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The New NCAA Academic Standards: Are They Constitutional? Are They Effective?

Annemarie Dinardo

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THE NEW NCAA ACADEMIC STANDARDS: ARE THEY CONSTITUTIONAL? ARE THEY EFFECTIVE?

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I. INTRODUCTION

The fundamental policy of the National Collegiate Athletic Association¹ (NCAA) is "to maintain intercollegiate athletics as an integral part of the educational program and the athlete as an integral part of the student body and, by so doing, retain a clear line of demarcation between college athletics and professional sports."² A student athlete is defined by the NCAA as "one who engages in a particular sport for the educational, physical, mental and social benefits derived therefrom and to whom participation in that sport is an avocation."³ In an attempt to carry out this policy, the NCAA developed a multitude of rules regulating recruiting, playing and practicing, financial aid, eligibility, and numerous administrative areas. One of these areas that has received recent notoriety is the academic eligibility of college athletes.

1. The National Collegiate Athletic Association is a private non-profit association. The NCAA consists of approximately 900 members. Membership is open to four-year institutions which meet certain academic standards. Allied and Associate membership is open to athletic conferences, associations and other groups interested in intercollegiate athletics. The NCAA operates pursuant to a Constitution and Bylaws adopted by the membership and subject to amendment by the members. The general policies of the NCAA are established by the membership at annual conventions. When the annual convention is not in session, policy is established and directed by the NCAA Council of 22 members elected by the entire membership at the annual convention. See *Board of Regents of the Univ. of Okla. v. National Collegiate Athletic Ass'n.*, 546 F. Supp. 1276, 1282 (W.D. Okla. 1982), *aff'd in part, rev'd in part*, 707 F.2d 1147 (10th Cir. 1983), *aff'd*, 468 U.S. 85 (1984).

2. NCAA CONST. art. 2, § 2, reprinted in *1985-86 Manual of the National Collegiate Athletic Association* [hereinafter *NCAA Manual*] at 7.

3. NCAA CONST. art. 3, § 1, reprinted in *NCAA Manual* at 9.

Some schools have been forced into new courses of action by publicly embarrassing events. Following the death of basketball player Len Bias, the Chancellor of the University of Maryland, who is also the chairman of the NCAA's presidents' commission, made several changes in an effort to address the academic problems of student-athletes at the University of Maryland.⁴ He shifted academic counseling of athletes to an academic department in hopes that the removal of counseling from the athletic department will lead to advice aimed at meeting the academic standards and requirements of the University and not advice designed merely to retain eligibility.⁵ Additionally, the Chancellor attempted to have the NCAA bar the participation of freshman in athletic competition and limit freshman practice time to fifteen hours per week.⁶

Jan Kemp, an assistant professor of English at the University of Georgia, was fired for protesting preferential academic treatment for athletes.⁷ Kemp won a \$2.57 million settlement and reinstatement in a highly publicized lawsuit which brought academic abuses by student-athletes and athletic departments to the attention of the public and the administrations of colleges and universities.⁸ Academic institutions should not wait for a tragedy to occur or a whistleblower to step forward before steps are taken to correct the problems existing in college athletics.

Since the initial adoption of the current academic standards in January 1983, there has been a great deal of criticism concerning the effect, fairness, and likelihood of the rule attaining its goal. The new academic standard for students participating in Division I athletics went into effect in August, 1986. This rule is an attempt by the NCAA to restore academic integrity to collegiate athletics. This paper will examine the rule, its underlying policy, and the legal challenges which have been advanced against it.

II. CURRENT ELIGIBILITY RULES

To be eligible to practice and play in Division I sports, an en-

4. Farrell & Monaghan, *U. of Maryland Athletic Director Quits; Task Force Faults Sports Department for Players' Academic Ills*, *Chronicle of Higher Educ.*, Oct. 15, 1986, at 45, col. 2.

5. *Id.* at 48, col. 3.

6. *Id.* at 48, col. 5.

7. Lederman, *Many Faculty Members Seek Greater Rule in Athletic Decision-Making on Campuses*, *Chronicle of Higher Educ.*, Feb. 4, 1987, at 29, col. 3.

8. *Id.*

tering freshman must

have graduated high school with a 2.0 grade point average, on a scale of 4.0, in a core curriculum of at least 11 academic courses including at least three years of English, two years of mathematics, two years of social science and two years of natural or physical science, including at least one laboratory class, if it is offered by the high school. Additionally, the student must have a combined SAT score of 700 or a 15 composite score on the ACT.⁹

If a student fails to meet these requirements, he or she is ineligible to participate during the first year of college and loses one year of eligibility.¹⁰

In the years after the athlete's first year in residence or after the athlete has used one year of eligibility, he or she must, prior to each term in which a season of competition begins, satisfactorily complete an average of twelve semester or quarter hours during each of the preceding semesters or quarters in which the athlete has been enrolled.¹¹ The satisfactory completion requirement will be met if the athlete maintains a grade point average that places him or her in good academic standing as established by the institution for all students.¹²

Several rationales for the rule have been offered by the NCAA Ad Hoc Committee on Problems of Major Intercollegiate Athletics Programs,¹³ the committee which proposed the new rules. Derek C. Bok, chairman of the Ad Hoc Committee and President of Harvard University, and J. W. Peltason, President of the American Council on Education¹⁴ (ACE) stated that the purpose of the com-

9. Bylaw 5-1-(j), reprinted in *NCAA Manual* at 92.

10. *Id.*

11. Bylaw 5-1-(j)-(6), reprinted in *NCAA Manual* at 94.

12. Bylaw 5-1-(j)-(6)-(ii), reprinted in *NCAA Manual* at 95.

13. The Ad Hoc Committee on Problems of Major Intercollegiate Athletic Programs [hereinafter the Ad Hoc Committee] is comprised of forty college presidents, the American Council on Education's president and executive vice-president and a representative from the Association of American Universities. The Committee was formed to provide a new forum through which campus executives could deal with recruitment violations, illegal payments to student-athletes and other problems which have recently tainted college athletics. See Greene, *The New NCAA Rules of the Game: Academic Integrity or Racism?* 28 St. Louis U.L.J. 101, 106 (1984).

14. The American Council on Education is the principal coordinating body for post-secondary education and consists of 1600 colleges and universities. The ACE operates through a 37-member Board of Directors, its chair, a president and various committees and task forces. "Through voluntary and cooperative action, the council provides comprehensive leadership for improving education standards, policies, procedures, and services," Greene, *supra* note 8, at 105 (citing American Council on Education, 1982 *Members' Guide*, inside front cover).

mittee was to bring about changes that are needed to reassert the view that student-athletes are students first and athletes second.¹⁵ The letter expressed a concern that "in the zeal to produce winning teams, athletic eligibility has often been placed ahead of academic qualifications."¹⁶ It was also felt that the previous rule requiring a 2.0 high school grade point average extended eligibility to "a large number of athletes who have little or no chance or successfully completing a course of study in [college] institutions."¹⁷

One member of the committee was concerned that universities were losing sight of their purpose of providing higher education, not remediation.¹⁸ Another member suggested that higher standards would result if high schools improved the courses offered and established and enforced responsible graduation criteria.¹⁹ Motivation for change may also have come from the need to re-establish the credibility of colleges whose reputations have been damaged due to recruiting violations, alteration of academic records and other NCAA rule violations.²⁰

The NCAA used other schemes in the past to determine academic eligibility for athletes. To be eligible between 1966 to 1973, a freshman had to "predict" an ability to maintain a 1.6 grade point average (GPA) in college.²¹ This "prediction" was based on two factors: high school grades or class rank and a score on a scholastic aptitude test.²² The purposes of the rule were to prevent the exploitation of athletes who would probably be unable to complete the academic requirements necessary to earn a degree, to further the image that college athletes were primarily students, and to encourage those who could not meet the requirements to devote their freshman year to study.²³

The 1.6 rule was challenged in *Associated Students, Inc. v. NCAA*.²⁴ The court held that the rule was reasonably related to its

15. Greene, *supra* note 8, at 108.

16. *Id.* at 109.

17. *Id.*

18. *Id.*

19. *Id.*

20. *Id.*

21. Waicukauskis, *The Regulation of Academic Standards in Intercollegiate Athletics*, 1983 ARIZ. ST. L.J. 79, 91 (1982).

22. *Id.*

23. *Id.* (citing *Associated Students, Inc. v. NCAA*, 493 F.2d 1251, 1255 (9th Cir. 1974)).

24. 493 F.2d 1251 (9th Cir. 1974) *Associated Students, Inc.*, and eleven individual students brought an action against the NCAA alleging that the 1.6 rule resulted in an unreasonable classification in violation of the fourteenth amendment. The students were admitted to the California State University at Sacramento (CSUS) under the "Four Percent Rule." The Four Percent rule was a statutory provision under which a student could qualify for

purposes, even with regard to those who failed to predict a 1.6 GPA but earned a 1.6 GPA after the first year.²⁵ In 1973, the membership of the NCAA, in an effort to simplify administration of eligibility requirements and in response to concern for special admissions and institutional autonomy, voted to relax the academic eligibility requirements and replace the 1.6 rule with the 2.0 rule.²⁶ From 1973 to 1986, the 2.0 rule provided that a freshman was ineligible to practice to play if he or she did not graduate from high school with at least a 2.0 grade point average on a scale of 4.0.²⁷ The grade point average was required to be calculated in the same manner as it would be calculated for any other student at the high school.²⁸

In *Jones v. Wichita State University*,²⁹ a basketball player challenged the 2.0 rule on equal protection grounds. Jones alleged that allowing each individual high school to determine the classes that were to be included in the computation of the GPA resulted in the creation of disparate classes.³⁰ Some high schools included physical education grades in the computation while others did not.³¹ This resulted in some students being ineligible even though "they had the same academic achievement . . . as their counterparts who are eligible under the standard."³² Because Jones was not a member of a suspect class, however, the 2.0 rule was evaluated under the rationality test and only needed to bear some reasonable relationship to a legitimate interest to pass constitutional muster.³³ An NCAA official testified that the purposes of the rule

admission based on factors such as economic need, motivation and maturity without satisfying the usual requirements which include taking a standard achievement test. Without a test grade, a student could not satisfy the 1.6 rule regardless of his or her high school grade point average or class rank. Although the students did not predict a 1.6 grade point average, they participated in athletics during their freshman year and earned at least a 1.6 grade point average at CSUS. When the NCAA learned of the violation, it required CSUS to declare the students ineligible for one year or pay stiff fines. The students argued that the rule violated the Equal Protection clause as it applied to them because it sought to declare ineligible students who earned at least a 1.6 grade point average during their freshman year.

25. *Id.* at 1256. See also 2 R. BERRY & G. WONG, *LAW AND BUSINESS OF THE SPORTS INDUSTRIES* 101-109 (1986).

26. Cross, *The College Athlete and the Institution*, 38 *LAW & CONTEMP. PROBS.* 151, 158-59 (1973).

27. Waicukauski, *supra* note 16, at 89.

28. R. BERRY & G. WONG, *supra* note 20, at 108.

29. 698 F.2d 1082 (10th Cir. 1983).

30. *Id.* at 1086.

31. *Id.* at 1084.

32. *Id.* at 1086.

33. *Id.* The equal protection doctrine ensures that those similarly situated will be treated similarly. Two levels of review have developed under the doctrine. The "mere ra-

were the same as those of the 1.6 rule: to prevent the exploitation of young athletes by prohibiting the recruitment of athletes who will probably be unable to complete the academic requirements for a degree, to further the policy of the Association that participants are students first and athletes second, and to encourage those who cannot meet the requirements to devote their time to study rather than athletics during their freshman year.³⁴ The court upheld the rule and its objectives as reasonable.³⁵ Despite its lofty goals, the lack of uniformity in computation of high school GPAs, the possibility of inaccurate transcripts, and doubt as to the academic achievement necessary to obtain a 2.0 in some schools made the 2.0 rule relatively meaningless.³⁶

III. GROUNDS FOR POTENTIAL CHALLENGES

Opponents of the new rule raise two primary concerns. The first is the lack of representation of historically black institutions and other affected groups on the Ad Hoc Committee that formulated the rule. The other concern is the appropriateness of using standardized test scores as an element of freshman eligibility.³⁷ Groups excluded from the promulgation which will be affected by the new process include blacks, historically black colleges, and high schools.³⁸ J. W. Peltason, President of the ACE, stated that he initially sought to include the presidents of the Division I-A schools in forming the Ad Hoc Committee.³⁹ There are no black institutions or presidents in Division I-A.⁴⁰ Peltason said that when the focus of the committee changed to academic standards he invited some of the presidents of historically black colleges to join the committee but his invitations were declined because they were not

tionality" standard asks only whether it is conceivable that the classification bears a rational relationship to an end of government which is permissible. A classification will be upheld under "strict scrutiny" only if it is necessary to promote a compelling state interest. Strict scrutiny is applied to suspect classifications and those classifications impairing fundamental rights. A third, middle standard of review has arguably developed. It has been applied to classifications based on gender and legitimacy and asks if the means chosen by the government bear a fair and substantial relationship to an important government objective. See generally L. TRIBE, *AMERICAN CONSTITUTIONAL LAW* 991-94 (1978); J. NOWAK, R. ROTUNDA, J. YOUNG, *CONSTITUTIONAL LAW* 521-43 (3d ed. 1986).

34. *Jones*, 698 F.2d at 1087.

35. *Id.*

36. Waicukauski, *supra* note 16, at 90.

37. Greene, *supra* note 8, at 111-12.

38. *Id.* at 112.

39. *Id.* at 114.

40. *Id.*

included in the process from the beginning.⁴¹ Several weeks before the NCAA convention, but after the proposals were finalized, an invitation was extended to the president of Delaware State University, a predominantly black school. The invitation was accepted.⁴² There has also been a suggestion that the racial controversy was a surprise and the presence of a black representative was an afterthought.⁴³

Also excluded from the process were representatives from secondary educational institutions.⁴⁴ None of the governing bodies within the NCAA include representatives from such institutions.⁴⁵ In a 1974 ACE Report on Intercollegiate Athletics, the ACE recognized that secondary educational institutions, their students, teachers, counselors, administrators, and athletic department personnel were directly affected by intercollegiate athletics.⁴⁶ In spite of the ACE report, it appears that the impact of the new standards on such institutions may not have been considered.⁴⁷

Opponents of the new rule object primarily to the use of standardized test scores in determining eligibility, citing a disproportionately negative impact on black students.⁴⁸ Statistical data emerging after the adoption of the rule seems to support the allegation of disproportionate impact. Gregory R. Anrig, President of Educational Testing Service, cautioned that the use of a fixed cut-off score on standardized tests will have effects that may not have been fully realized before the decision was reached.⁴⁹ Anrig stated that based on 1981 figures for college-bound high school seniors, almost 51 percent of black males and 60 percent of black females would be ineligible their freshman year under the NCAA rule.⁵⁰ The percentage of white students affected would be smaller.⁵¹ A study of the athletes attending schools in the Big Eight Conference in 1982-1983 concluded that more than 60 percent of the black athletes would have been barred in their freshman year had such a rule been in effect, as compared to between 10 and 27 percent of

41. *Id.*

42. *Id.* at 114-15.

43. *Id.* at 114.

44. *Id.* at 115.

45. *Id.*

46. *Id.* at 115 n.71.

47. *Id.* at 115.

48. Yasser, *The Black Athletes' Equal Protection Case Against the NCAA's New Academic Standards*, 19 GONZ. L. REV. 83, 84 (1983/1984).

49. *Id.* at 85 n.9.

50. *Id.*

51. *Id.*

the white athletes at the same institutions.⁵²

There are two potential avenues for judicial review of the new eligibility rule: equal protection and private association law. In order to reach an equal protection analysis, it must first be established that the NCAA action amounts to state action. The constitutional restraints of due process and equal protection do not apply to private action unless a sufficiently close nexus exists between the state and the challenged action of the private entity so that the action of the private entity can be fairly treated as that of the State.⁵³

A. State Action Doctrine

Recent United States Supreme Court decisions have narrowed the state action doctrine.⁵⁴ In *Blum v. Yaretsky*⁵⁵ and *Rendell-Baker v. Kohn*,⁵⁶ the Court held that the mere fact that an entity was regulated by the state and received much of its funding from state or federal sources did not make the acts of the entity state action. In so ruling, the Court held that a "state normally can be held responsible for a private decision only when it has exercised coercive power or has provided such significant encouragement, either overt or covert, that the choice must in law be deemed to be that of the state."⁵⁷ The mere participation of state sponsored institutions in the NCAA and its rule-making processes may not be a significant enough exercise of power to treat the actions of the NCAA as those of the state.

The state action doctrine has not been applied consistently to collegiate sports. Several courts have found that the NCAA does

52. *Id.* at 86.

53. *Jackson v. Metropolitan Edison Co.*, 419 U.S. 345, 351 (1974).

54. Greene, *supra* note 8, at 124. See also Martin, *The NCAA and Its Student Athletes: Is There Still State Action?*, 21 NEW ENG. L. REV. 49 (1985/1986).

55. 457 U.S. 991 (1982). In *Blum*, Medicaid patients in private nursing homes in New York challenged transfer decisions made by personnel as lacking due process. Although private facilities, the homes were heavily regulated by the state and received substantial state funding. *Id.* at 1004. The Supreme Court held that the mere fact of state regulation and funding does not make the transfers "state action," noting that the regulations do not require the facility to rely on government standards in making transfer decisions. *Id.* "[The] decisions ultimately turn on medical judgments made by private parties according to professional standards which are not set by the State." *Id.* at 1008.

56. 457 U.S. 530 (1982). In *Rendell-Baker*, the Court found no "state action" in the speech-related dismissal of a teacher by a heavily state regulated and substantially state funded private school. Neither the state regulations imposed on the school nor the provisions of the contract under which the school provided an education to problem children for the state imposed specific personnel requirements. *Id.* at 841.

57. *Blum*, 457 U.S. at 1004.

not act with state authority. Others have come to the opposite conclusion. In *Arlosoroff v. NCAA*,⁵⁸ the plaintiff athlete challenged an NCAA eligibility rule. Under the then-existing rule, any participation in organized competition during each twelve month period after the student's twentieth birthday and before matriculation at a member institution counts as one year of varsity competition.⁵⁹ Arlosoroff challenged the rule on equal protection grounds, claiming that the rule was designed to exclude aliens from participation in NCAA affiliated programs.⁶⁰ The Court of Appeals for the Fourth Circuit noted that although the NCAA may be said to perform a public function as the "overseer of the nation's intercollegiate athletics," the regulation of collegiate athletics was not a function "traditionally exclusively reserved to the states."⁶¹ The fact that over half of the NCAA's revenues are provided by public institutions was also not sufficient to find state action.⁶² Citing *Rendell-Baker* and *Blum*, the court found that if the state in its regulation and subsidizing of these institutions does not order or cause the action complained of, and if the action is not one traditionally reserved to the state, there is no state action.⁶³

In *McHale v. Cornell University*,⁶⁴ the court denied a request for an injunction which would have allowed the plaintiff to participate in the 1985 football season pending an appeal. The plaintiff brought equal protection and due process actions against Cornell and the NCAA challenging the NCAA's transfer rule. The rule required that a student transferring to a Division I school complete one year at the new institution before becoming eligible to compete in intercollegiate athletics.⁶⁵ The court failed to find a likelihood of success on the merits⁶⁶ due to the Supreme Court's rulings in *Rendell-Baker* and *Blum*.⁶⁷

A similar finding was reached in *Barbay v. NCAA*.⁶⁸ The

58. 746 F.2d 1019 (4th Cir. 1984).

59. *Id.* at 1020.

60. *Id.*

61. *Id.* at 1021.

62. *Id.*

63. *Id.* at 1022.

64. 620 F. Supp. 67 (N.D.N.Y. 1985).

65. *Id.* at 68.

66. A preliminary injunction will be issued upon a showing that irreparable injury is likely to occur without the injunction, and a demonstration of either a likelihood of success on the merits or sufficiently serious questions going to the merits to make them fair grounds for litigation. The moving party must also show that the balance of hardships in the case tips in his favor. *Id.* at 68.

67. *Id.* at 70.

68. No. 86-5697, (E.D. La. Jan. 20, 1987) (LEXIS, Genfed library, Dist file).

plaintiff filed a petition for an injunction which would prevent the NCAA and Louisiana State University from declaring him ineligible to practice for and participate in the 1987 Sugar Bowl pending the resolution of his 42 U.S.C. § 1983 claim.⁶⁹ The court denied the request for an injunction because the plaintiff failed to show a substantial likelihood of success on the merits.⁷⁰ To succeed under section 1983, the plaintiff must establish that the conduct complained of was committed by a person acting under color of state law and the conduct deprived the plaintiff of rights, privileges, or immunities secured by the Constitution or laws of the United States.⁷¹ In order to find that the actions of the NCAA were state action, it must be established either that the NCAA performed a function traditionally and exclusively reserved to the state or that the state or its agencies caused, controlled or directed the NCAA's action.⁷² The court held that the Supreme Court's rulings in *Rendell-Baker* and *Blum* precluded a finding that the NCAA's conduct was state action.⁷³

Notwithstanding the United States Supreme Court's state action jurisprudence and the precedent of *Arlosoroff*, *McHale*, and *Barbay*, the Supreme Court of Nevada held that the regulatory actions of the NCAA were state action. In *Tarkanian v. NCAA*,⁷⁴ the NCAA challenged an injunction issued by the lower court which prohibited the NCAA-ordered suspension of Tarkanian as the University of Nevada, Las Vegas (UNLV), basketball coach. The NCAA argued that *Rendell-Baker* and *Blum* prohibited a finding of state action.⁷⁵ The Nevada Supreme Court disagreed.⁷⁶ Citing the recent United States Supreme Court decisions, the Nevada Court found that state action could be present if the private entity had exercised powers traditionally reserved to the state.⁷⁷ Because UNLV was a state institution, Tarkanian was a state employee.⁷⁸ In the Nevada Supreme Court's view, the right to discipline state employees is traditionally reserved to the state.⁷⁹ UNLV's delega-

69. *Id.*

70. *Id.*

71. *Id.*

72. *Id.*

73. *Id.*

74. 741 P.2d 1345 (Nev. 1987), cert. granted, 108 S. Ct. 1011 (1988).

75. *Id.* at 1347 the NCAA also relied on *Lugar v. Edmonson Oil Co.*, 457 U.S. 922 (1982). The Nevada Supreme Court referred to all three cases as the *Blum* trilogy.

76. *Id.*

77. *Id.* at 1348.

78. *Id.*

79. *Id.*

tion of authority to the NCAA over athletic personnel decisions and implementation of the NCAA's directive to suspend Tarkanian amounted to state action by the NCAA.⁸⁰

The *Tarkanian* court is not the first to come to this conclusion. In *Parish v. NCAA*,⁸¹ the court noted "that were the NCAA to disappear tomorrow, government would soon step in to fill the void." It then went on to note that "it would be strange doctrine indeed to hold that the states could avoid the restrictions placed upon them by the Constitution by bonding together to form a 'private' organization to which they have relinquished some portion of their governmental power."⁸² In *Howard University v. NCAA*,⁸³ the court found that state institutions were the dominant force in determining NCAA policies and actions by virtue of their size and numbers. Although the NCAA might not perform a traditional state function or control the details of the NCAA's operation,⁸⁴ the public institutions have delegated substantial power to a private organization.⁸⁵ If the state retained these powers, then there would be no question that state action existed and constitutional scrutiny would apply.⁸⁶ Does delegation of a state power to a private organization sufficiently remove its actions from the purview of the Constitution? The NCAA is not providing a service to the state as were the private nursing homes in *Blum* or the private school in *Rendell-Baker*.⁸⁷ Instead, the NCAA is exercising powers delegated to it by the state.⁸⁸

The NCAA has been called "the only game in town."⁸⁹ In light

80. *Id.* at 1349.

81. 506 F.2d 1028, 1033 (5th Cir. 1975) Parish and four other Centenary College basketball players sought a permanent injunction forbidding the NCAA's enforcement of sanctions in response to violations of the 1.600 rule.

82. *Id.*

83. 510 F.2d 213, 219 (D.C. Cir. 1975). Howard University and one of its students sought injunctive and declaratory relief against the NCAA alleging violations of the Equal Protection clause and the Due Process clause. Applying the NCAA's "Five-Year Rule," "1.6 Rule," and "Foreign-Student Rule," the NCAA found that certain members of Howard's intercollegiate soccer competition completed in two NCAA championships while ineligible. The court found that there was "state action" present and that the five-year and 1.6 rules, but not the foreign-student rule, passed constitutional scrutiny. The court did not find a violation of due process.

84. *Arlosoroff*, 746 F.2d at 1022. The court noted that there was no indication that the representatives of the state institutions joined together to approve the rule over the objections of the private institutions.

85. Martin, *supra* note 49, at 73.

86. *Id.* at 73.

87. *Id.* at 74.

88. *Id.*

89. Greene, *supra* note 8, at 138.

of the involuntary situation facing colleges and the fact that the initial eligibility rule may involve a suspect classification, then the issue of state action should be reviewed more closely while analyzing a challenge of the rule.

B. *Equal Protection Issues*

If the state action question is overcome, two approaches may be taken in arguing the equal protection issue. Disproportionate impact alone is not sufficient to invalidate the new rule.⁹⁰ An intent to exclude black athletes, however, would be unlawful. Several factors would be relevant to such an allegation: the fact that the use of standardized test scores would have a greater impact on black athletes than on white athletes was known by the Ad Hoc Committee; the committee refused to consider less exclusionary alternatives to the rule; and representatives of blacks and predominantly black institutions were excluded from the "legislative process."⁹¹

A second approach to the equal protection issue challenges the rationality of the new rule. It is unlawful to draw irrational classifications between people,⁹² but deference is usually given to legislative decisions. An important basis for this deference is the representative nature of a legislative process. In the present situation, however, the legislative process was flawed in that it did not permit the participation of all groups significantly affected by the legislation.⁹³ In *Parish*,⁹⁴ the Fifth Circuit Court of Appeals, after finding state action, followed the deferential approach and upheld the 1.6 rule by applying the "minimum rationality" standard.

C. *Private Association Law Issues*

Common law principles exist governing private associations which voluntarily join together.⁹⁵ The courts have consistently given deference to such organizations based primarily upon theories of freedom of association and freedom of contract.⁹⁶ A private organization extending the scope of its activities into the public domain, however, may receive less deference and more judicial su-

90. *Washington v. Davis*, 426 U.S. 229, 230 (1976).

91. *Yasser*, *supra* note 43, at 100-01.

92. *Greene*, *supra* note 8, at 130.

93. *Id.* at 133.

94. 506 F.2d at 1034.

95. *Greene*, *supra* note 8, at 135.

96. *Id.*

pervision.⁹⁷ In some instances, private organizations exert such control over a particular activity that an individual who desires to participate has no choice regarding joining the organization.⁹⁸ The district court in *Board of Regents of the University of Oklahoma v. NCAA*⁹⁹ noted that membership in the NCAA was not voluntary in a meaningful sense. Any institution, private or public, seeking to participate in intercollegiate athletics in any meaningful sense has no choice but to join the NCAA. State financial pressures and constraints may also provide an incentive to public institutions to join the NCAA and get a cut of the lucrative television contracts and gate receipts.¹⁰⁰

Existing association law principles provide for evaluation of the action taken by an association only when it is alleged that the action violates the association's bylaws, involves fraud, or is capricious, arbitrary, or illegal.¹⁰¹ It is not alleged that the promulgation of the new eligibility rules are in violation of the association's bylaws or involve any fraud or illegality. Consequently, the traditional deference given to governing bodies would probably protect the rule.¹⁰²

It has been suggested that a more meaningful evaluation of an association's action would involve consideration of the following elements: the extent to which the interests of all individuals and groups likely to be affected by the action were represented; whether impermissible ends were incorporated into the action; and whether the action is a reasonable resolution of an issue, given the existence of competing interests.¹⁰³ As discussed earlier, several groups were not included in the formulation process which resulted in the new eligibility rule. Black athletes, predominantly black institutions and secondary schools,¹⁰⁴ all of which are significantly affected by the NCAA's action, were excluded from the process. The lack of adequate representation of affected interests weakens

97. *Id.* (citing *Pinsker v. Pacific Coast Soc'y of Orthodontists*, 1 Cal. 3d 160, 460 P.2d 495, 81 Cal. Rptr. 623 (1969)).

98. *Id.* at 135.

99. 546 F. Supp. 1276, 1308 (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).

100. Martin, *supra* note 49, at 74-75.

101. Greene, *supra* note 8, at 138 (citing *Parsons College v. North Cent. Ass'n of Colleges and Secondary Schools*, 271 F. Supp. 65, 70 (N.D. Ill. 1967)).

102. Greene, *supra* note 8, at 138.

103. *Id.* at 138-39.

104. Secondary schools are affected by the new rule because it will be necessary for the schools to develop programs and to counsel student-athletes with the new rule in mind. *Id.* at 140.

the validity of the rule. In light of the Supreme Court's current interpretation of the equal protection clause, judicial scrutiny of possible racial motivation behind the rule would probably be limited.¹⁰⁵ Although the reasonableness of the rule may be questionable, reasonableness analysis does not include an evaluation of representation or disproportionate impact.

IV. ALTERNATIVE APPROACHES TO ELIGIBILITY GUIDELINES

The Ad Hoc Committee apparently did not consider alternative schemes which could have less racial impact.¹⁰⁶ The current initial eligibility rule will do little to attain the goals of the Ad Hoc Committee. It has been estimated that playing football at a Division I school requires forty to sixty hours per week, the equivalent of a full time job.¹⁰⁷ Playing basketball requires at least thirty-five hours per week.¹⁰⁸ The minimum standards posed by the new rule could hardly be expected to ensure success, or even a marked increase in graduation rates for athletes, in light of the time constraints involved in participation in certain sports as well as the incentives that lead to the ranking of athletics above education. Perhaps the best way to ensure that freshman athletes get off to a good start at college would be to bar freshmen from participating in collegiate athletic events and severely limit a freshman's practice time.¹⁰⁹ In addition to these changes, extending financial aid scholarships to five years and allowing freshman to retain all four years of eligibility would be tremendous steps towards returning academic integrity to college athletics.¹¹⁰

Possible alternatives which would be less exclusionary than the new rule include: (1) use of either a minimum grade point average or a minimum standardized test score, (2) complete removal of the standardized test score from the formula (3) a return to the NCAA's old 1.6 rule,¹¹¹ (4) freshman ineligibility, (5) five year scholarships with four years of eligibility,¹¹² or (6) loss of scholar-

105. *Id.*

106. *Id.* at 107.

107. Norton, *No Time for Classes: Many Athletes Go to College Hoping to Play Professionally . . . But Now They Are Suing Because They Failed to Get an Education*, 4(7) CALIFORNIA LAW. 44 (1984).

108. Greene, *supra* note 8, at 145.

109. Farrell, *About 400 Freshman Athletes in Big-Time Sports Are Ineligible to Compete Under New Rules*, *Chronicle of Higher Education*, Sept. 10, 1986, at 1, col. 2.

110. *Id.* See also Norton, *supra* note 102, at 48.

111. Greene, *supra* note 8, at 146.

112. Farrell & Monaghan, *supra* note 106, at 48, col. 5.

ships based on a failure to graduate a certain percentage of student-athletes.¹¹³ The first three alternatives would eliminate the disproportionate racial impact, the point on which the current rule has received the vast majority of its criticism; however, they would do very little to achieve the NCAA's goal of restoring academic integrity to collegiate athletics. All three are subject to abuse and cheating, such as altered high school records. Additionally, none of the first three alternatives ensure that an athlete will receive an education once he or she is admitted.

Freshman ineligibility and extension of scholarships to five years to allow completion of a course of study are more substantial moves towards NCAA goals. Athletic scholarships are often the only way some people can afford a college education. Extending scholarships to five years will bolster the NCAA's claim that student-athletes are students first and athletes second by ensuring that they have an opportunity to complete their educations without the burden of costs which otherwise would keep the athlete out of college. The sixth alternative, loss of scholarships, would force schools to see that athletes devote time to study and receive proper counseling and tutoring with an eye towards graduation as well as maintaining eligibility. Perhaps the best alternative is a combination of these approaches. A minimum eligibility requirement or freshman ineligibility in addition to the extension of athletic scholarships will guarantee both that the athlete has the capability to attend college and that he or she has the opportunity to finish.

A final alternative is to abandon the idea of amateurism in some areas of collegiate athletics.¹¹⁴ Sports such as football and basketball have become very lucrative ventures for some colleges due to the multi-million dollar television contracts, substantial gate receipts and the possibility of professional contracts for the athletes.¹¹⁵ It is very unlikely that colleges would be willing to sacrifice these revenues in order to return academics to the priority

113. Norton, *supra* note 94, at 48.

114. Greene, *supra* note 8, at 146. The Nebraska legislature took steps towards this approach earlier this year. Notwithstanding the NCAA prohibition on payments to students, a law was proposed that would pay student athletes at the University of Nebraska a stipend. The law would go into effect only if a majority of the remaining Big Eight Conference schools passed a similar law. The Nebraska legislature initially defeated the bill, but eventually passed it in order to urge the NCAA to reconsider its position. Governor Kay Orr vetoed the bill, stating that "an expression to the NCAA through the enactment of a statute is inappropriate." See Miami Herald, April 9, 1988, at C3, col. 1; Miami Herald, April 14, 1988, at C4, col. 6. These actions also neatly underscore the contention that the NCAA operates with state action.

115. *Id.* at 147.

position they once held. It is argued that because college teams have essentially become the training grounds for some professional sports, abandoning the distinction between amateur and professional athletics would certainly be a less hypocritical approach than the current situation.¹¹⁶ Such a solution would remove the need for concern regarding the academic achievements of the athletes. It also may lead to compensation for the athletes and to a system under which the professional leagues would support the college's programs by sharing their profits as compensation for the training of potential professional athletes.¹¹⁷ The alternative may offend those who still hold to the traditional notion of a student-athlete. Abandoning the idea of amateurism in favor of support from the professional leagues, however, may actually be less offensive because it lessens the monetary burden of the educational institutions which support the teams and allows for stricter standards in the pursuit of higher education. But, as stated before, the schools are likely to be unwilling to sacrifice the revenues which intercollegiate athletics raises and will continue to search for some middle ground.

V. CONCLUSION

This paper examined the NCAA's initial eligibility rule as an answer to the problems of academic integrity in the context of collegiate athletics. The rule, as currently in effect, has a substantially disproportionate impact on black athletes. Judicial challenges to the rule based on this impact, however, are not likely to succeed. In addition to a disproportionate impact, the rule would seem to be fairly ineffective in attaining the goal set out by the NCAA. The NCAA sought to reestablish the idea that student-athletes are students first and athletes second. If the NCAA is sincere in its efforts, a much more drastic reform is necessary.

*Annemarie DiNardo**

116. *Id.* at 148.

117. *Id.*

* College of William and Mary, B.A. 1985; Marshall-Wythe School of Law of the College of William and Mary, J.D. 1988. Dedicated to my parents who have supported me in all that I have ever done.