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ASSESSING THE RACIAL IMPLICATIONS OF NCAA ACADEMIC MEASURES

TIMOTHY DAVIS*

ABSTRACT

In 1983, the NCAA's adoption of heightened initial eligibility standards for incoming intercollegiate athletes was met with applause and criticism. Proponents lauded the measure as a legitimate means of restoring academic integrity within intercollegiate athletics. Opponents questioned whether seemingly racially neutral eligibility standards had a disproportionately negative impact on African American athletes. It is against this backdrop that the Article examines the racial implications of the NCAA's past and present academic standards.

These standards consist of initial eligibility rules, progress-toward-degree requirements, the graduation success rate, and academic progress rate, the latter two of which comprise the NCAA's Academic Performance Program. Through these measures, the NCAA states that it seeks to increase the likelihood that college athletes will develop academically while participating in intercollegiate athletics and graduate from their colleges and universities. As was true of past academic reforms such as Propositions 48, critics question the success of these measures in achieving their stated goals. Legitimate concerns have also been raised in the past and present regarding the disproportionate impact of the NCAA's academic rules on Black Division I college athletes and historically Black colleges and universities (HBCUs).

In addition to examining the NCAA's past and current academic rules, the Article discusses the NCAA's likely adoption of a rule to eliminate the standardized test score component of its initial eligibility criteria for matriculating scholarship intercollegiate athletes. This measure is likely to be perceived as beneficial to Black athletes. Advocates for enhanced racial fairness within college athletics have argued in favor of eliminating standardized test scores as an eligibility factor and believe it will be beneficial to athletes from under-represented communities, particularly Black athletes. While thoughtful arguments can be made in support of the proposal, the Article examines whether the proposal could inadvertently exacerbate the

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academic marginalization of Black Division I intercollegiate athletes. The Article also examines other practices that erode the value of the educational opportunity afforded Division I intercollegiate athletes.

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INTRODUCTION

The National Collegiate Athletic Association (NCAA), which consists of approximately 1,100 colleges and universities, is the body responsible for regulating major intercollegiate athletics in the United States.¹ The NCAA’s governance model subdivides its member institutions into three divisions, Divisions I, II, and III.² This Article

1. TIMOTHY DAVIS & N. JEREMI DURU, UNDERSTANDING SPORTS LAW 37 (2022).

2. The NCAA describes its three divisions as follows:

Among the three NCAA divisions, Division I schools generally have the biggest student bodies, manage the largest athletics budgets and offer the highest number of athletics scholarships. Division II provides growth opportunities through academic achievement, learning in high-level athletics competition and a focus on service to the community. The Division III experience offers participation in a competitive athletics environment that pushes college athletes to excel on the field and build upon their potential by tackling new challenges across campus.

Overview, NCAA, <https://www.ncaa.org/sports/2021/2/16/overview.aspx> [https://perma.cc/V4GV-CWBZ] (last visited Nov. 18, 2022).

focuses on the academic standards for the NCAA's more than 350 Division I colleges and universities.³

Division I provides the highest level of athletic competition and “full scholarships, cost-of-attendance stipends, degree completion programs and academic revenue distribution from the NCAA for schools that meet certain criteria.”⁴ Within Division I intercollegiate athletics, teams that participate in the football bowl subdivision (FBS football)⁵ and men's basketball are the primary revenue generators for NCAA-organized intercollegiate athletics.⁶ As explored below, Division I athletic programs' potential for revenue generation gives rise to a persistent tension with which colleges and universities have struggled for decades—the temptation to recruit athletes with high-level athletic prowess but questionable preparedness for the academic rigors of college.⁷

This tension, among others,⁸ threatens the NCAA's conceptualization of intercollegiate sport premised on what the NCAA refers to

3. *Our Division I Story*, NCAA, <https://www.ncaa.org/sports/2021/2/16/our-division-i-story.aspx> [<https://perma.cc/RP6J-6XDD>] (last visited Nov. 18, 2022).

4. *Id.*

5. Division I intercollegiate athletics afford non-FBS football programs the opportunity to participate in the Football Championship Subdivision which is less prestigious and provides a lower level of athletic competition and potential financial rewards than FBS football that culminates in the College Football Playoff. Daniel Wilco, *FCS Championship: Everything You Need to Know*, NCAA (Jan. 13, 2020), <https://www.ncaa.com/news/football/article/2020-01-11/fcs-championship-everything-you-need-know> [<https://perma.cc/E5W9-CGYB>]; Kevin Trahan, *Pay-For-Flay: Why FBS-FCS Beatdowns Will Never Go Away*, VICE (Sept. 16, 2015, 12:55 PM), <https://www.vice.com/en/article/aemxn4/pay-for-flay-why-fbs-fcs-beatdowns-will-never-go-away> [<https://perma.cc/86WJ-74ZY>].

6. See *NCAA v. Alston*, 141 S. Ct. 2141, 2150 (2021) (recognizing the revenue generated by Division I men's football and men's basketball); Timothy Davis, *The Racial Caste System in College and Professional Sports*, 9 TEX. A&M L. REV. 599, 623–27 (2022) (discussing the NCAA's revenue generating sports and the inequities resulting from the NCAA's current economic model).

7. Sara Ganim, *CNN Analysis: Some College Athletes Play Like Adults, Read Like 5th-Graders*, CNN (Jan. 8, 2014, 1:05 PM), <https://www.cnn.com/2014/01/07/us/ncaa-athletes-reading-scores#:~:text=Based%20on%20data%20from%20those,percentages%20of%20below%20threshold%20athletes> [<https://perma.cc/8AGA-MU77>].

8. Other threats to the collegiate mode, which has at its core the notion of amateurism, include antitrust challenges to the collegiate model, particularly recent decisions such as *NCAA v. Alston*, 141 S. Ct. 2141 (2021) and *O'Bannon v. NCAA*, 802 F.3d 1049 (9th Cir. 2015), *cert. denied*, 137 S. Ct. 277 (2016), in which courts have severely criticized and refused to blindly accept the NCAA's definition of amateurism. Legal challenges and potential state legislative initiatives may impose pressure on Division I colleges and universities to change the current economic model of intercollegiate athletics. See DAVIS & DURU, *supra* note 1 (manuscript at 78–82) (discussing the threat to the NCAA's economic model which is presumed on the NCAA's conceptualization of amateurism, a key feature of which is not directly compensating college athletes for competing in intercollegiate athletics); Daniel Libit, *NIL Is Nothing: California's Next Big Anti-NCAA Bill Takes the Field*, SPORTICO (Apr. 19, 2022, 10:30 AM), <https://www.sportico.com/leagues/college-sports/2022/california-college-athlete-revenue-1234673221> [<https://perma.cc/2PD4-CTL2>] (discussing California's SB-401, which would require California colleges and universities to share athletic revenue with college athletes).

as the collegiate model of intercollegiate athletics and its concomitant commitments.⁹ A cornerstone of the NCAA's collegiate model is the organization's articulated commitment to the academic well-being of college athletes.¹⁰ Consistent with this commitment, the NCAA's Division I Manual states "[i]ntercollegiate athletics programs shall be maintained as an important component of the educational program, and student-athletes shall be an integral part of the student body."¹¹

To facilitate achieving the above-described goals, the NCAA promulgates academic standards.¹² The NCAA's Division I Manual states, "Standards of the Association governing participation in intercollegiate athletics . . . shall be designed to ensure proper emphasis on educational objectives and the opportunity for academic success, including graduation, of student-athletes who choose to participate at a member institution."¹³ It is notable that in January 2022, NCAA member institutions adopted an amended Constitution that made major changes to the organization's governance model, by for example, delegating more regulatory control of intercollegiate athletics to the three divisions.¹⁴ Although the amended Constitution grants authority to the three divisions to develop academic eligibility standards, the amended Constitution emphasizes the NCAA's continued expressed commitment to the collegiate model and the educational primacy of intercollegiate athletics.¹⁵ The amended Constitution provides:

The Primacy of the Academic Experience: Intercollegiate student-athletes are matriculated, degree-seeking students in good standing with their institutions who choose voluntarily to participate in NCAA sports. It is the responsibility of each member institution to establish and maintain an environment in which a student-athlete's activities are conducted with the appropriate primary emphasis on the student-athlete's academic experience.¹⁶

9. The NCAA's vision of the collegiate model is premised on several commitments including commitments to amateurism, fair competition, integrity and sportsmanship, institutional control and compliance, and diversity and inclusion. NCAA, 2022–23 DIVISION I NCAA MANUAL xiii (2022) [hereinafter NCAA MANUAL].

10. *Id.*

11. *Id.*

12. See discussion *infra* Parts I, II.

13. NCAA MANUAL, *supra* note 9, at xiii.

14. DAVIS & DURU, *supra* note 1, at 39–40.

15. NCAA, NCAA CONSTITUTION, ARTICLE IA (adopted Jan. 20, 2022).

16. *Id.* (emphasis in original). Article IA further states that, "[i]ntercollegiate athletics programs shall be maintained as a vital component of each institution's broader educational program. The admission, academic standing and academic progress of student-athletes shall be consistent with the policies and standards adopted by the institution." *Id.*

Thus, it is likely that whatever specific eligibility standards the NCAA's three divisions adopt in the future, they will do so within the framework of the above-stated principle. This Article assumes, as discussed *infra*,¹⁷ that any such changes to Division I academic eligibility rules will likely mirror key components of the existing academic eligibility regime while jettisoning others, such as the standardized test score of the current initial eligibility rules.

The Article assesses the impact of the NCAA's existing and proposed academic eligibility standards on Black athletes and historically Black colleges and universities (HBCUs) and the possible effects of the elimination of the standardized test component of the NCAA's initial eligibility rules.¹⁸ The Introduction begins, however, with a brief historical overview of NCAA Division I initial eligibility standards, Propositions 48, 42, and 16, and the criticism of and lawsuits spurred by these standards.¹⁹ The discussion also explores the reasons that prompted the NCAA to legislate uniform academic eligibility requirements.²⁰ Part II examines the outcome of lawsuits in which Black athletes alleged that Proposition 16 was racially discriminatory.²¹ It then discusses the lasting influence of these lawsuits.²²

Part I concludes with a discussion of a proposed change to Division I and II's initial eligibility standards—the elimination of standardized test scores as one of the metrics for determining whether matriculating college athletes can compete in intercollegiate athletics.²³ The Article proposes that while eliminating the standardized test component is theoretically sound, it creates potential for marginalizing the academic interests of intercollegiate athletes, particularly Black athletes.²⁴

Part II examines other academic measures which constitute what are referred to as NCAA academic reforms.²⁵ Through these measures, the NCAA seeks to increase the likelihood that college

17. See discussion *infra* Part I.

18. HBCUs were established after the civil war to provide higher education opportunities for Black students who were prohibited from attending many predominantly white colleges and universities. HBCUs have historically had fewer resources than predominantly white institutions and consequently smaller budgets. Class Action Complaint at 4, *Manassa v. NCAA*, No. 1:20-cv-03172 (S.D. Ind. filed Dec. 10, 2020) [hereinafter *Manassa Complaint*]. Today, the nation's 1,010 HBCUs enroll approximately 300,000, 80 percent of whom are Black and many of whom are first-generation college students. *Id.*

19. See discussion *infra* Section I.B.

20. *Id.*

21. See discussion *infra* Section I.C.

22. See discussion *infra* Section I.B.4.

23. See discussion *infra* Section I.C.2.

24. See discussion *infra* Section I.C.

25. See discussion *infra* Part I.

athletes will develop academically while participating in intercollegiate sports.²⁶ These measures include the progress-toward-degree requirements²⁷ and the NCAA's Academic Performance Program (APP), the constituent parts of which are the Graduation Success Rate (GSR) and the Academic Progress Rate (APR).²⁸ As is true of the NCAA's initial eligibility standards, critics question whether these metrics assist institutions in achieving the NCAA's stated objectives as well as whether the APP prioritizes quantitative over qualitative outcomes.²⁹ Part II addresses the impact of the APP on Black intercollegiate athletes and HBCUs and discusses *Manassa v. NCAA*,³⁰ a lawsuit brought by current and former Black student-athletes at HBCUs who allege that the APP, particularly the APR component, is racially discriminatory due to its disproportionately negative impact on Black students and HBCUs.³¹

I. HISTORICAL OVERVIEW OF NCAA ACADEMIC STANDARDS

A. The "1.6" and "2.0" Academic Eligibility Requirements

Prior to 1965, each NCAA Division I institution bore responsibility for determining whether entering and continuing students were academically eligible to participate in intercollegiate athletics.³² In 1947, the NCAA adopted the "Sanity Code," a short-lived attempt to curb abuses in intercollegiate athletics, by banning all athletic scholarships.³³ The Sanity Code was repealed after three years.³⁴

26. *Graduation Rates*, NCAA, <https://www.ncaa.org/sports/2013/11/19/graduation-rates.aspx> [<https://perma.cc/N7M9-N32V>] (last visited Nov. 18, 2022); *NCAA Board of Directors Adopts Landmark Academic Reform Package*, NCAA: PRESS RELEASE ARCHIVE (Apr. 29, 2004), <http://fs.ncaa.org/Docs/PressArchive/2004/Legislation/NCAA+Board+of+Directors+Adopts+Landmark+Academic+Reform+Package.html> [<https://perma.cc/F7NK-HY44>].

27. See discussion *infra* Section II.A.

28. See discussion *infra* Section II.B.

29. See discussion *infra* Section II.C.

30. *Manassa v. NCAA*, No. 1:20-cv-03172 (S.D. Ind. filed Dec. 10, 2020).

31. See discussion *infra* Section II.B.3.

32. See Jeffrey M. Waller, *A Necessary Evil: Proposition 16 and Its Impact on Academics and Athletics in the NCAA*, 1 DEPAUL J. SPORTS L. & CONTEMP. PROBS. 189, 191–92 (2003) (discussing the abuses, including "tramp" athletes who traveled from one school to another, which prompted the NCAA to introduce uniform academic eligibility standards).

33. *Id.* at 192. Colleges circumvented the Sanity Code by secretly giving athletes scholarships and payments. *Id.* Colleges also increasingly pressured the NCAA to modify the restrictive nature of the Sanity Code. Phillip C. Blackman, *The NCAA's Academic Performance Program: Academic Reform or Academic Racism*, 15 UCLA ENT. L. REV. 225, 231 (2008).

34. See Blackman, *supra* note 33, at 230–31 (noting that even though the Sanity Code's repeal resulted from pressure by NCAA institutions to loosen its restrictive recruiting rules, the Code's promulgation departed from the concept of home rule and established the principle of centralized control and oversight of intercollegiate athletics).

The NCAA's efforts to establish uniform academic eligibility standards began in earnest in 1965 with its adoption of the "1.6 rule," as the standard for determining the eligibility of entering athletes to compete in intercollegiate athletics.³⁵ The 1.6 rule constituted a complex predictive methodology that required the NCAA to weigh a high school student's GPA, class rank, and standardized test scores (e.g., SAT or ACT) in an attempt to forecast the likelihood that a matriculating athlete would be able to achieve a 1.6 GPA during her or his first year of college.³⁶ If the weighting of these variables failed to predict a 1.6 GPA, the athlete was deemed ineligible for intercollegiate competition during her or his first year.³⁷

In 1973, the NCAA repealed the 1.6 rule, in part, because it required analyzing a massive amount of data to facilitate the prediction.³⁸ In addition, academically more rigorous colleges argued that the 1.6 rule placed them at a disadvantage in recruiting Black athletes because the rule failed to take into account the strength of their academic programs.³⁹ According to these colleges and universities, a 1.6-predicted GPA did not translate into a marginal student at their schools.⁴⁰ The 1.6 rule was also criticized due to the poor academic performance of Black athletes whose intercollegiate participation opportunities increased substantially during the 1960s as a result of the lowering of racial barriers that had previously severely limited their ability to play intercollegiate sports, particularly for southern colleges and universities.⁴¹ The poor academic performance of some Black intercollegiate Division I athletes resulted in charges of exploitation as athletes excelled athletically but failed to achieve academic success.⁴² A sports historian summarized the reasons underlying the demise of the 1.6 rule: 1) Concerns about the

35. *Id.* at 231.

36. Kevin Brown & Antonio Williams, *Out of Bounds: A Critical Race Theory Perspective on Pay for Play*, 29 J. LEGAL ASPECTS SPORT 30, 52 (2019); Waller, *supra* note 32, at 192; Blackman, *supra* note 33.

37. The Atlantic Coast Conference (ACC) also required entering athletes to have a minimum 800 SAT score as a condition to competing during their first year of college. Michael J. Mondello & Amy M. Abernethy, *An Historical Overview of Student-Athlete Academic Eligibility and the Future Implications of Cureton v. NCAA*, 7 VILL. SPORTS & ENT. L.J. 127, 128 (2000).

38. Blackman, *supra* note 33, at 231.

39. Brown & Williams, *supra* note 36, at 53.

40. *Id.*

41. Akuoma C. Nwadike, Ashley R. Baker, Velina B. Brackebusch & Billy J. Hawkins, *Institutional Racism in the NCAA and the Racial Implications of the 2.3 Or Take a Knee Legislation*, 26 MARQ. SPORTS L. REV. 523, 525 (2016); Blackman, *supra* note 33, at 231; see also Timothy Davis, *The Myth of the Superspade: The Persistence of Racism in College Athletics*, 22 FORDHAM URB. L.J. 615, 637, 668 (addressing factors leading to increased participation opportunities for Black college athletes and concerns relating to exploitation).

42. Nwadike, Baker, Brackebusch & Hawkins, *supra* note 41, at 523; Blackman, *supra* note 33, at 231.

“validity of standardized tests”; 2) the potential for conflict between the rule and “university policies opening up admission to disadvantaged students”; and (3) the restrictions the rule imposed on which “athletes coaches could recruit.”⁴³

In 1973, the NCAA repealed the 1.6 rule and replaced it with the “2.0 rule.”⁴⁴ This standard required entering students to have achieved a minimum high school grade point average (GPA) of 2.0 as a condition to participating in intercollegiate athletics during their first year of college.⁴⁵ Given the differing levels of rigor at high schools and concerns that high school teachers would inflate grade point averages to comply with the 2.0 academic standard,⁴⁶ it was inevitable that the NCAA would eventually seek a more uniform and stringent standard which it found in Proposition 48.

B. Propositions 48, 42, and 16

1. The Pressure to Enact Uniform Academic Standards

Beginning with Proposition 48 and subsequently with Propositions 42 and 16, the NCAA enacted uniform initial eligibility rules that govern whether a matriculating college athlete is permitted to obtain an athlete scholarship and participate in intercollegiate athletic competition.⁴⁷ Before discussing the details of these standards, the discussion examines reasons that contributed to the NCAA’s promulgation of Proposition 48. A principal factor was concern that college athletes were being exploited for their athletic skills without gaining corresponding academic success.⁴⁸ The plight of two scholarship Division I athletes, Dexter Manley and Kevin Ross, exemplify the basis for the concern and the imbalance between athletic achievement and academic success.

Dexter Manley thrived as a college and professional football player. Manley progressed through grade school before accepting an

43. Michael Oriard, *NCAA Academic Reform: History, Context and Challenges*, 5 *J. INTERCOLLEGIATE SPORT* 4, 11 (2012).

44. Blackman, *supra* note 33, at 231.

45. *Id.*

46. Waller, *supra* note 32, at 192.

47. Gary Brown, *NCAA Graduation Rates: A Quarter-Century of Tracking Academic Success—Graduation Rates Timeline*, NCAA, <https://www.ncaa.org/sports/2014/10/28/ncaa-graduation-rates-a-quarter-century-of-tracking-academic-success.aspx> [https://perma.cc/A477-ZFEU] (last visited Nov. 18, 2022).

48. Diana Nyad, *Views of Sport; How Illiteracy Makes Athletes Run*, *N.Y. TIMES* (May 28, 1989), <https://www.nytimes.com/1989/05/28/sports/views-of-sport-how-illiteracy-makes-athletes-run.html?pagewanted=1> [https://perma.cc/N4VS-UCVL].

athletic scholarship to play football at Oklahoma State University (OSU).⁴⁹ He advanced through grade school, was admitted as a scholarship athlete into OSU where he maintained his academic eligibility to play football for four years even though he was functionally illiterate.⁵⁰ At the age of twenty-six, Manley reportedly had the “literacy skills of a second grader.”⁵¹ Before joining the NFL’s Washington football team,⁵² Manley was advanced through grade school before he accepted a scholarship to play football at OSU.⁵³

In a lawsuit filed in 1987,⁵⁴ Kevin Ross sued Creighton University alleging, *inter alia*, negligent admission, educational malpractice, and breach of contract claims.⁵⁵ Ross, who is African American and was from an “academically disadvantaged background[,]”⁵⁶ attended Creighton and played on its basketball team from 1978 to 82.⁵⁷ Creighton admitted Ross even though his incoming academic credentials placed him within the bottom fifth percentile of students who took the ACT and far below most students matriculating at Creighton, who scored in the upper twenty-seven percent.⁵⁸ Ross enrolled in classes at Creighton, such as “Marksmanship” and “Theory of Basketball,” that did not count toward his major.⁵⁹ Ross, who maintained a D average at Creighton, also left the university after exhausting his athletic eligibility but without earning a degree.⁶⁰ Ross departed Creighton with the “overall language skills of a fourth grader and the reading skills of a seventh grader.”⁶¹

49. Hannah Lichtenstein, *How One Haunting Night Led Dexter Manley to Address a Lifelong Secret*, COMMANDERS (Nov. 8, 2021, 3:48 PM), <https://www.commanders.com/news/one-haunting-night-led-dexter-manley-to-confront-illiteracy> [https://perma.cc/42C5-V23A].

50. See Oriard, *supra* note 43, at 13 (referring to Manley’s Congressional testimony in which the athlete admitted he played at OSU for four years even though he was functionally illiterate).

51. Lichtenstein, *supra* note 49.

52. The team that is now called the Washington Commanders was then referred to as the Washington Redskins. Nick Selbe, *Washington Football Team Announces Name Change to Commanders*, SPORTS ILLUSTRATED (Feb. 2, 2020), <https://www.si.com/nfl/2022/02/02/washington-football-team-name-change-announcement-commanders> [https://perma.cc/Q6FY-H7E3].

53. Lichtenstein, *supra* note 49.

54. Ross v. Creighton Univ., 740 F. Supp. 1319, 1322 (N.D. Ill. 1990), *aff’d in part, rev’d in part*, 957 F.2d 410 (7th Cir. 1992).

55. Ross v. Creighton Univ., 957 F.2d 410, 412 (7th Cir. 1992). The court would uphold the district court’s dismissal of Ross’s negligent admission and educational malpractice claims while recognizing a limited cognizable breach of contract claim. *Id.* at 415, 417.

56. *Id.* at 411.

57. *Id.* at 412.

58. *Id.* at 411.

59. *Id.* at 412.

60. Ross, 740 F. Supp. at 1322.

61. Ross, 957 F.2d at 412.

Although Ross's and Manley's circumstances were particularly egregious, they epitomized the under-preparedness of many prospective college athletes, during the 1970s and 1980s, to gain a meaningful educational experience in college.⁶² The NCAA did not begin to collect data on athletes' graduation rates and performance until the federal government mandated that it do so in the 1980s.⁶³ Nevertheless, isolated studies regarding athletes' low academic preparation and performance converged with "high-profile academic scandals,"⁶⁴ such as those involving Kevin Ross and Dexter Manley, to pressure the NCAA to take steps toward academic reform.⁶⁵

In 1989, it was estimated that the illiteracy rate among high school football and basketball players was between twenty-five and thirty percent, twice the then national average.⁶⁶ They were functionally illiterate.⁶⁷ A study of college freshman entering college in 1977, showed six-year graduation rates of thirty-one percent for Black athletes and fifty-three percent for white athletes.⁶⁸ In 1989, it was reported that ninety-two percent of NHL, sixty-seven percent of NFL, and eighty percent of NBA players left college without degrees.⁶⁹ The graduation rate for Black basketball and football players was twenty percent.⁷⁰ At one university from 1973 through 1983, only twenty-one percent of football and twenty percent of basketball players graduated.⁷¹ Over the same ten-year period at another university, only six of fifty-eight Black basketball players graduated.⁷² In the 1980s, graduation rates for football players in what was then the Big Eight Conference ranged from a low of sixteen percent to a high of forty-one percent.⁷³

Questions also reverberated regarding the extent to which athletes who graduated from college had taken courses that prepared

62. Oriard, *supra* note 43, at 12–13.

63. *Id.* at 12.

64. Todd A. Petr & John J. McArdle, *Academic Research and Reform: A History of Empirical Basis for NCAA Academic Policy*, 5 J. INTERCOLLEGIATE SPORT 27, 28 (2012).

65. Oriard, *supra* note 43, at 12–13.

66. RICHARD E. LAPCHICK, *PASS TO PLAY: STUDENT ATHLETES AND ACADEMICS* 12 (1989).

67. Frederick Waterman, *The Messages Sent to the Young Athlete Are Subtle*, UNITED PRESS INT'L (Apr. 5, 1988), <https://www.upi.com/Archives/1988/04/05/The-messages-sent-to-the-young-athlete-are-subtle/7751576216000> [<https://perma.cc/9EPC-GN67>].

68. LAPCHICK, *supra* note 66, at 13.

69. Nyad, *supra* note 48.

70. *See id.*; Irvin Molotsky, *No More Than 1 in 5 Athletes Graduating at Many Schools*, N.Y. TIMES (Sept. 10, 1989), <https://www.nytimes.com/1989/09/10/sports/no-more-than-1-in-5-athletes-graduating-at-many-schools.html?smid=url-share>.

71. Oriard, *supra* note 43, at 12.

72. *Id.*

73. *Id.*

them for life after college.⁷⁴ Many Black athletes who graduated received degrees in a few majors such as sociology, social sciences, and communications.⁷⁵

2. Proposition 48 and Its Racial Implications

NCAA member institutions enacted Proposition 48 in 1983 with an effective date of 1986 to allow high school athletes time to adjust to the new requirements.⁷⁶ In order for prospective college athletes to be eligible to compete in intercollegiate athletics during their first year, Proposition 48 required that athletes have achieved a minimum 2.0 high school grade point average (GPA) in eleven core courses and scored a minimum 700 on the SAT or fifteen on the ACT.⁷⁷

Focusing on what they perceived as the racial inequities of the SAT and ACT, critics argued Proposition 48 would have a disproportionately negative impact on the enrollment of Black athletes.⁷⁸ The then-president of the College Board, which develops the SAT, was critical of the absolute 700 SAT cutoff, arguing “it was indisputable that African Americans performed worse on standardized tests because of a lack of educational privilege and that using the SAT as a minimum standard was racist and discriminatory.”⁷⁹ The court in *Cureton v. NCAA*⁸⁰ concluded that Proposition 48 was created, in part, “in response to the public’s perception that NCAA schools were exploiting student athletes for their talent without concern for whether they graduated.”⁸¹ Critics also characterized Proposition 48 as a covert means of thwarting the increasing dominance of Black athletes in college football and basketball.⁸² In addition, the standard’s

74. See Nyad, *supra* note 48.

75. See John J. Fountain & Peter S. Finley, *Academic Majors of Upperclassmen Football Players in the Atlantic Coast Conference: An Analysis of Academic Clustering Comparing White and Minority Players*, 2 J. ISSUES IN INTERCOLLEGIATE ATHLETICS 1, 4, 7 (2009), <http://jvlone.com/sportsdocs/AthletesMajorsAAC2009.pdf> [<https://perma.cc/N4XV-GN8C>] (identifying majors in which athletes frequently enroll); see also Jill Lieber Steeg, Jodi Upton, Patrick Bohn & Steve Berkowitz, *College Athletes Studies Guided Toward ‘Major in Eligibility’*, USA TODAY (Nov. 18, 2008), https://usatoday30.usatoday.com/sports/college/2008-11-18-majors-cover_N.htm [<https://perma.cc/5X44-RLBE>] (identifying such majors).

76. Brown, *supra* note 47.

77. *Id.*

78. LAPCHICK, *supra* note 66, at 16–17.

79. See Nwadike, Baker, Brackebusch & Hawkins, *supra* note 41, at 530 (paraphrasing the concerns of the College Board’s president).

80. *Cureton v. Nat’l Collegiate Athletic Ass’n*, 198 F.3d 107, 107 (3d Cir. 1999).

81. *Id.* at 110.

82. See Davis, *supra* note 41, at 665 (discussing the concerns voiced by opponents of Proposition 48); Nwadike, Baker, Brackebusch & Hawkins, *supra* note 41, at 529–30

opponents criticized the NCAA's failure to meaningfully include Black educators and administrators in Proposition 48's formulation and implementation.⁸³

Renowned sociologist Harry Edwards adopted a contrary stance.⁸⁴ Edwards criticized Proposition 48, but for its failure to be sufficiently rigorous.⁸⁵ According to Edwards:

Proposition 48 is not going to do too much, because not very much is demanded. We're looking at the most minimum kinds of academic standards. What the NCAA is really doing is not putting forth standards conducive to education. What they are saying is you cannot come on campus and be functionally illiterate.⁸⁶

Edwards also stated that value resided within Proposition 48 because it would send the message to Black athletes that they had to thrive academically as well as athletically.⁸⁷ Supporters of this initial eligibility standard also argued that Proposition 48 could stymie the exploitation of Black college athletes if those who matriculated were better equipped to achieve academic success.⁸⁸

Proposition 48's opponents and proponents were correct.⁸⁹ The standard 48 initially resulted in a reduction in the numbers of incoming Black Division I athletes.⁹⁰ Yet, the reduction was substantially less than had been predicted.⁹¹ The overwhelming majority of prospective Black athletes were able to meet Proposition 48's initial eligibility requirements.⁹² The first cohort of athletes who were admitted under the Proposition 48 requirements graduated at an overall rate higher than nonathlete students.⁹³ Moreover, college athletes' graduation rates improved overall after the imposition of Proposition 48.⁹⁴ Prior to Proposition 48, college athletes graduated at a lower rate than nonathlete students, which would continue to be true in subsequent years.⁹⁵ Improved graduation rates would occur

(noting that some critics believed the increased influx of Black athletes into the college ranks influenced the adoption of Proposition 48).

83. Davis, *supra* note 41, at 665 n.262.

84. LAPCHICK, *supra* note 66, at 16.

85. *Id.*

86. *Id.*

87. *Id.*

88. Davis, *supra* note 41, at 665 n.264.

89. LAPCHICK, *supra* note 66, at 15–16.

90. *Id.*

91. *Id.* at 16.

92. *See id.*

93. Brown, *supra* note 47.

94. Petr & McArdle, *supra* note 64, at 38.

95. *See id.*; Brown, *supra* note 47; Cureton v. NCAA, 37 F. Supp. 2d 687, 690 (E.D.

after the NCAA's adoption of additional academic reform measures, which are discussed *infra*.⁹⁶

In short, Proposition 48 had negative and beneficial effects. The enrollment of Black Division I athletes dropped from twenty-four percent to seventeen percent after the measures were implemented.⁹⁷ By 1993, however, the rate had increased to twenty-eight percent.⁹⁸ If graduation rates are indicia of athletes achieving academically, the measures also would appear to have had an overall beneficial impact on all athletes, particularly Black athletes.⁹⁹ But as discussed *infra*,¹⁰⁰ graduation rates are not necessarily the best indicator of the extent to which intercollegiate athletes obtain educational value in exchange for the services that they provide to their institutions.

3. Proposition 42

In an effort to strengthen Proposition 48, the NCAA adopted Proposition 42 in 1989.¹⁰¹ This highly controversial initiative maintained the initial eligibility standards of Proposition 48, but with a major exception—it created the partial qualifier.¹⁰² Under Proposition 42, incoming athletes who met at least one of the minimum eligibility requirements, a 2.0 GPA in core courses or a 700 SAT, were eligible to receive need-based financial aid but not athletic-based aid during their first year of college.¹⁰³ An incoming athlete who met neither of the requirements was a non-qualifier and ineligible to receive any financial aid during their first year.¹⁰⁴ Due to intense opposition, the NCAA rescinded Proposition 42 in 1990.¹⁰⁵

4. Proposition 16 and Race-Based Legal Challenges

In 1992, the NCAA adopted Proposition 16, which was to have taken effect in 1995.¹⁰⁶ Following criticism, the effective date of Proposition 16 was delayed until the 1996–1997 academic term.¹⁰⁷

Pa. 1999) (noting the improvement in graduation rates for college athletes following the passage of Proposition 48).

96. See discussion *infra* Sections I.B.4, II.A–B.

97. Brown & Williams, *supra* note 36, at 54.

98. *Id.*

99. *Id.* at 55.

100. See discussion *infra* Conclusion.

101. Nwadike, Baker, Brackebusch & Hawkins, *supra* note 41, at 531.

102. *Id.*

103. *Id.*

104. *Id.* at 531–32.

105. Brown, *supra* note 47.

106. Nwadike, Baker, Brackebusch & Hawkins, *supra* note 41, at 532; Brown, *supra* note 47.

107. Brown, *supra* note 47.

Proposition 16 was the NCAA's response to concerns that Proposition 48's reliance on standardized test scores was racially discriminatory.¹⁰⁸ The NCAA's stated goals for implementing Proposition 16 were to increase the graduation rate of Black intercollegiate athletes and narrow the graduation gap between Black and White athletes.¹⁰⁹ As originally adopted and implemented, Proposition 16 attempted to address these concerns by introducing a sliding scale or eligibility index that reduced the weight of standardized test scores in determining an incoming student's athletic eligibility.¹¹⁰ Proposition 16 increased the minimum high school core courses from eleven to thirteen.¹¹¹ It required that a prospective college athlete have a minimum 2.5 GPA and a 700 SAT score or eighteen ACT score in order to be able to receive athletic-related financial aid and participate in intercollegiate competition.¹¹² Under Proposition 16's sliding scale, however, a GPA below 2.5 could be offset by a high test score.¹¹³ For example, a prospective college athlete with a 2.0 could become a qualifier by achieving at least a 1010 SAT score.¹¹⁴ Proposition 16 also permitted partial qualifiers, incoming students who are permitted to receive athlete-based financial aid during their first year and practice with their teams but cannot engage in intercollegiate competition.¹¹⁵

The district court in *Cureton v. NCAA*¹¹⁶ described the operative effect of Proposition 16's sliding scale index as follows:

Using the index, the student-athlete could establish eligibility with a GPA as low as 2.000, provided the student also presented an SAT score of 1010 or an ACT sum (as opposed to composite) score of 86. At the other end of the index, a minimum 820 SAT or 68 ACT sum score establishes the floor for students with GPAs of 2.500 or higher. Statistically speaking, the resultant effect of Proposition 16 was to modify Proposition 48 by increasing the weight assigned to GPAs relative to test scores: while the core GPA cutoff score of 2.000 is set at two standard deviations below the national mean, the SAT/ACT test cutoff scores are set at only one standard deviation below the national mean, resulting in a heavier weighting of the standardized test. A student-athlete not qualifying under Proposition 16 may become a partial qualifier

108. *Cureton v. NCAA*, 37 F. Supp. 2d 687, 699 (E.D. Pa. 1999).

109. *Id.*

110. *Id.* at 690–91.

111. Nwadike, Baker, Brackebusch & Hawkins, *supra* note 41, at 532; Oriard, *supra* note 43, at 13.

112. *Id.*

113. *Id.*

114. Nwadike, Baker, Brackebusch & Hawkins, *supra* note 41, at 532.

115. *Cureton*, 37 F. Supp. 2d at 691.

116. *Id.*

by presenting an SAT score between 720 and 810 (ACT score between 59 and 67) and a core GPA that produces a GPA-test combination score comparable to that required of qualifiers. Partial qualifiers may not compete in intercollegiate athletics, but may be eligible for athletically related financial aid.¹¹⁷

The impact of Proposition 16 was initially disproportionately borne by Black athletes.¹¹⁸ “[O]nly 46.4% of African American college-bound high school seniors met Proposition 16’s requirements, as compared to approximately 67% of white college-bound high school seniors.”¹¹⁹ NCAA researchers concluded that the representation of minority athletes decreased after the implementation of Proposition 16 and would not increase until changes, discussed *infra*,¹²⁰ were made to the test score cutoff in 2003.¹²¹ In response to criticisms that the eligibility standard was racially discriminatory and lacked significant African American participation in the rule-making process, the NCAA argued the legislation’s intent was to promote stronger academic values and that over time African American athletes would meet the standard.¹²² Unlike Proposition 48, however, the NCAA’s enactment of Proposition 16 led to lawsuits.¹²³

In *Cureton*, four African American student-athletes failed to meet Proposition 16’s minimum test score requirement.¹²⁴ They filed a putative class action lawsuit alleging that Proposition 16’s test requirement had a disproportionately disparate impact on African American student-athletes in violation of Title VI.¹²⁵ The district court ruled that the NCAA is a program or activity subject to Title VI.¹²⁶ Rejecting the NCAA’s motions for summary judgment, the district court concluded that plaintiffs presented sufficient evidence to establish a *prima facie* case that they were disparately impacted by Proposition 16.¹²⁷ In reaching this conclusion, the court relied on NCAA-generated studies showing that the numbers of African American student-athletes admitted decreased following the implementation of Proposition 16.¹²⁸

117. *Id.* at 690–91.

118. Blackman, *supra* note 33, at 233.

119. *Cureton*, 37 F. Supp. 2d at 699.

120. See discussion *infra* Section I.C.

121. Petr & McArdle, *supra* note 64, at 34.

122. Nwadike, Baker, Brackebusch & Hawkins, *supra* note 41, at 534.

123. *Id.* at 532.

124. *Cureton*, 37 F. Supp. 2d at 689.

125. *Id.*

126. *Id.* at 694, 696.

127. *Id.* at 712, 712, 714.

128. *Id.* at 698. One NCAA memorandum stated: “26.6 percent [of African-American student-athletes] did not meet Proposition 16 standards in 1996 and 21.4 percent did not qualify in 1997 (compared to 6.4 percent of white student-athletes in 1996 and 4.2 percent in 1997).” *Id.* The court cited another NCAA report issued before Proposition 16 went

The Third Circuit reversed without considering the substantive merits of the plaintiffs' claims.¹²⁹ The appellate court found that plaintiffs' Title VI disparate impact claim, in contrast to an intentional discrimination claim, required them to establish that the NCAA was a program or activity that was the recipient of federal funds.¹³⁰ Rejecting plaintiff's theories on which the district court had concluded that the NCAA was such a recipient, the appellate court granted judgment in favor of the NCAA.¹³¹

Subsequent to *Cureton*, the alleged discriminatory impact of Proposition 16's standardized test requirement was considered by the court in *Pryor v. NCAA*.¹³² There, Black intercollegiate athletes sued the NCAA alleging the test score component of Proposition 16 intentionally discriminated against African American college-bound athletes in violation of Title VI.¹³³ According to the court, the gist of plaintiffs' complaint was that:

Proposition 16 has caused increased numbers of [B]lack student athletes to lose eligibility for receiving athletic scholarships and for participating in intercollegiate athletics during their freshmen year. Plaintiffs further allege that [the NCAA] knew of these effects and intended them. . . . Plaintiffs suggest that the NCAA actually adopted Proposition 16 'to screen out' more [B]lack student athletes from ever receiving athletic scholarships in the first place, with the asserted goal of increased graduation rates serving as a mere 'pretext.'¹³⁴

The court held that plaintiffs alleged facts sufficient to require it to reject the NCAA's motion to dismiss for plaintiffs' failure to state a claim for relief.¹³⁵

C. The NCAA's Post-Pryor Initial Eligibility Standards

1. Modifications to the Initial Eligibility Index

In response to the court's ruling in *Pryor* and to avoid future litigation, the NCAA modified Proposition 16's initial eligibility

into effect, which found that "only 67.4% of African-American college-bound student-athletes cleared the test score hurdle, as compared to 91.1% of white college-bound student-athletes." *Id.* at 699.

129. *Cureton v. NCAA*, 198 F.3d 107, 118 (3d Cir. 1999).

130. *Id.* at 115–16.

131. *Id.* at 118.

132. *Pryor v. NCAA*, 288 F.3d 548, 553 (3d Cir. 2002).

133. *Id.* at 554–55.

134. *Id.* at 552.

135. *Id.*

index.¹³⁶ Under the 2003 modifications, the NCAA increased the number of core courses from thirteen to fourteen.¹³⁷ More importantly, the eligibility index and its sliding scale de-emphasized test scores.¹³⁸ Under the 2003-revised initial eligibility index, a high school student is eligible to receive a college scholarship and play intercollegiate sports during her or his first year even if they failed to achieve a 700 SAT score.¹³⁹ For example, a high school student who scored four hundred on the SAT but had a GPA of 3.550 or above in fourteen core courses, would have been fully eligible.¹⁴⁰ The NCAA's rationale for the change was to "maximize graduation rates while minimizing adverse impact on minorities and disadvantaged populations."¹⁴¹ In 2008, the number of core courses was increased from fourteen to sixteen.¹⁴²

In 2016, the NCAA further heightened its initial eligibility standard.¹⁴³ The requirement of sixteen core courses has been maintained but modifications were made to when core courses must be taken in high school.¹⁴⁴ "[A]thletes must complete 10 of those courses before their seventh semester and 7 of the 10 must be in English, math, or natural/physical science."¹⁴⁵ In addition, a prospective college athlete can qualify as an academic redshirt, which is an athlete who is eligible to receive athletics-based financial aid and practice with the team but cannot compete in intercollegiate athletics during the student's first year.¹⁴⁶

Currently, in order for a prospective athlete to be eligible for athletic competition during the first year, an athlete must have achieved a minimum 2.3 GPA in sixteen core subjects with a corresponding SAT score of 980 or an ACT score of seventy-five.¹⁴⁷ An incoming student who fails to meet the 2.3 GPA threshold but has at least a 2.0 GPA in sixteen core subjects qualifies as an academic redshirt if their corresponding test score is a minimum 1020 on the

136. See Kathleen Overly, *The Exploitation of African-American Men in College Athletic Programs*, 5 VA. SPORTS & ENT. L.J. 31, 42 (2005) (arguing that the NCAA revised its eligibility index to avoid further litigation).

137. Nwadike, Baker, Brackebusch & Hawkins, *supra* note 41, at 538.

138. See Overly, *supra* note 136, at 43.

139. *Id.* at 36, 43–44.

140. See Brown, *supra* note 47; NCAA MANUAL, *supra* note 9, at 151–52.

141. Brown, *supra* note 47.

142. USA Gymnastics, *supra* note 115, at Appendix.

143. *Id.*

144. See NCAA MANUAL, *supra* note 9, at 150–51 (stating the core courses currently include English, Mathematics (at a level of Algebra I or above), Natural or Physical Science, Social Science, and additional courses (e.g., a foreign language)). *Id.*

145. Brown & Williams, *supra* note 36, at 54; NCAA MANUAL, *supra* note 9, at 151.

146. NCAA MANUAL, *supra* note 9, at 152; Brown & Williams, *supra* note 36, at 54.

147. *Division I Academic Eligibility Requirements*, NCAA, http://fs.ncaa.org/Docs/eligibility_center/Student_Resources/DI_ReqsFactSheet.pdf [<https://perma.cc/3PPG-UJFF>] (last visited Nov. 18, 2022).

SAT or eighty-six on the ACT, respectively.¹⁴⁸ An academic redshirt is eligible to receive athletic financial aid and practice with the team but can't engage in intercollegiate competition.¹⁴⁹ The NCAA's articulated goal for the more stringent standards is "to ensure that prospective athletes are just as prepared for school as they are for their sport . . ."¹⁵⁰ Notwithstanding this goal, the 2016 modifications have raised concerns regarding the disproportionate negative impact on the enrollment of prospective Black intercollegiate athletes.¹⁵¹

2. Eliminating the Standardized Test Component of Initial Eligibility Index

In 2021, an NCAA task force, which was formed as a part of the NCAA's racial equity initiative in response to 2020's "national reckoning with racial justice,"¹⁵² recommended the elimination of the standardized test component of the NCAA's initial eligibility standard.¹⁵³ In drafting the proposed legislation, the task force stated that it consulted with various groups, including member institutions, testing agencies, the National Association of College Admissions Counselors, and the Knight Commission.¹⁵⁴ For its part, the Knight Commission in an 2021 report on racial equity in college sports called for eliminating the test component of the NCAA's initial eligibility rules.¹⁵⁵ The Commission based its recommendation on many institutions having adopted test score optional admissions policies, concerns regarding the reliability of SAT and ACT scores as indicators of academic success, the inequity of requiring standardized tests for the admissibility of college athletes but not for nonathlete students, and the suspension of the use of standardized tests at many institutions during the COVID-19 pandemic, which suggests such tests are no longer essential to determine the admissibility of students.¹⁵⁶

148. Brown & Williams, *supra* note 36, at 54.

149. Nwadike, Baker, Brackebusch & Hawkins, *supra* note 41, at 525.

150. *Id.* at 526.

151. *Id.*

152. Doug Lederman, *Proposals to End the Use of Test Scores Advance Within NCAA*, INSIDE HIGHER ED (Feb. 18, 2022), <https://www.insidehighered.com/quicktakes/2022/02/18/proposals-end-use-test-scores-advance-within-ncaa> [<https://perma.cc/PJL7-Y767>].

153. Mark Schlabach, *NCAA task force recommends removing minimum standardized test scores in effort to advance racial equity*, ESPN (Oct. 15, 2021), https://www.espn.com/college-sports/story/_/id/32405869/ncaa-task-force-recommends-removing-minimum-standardized-test-scores-effort-advance-racial-equity [<https://perma.cc/95YN-GAGZ>].

154. *Id.*

155. *Achieving Racial Equity in College Sports*, KNIGHT COMM'N ON INTERCOLLEGIATE ATHLETICS 1, 9 (2021) [hereinafter 2021 KNIGHT COMM'N REP.].

156. *Id.* at 6–7.

The National Association of Basketball Coaches also supports the task-force proposal. It stated:

The days of colleges requiring the SAT or ACT are passing rapidly: more than half of all four-year colleges and universities will not require these tests for admissions in 2021, and more are dropping the requirement every week The tests are again being recognized as forces of institutional racism, which is consistent with their history, and they should be jettisoned for that reason alone; moreover, pragmatics also support this change.¹⁵⁷

A contrary view was expressed by an officer of the College Board who responded that the SAT is reviewed to ensure that the test does not favor one group over another, that the SAT measures what is taught and learned by students in high school, and provides an opportunity for all students including under-represented students to demonstrate what they know.¹⁵⁸

In February 2022, the Division I Committee on Academics recommended the removal of the test score requirement from initial eligibility rules for first year students for the reasons stated above.¹⁵⁹ The Committee also recommended that the NCAA Division I Council vote in January 2023 on its recommendation, which would take effect for athletes entering school enrolling fall 2023, during the NCAA annual meeting in January 2023.¹⁶⁰ The Division II Committee on Academics made the same recommendation for students coming into its institutions.¹⁶¹

The arguments raised by proponents of the NCAA's proposal mirror those that have been raised by those arguing, outside of the athletic context, for the elimination of standardized test scores as a metric for college admission.¹⁶² A principal rationale in support of test-optional policies is achieving greater diversity and equity in college

157. Schlabach, *supra* note 153.

158. *Id.*

159. NCAA, REPORT OF THE NCAA DIVISION I COMMITTEE ON ACADEMICS 1 (Feb. 10, 2022) [hereinafter DIVISION I COMMITTEE ON ACADEMICS], https://ncaaorg.s3.amazonaws.com/committees/d1/acadcom/Feb2022D1COA_Report.pdf [<https://perma.cc/GB6H-M9PX>].

160. *Id.* at 2.

161. Saquandra Heath, *Proposals to Drop Test Scores for Incoming College Athletes Advance*, NCAA (Feb. 16, 2022), <https://www.ncaa.org/news/2022/2/16/media-center-proposals-to-drop-test-scores-for-incoming-college-athletes-advance.aspx> [<https://perma.cc/Y7BZ-L8KQ>].

162. *Id.*; Darrell Lovell & Daniel Mallinson, *How Test-Optional College Admission Expanded During the COVID-19 Pandemic*, URB. INST. 1 (Dec. 2021), <https://www.urban.org/sites/default/files/publication/105269/how-test-optional-college-admissions-expanded-during-the-covid-19-pandemic.pdf> [<https://perma.cc/P7PV-LY87>].

admissions.¹⁶³ This view has resonated with many institutions.¹⁶⁴ Between 2020 and 2021, the number of institutions adopting test optional policies increased from 713 to 1,350, including selective private schools and public institutions.¹⁶⁵ The COVID-19 pandemic accelerated the pace of adoptions.¹⁶⁶ Studies differ on the extent to which test optional policies achieve the objectives of enhancing equity and diversity.¹⁶⁷

There is a surface appeal to not subjecting intercollegiate athletes to test scores requirements when nonathlete students at an increasing number of Division I schools, which have adopted test optional policies, are not being subjected to such a requirement. This is particularly true if the standardized test score requirement disparately impacts the admissibility of students of color. The reality is, however, that intercollegiate athletes are not like other students because of commercial pressures and demands placed on their time.¹⁶⁸ Consequently, the elimination of the standardized test requirement for college athletes could ultimately result in negative academic implications.¹⁶⁹

Indeed, the proposal may tempt institutions to admit marginal intercollegiate athletes who are less prepared to succeed in college.¹⁷⁰ Given the money making potential of FBS football and Division I basketball and the racial demographics of athletes¹⁷¹ who play those sports, the result could be the admission of more Black athletes who may be underprepared to derive substantial educational benefits from

163. Lovell & Mallinson, *supra* note 162, at 1.

164. *Id.* at 4.

165. *Id.* at 1.

166. *Id.*

167. *Id.* See Christopher Bennett, *Untested Admission: Examining Changes in Application Behaviors and Student Demographics Under Test-Optional Policies*, AMERICAN EDUC. RSCH. J. 180, 202 (Feb. 2022) (finding that test optional policies resulted in a one percent increase in both the number of students of color and the number of low-income students at 100 institutions adopting test-optional policies between 2005–06 and 2015–16. The study found a greater increase—four percent—in the numbers of women admitted into these institutions.) *Id.* at 194–95. This contrasts with another study that found that test-optional policies are “improving access broadly for low income, underrepresented, and first generation students.” Scott Jaschik, *Mixed Report on Test-Optional Admissions*, INSIDE HIGHER ED (July 19, 2021).

168. See Lukasz Muniowski & Tomasz Jachec, *Illusory Facets of Sport: The Case of the Duke Basketball Team*, 75 PHYSICAL CULTURE AND SPORT: STUDIES AND RESEARCH 43, 47 (2017) (discussing how intercollegiate athletes differ from other students).

169. See Overly, *supra* note 136, at 57 (explaining that a standard is needed to determine the student’s preparedness level for academic success).

170. Overly, *supra* note 136, at 52.

171. See Davis, *supra* note 6, at 623 (stating that during the 2019–2020 season Black student athletes comprised approximately forty-eight percent of FBS football players and 53 percent of Division I men’s basketball players).

their institutions.¹⁷² The NCAA's Academic Performance Program (APP), which is discussed *infra*,¹⁷³ may very well limit the extent to which institutions will admit academically at-risk FBS football and Division I men's basketball players.¹⁷⁴ Yet, the APP will not deter and may encourage institutions to engage in practices, such as clustering, which jeopardize the value of the education that intercollegiate athletes receive.¹⁷⁵ Thus, Division I FBS football and men's basketball programs may not be able to resist the temptation to admit athletes with superior athletic skills and marginal academic preparedness, which subjects these athletes to practices that marginalize their academic experience.¹⁷⁶

II. THE RACIAL IMPACT OF OTHER NCAA ACADEMIC REFORMS

In addition to changes to its initial eligibility rules over the past four decades, the NCAA has adopted other academic reforms measures.¹⁷⁷ Prominent among them are progress-toward-degree requirements and the NCAA's Academic Performance Program, which consists of two components, the Academic Progress Rate and the Graduation Success Rate.¹⁷⁸ As discussed in the Section II.B *infra*, and was true of the NCAA's initial eligibility rules, these academic reforms have positively and negatively impacted HBCUs and Black Division I athletes.

A. Progress-Toward-Degree Requirements

Kevin Ross played basketball at Creighton but took classes that neither permitted him to attain a degree nor obtain a quality education.¹⁷⁹ Ross and other athletes' circumstances illustrated that the NCAA's "continuing eligibility standards," which were in place through the 1980s, had a "minimal impact on student-athlete academic performance."¹⁸⁰ The NCAA's solution was the adoption in 2003 of

172. See Overly, *supra* note 136, at 52.

173. See discussion *infra* Section II.B.

174. See *Academic Progress Rate Q & A*, NCAA (May 27, 2014), <https://www.ncaa.org/news/2014/5/27/academic-progress-rate-q-a.aspx> [<https://perma.cc/Y29R-SG9E>].

175. See Alvin D. Logan, Jr. & Louis Harrison, Jr., *4 Years a Football Player: The (Un)Democratic Practices in the Education of Black College Football Players*, 24 RACE, GENDER & CLASS J. 65, 76 (2017).

176. See discussion *infra* Section II.B; see also Logan, Jr. & Harrison, Jr., *supra* note 175, at 75–76 (discussing institutional practices, including clustering and "ghost" classes that allow athletes to maintain their eligibility for athletic competition but result in the academic marginalization of Black FBS players); Davis, *supra* note 6, at 630–37.

177. Blackman, *supra* note 33, at 227.

178. *Id.*

179. *Ross v. Creighton Univ.*, 740 F. Supp. 1319, 1322 (N.D. Ill. 1990).

180. Petr & McArdle, *supra* note 64, at 35–36.

progress-toward-degree requirements.¹⁸¹ One commentator stated that these requirements were chosen to increase the likelihood that a student-athlete who met the new requirements would graduate within five years.¹⁸² “Examination of data revealed that the former requirements were allowing at least some student-athletes to maintain their athletic eligibility without resulting in steady progress toward graduation.”¹⁸³ Based on a five-year window to graduation, progress-toward-degree bylaws require an athlete to complete twenty percent of their graduation requirements each year.¹⁸⁴

The requirements consist of two components.¹⁸⁵ The first requires that athletes complete a certain number of credit hours as a condition to remaining academically eligible to engage in intercollegiate competition.¹⁸⁶ For example, before the start of her second year, an athlete must have completed twenty-four semester hours or thirty-six quarter hours.¹⁸⁷ The other component consists of an athlete reaching specified benchmarks in their academic major as a condition to athletic eligibility.¹⁸⁸

A student-athlete who is entering the third year of collegiate enrollment shall have completed successfully at least 40 percent of the course requirements in the student’s specific degree program. A student-athlete who is entering the fourth year of collegiate enrollment shall have completed successfully at least 60 percent of the course requirements in the student’s specific degree program. A student-athlete who is entering the fifth year of collegiate enrollment shall have completed successfully at least 80 percent of the course requirements in the student’s specific degree program. The course requirements must be in the student’s specific degree program (as opposed to the student’s major).¹⁸⁹

Progress-toward-degree requirements have been beneficial and make it less likely today that intercollegiate athletes, such as Kevin Ross or Dexter Manly, will not make progress toward graduation. Nevertheless, as discussed *infra*, this requirement is not without its potential downsides.¹⁹⁰

181. *Id.* at 36.

182. See Walter Harrison, *NCAA Academic Performance Program (APP): Future Directions*, 5 J. INTERCOLLEGIATE SPORTS 65, 67–68 (2012).

183. *Id.*

184. *Id.* at 68.

185. NCAA MANUAL, *supra* note 9, at 158, 160–61.

186. *Id.* at 158.

187. *Id.*

188. *Id.* at 160–61.

189. *Id.*

190. See discussion *infra* Part I.

B. Academic Performance Program (APP)

In 2004, the NCAA adopted an academic reform package in response to concerns that Division I institutions were not fulfilling their bargain to provide scholarship athletes with a meaningful educational opportunity.¹⁹¹ Included within these reform measures was the NCAA's Academic Performance Program (APP) consisting of the Graduation Success Rate (GSR) and the Academic Progress Rate (APR).¹⁹² The GSR is a methodology developed by the NCAA "to measure student-athletes' graduation-rates" that also seeks to "track student-athletes' 'long-term' academic success."¹⁹³ The APR, in contrast to the GSR, "provides a 'real-time' assessment of . . . [the] academic progress" of college athletes and teams.¹⁹⁴ After describing these metrics, the Article examines their effect on HBCUs and Black Division I college athletes.

1. Graduate Success Rate (GSR)

The NCAA developed the GSR as an alternative to the federally mandated metric for measuring graduation rates—the Federal Graduation Rate (FGR).¹⁹⁵ Under the FGR, "[a] student, whether athlete or not, who enters for the first time as a full-time enrollee at an institution is recorded as a graduate or nongraduate for this metric at the conclusion of a 6-year period following initial full-time enrollment."¹⁹⁶

The NCAA had two concerns with the FGR that it sought to rectify with its GSR.¹⁹⁷ The NCAA stated the FGR treats athletes who transfer to another college or university after the athlete's initial enrollment as not having graduated.¹⁹⁸ In addition, it argued that a transfer student is not included in the graduation rate of her or his cohort who initially enrolled at the school to which the student transferred.¹⁹⁹ Under the GSR, transfers, who are athletically eligible at the time they transfer, are removed from the cohort of students who matriculated at the same time as the transferring athlete.²⁰⁰ In addition, "a student-athlete who transfers into an institution

191. Blackman, *supra* note 33, at 227, 237.

192. *Id.* at 227 (discussing the NCAA's promulgation of the APP and its constituent parts, the GSR and APR).

193. *Id.* at 227–28.

194. *Id.* at 228.

195. Harrison, *supra* note 182, at 69.

196. *Id.*

197. *Id.*

198. *Id.*

199. *Id.*

200. *Id.* at 69–70.

is added to the appropriate cohort of initial enrollment for purposes of measuring graduation performance.”²⁰¹ One commentator favorably described the NCAA’s logic in creating the GSR as follows:

The logic of these modifications is that a student who leaves an institution, but is eligible to continue, has met her or his academic responsibilities at that institution and should not be classified as a graduation failure there, but rather simply a nonevent, at least insofar as graduation is considered. However, a departing student-athlete who was not eligible to continue is still considered the responsibility of that institution and is treated as a nongraduate.²⁰²

Other commentators take the position that rather than an effort by the NCAA to manipulate data, the GSR represents an effort to accurately reflect educational realities.²⁰³

Notwithstanding the foregoing logic, concerns have been raised about the NCAA’s use of the GSR.²⁰⁴ Those calling for eliminating the GSR argue that, unlike the FGR, the GSR does not permit a comparison of the graduation rates of scholarship intercollegiate athletes and nonathlete students.²⁰⁵

The [FGR] permits this comparison. The NCAA [GSR] does not allow a comparison with nonathlete students because it significantly changes the original FGR scholarship athlete cohort by allowing removal of transfers out (dropouts and stopouts), addition of transfers in and the counting of non-athletic scholarship recipients (Ivy League and military academies) as scholarship athletes. The institution which recruited and enrolled the athlete is not held accountable for those who leave the college. The result is a mathematically flawed overcompensation bias and purposefully deceiving graduation rate metric that produces GSR rates that are estimated significantly higher percentage points . . . than the FGR.²⁰⁶

On the issue of transfers, critics argue that the GSR’s exclusion of students who transfer out of an institution inflates graduate rates

201. Harrison, *supra* note 182, at 69–70.

202. *Id.* at 70.

203. Petr & McArdle, *supra* note 64, at 39.

204. DRAKE GROUP, POSITION STATEMENT: A CONTINUING DISGRACE—INTERCOLLEGIATE ATHLETICS RACE ISSUES 15 (2021) [hereinafter DRAKE POSITION PAPER], <https://www.the-drakegroup.org/wp-content/uploads/2021/05/FINAL-DRAFT-RACE-PAPER.pdf> [<https://perma.cc/SY7U-A3YP>].

205. *Id.*

206. *Id.*

by, for example, not including students who dropout of their institution without enrolling in another school.²⁰⁷ Critics also argue that by including non-scholarship intercollegiate athletes who attend Ivy League colleges and the military academies, the GSR inflates overall graduation rates by eight percent.²⁰⁸ Finally, critics add that the GSR inflates graduation rates by allowing institutions to manipulate data by engaging in practices, such as pushing out “academically weak basketball or football athlete[s].”²⁰⁹ These critics argue that the negative effect of the GSR is magnified by the APR which is tied to it.²¹⁰

2. Academic Progress Rate (APR)

The NCAA states that the APR, which was introduced in 2003, “holds institutions accountable for the academic progress of their student-athletes through a team-based metric that accounts for the eligibility and retention of each student-athlete for each academic term.”²¹¹ The APR metric is calculated as follows: each team within an institution’s athletic program receives an APR score which is based on two factors—whether a scholarship student-athlete has maintained her or his athletic eligibility and has remained enrolled at an institution.²¹² Calculated for each student-athlete on a per-semester basis, an institution receives one point for meeting each eligibility and retention standard, for a maximum of two points per semester for each scholarship athlete.²¹³ A team can receive up to four points per academic year for each student on a team; if all the scholarship athletes on a team receives four points, the team receives the maximum score of 1000.²¹⁴

When it was initially implemented, a team was required to receive a four-year minimum 900 APR to avoid penalties.²¹⁵ In 2011, the APR benchmark was increased to 930, which the NCAA states corresponds to a fifty percent GSR.²¹⁶ If a team fails to reach the minimum 930 APR, it is subjected to penalties including limitations on the amount of time a team’s athletes can engage in school-sponsored

207. *Id.*

208. *Id.* at 15–16.

209. *Id.* at 16.

210. DRAKE POSITION PAPER, *supra* note 204, at 16.

211. *Academic Progress Rate Explained: What Is the APR and How Is It Calculated?*, NCAA, <https://www.ncaa.org/sports/2015/5/19/academic-progress-rate-explained.aspx?id=3191> [<https://perma.cc/VUN3-XGP3>] (last visited Nov. 18, 2022).

212. *Id.*

213. *Id.*

214. *Id.*

215. Brown & Williams, *supra* note 36, at 55.

216. *Id.* at 55.

athletic activities, scholarship reductions, recruiting restrictions, coaching suspensions, and ineligibility for postseason play.²¹⁷

Data demonstrate that average four-year APRs have risen since the metric's introduction.²¹⁸ For the four-year period ending 2014–2015, the average APR was 979 for all Division I men's and women's sports.²¹⁹ This compares to an average APR of 984 for the four-year period ending 2020–2021.²²⁰ The APRs for men's basketball teams were 958 and 965 for the periods ending 2011–12 and 2020–21, respectively.²²¹ For Division I FBS football, the average APRs were 958 in 2011–2012 and 968 in 2020–2021.²²² The four-year average APRs for HBCUs also improved from 912 in 2009–2010, peaking at 970 in 2019–2020, and declining to 955 for the 2020–21 period.²²³

The NCAA attributes the overall improvement in APRs to policy adjustments including: the heightened progress-toward-degree requirements, an increased number of core courses required for initial eligibility, and adjusting the APR metric by not penalizing institutions on retention for transfers who were academically eligible for intercollegiate competition when they transferred.²²⁴ Increased APRs also may have resulted from athletes and their institutions becoming more familiar with the metric,²²⁵ and the development of improvement plans for certain institutions.²²⁶ The NCAA also states that the APR caused some institutions to “re-evaluate their recruiting

217. *Academic Progress Rate Explained: What Is the APR and How Is It Calculated?*, *supra* note 211. Two scholars elaborate as follows:

In 2011, the NCAA instituted a three-level penalty structure. The first level provides for a reduction in possible practice time by four hours and to one day per week. The second level involves a reduction in the number of competitions that a team can participate in during the regular or postseason The third level of punishment involves coaching suspensions, financial aid reductions, and restricted NCAA membership.

Brown & Williams, *supra* note 36, at 55–56.

218. See Thomas S. Paskus, *A Summary and Commentary on the Quantitative Results of Current NCAA Academic Reforms*, 5 J. INTERCOLLEGIATE SPORT 41, 42 (2012); see also NCAA RSCH., NATIONAL AND SPORT-GROUP APR AVERAGES AND TRENDS SPORT 2–3 (June 2022) [hereinafter 2022 APR REPORT], https://ncaaorg.s3.amazonaws.com/research/academics/2022RES_APR_AveragesTrends.pdf [<https://perma.cc/4Y5Y-VXGY>] (last visited Nov. 18, 2022).

219. MATTHEW J. MITTEN, TIMOTHY DAVIS, N. JEREMI DURU & BARBARA OSBORNE, *SPORTS LAW AND REGULATION: CASES, MATERIALS, AND PROBLEMS* 132 (5th ed. 2020).

220. 2022 APR REPORT, *supra* note 218, at 2.

221. *Id.* at 16.

222. *Id.*

223. *Id.* at 19.

224. MITTEN, DAVIS, DURU & OSBORNE, *supra* note 219, at 131; see 2022 APR REPORT, *supra* note 218, at 43.

225. See 2022 APR REPORT, *supra* note 218, at 43.

226. NCAA, *supra* note 174.

strategies, bringing in students who can be successful and those they can support academically.”²²⁷

Notwithstanding the overall upward trend, there persists a substantial gap between the overall average APRs of HBCUs and non-HBCU institutions.²²⁸ This gap is highlighted in the most recent APR report.²²⁹ The fifteen-point decline in the average APRs for HBCUs, 955, is much steeper than the three-point decline in average APRs, 984, for non-HBCU institutions for 2020–21.²³⁰

3. *The Racialized Impact of the APR*

The APR has disproportionately impacted HBCUs and their intercollegiate students.²³¹ During the metric’s development, NCAA research predicted HBCUs would be more negatively affected than predominantly white colleges and universities.²³² In its 2021 Report, the Knight Commission highlighted the extent of the APR’s impact on HBCUs.²³³ It reported that “[o]f the 159 teams banned from post-season play for APR violations, 114 teams—72 percent—are from HBCUs, even though HBCUs constitute less than seven percent of Division I schools.”²³⁴ Factors contributing to lower APRs for HBCUs include the aforementioned limited resources and support services, the admissions profiles of entering students, their mission, which includes educating at-risk and first-generation students, and higher rates of administrative turnover.²³⁵

The NCAA’s proposed solution to the disparate impact of the APR on HBCUs and their intercollegiate athletes was to incorporate what it refers to as *mission filters* that would “provide relief from penalties,” particularly in the beginning stages of the metric’s implementation.²³⁶ Beginning in 2013, the NCAA also began to provide “Accelerating Academic Success Program (AASP)” grants to low-resourced

227. *Id.*

228. 2022 APR REPORT, *supra* note 218, at 19.

229. *Id.*

230. *Id.*

231. 2021 KNIGHT COMM’N REP., *supra* note 155, at 8.

232. Harrison, *supra* note 182, at 71.

233. 2021 KNIGHT COMM’N REP., *supra* note 155, at 8.

234. *Id.*

235. 2022 APR REPORT, *supra* note 218, at 43; see Blackman, *supra* note 33, at 242–43 (listing similar factors); see Michael L. Lomax, *Six Reasons HBCUs Are More Important Than Ever*, UNCF, <https://unconf.org/the-latest/6-reasons-hbcus-are-more-important-than-ever> [<https://perma.cc/4LDZ-R7QG>] (last visited Nov. 18, 2022) (stating “HBCUs provide a stable and nurturing environment for those most at risk of not entering or completing college: low-income, first-generation college students,” many of whom are “academically underprepared for college.”).

236. Harrison, *supra* note 182, at 71.

institutions, many of which are HBCUs.²³⁷ The goal of these grants is “to assist [eligible schools] in creating programming and systems that will further academic success.”²³⁸ The grants are single- and multi-year.²³⁹ Since 2013, \$12 million of the \$20 million AASP grants have been awarded to HBCUs.²⁴⁰ While applauding the funding which has enabled HBCUs to increase academic support services for their athletes, critics argue that the grants, “averaging a little more than \$1 million a year to HBCUs, are modest compared to the annual NCAA Division I revenue distribution of nearly \$600 million.”²⁴¹

The NCAA has also been criticized for developing a metric in the form of the APR, which has an inherent bias in favor of institutions with more substantial resources.²⁴² Commentating on how NCAA academic rules disproportionately benefit well-resourced and predominantly white colleges and universities, one critic of NCAA academic reforms, stated:

[T]he current system appears to create a self-perpetuating cycle of haves and have-nots, privileging athletic departments situated in primarily [w]hite, research-intensive institutions while penalizing departments situated in institutions with few financial resources, like many HBCUs.²⁴³

The resource advantage permits institutions to provide more extensive tutoring and other academic programming for athletes and summer school financial aid, which permits athletes to boost their GPAs and transfer from their schools with academic eligibility.²⁴⁴ Financial resources also enable institutions to hire more expansive compliance staffs that can navigate the NCAA bureaucracy and request disability, medical, and other waivers and exceptions to APR standards.²⁴⁵

A former member of the NCAA Board of Directors and former chair of the NCAA Committee on Academic Performance, who supported the APR, acknowledged awareness of the impact of the APR on HBCUs.²⁴⁶

237. 2021 KNIGHT COMM’N REP., *supra* note 155, at 8.

238. *AASP Grants for Schools*, NCAA (2022), [https://www.ncaa.org/sports/2017/2/8/aasp-grants-for-schools.aspx#:~:text=As%20part%20of%20the%20AASP,initiatives%20grants%20\(single%20year\)](https://www.ncaa.org/sports/2017/2/8/aasp-grants-for-schools.aspx#:~:text=As%20part%20of%20the%20AASP,initiatives%20grants%20(single%20year)) [https://perma.cc/5L69-ZHYS] (last visited Nov. 18, 2022).

239. *Id.*

240. 2021 KNIGHT COMM’N REP., *supra* note 155, at 8.

241. *Id.*

242. George B. Cunningham, *Diversity Issues in Academic Reform*, 5 J. INTERCOLLEGIATE SPORT 54, 57 (2012).

243. *Id.*

244. DRAKE POSITION PAPER, *supra* note 204, at 17–18.

245. *Id.* at 18.

246. Harrison, *supra* note 182, at 65.

Data analysis during the design stage of this system also revealed that low resource and [HBCUs] would likely be more heavily impacted than would other institutions. The response was implementation of a set of *mission filters* that would provide relief from penalties, particularly in the early years of operation of the APP. The filters were based on factors such as resource level of the institution, academic characteristics of the institution, comparison within a specific sport group, and demonstrated APR improvement over time.²⁴⁷

Notwithstanding the filters and other efforts, the APR's negative impact on HBCUs was substantial.²⁴⁸

As alluded to above, the NCAA's proposed solution to the adverse impact of the APR was to extend to HBCUs "existing APR filters for under-resourced institutions that enable teams to avoid penalties and maintain access to postseason play by meeting standards that show academic improvement of academically underperforming teams."²⁴⁹ During fall of 2020, the Division I Board of Directors also suspended APR penalties, which would have excluded teams from postseason competition, for two years due to the impact of the COVID-19 pandemic.²⁵⁰ In February 2022, the NCAA's Committee on Academics reported that during this period, it had "engaged in a comprehensive review of the metric and its impact on teams, especially [HBCUs], limited-resource institutions, and other schools and student-athletes that may have experienced unique or difficult challenges during the pandemic."²⁵¹ It added that it will continue its review which will likely result in changes to the metric.²⁵² The Committee also recommended not imposing penalties, including a loss of eligibility for postseason play, based on four-year averages in 2023.²⁵³

The timing of the Committee's recommendation may well be tied not only to COVID-19, but also to a lawsuit challenging the APR as racially discriminatory.²⁵⁴ On December 10, 2020, three current or former Black student-athletes sued the NCAA and its Board of Governors and Division I Board of Directors.²⁵⁵ Two of the plaintiffs,

247. *Id.* at 71.

248. 2021 KNIGHT COMM'N REP., *supra* note 155, at 8.

249. *Id.*

250. Michelle Brutlag Hosick, *DI Board Backs Transfer Proposal, Suspends Academic Penalties*, NCAA (Oct. 28, 2020, 5:40 PM), <https://www.ncaa.org/news/2020/10/28/di-board-backs-transfer-proposal-suspends-academic-penalties.aspx> [<https://perma.cc/HW5B-G2KG>].

251. DIVISION I COMMITTEE ON ACADEMICS, *supra* note 159, at 3.

252. *Id.* at 3.

253. *Id.* at 2.

254. Manassa Complaint, *supra* note 18, at 1.

255. *Id.*

Troyce Manassa and Austin Dasent, were scholarship athletes who played men's basketball at Savannah State University.²⁵⁶ The third plaintiff, J'Ta Freeman, was a scholarship athlete who played lacrosse at Howard University.²⁵⁷ Both Savannah State and Howard are classified as HBCUs.²⁵⁸ The Savannah State men's basketball team was deemed ineligible to participate in postseason play in 2017, notwithstanding its record, because it failed to comply with the NCAA's APR.²⁵⁹ Howard's lacrosse team was not ineligible for postseason play because of a substandard APR, while Freeman was on the team.²⁶⁰ Nevertheless, she alleged that Howard University teams, including women's lacrosse, previously were ineligible for postseason play because of low APR scores and were at risk of further APR-based postseason ineligibility.²⁶¹ Freeman also alleged that she did not know that Howard's lacrosse team previously had been subjected to APR-related postseason ineligibility.²⁶²

The athletes' putative class action alleges,²⁶³ *inter alia*, that defendants designed and implemented the NCAA's Academic Performance Program, the key components of which are the GSR and APR, with the knowledge that it would "directly and negatively affect Black student-athletes"²⁶⁴ as well as HBCUs and lower-resourced colleges and universities.²⁶⁵ Plaintiffs further allege that the NCAA adopted and implemented the APR's penalty structure even though it knew that it would have a significantly greater adverse impact on HBCUs than predominantly white institutions.²⁶⁶ According to the plaintiffs, this

256. *Id.* at 5–6.

257. *Id.* at 8.

258. *Id.* at 5, 7.

259. *Id.* at 7; see *Savannah State Banned but APRs Improves at HBCUs*, SPORTS ILLUSTRATED (May 10, 2017), <https://www.si.com/college/2017/05/10/ap-fbc-fcs-alabama-am-savannah-st-apr-penalties> [<https://perma.cc/84DM-KFQC>].

260. Manassa Complaint, *supra* note 18, at 8.

261. *Id.*; see also *APR: FAMU, Howard, Bama State, Mississippi Valley and Norfolk State Hit with Multiple Postseason Bans*, HBCU GAMEDAY (May 15, 2014), <https://hbcugameday.com/2014/05/15/apr-famu-howard-bama-state-mississippi-valley-and-norfolk-state-hit-with-multiple-postseason-bans> [<https://perma.cc/RG5Z-6BWF>]; Steven J. Gaither, *Howard University Football, Several HBCU Basketball Programs Ineligible for Postseason Play with Low APR*, HBCU GAMEDAY (May 19, 2020), <https://hbcugameday.com/2020/05/19/hbcu-howard-academically-ineligible-postseason-2020-apr> [<https://perma.cc/R6LC-9TYYS>].

262. Manassa Complaint, *supra* note 18, at 85.

263. Plaintiffs' alleged class consists, in part, of "[a]ll Black student-athletes who participated in Division I HBCU athletic teams that were subjected to a postseason access ban from the 2010–11 school year through the date of class certification . . ." *Id.* at 43.

264. *Id.* at 28.

265. *Id.*

266. *Id.* at 48.

impact has manifested in penalties, particularly APR-based postseason competition bans, being disproportionately applied to HBCUs.²⁶⁷

Plaintiffs allege that the APP violates 42 U.S.C. § 1981 which prohibits racial discrimination, in the “mak[ing] and enforce[ment] [of] contracts.”²⁶⁸ The making and enforcement of contracts includes, in part, “the enjoyment of all benefits, privileges, terms, and conditions of the contractual relationship.”²⁶⁹ Thus, critical to a § 1981 claim is the existence of contractual relationship.²⁷⁰ In this regard, plaintiffs identify the National Letter of Intent, which is a contract pursuant to which a college scholarship athlete commits to attend and play sports for an institution in exchange for an athletic-related scholarship.²⁷¹ It is the NLI and the financial aid agreement between a student-athlete and an institution that provides the basis of the parties’ contract.²⁷²

Having established the contractual predicate for their § 1981 claim, plaintiffs alleged APR-based postseason ineligibility diminished their ability to: (1) “further develop their athletic careers;” (2) garner greater media exposure and the attention of and access to recruiters and sponsors and the benefits derived therefrom; (3) “achieve meaningful play-based metrics, which affects subsequent career trajectory;” and (4) have “confidence in their HBCUs, their teams, and themselves.”²⁷³ Plaintiffs also allege violations of 42 U.S.C. § 1985(3), which prohibits conspiracies to deprive citizens of their privileges and immunities as well as their Equal Protection rights.²⁷⁴ Plaintiffs seek injunctive relief and compensatory and punitive damages.²⁷⁵

In response to plaintiffs’ Complaint, the defendants filed a motion to dismiss asserting plaintiffs lack standing because they failed to establish “‘an invasion of a legally protected interest’ that is ‘concrete and particularized’ and ‘actual or imminent, not conjectural or hypothetical.’”²⁷⁶ Defendants further argued that even if SSU had participated in postseason play, any injury resulting to

267. *Id.*

268. 42 U.S.C.A. § 1981 (Westlaw through Pub. L. No. 117-59).

269. Manassa Complaint, *supra* note 18, at 46.

270. *Id.*

271. DAVIS & DURU, *supra* note 1 (manuscript at 50–51).

272. *Id.* at 49–51.

273. Manassa Complaint, *supra* note 18, at 39.

274. *Id.* at 52. Plaintiff, Freeman, who attended Howard University, also alleged violations of the District of Columbia Human Rights Act. *Id.*

275. *Id.* at 55.

276. Entry on Defendant’s Motion to Dismiss at 9, Manassa v. NCAA No. 1:20-cv-3172 (S.D. Ind. filed Dec. 10, 2020) [hereinafter Manassa Entry] (citing Spokeo Inc. v. Robins, 136 S. Ct. 1540, 1548, as revised (May 24, 2016)).

Manassa and Dasent is speculative because they failed to identify specific opportunities they lost because of SSU's ineligibility for postseason play²⁷⁷ and that participation in postseason play is not a protectable right.²⁷⁸ With respect to plaintiff Freeman, defendants asserted that her injury was highly speculative because Howard's women's lacrosse team was not subject to APR-based postseason ineligibility while she was a member of the team.²⁷⁹ The NCAA also argues that the statute of limitations had run on Manassa's and Dasent's claims and that its running should not be tolled.²⁸⁰

With respect to plaintiffs' § 1981 claim, defendants argued that plaintiffs' complaint failed to establish the "intentional discrimination"²⁸¹ and but-for elements²⁸² of a cognizable § 1981 claim.²⁸³ Defendants further asserted that plaintiffs received all the benefits of athletics-related financial aid that they were entitled to receive under their NLIs with SSU and Howard.²⁸⁴ With respect to plaintiffs' § 1985 claims, the NCAA argues that it constitutes a single actor and therefore cannot conspire²⁸⁵ and that plaintiffs failed to establish the requisite discriminatory animus element of such a claim.²⁸⁶

The district court granted in part and denied in part defendants' motion to dismiss.²⁸⁷ The court dismissed plaintiffs' claims against the NCAA Board of Governors and the Division I Board of Directors finding those defendants are not real parties in interest.²⁸⁸ It also dismissed Freeman's claims holding that "Freeman has not plausibly alleged that there is a substantial risk that she and her team will receive a postseason ban in light of the 'highly speculative' and 'attenuated chain of inferences' required to find harm here."²⁸⁹ The court appropriately emphasized that Howard's lacrosse team had not been deemed ineligible arising from low APR scores during the time Freeman was a member of it.²⁹⁰ According to the court, "[h]ere,

277. *Id.* at 10.

278. Defendants' Reply to Plaintiffs' Opposition to Defendants' Motion to Dismiss at 1, *Manassa v. NCAA* No. 1:20-cv-3172 (S.D. Ind. filed Dec. 10, 2020) [hereinafter NCAA Motion to Dismiss].

279. *Id.* at 7–8.

280. *Id.* at 10–11.

281. *Id.* at 16.

282. *Id.* at 13–14.

283. *Id.* at 16.

284. NCAA Motion to Dismiss, *supra* note 278, at 4–5.

285. *Id.* at 18–20.

286. *Id.* at 15.

287. *Manassa Entry*, *supra* note 276, at 20.

288. *Id.* at 15–16.

289. *Id.* at 13.

290. *Id.*

the future injury is not immediate, and the court can only speculate that Freeman and her team would be penalized by the NCAA.”²⁹¹

The court refused, however, to dismiss Manassa and Dasent’s §§ 1981 and 1985 claims.²⁹² Turning first to the § 1981, the court concluded plaintiffs’ complaint alleged the required three elements: “(1) they are members of a racial minority; (2) the defendants intended to discriminate on the basis of race; and (3) the discrimination concerned the making or enforcing of a contract.”²⁹³ The court ruled that plaintiffs, at this stage of the litigation, had carried their burden of establishing intentional discrimination given that the NCAA expressly considered race in the development and implementation of the APP and was aware of the disparate adverse impact the APP would have on Black students and HBCUs.²⁹⁴ Similar to the plaintiffs in *Cureton* and *Pryor*, plaintiffs bolstered their claim by identifying research, some of which was generated by the NCAA, to demonstrate the NCAA’s awareness, during its design and implementation of the APP, of the impact that the metric would have on HBCUs and their intercollegiate athletes.²⁹⁵ The court relied on facts supporting plaintiff’s § 1981 claim in concluding that at this stage of the pleadings, plaintiffs had demonstrated intentional discrimination.²⁹⁶

The court next determined whether the plaintiff had adequately pled but-for causation—“a plaintiff must initially plead and ultimately prove that, but for race, it would not have suffered the loss of a legally protected right.”²⁹⁷ Again, the court emphasized facts pled by plaintiffs showing that the NCAA considered race in developing the APP and was aware of its likely disproportionate impact on Black student-athletes at HBCUs. It stated that “[i]f Plaintiffs had attended a predominately white institution, the APP’s formulation would not have affected them in the same way.”²⁹⁸ The court further concluded that plaintiffs’ allegations were sufficient to establish that the NCAA interfered with the making and enforcement of their contracts.²⁹⁹ The court stated the complaint alleges that the APP interfered with plaintiffs’ ability to participate in postseason play, which is one of the benefits ensuing from their NLI’s.³⁰⁰

291. *Id.* at 14.

292. *Id.* at 18.

293. Manassa Entry, *supra* note 276, at 17.

294. *Id.* at 17–18.

295. *Id.* at 17.

296. *Id.* at 18.

297. *Id.*

298. *Id.* at 19.

299. Manassa Entry, *supra* note 276, at 19.

300. *Id.*

With respect to plaintiffs' § 1985 claim, the court rejected the NCAA's intra-corporate conspiracy defense which operates as a shield against liability when there is "an agreement between or among agents of the same legal entity."³⁰¹ The court ruled that the defense is inapplicable when the alleged conspiracy is a "part of some broader discriminatory pattern."³⁰² It concluded that the NCAA over a number of years had developed "an intentionally discriminatory system of eligibility requirements and penalties" and had knowledge of the disparate impact of the APP on Black student-athletes.³⁰³ The court concluded "[t]his all came about through numerous acts and decisions by the NCAA's leadership, as well as a failure to disclose certain information to Plaintiffs that the NCAA knew would impact Plaintiffs' decisions regarding their NLI's."³⁰⁴

We should be mindful that the court's ruling arose in the context of the NCAA's motion to dismiss.³⁰⁵ Thus, the court's task was limited to determining whether plaintiffs had alleged facts sufficient to support cognizable §§ 1981 and 1985 claims.³⁰⁶ Like the district court's opinion in *Cureton* and the district and appellate courts' decisions in *Pryor*, the *Manassa* court's decision does not bode well for the NCAA.³⁰⁷ As was true in *Cureton* and *Pryor*, the *Manassa* plaintiffs as well as the district court relied on evidence, research much of which the NCAA sponsored, to establish the factual predicates supporting allegations and findings that the NCAA considered race in developing and implementing the APP.³⁰⁸ This evidence may be sufficient to permit the *Manassa* plaintiffs to ultimately prevail on the merits of their claims.

C. Other Racial Implications of the NCAA's Academic Reforms

In addition to the disparate racial impact of the APR and GSR, the NCAA's APP and other academic reform measures have been criticized for prioritizing quantitative metrics over qualitative.³⁰⁹ Critics assert that neither the GSR or APR reflect "academic success or the quality of education received by individuals or teams."³¹⁰ One

301. *Id.* (quoting *Ziglar v. Abbasi*, 137 S. Ct. 1843, 1867 (2017)).

302. *Id.* at 19.

303. *Id.* at 19–20.

304. *Id.* at 20.

305. *Manassa* Entry, *supra* note 276, at 2.

306. *See id.* at 17–20.

307. *Cureton v. NCAA*, 37 F. Supp. 2d 687, 717 (E.D. Pa. 1999); *Pryor v. NCAA*, 288 F.3d 548, 570 (3d Cir. 2002).

308. *Manassa* Complaint, *supra* note 18, at 13–14.

309. DRAKE POSITION PAPER, *supra* note 204, at 15–16.

310. *Id.* at 17.

commentator even suggests that the purpose of the NCAA's academic reform metrics is integral to the organization's efforts to solidify its brand, which includes promoting the idea of academic success of intercollegiate athletes.³¹¹ The alleged purpose of this effort is "to convince a skeptical public that 'the business of college sports is not a necessary evil, [but] a proper part of the overall enterprise.'"³¹²

It is not necessary to be in complete agreement with the foregoing perspective in order to recognize serious concerns emanating from the NCAA's academic reform measures and their focus on data derived from NCAA-developed academic metrics. These concerns are captured in the views of a prominent sport historian who warned in 2012 that "raising academic standards through strengthening the APR and increasing its penalties begs all of the questions about whether the APR actually guarantees opportunities for a meaningful educational experience."³¹³ Similar questions can be raised regarding the messaging and overall impact of the GSR and progress-toward-degree requirements notwithstanding the beneficial effects that may flow from these metrics.

The GSR and APR's emphasis on quantitative outcomes can obscure the extent to which athletes receive educational value even though they graduate and remain academically eligible for intercollegiate athletes. For example, academic clustering has been singled out as a particularly harmful practice arising from the emphasis on quantitative outcomes.³¹⁴ Academic clustering occurs when athletes on a team disproportionately enroll, typically defined as twenty-five percent or more, in the same major.³¹⁵ Numerous studies since a groundbreaking 1987 report³¹⁶ have documented the clustering phenomenon.³¹⁷ Recent studies have confirmed the existence of clustering and its persistence.³¹⁸ The authors of one of these studies stated

311. Richard M. Southall, *NCAA Graduation Rates: A Quarter-Century of Re-branding Academic Success*, 7 J. INTERCOLLEGIATE SPORT 120, 121 (2014).

312. *Id.* at 130.

313. Oriard, *supra* note 43, at 15; see also Sarah K. Fields, *Are We Asking the Right Questions? A Response to Academic Reforms Research the NCAA*, 5 J. INTERCOLLEGIATE ATHLETICS 60, 62–63 (2012) (emphasizing the importance of looking beyond statistics in order to assess the overall quality of college athletes' educational opportunities and experiences).

314. Oriard, *supra* note 43, at 10–11.

315. Davis, *supra* note 6, at 631 (discussing clustering).

316. Bob Case, H. Scott Brown & James Greer, *Academic Clustering in Athletics: Myth or Reality?*, 11 ARENA REV. 48, 50 (2022) (defining the concept and noting its prevalence, particular among Black college athletes).

317. Davis, *supra* note 6, at 631–34 (discussing the prevalence and causes of clustering and citing to numerous studies).

318. Steve Miller, *An Analysis of the Rate of Academic Clustering and the Types of Majors Chosen by Divisions I, II, and III Intercollegiate Athletes*, J. STUDY OF SPORTS AND

that “the study confirmed previous research, which has consistently shown a propensity of clustering among Division I sports teams, especially in men’s sports like baseball and basketball. However, the study also provided strong evidence that clustering occurs at a similar rate among Division II teams”³¹⁹

Another recent study, which examines clustering in baseball, concluded that clustering amongst baseball teams was more prevalent in Division I and amongst the highest-ranking baseball programs.³²⁰ Clustering steers intercollegiate athletes to enroll in majors that provide an easier path to remaining athletically eligible and graduating but may fail to provide them with a quality educational experience that well prepares them for their post-college careers.³²¹

Studies also conclude that clustering is particularly prevalent in football and is higher for Black players compared to white college football players.³²²

[T]he distribution of football players’ academic majors differed from that of the general study body both at institutions in the “most selective” and “least selective” groups. Football players

ATHLETES IN EDUC. 1, 14 (2021) [hereinafter Miller, *Rate of Clustering*], <https://www.tandfonline.com/doi/full/10.1080/19357397.2021.1916305> [<https://perma.cc/PP7E-WLXB>]; Steve Miller, *Academic Clustering and Intercollegiate Baseball Programs: Do National Rankings Matter?*, J. ISSUES IN INTERCOLLEGIATE ATHLETICS 268, 271 (2021) [hereinafter *Clustering in Baseball*]; see also Jesse Brock, Colin G. Pennington & Kelsey McEntyre, *Academic Clustering and Division II Athletics: A Study of One Public State University*, 1, 19–20 (2021), in CURRENT TOPICS IN KINESIOLOGY AND SPORT PEDAGOGY (C.G. Pennington ed. 2021), https://www.researchgate.net/publication/355049816_ACADEMIC_CLUSTERING_AND_DIVISION_II_ATHLETICS_A_STUDY_OF_ONE_PUBLIC_STATE_UNIVERSITY [<https://perma.cc/B5BE-3RZQ>] (finding a high level of clustering amongst intercollegiate athletes, over forty percent of athletes were in the same major, at the Division II institution that was the subject of the study).

319. Miller, *Rate of Clustering*, *supra* note 318, at 14–15.

320. *Clustering in Baseball*, *supra* note 318, at 278–79. This study concluded that coaches encourage clustering to facilitate risk averse behavior. “That mentality is consistent with academic advisors and coaches encouraging athletes to opt into an academic major already proven to be compatible with athletics allows the program to thrive and pays dividends for the athlete in terms of reducing risk of ineligibility that could accompany a less common major” *Id.* at 279.

321. Camile P. O’Bryant, *Academic Performance Programs: New Direction and (Dis)Connections in Academic Reform*, 5 J. INTERCOLLEGIATE SPORT 83, 87 (2012) (expressing this concern); Cunningham, *supra* note 242, at 56–57 (urging research that looks beyond graduation data and examines the overall experiences of college athletes and warning that graduation does not necessarily correspond to an athlete having obtained a quality education).

322. *Clustering in Baseball*, *supra* note 318, at 271–72; Jeffery J. Fountain & Peter S. Finley, *Academic Clustering: A Longitudinal Analysis of a Division I Football Program*, 4 J. ISSUES IN INTERCOLLEGIATE ATHLETICS 24, 26 (2011) (finding clustering disproportionately impacts Black college athletes).

were most frequently overrepresented in “social sciences” and underrepresented in “engineering” majors. Further, it appears that football players were overrepresented or underrepresented in academic areas of study more frequently at the “most selective” institutions.³²³

This finding is consistent with research suggesting that NCAA academic reforms converge with stereotypes of the lack of intellectual acumen of Black athletes, which contributes to clustering.³²⁴

Although clustering is a consequence of several variables,³²⁵ researchers have concluded that factors include influential NCAA academic reforms, including progress-toward-degree requirements and the APP.³²⁶ The pressure for teams and institutions to meet these standards³²⁷ results in “coaches and athletic academic advisors . . . channel[ling] student-athletes into majors that increase the likelihood that athletes will retain their eligibility, meet APR standards, and graduate.”³²⁸ In a report published in 2021 on racial inequities in college sports, the influential Knight Commission on Intercollegiate Athletics warned of the consequences of clustering:

A second institutional practice—clustering Division I football and basketball athletes in certain classes and majors—is another form of disparate treatment that disproportionately impacts Black athletes, creating a barrier to them receiving a quality educational experience. . . . Clustering has proved to be detrimental to students’ academic and career trajectories and effectively disregards the interests and goals of college athletes.³²⁹

Thus, the detrimental effects of clustering include: (1) athletes taking majors to maintain their athletic eligibility sacrifices their enrollment

323. Adam Love, Jim Watkins & Seungmo Kim, *Admissions Selectivity and Major Distribution in Big-Time College Football*, 10 J. ISSUES IN INTERCOLLEGIATE ATHLETICS 1, 1 (2017).

324. Davis, *supra* note 6, at 634–39 (discussing harmful consequences of clustering on Black athletes).

325. These include the time athletes commit to their sports, the availability of classes that do not conflict with practice times, the influence of athlete peers, and the comfort that is derived from being in the same major as teammates. *Id.* at 635.

326. *Id.* at 634.

327. *Id.*; see also *Clustering in Baseball*, *supra* note 318, at 270.

328. Davis, *supra* note 6, at 634; see also C.G. Brock Pennington & K. McEntyre, “*It’s Bound to Happen. . .*”: *Academic Clustering at a Division III College*, 2 J. STUDENT-ATHLETE EDUC. DEV. & SUCCESS 151, 153, 161 (2020) (commenting on the pressure engaged in by coaches and academic advisors that contributes to clustering); Logan, Jr. & Harrison, Jr., *supra* note 175, at 76 (commenting on how channeling athletes into certain majors supports maintaining their athletic eligibility).

329. 2021 KNIGHT COMM’N REP., *supra* note 155, at 7.

in majors that would better prepare them for life after college;³³⁰ (2) clustering fostering athletes enrolling in majors that are incongruent with their interests,³³¹ (3) it is an impediment to athletes obtaining a quality education,³³² and (4) contributes to the creation of a “psychosocial divide between [athletes’] academic and athletic identities.”³³³ The stronger the athletic identity the less time athletes will devote to academics.³³⁴ Ultimately, the impact of clustering is that it “may limit the ability of student-athletes to gain a full, meaningful educational experience that is comparable to that of their non-athlete peers. Notably, this may be a particular concern at more highly-selective institutions with big-time football programs.”³³⁵

Colleges could take steps to limit the negative repercussions of practices such as clustering. These include moving academic counseling and tutoring outside of the athletic department and enacting policies to keep better track of and to control clustering.³³⁶ Thus far, Division I institutions have not demonstrated a willingness to adopt these strategies.³³⁷

CONCLUSION

The NCAA’s Division I academic reform measures, which were initially promulgated in the 1980s, are the result of a convergence of factors, including the NCAA’s responses to public pressure and litigation or potential litigation, the NCAA fashioning of a narrative of what constitutes academic success, and a desire to improve the educational and overall well-being of intercollegiate athletes.³³⁸ This mixture of often-conflicting motivations has undeniably reduced the likelihood of the occurrence today of scandals such as those that involved Dexter Manley and Kevin Ross.³³⁹ Yet, it is equally undeniable that this combination of motivations, along with persistent competitive pressures to field winning teams, have led the NCAA to enact academic measures knowing that their negative effects would be disproportionately borne by Black athletes and HBCUs.³⁴⁰

330. Davis, *supra* note 6, at 635.

331. *Id.* at 635–36.

332. *Id.* at 636.

333. *Id.*

334. *Id.*

335. Love, Watkins & Kim, *supra* note 323, at 13.

336. Davis, *supra* note 6, at 643 (offering these and other suggestions).

337. *Id.*

338. See Brown & Williams, *supra* note 36, at 50; Southall, *supra* note 311, at 121.

339. See *supra* Section I.B.1.

340. See *supra* Section II.A.

Moreover, the NCAA's focus on quantitative outcomes obscures the true nature of athletes' educational experiences and deflects attention from the most pertinent question of all—whether institutions are abiding by their implicit promise to provide athletes with a meaningful educational experience and opportunity in exchange for athletic services. This question becomes particularly pertinent in FBS football and men's Division I basketball, with its disproportionate concentration of Black athletes, because of the substantial revenue generation potential of these sports.³⁴¹

The quality of the educational experience of FBS football and Division I men's basketball players, will likely become increasingly pertinent given the rapidly changing landscape of FBS football and the corresponding increase in economic pressures as illustrated by: (1) the University of Southern California and UCLA's impending membership in the Big Ten Athletic Conference, which may result in an estimated \$1 billion per year going to the conference for football media rights and lead to further conference realignment,³⁴² but likely harm the academic, mental, and physical well-being of athletes,³⁴³ (2) the uncertain future of the NCAA governance of college sports given its new constitution and conference realignment that may result in two super athletic conferences,³⁴⁴ and (3) uncertainty surrounding the continued viability of current NCAA Division I academic standards, which albeit flawed, provide some means of holding institutions accountable for their athletes' academic experiences.³⁴⁵ Unfortunately, these dynamics may further undermine institutions' willingness or ability to fulfill their implicit promise to provide athletes with a meaningful educational opportunity absent some combination of external means of accountability including: (1) state or federal legislation; (2) lawsuits challenging NCAA regulations; (3)

341. See *NCAA v. Alston*, 141 S. Ct. 2141, 2150 (discussing the considerable revenues generated by FBS football and men's Division I basketball).

342. Ross Dellenger, *USC, UCLA and the Big Ten: How and Why College Sports' Latest Stunning Move Happened*, SPORTS ILLUSTRATED (July 1, 2022), <https://www.si.com/college/2022/07/01/usc-ucla-move-big-ten-how-it-happened-college-sports> [https://perma.cc/5EJH-CMLJ].

343. Brianna Hatch, "There's So Many Questions": *Sports-Realignment Shocker Could Mean a Sea Change for Higher Ed*, CHRON. HIGHER EDUC. (July 1, 2022), https://www.chronicle.com/article/theres-so-many-questions-sports-realignment-shocker-could-mean-a-sea-change-for-higher-ed?emailConfirmed=true&supportSignUp=true&supportForgotPassword=true&email=jemorgan%40email.wm.edu&success=true&code=success&bc_nonce=h0byo5zqzcal7nh1o4fuo&cid=gen_sign_in [https://perma.cc/9QND-2GU9] (discussing potential negative implications of conference realignment on student-athlete well-being).

344. *Id.*

345. *Id.*

changes to the economic model of Division I intercollegiate; (4) or a reimagining of what is currently Division I intercollegiate athletics.

If history is our guide, unless forced to do so, FBS institutions will likely resist efforts to enact internal changes that will interfere with efforts to generate increased revenue from FBS football and men's Division I basketball. The more likely outcome is that whatever academic measures are developed will prioritize maintaining eligibility over a high-quality academic experience for athletes. Consequently, the academic interests of Black intercollegiate athletes will continue to be marginalized.