug. 1991).

140. *See* Justice v. NCAA, 577 F. Supp. 356, 370 n.9 (1983) (noting that where less restrictive alternatives are unavailable, an examination of rational basis review would be pointless and, thereby implying that less restrictive alternatives are part of rational basis analysis).

141. *See* Layden & Topol, *supra* note 88, at 28. Freshmen have been declared eligible for all NCAA sports since 1972. *Id.* Prior to 1972, freshmen were declared ineligible at various intervals throughout the history of intercollegiate sports. *See id.*

142. *Id.*

at all. And, since current eligibility of all student-athletes other than freshmen is determined by college grades,[143] this standard would effectuate little difference in result after the student's first year. Furthermore, the elimination of freshman eligibility would go much further than the current regulations toward ensuring that freshmen concentrate on academics and do not become overwhelmed by the pressures of trying to be a student-athlete at a major college or university at the age of eighteen.[144]

However, a proposal to eliminate freshman eligibility would seem unlikely to pass the NCAA without a push. But the threat of sanction through a successful court challenge may be enough to allow a freshman eligibility rule to pass. The threat of Congressional intervention and regulation of the NCAA may also provide the requisite push.[145]

Another alternative to the use of the SAT or ACT would be to require student-athletes to take the Graduate Record Examination (GRE) before leaving an institution.[146] The GRE is typically cited as exhibiting less cultural bias than the SAT.[147] The test is given to graduating college seniors as a means of measuring skill levels for admission to graduate school.[148] The NCAA could force its schools to administer the test to student-athletes after four years of college.[149] Students who did not meet a minimum standard on the test would not be punished. Rather, for each student-athlete who scored below a certain level the institution would be denied one four-year athletic scholarship.[150] In this way a school would be allowed to admit any student-athlete it chose, but would be held accountable if that student did not receive an education.

There are problems with this proposal, however. For one, the GRE is not totally free of cultural bias. In addition, the typical

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143. NCAA BYLAWS, *supra* note 3, arts. 14.01.1, 14.02.5 (stating that with respect to non-freshman eligibility, the student-athlete must be in "good academic standing" as determined by the athlete's institution).

144. This proposal need not contradict the notion that student-athletes suffer when forced to miss a year of athletic competition because all athletes would be treated equally.

145. *See infra* part V. In an effort to maintain its independence free from Congressional intervention, the NCAA could pass regulations it might not normally approve. Declaring freshmen ineligible is one such possibility.

146. SPERBER, *supra* note 44, at 226-28.

147. *Id.* at 226.

148. *Id.*

149. *Id.* at 227.

150. *Id.*

problems of cheating on the test[151] and the arbitrary selection of a cutoff score are likely to surface.[152] Furthermore, as with Proposition 42, a school denied athletic scholarships will somehow find a way to admit talented student-athletes. When denied athletic scholarships, these schools may award need-based assistance to student-athletes. As a result the institution may deny that assistance to more academically qualified students.

Nevertheless, the proposal has the advantage of punishing the school, not the student-athlete. And it would provide a tremendous incentive to the institution to see that its student-athletes are in fact educated. It would also create a documented record of each college or university's rate of success in educating student-athletes.[153] That record could be used by future students in selecting a school. If the NCAA is serious about its desire to promote academic integrity in intercollegiate sports, it ought to look at this proposal.

The NCAA could even go one step further. In order to improve on the proposal to use the GRE, the NCAA ought to consider developing its own test. The NCAA could take particular care in removing cultural bias from such a test. The cost of administration may be well worth the return of increased academic integrity.

In addition, or as an alternative, to the GRE proposal, the NCAA could encourage its members to adopt and enforce standards consistent with solid academic goals. One step in the right direction is the adoption of new guidelines by the Southern Association.[154] Under the guidelines, an institution's ability to exercise responsible control over its athletic association can be a factor in determining whether it is accredited.[155] A school which is denied accreditation can lose, among other things, federal funding.[156] The Southern Association's action has the potential to put pressure on the institu-

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151. *See id.* (noting that cheating would remain a problem, but that cheating on the GRE would be less likely than cheating on the SAT).

152. *See* Groves v. Alabama State Bd. of Educ. 776 F. Supp. 1518, 1530-31 (M.D. Ala. 1991) (striking an arbitrarily set ACT cutoff score of 16 as a measure of future teaching ability).

153. The NCAA membership may never pass a proposal which evaluated the colleges success in educating students because of the likelihood it would force the schools to reveal their inability to educate student-athletes. SPERBER, *supra* note 44, at 228.

154. *Role Models for College Sports Reform*, CHI. TRIB., Dec. 27, 1991, at 20. The Southern Association is one of six regional college and university accrediting bodies. *Id.*

155. *Id.*

156. *Id.*

tions under its control. If strictly enforced, it can tie a university's ability to succeed as an entity to its ability to take responsibility for its athletic association — including its ability to educate student-athletes.

The argument for rational basis review of the NCAA academic standards is more plausible than it may appear at first glance. Courts have applied a very loose standard to determine whether a particular action satisfies the rational basis test.[157] The current United States Supreme Court may do the same with respect to the NCAA standards should it ever address the question. Where a restriction does little to further the stated goals of the NCAA and where many less restrictive and less discriminatory options are available, the NCAA regulations may be unable to survive a constitutional challenge.

Before a student-athlete can participate in intercollegiate athletics, he or she must be admitted to a college or university. To do so, he or she must meet the institution's academic standards for admission. To deny an athlete who has been admitted to an institution the chance to participate in intercollegiate sports — as Proposition 48 currently does — would seem tenuous. To deny that athlete an athletic scholarship and perhaps the chance to attend the institution at all — the result under Proposition 42 — would seem to have no rational basis.

IV. TITLE VI OF THE CIVIL RIGHTS ACT OF 1964

Perhaps a more productive way to legally challenge the NCAA measures would be an action under Title VI of the Civil Rights Act of 1964 which prohibits discrimination in federally assisted programs.[158] Regulations issued under the statutory mandate require that recipients of federal funding may not use selection standards which discriminate on the basis of race, color, or national origin.[159]

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157. *See The Supreme Court, 1981 Term*, 96 HARV. L. REV. 62, 106-40 (1982) (discussing the United States Supreme Court's 1981 decisions on equal protection).

158. 42 U.S.C. 2000d (1988). Title VI provides that "[n]o person in the United States shall, on the ground of race, color or national origin, be excluded from participation in, be denied the benefits of, or be subjected to discrimination under any program or activity receiving federal financial assistance."
Id.

159. 34 C.F.R. § 100.3(b)(2) (1993). Federal regulations provide:
A recipient, in determining the types of services, financial aid, or other benefits . . .

A challenge to the NCAA regulations under this statute thus has many advantages. First, a plaintiff need only show that the NCAA's regulations have disproportionate impact, not discriminatory intent, in order to prevail.[160] A challenge to Proposition 48 or 42 could be successful by establishing that the measures have a significant adverse disparate impact on one or more racial groups.[161]

To establish a prima facie case under Title VI, the complaining party must first demonstrate that the disputed test caused a disparate impact on a protected group.[162] That impact can be shown in a number of ways. As the *Groves* court noted, most courts and the Equal Employment Opportunity Commission (EEOC) will infer "adverse racial impact where the members of a particular racial group are selected at a rate that is less than four-fifths, or 80%, of the rate at which the group with the highest rate is selected."[163]

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may not, directly or through contractual or other arrangements, utilize criteria or methods of administration which have the effect of subjecting individuals to discrimination because of their race, color, or national origin, or have the effect of defeating or substantially impairing accomplishment of the objectives of the program as respect individuals of a particular race, color, or national origin.

Id. See Larry P. By Lucille P. v. Riles, 793 F.2d 969, 981-82 (9th Cir. 1984). (involving a plaintiff who challenged an elementary school placement test and successfully made a prima facie showing of discrimination under § 2000d when the evidence showed that black children scored ten points lower than white children on the disputed test).

160. *Larry P. By Lucille P.*, 793 F.2d at 981-82 (citing Guardians Ass'n v. Civil Serv. Comm'n, 463 U.S. 582 (1983)). In *Guardians Association*, the Supreme Court wrote a confusing opinion which purported to address the issue of discriminatory impact or intent head on, but because of the division between the justices, the case did not create a coherent precedent. *Id.*

As many courts have noted, "[t]he elements of a disparate-impact claim under Title VI's regulations are substantially similar to those applicable in an employment discrimination action under Title VII." *See, e.g,* Groves v. Alabama State Bd. of Educ., 776 F. Supp. 1518, 1523 (M.D. Ala. 1991) (citing Quarles v. Oxford Mun. Separate Sch. Dist., 868 F.2d 750, 754 n.3 (5th Cir. 1989)).

161. United States v. Lulac, 793 F.2d 636, 648-49 (5th Cir. 1986). (noting that a "skills" test required for all potential teachers would have violated Title VI or Title VII if it was found that the test, which caused disparate impact on minority applicants, was not calculated to measure a "bona fide occupational qualification").

162. *Groves*, 776 F. Supp. at 1523.

163. *Groves*, 776 F. Supp. at 1526. *Groves* also contains a description of other methods of calculating whether a given test result constitutes actionable disparate impact. *Id.* at 1526-27. The *Groves* decision explained the "standard deviation" test and the "Shoben formula." *Id.* at 1527. Using the "standard deviation" test, a finding of disparate impact is shown when the observed and expected values have a difference of more than three standard deviations. *Id.* Using the "Shoben formula," a difference greater than 1.96 standard deviations is sufficient to support a finding of adverse impact. *Id.*

Because the eighty percent standard is not a rigid one,[164] a Title VI challenge to the NCAA standard can meet the eighty percent threshold.[165] Once a prima facie case of discrimination is established, the burden shifts to the defendant to defend the discriminatory practice.[166] In *Newark Branch, NAACP v. Town of Harrison, New Jersey,*[167] the court noted that a defendant in a disparate impact case must establish a strong relationship between a practice which effects discriminatory impact and the defendant's employment purposes.[168] The NCAA would thus have to establish that its use of the standardized tests was required by educational necessity.[169]

The "educational necessity" requirement is interpreted differently by the courts. The United States Court of Appeals for the Ninth

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164. *See id.* (finding disparate impact where the ratio was 82.3%); Paul Meier et al., *What Happened in Hazelwood: Statistics, Employment Discrimination and the 80% Rule,* 1 AM. B. FOUND. RES. J. 139, 163-64 (1984).

165. In 1990, as consistent with prior trends in Division I, roughly 85% of the black student-athletes who applied to meet the NCAA standards qualified. *Enrollment Trends, supra* note 36, at 3. By contrast, roughly 98% of white student-athletes met those standards. *Id.* These numbers reflect only the 83.8% of Division I schools that elected to respond to the NCAA survey. *Id.* at 1. The numbers reveal that black student-athletes were excluded by the NCAA at a rate that was 86.7% that of white student-athletes. In 1991, the percentage of black and white student-athletes who qualified stayed substantially similar to 1990 figures. *Partial-Qualifier Rate Grows, supra* note 36, at 1. Also in 1991 only 88.3% of Division I schools responded to the survey. *Id.* In 1992, the gap in Division I black and white qualifier percentages closed to 91% and 99%, respectively. *Partial Qualifiers Decrease, supra* note 36, at 21. These figures still result in black athletes qualifying at a rate of 91.9% of the rate at which white student-athletes qualify. *See id.* Again, however, only 87.6% of Division I institutions responded to the 1992 survey. *Id.* at 1.

Considering that those schools which did not report data are likely to be schools where more athletes failed to meet the NCAA standards, the actual ratio of black to white student-athletes excluded by the rule is likely to be lower. This is so because the number of student-athletes failing to meet the NCAA standards is likely to increase when data from these schools is included. As that number increases, it will do so in a disproportionate rate of black-to-white student-athletes. The ratio is therefore likely to fall within or close to the 80% threshold.

166. Larry P. By Lucille P. v. Riles, 793 F.2d 969, 982 (9th Cir. 1984). Title VII, which has been analogized to Title VI, *see supra* note 160, provides that the defendant carries the burden of proof once the complainant establishes that the employment practice has caused a disparate impact. 42 U.S.C. § 2000e-2(k)(1)(B)(i) (enacted as part of the Civil Rights Act of 1991).

167. 940 F.2d 792 (3d Cir. 1991).

168. *Id.* at 804. The *Newark Branch* court stated that "the employer retains the burden of producing significant evidence that establishes a strong factual showing of manifest relationship between the challenged practice and the defendant's employment goals." *Id.*

169. Board of Educ. of N.Y. v. Harris, 444 U.S. 130, 151 (1979); *Larry P. By Lucille P.*, 793 F.2d at 982-83.

Circuit clearly puts the burden on the defendant to justify the necessity of the regulation.[170] By contrast, the United States Court of Appeals for the Fifth Circuit has held that a plaintiff carries the burden of proof to establish discrimination in violation of Title VI.[171] The difference is key. The standardized tests are a reliable measure of educational ability.[172] If the interests of the NCAA lie in preserving academic integrity, a court adopting the Fifth Circuit's approach may hold that the use of the standardized tests are a reasonable means of achieving that goal.[173] However, it may reach a different conclusion if it addresses the question of whether the NCAA ought to be measuring academic ability and denying a student accepted at an accredited college the right to participate in intercollegiate athletics. Furthermore, the NCAA has available less restrictive alternatives to the use of the standardized tests.[174] A court adopting the United States Court of Appeals for the Ninth Circuit approach may be less sympathetic to the NCAA's use of the tests.[175]

The toughest problem facing a Title VI action of this type, however, lies in establishing that the NCAA or a member institution receives federal financial assistance. The requirements of Title VI apply only to those institutions, organizations or programs that receive such assistance.[176] The NCAA is funded through dues paid by member institutions as well as through part of the revenues generated from television contracts. It receives no dollars directly from the federal government. Nor do athletic programs at most

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170. *Larry P. By Lucille P.*, 793 F.2d at 982-83.

171. United States v. Lulac, 793 F.2d 636, 649 (5th Cir. 1984). The plaintiff must show that "the challenged test is not a reasonable measure of a bona fide educational requirement" to establish discrimination in violation of Title VI. *Id.* (citing NAACP v. Medical Cent., 657 F.2d 1322, 1333-34 (3d Cir. 1981) (en banc)). *Accord* Board of Educ. of City Sch. Dist. v. Califano, 584 F.2d 576, 589 (2d Cir. 1978), *aff'd*, 444 U.S. 130 (1979).

172. Ames, *supra* note 117, at 63, 68.

173. *Lulac*, 793 F.2d at 649.

174. *See supra* notes 140-56 and accompanying text.

175. With respect to Title VI, the Department of Education's Office of Civil Rights requires that recipients of federal funding assistance who have previously discriminated on the grounds of race take affirmative action to overcome the effects of prior discrimination. Washington Legal Found. v. Alexander, 984 F.2d 483, 484-85 (D.C. Cir. 1993) (citing 34 C.F.R. § 100.3(b)(6) (1992)). It is clear that certain NCAA member institutions do have a history of discrimination. Under these regulations, then, the NCAA would be required to take further positive steps toward eliminating racial discrimination. *Id.* The use of the standardized tests can hardly be seen as a step away from racial discrimination. Rather, it is a step toward increased racial disharmony.

176. 42 U.S.C. § 2000d (1988). See *supra* note 158 for the text of § 2000d.

NCAA schools receive federal funding. In fact, some athletic programs generate enough revenue to not only be self-supporting, but to make a financial contribution to the schools they represent. Since neither the NCAA nor its member institutions' athletic programs receive direct federal financial assistance, neither would seem to be subject to the requirements of Title VI. However, some lower courts have noted that the nexus between the NCAA or the university and the discriminatory practice need not be direct.

In *Iron Arrow Honor Society v. Heckler*,[177] the United States Court of Appeals for the Fifth Circuit found that an honor society's discrimination against women gave rise to a valid cause of action under Title VI.[178] The court held that the importance of the honor society to the university justified the attribution of the honor society's discriminatory practices to the university.[179] The nexus between an athletic department and a university is equally as close as that between the school and its honor society.[180] Furthermore, in *Haffer v. Temple University*,[181] the United States Court of Appeals for the Third Circuit held that where a university received federal funding, its athletic department is governed by Title IX.[182] Title IX regulations forbidding discrimination against women have been often analogized to the Title VI protections against racial discrimination.[183] The *Haffer* court opined that federal aid which is nonearmarked is effectively aid to the institution itself which is equivalent to the 'program' referenced in Title IX.[184]

This argument is further buoyed by the action of Congress in

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177. 702 F.2d 549 (5th Cir.), *vacated*, 464 U.S. 67 (1983). The United States Supreme Court majority found that a letter from the university president to Iron Arrow Honor Society which was sent during the pendency of the case rendered the issue moot. *Iron Arrow Honor Society*, 464 U.S. at 70. The letter informed Iron Arrow that they would only be permitted back on campus if they complied with the university's policy of nondiscrimination. *Id.* at 69-70.

178. *Iron Arrow Honor Society*, 702 F.2d at 562-64.

179. *Id.* at 564.

180. *See* Greene, *supra* note 13, at 130 n.136.

181. 688 F.2d 14 (3d Cir. 1982).

182. *Id.* at 17 (stating that where a "university as a whole receives federal monies, its intercollegiate athletic department is governed by Title IX"). For a brief description of Title IX, which calls for gender equity in collegiate athletics, see *id.* at 15.

183. Foss v. City of Chicago, 817 F.2d 34, 36-37 (7th Cir. 1987); Bennett v. West Tex. State Univ., 799 F.2d 155, 157 (5th Cir. 1986).

184. *Haffer*, 688 F.2d at 17. Note that in this context, a challenge could be brought against either a public or a private college or university. Even the most private institution is likely to receive federal funding in the form of research grants or student loan assistance. As such, it would be held accountable under Title VI.

passing the Civil Rights Restoration Act of 1987.[185] That Act overturned the United States Supreme Court's decision in *Grove City College v. Bell*.[186] The *Grove City* case held that a college or university that receives federal dollars only in the form of student financial aid does not receive federal assistance as an institution under Title IX.[187] The *Grove City* court looked to Title VI to support its conclusion because of the language similarities between Title VI and IX.[188] But Congressional action to overturn this provision makes it clear that athletic programs at a university which receives any sort of federal funding would be accountable under Title VI.[189]

Nevertheless, to conclude that the NCAA is subject to Title VI would require an extension of the *Iron Arrow Honor Society* reasoning. There is little doubt that the NCAA receives its funding from its member institutions. Nor is there doubt that some of that money, albeit not directly, comes from the federal government.[190] The NCAA's liability under Title VI requires the assumption that the NCAA received at least a portion of those federal dollars. Such a

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185. 42 U.S.C. § 2000d-4a (1988). The law states in pertinent part:

> For the purposes of this subchapter, the term "program or activity" and the term "program" mean all operations of -
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> (2)(A) a college, university, or other postsecondary institution, or a public system of higher education; or
>
> (B) a local educational agency (as defined in section 198(a)(10) of the Elementary and Secondary Education Act of 1965), a system of vocational education, or other school system . . . any part of which is extended Federal financial assistance.

Id.

186. 465 U.S. 555 (1984). Radcliff v. Landrau, 883 F.2d 1481, 1483 (9th Cir. 1989) (finding that the Civil Rights Restoration Act of 1987 overturned *Grove City* by holding that Federal financial assistance provided to any program provided by a school placed the entire school under Title VI coverage).

187. *Grove City College*, 465 U.S. at 573-74.

188. *Id.* at 566; *Radcliff*, 883 F.2d at 1483.

189. *Radcliff*, 883 F.2d at 1483.

190. To make this leap, the *Iron Arrow Honor Society* argument must be read to hold that income to a college or university, from whatever source derived, is lumped together. Thus the source of a payment by an institution to the NCAA would be indeterminate. In other words, a court would not distinguish whether such a payment came from the athletic department or a federally funded research grant.

In reality, such an amalgamation may not be possible. Most universities separate their athletic department revenues from other university incomes. *Bennett v. West Tex. State Univ.*, 799 F.2d 155, 157 (5th Cir. 1986). In such cases it would no doubt be possible to trace funds paid to the NCAA to sources that do not include the federal government and it would be difficult to link athletic association dollars to government grants.

link is highly unlikely to prove successful. Still, as with the state action problem, if individual schools are successfully challenged under Title VI for enforcing the NCAA rules, the ability of the NCAA to maintain continuous, uniform enforcement would be tenuous at best.[191]

V. CONGRESSIONAL ACTION

Opponents of the NCAA's academic requirements may also choose to look to Congress. Congress has attempted to join the effort to provide some regulation of the NCAA. Much of the Congressional action has focused on the NCAA's inability to correct the disparate impact of its policies and on the organization's discriminatory implementation of its freedom to punish its members and their students without due process of law.Within the last three years, at least five pieces of legislation pertaining to the NCAA have been introduced in Congress. Although none of these bills has been passed into law each has had an impact on the NCAA. One introduced bill, House Bill 2157, addressed the *Tarkanian* result,[192] and proposed that the NCAA shall be held to be a state actor for the purpose of its implementation of disciplinary proceedings.[193]

Another bill, House Bill 2433, would have required the public disclosure of athletic activity revenues and expenditures.[194] The bill would have required that the Secretary of Education have access to the revenue information of major college and university athletic programs.[195]

A third piece of legislation, House Bill 3046,[196] would have exempted the NCAA from certain aspects of the antitrust laws in ex-

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191. See *supra* part III.A.

192. For discussion of *Tarkanian* see *supra* notes 50-60 and accompanying text.

193. H.R. 2157, 102d Cong., 1st Sess. § 4 (1991). On May 1, 1991, Representative Edolphus Towns (D-NY) introduced a bill that would have required the NCAA "to provide due process in connection with its regulatory activities affecting coaches, players and institutions." *Id.* This bill appeared to be a direct response to the United States Supreme Court's decision in *NCAA v. Tarkanian*, 488 U.S. 179 (1988). It even provided that the NCAA shall be held to be a state actor for the purpose of its implementation of disciplinary proceedings. *Id.*

194. H.R. 2433, 102d Cong., 1st Sess. § 3 (1991). Representative Paul B. Henry (R-MI) introduced this bill on May 22, 1991.

195. *Id.*

196. H.R. 3046, 102d Cong., 1st Sess. (1991). On July 25, 1991, Representative Thomas McMillen (D-MD) introduced this bill.

change for comprehensive Congressional regulation of intercollegiate athletics.[197] The antitrust exemption would have aimed to make Congressional regulation palatable to the NCAA which is naturally reluctant to accept regulation by Congress.[198] The exemption would allow the association to jointly negotiate television contracts and other revenue-producing ventures on behalf of its member institutions.[199] This is something the NCAA has long desired.[200] In exchange the NCAA would have had to play by Congressional rules.

House Bill 3046 was introduced in response to the perception that NCAA institutions are unable to police themselves to balance academic and athletic concerns.[201] The argument reflects the widely held view that in order to adopt tougher academic requirements, schools would have been forced to risk the exclusion of some top quality athletes[202] causing a diminution of the team's competitiveness. Certainly no school has been willing to be the leader in this area or to do so without the assurance that other schools would adopt the same policy. The financial rewards of big time college athletic programs have become too great a source of revenue and prestige to a university[203] and may have driven many NCAA institutions to oppose restrictions on their athletic programs.[204] House Bill 3046 might have acted as a catalyst — spurring NCAA institutions to focus on academics and allowing them to do so with the knowledge that their on-field competitiveness would not have been diminished.

The fourth piece of legislation, House Bill 3233,[205] would have

197. *Id.* § 101. H.R. 3046 received considerable media attention. *See, e.g.*, Ed Sherman, *Bill Seeks Major NCAA Overhaul*, CHI. TRIB, July 25, 1991, at C1.; Mark Asher, *Coaches: NCAA Can Solve Its Problems Without Congressional Intervention*, WASH. POST, June 20, 1991, at C1.

198. Ken Denlinger, *McMillen Urges Congress to Attack NCAA's Evils at Root: Money*, WASH. POST, Oct. 17, 1991, at B3.

199. H.R. 3046, § 101.

200. *See* Board of Regents of the Univ. of Okl. v. NCAA, 468 U.S. 85 (1984).

201. H.R. 3046, § 1(8).

202. The list of athletes in recent years who have not met the Proposition 48 requirements includes NBA stars such as Rumeal Robinson and Sean Kemp. In men's football, more than 416 recruited student-athletes were denied their first year of eligibility in the 1992-93 academic year. *Partial Qualifiers Decrease, supra* note 36, at 21.

203. H.R. 3046, § 1(6).

204. *Id.* § 1(8).

205. H.R. 3233, 102d Cong., 1st Sess. (1991). This bill was introduced by Representative Mervyn Dymally (D-CA) on August 2, 1991.

established a commission to study the impact of intercollegiate athletics on interstate commerce.[206] While the study itself, once completed, may have had wide-ranging use in future Congressional action, the bill was also noteworthy for its statement of Congressional findings which focus heavily on the presence of minorities and women in intercollegiate athletics.[207] House Bill 3233's findings focused on several of the existing problems surrounding minorities and women with respect to collegiate athletics.[208]

The final piece of legislation, House Bill 921, has a version currently pending in both Houses of Congress.[209] The findings of House Bill 921 note the importance of participation in athletics to young Americans.[210] The bill also addresses the disparity of resources contributed to men's and women's athletic programs.[211] The substance of the bill calls for a detailed disclosure of data related to an athletic program's participation rates as well as financial support.[212]

Together, these bills symbolize the importance of the debate

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206. *Id.* § 4.

207. *Id.* § 2.

208. *Id.* The bill provides in pertinent part:

> (3) less than 5 percent of all college and university coaches are minorities . . . ;
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> . . . .
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> (5) historically black colleges and universities that are participants in NCAA Division I basketball have received none of such revenues that have been paid to other such participants;
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> . . . .
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> (7) the NCAA monthly allotment for incidental expenses to needy college and university student athletes who have athletic scholarships is only $25 per student;
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> . . . .
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> (9) college and university student athletes who participate in revenue-producing athletic programs, such as football and basketball, graduate at a considerably lower rate than students who are not athletes;
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> (10) graduation rates for college and university black student athletes who participate in revenue-producing athletic programs . . . are lower than the graduation rates for white student athletes who participate in such programs;
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> (11) since 1971, historically black college and university athletic teams have not appeared in a nationally broadcast athletic event on any of the major television networks; and
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> . . . .

Id.

209. H.R. 921, 103d Cong., 1st Sess. (1993); S. 1468, 103d Cong., 1st Sess. (1993). Representative Cardiss Collins (D-IL) introduced the House version on February 17, 1993. Senator Carol Moseley-Braun (D-IL) introduced the Senate version on September 22, 1993.

210. H.R. 921, § 2; S. 1468, § 2.

211. H.R. 921, § 2; S. 1468, § 2.

212. H.R. 921, § 3; S. 1468, § 3.

over the academic standards of the NCAA and of intercollegiate student-athletes. No longer is that debate centered within the NCAA. Rather, it has attained national interest. And while ultimate action on any of these proposals or future models of such proposals has not yet materialized, the threat of Congressional intervention now and in the future may be enough to cause the NCAA to tighten and correct the academic problems with intercollegiate athletics.

These bills have brought the debate over the NCAA's academic standards out of the NCAA boardrooms and into the public forum. The potential for Congressional action on these issues allows parties who are affected by student-athlete academic requirements to become actively involved in stimulating public debate. Most importantly, black groups which consider themselves victims of the standardized tests will have the chance to voice their views and have the issues resolved by a publicly accountable body.

Therefore, the threat of such legislation and public debate may encourage the NCAA to adopt tougher admission requirements. It may increase the commitment on the part of NCAA member institutions to the academic success of the individuals admitted as student-athletes. To the extent that the threat from Congress is also concerned with the nondiscriminatory nature of the NCAA requirements, the result may also be an NCAA revision of its standards — to adopt measures that regulate the academic integrity of intercollegiate sport, but do so in a nondiscriminatory manner.

VI. Private Tort Actions

The public debate over Proposition 48 is focused largely on the effects of the NCAA academic standards on education, on educational opportunity, and on intercollegiate athletics. But the impact of the rules is felt most dramatically by the individual student-athlete. Proposition 48 is a stigma on a student-athlete that can ruin a career.[213] A high school student-athlete who is deemed likely to be a Proposition 48 victim can suffer the loss of recruitment opportunities and, because of Proposition 42, may lose the chance at college education entirely. While this may be an important part of the effort to encourage high school student-athletes to devote time to academics, it has never been part of the stated intent of the

213. *See supra* notes 131-32.

NCAA.

As such, a student-athlete afflicted by Proposition 48 may have a number of private remedies against the NCAA. If, in fact, the NCAA's academic requirements deter a university from recruiting a student-athlete who would otherwise be admitted, then that student could claim damages. A few tort claims appear most likely. A student-athlete could challenge the NCAA's interference with his/her contractual relationship.[214] In essence, the nature of the scholarship forms a contract between the individual and the school.[215] The national letter of intent signed by many student-athletes in their final year of high school establishes such a contract in writing. The school agrees to provide an education and/or financial assistance, while the student agrees to participate in intercollegiate athletics on behalf of the school. The financial benefits of the athletic activity inure entirely to the institution. As such, a student could sue to keep the NCAA from interfering in such a contract.[216]

A student-athlete denied a scholarship may also be able to bring a claim for intentional infliction of emotional distress or for invasion of privacy.[217] Test scores of students are considered private and are not released to any third parties without the consent of the student. The NCAA requires such consent from those who would be student-athletes. A student-athlete seeking admission to college must provide test scores to the institution. To provide them to the NCAA, however, invariably leads to publication in at least local media and to a public debate over one student's academic failings. And yet, a student-athlete clearly has little choice. To refuse to provide the scores, he/she must forego college opportunity. To provide them risks public scrutiny of a very private matter. The choice

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214. *See, e.g.*, Chuy v. Philadelphia Eagles Football Club, 595 F.2d 1265, 1271-73 (3d Cir. 1979) (upholding a football player's claim for interference with contract).

215. Ross v. Creighton Univ., 740 F. Supp. 1319, 1330-32 (E.D. Ill. 1990); Taylor v. Wake Forest Univ., 191 S.E.2d 379, 380-82 (N.C. Ct. App. 1972).

216. *See* NCAA v. Hornung, 754 S.W.2d 855, 859-60 (Ky. 1988) (stating that the NCAA must have a reasonable justification for interference with a contract between two parties).

217. *See Chuy*, 595 F.2d at 1273-76 (upholding player's emotional distress claim). *But see Ross*, 740 F. Supp. at 1330 (denying a basketball player's claim for intentional infliction of emotional distress where the student went berserk after being exploited for the benefit of university's athletic program); Bilney v. The Evening Star Newspaper, 406 A.2d 652, 653 (Md. Ct. Spec. App. 1979) (denying privacy claims of University of Maryland basketball players who sued after their names and grades were published to the community by the local newspaper).

seems like a cruel one to require of teenagers aspiring to enter college.

The public policy debate about such claims is obvious. While the NCAA must be allowed to preserve the integrity of the game, the measures it has adopted to achieve that end do little to help the individual student-athlete who has been deprived of educational opportunity since the early primary grades. For such a student it may be too late to develop study habits capable of academic achievement at the level the NCAA requires.[218] Through athletics, this argument goes, such a student would have access to additional education. While the student may gain little from the academic experience of college life, little is more than he or she would gain if access to higher education is denied. And while only a relatively few intercollegiate athletes actually go on to become professional, the opportunity is one that the NCAA ought not deny if an institution is willing to provide it.

There are those who argue that tougher academic standards at the intercollegiate level will force the professional leagues to develop minor league farm systems or other means of accommodating the athletically talented individuals who do not meet the requirements of higher education.[219] Such a system might provide a means for these individuals to develop their athletic ability as they prepare to compete on the professional level. It may also provide employment for many athletes who do not make the NFL or NBA, but remain fairly competitive. Of course, such a system might have a deleterious effect on education altogether. Those who dream of playing professionally would then have a means of attaining that dream that circumvented higher education entirely. For these individuals, the incentive to study could be completely eliminated.

VII. CONCLUSION

If the NCAA is to preserve the integrity of intercollegiate sports, it must regulate the academic qualifications of its student-athletes. The measures the NCAA has employed thus far may appear to be helping to achieve that goal. The NCAA claims its rules send a message to aspiring student-athletes that one must be both a stu-

218. Temkin, *supra* note 113, at C14 (noting that some of the student-athletes who attempt to make up for lost education in an effort to meet Proposition 48 requirements are unsuccessful).

219. Reed, *supra* note 25, at 16.

dent and an athlete to compete on the intercollegiate level.

However, it is impossible to tell from the data available at this point whether the NCAA standards are effecting meaningful changes in the academic abilities of student-athletes. The available data indicates that if the NCAA excludes student-athletes who do not meet certain academic standards, the graduation rates of student-athletes will rise as will the academic ability of all those who participate in college sports. This will on paper help the NCAA preserve integrity. It does not, however, indicate an overall positive impact on student-athletes.

The NCAA designed its academic standards to preserve the integrity of intercollegiate sports. But integrity is not preserved by a policy that prevents student-athletes who are uneducated at the time they reach college age from participation in athletic activity. Such a policy serves not to educate, but to exclude. It punishes students who were denied access to quality primary and secondary education as well as those who chose not to study. The NCAA could better serve its goals by focusing on how to improve the educational quality at the primary and secondary levels. It can also target its punishment not at the student-athlete, but at the institutions who exploit talented, uneducated individuals for financial gain.

Nevertheless, a legal challenge to the NCAA's academic standards would seem difficult to win.A lawsuit brought on the right facts, couched in the right language, and tried before the right judge, could succeed. Given the current state of the law, it would seem difficult to prove that the NCAA's use of standardized tests is intentionally prejudicial. But the disparate impact of the tests is clear. The use of the standardized tests has tied college athletic eligibility to a student-athlete's ability to overcome the proven cultural bias of a standardized test. Even though just as many black student-athletes may receive scholarships now as before the NCAA adopted its regulations, those being awarded scholarships now are the ones who can escape their cultural heritage at least long enough to pass the standardized tests. The rest are left on the streets. It is difficult to conceive of such regulation as performing an educational necessity or as having a rational relationship to the preservation of integrity in intercollegiate athletics.

These questions are very real policy issues that reach far beyond the court or the playing surface. Unqualified individuals should not be admitted to college simply to play intercollegiate sports. But to turn away individuals who may benefit — however

slightly — from a college education is also hypocritical. The NCAA cannot escape this problem simply by focusing the blame on primary or secondary schools. It cannot continue to exploit the athletic talent of student-athletes without accepting responsibility for providing these athletes with an education. As a center for some of our nation's top minds, the NCAA ought to find a way to educate seventeen and eighteen year olds who reach the college level lacking in a sufficient educational background. Where the lives of individuals are at stake, anything less is unacceptable.

Finally, the NCAA ought to debate and decide these questions publicly — not behind the closed doors at NCAA meetings. The preservation of academic standards in intercollegiate athletics is a worthwhile, even necessary, goal. But where the costs of improper regulation are as high as discriminatory denial of college opportunity, more care must be taken to use the least restrictive means possible.

The NCAA's proposal to allow a sliding scale admission standard to SAT scores and high school grades acknowledges the problem. It does not, however, provide a real solution. If the NCAA is to regulate academic standards without discriminating, it must find a way to do so without using the standardized tests. To do less shows a lack of concern for education even if it maintains the academic integrity of college sports.