

UN-EQUAL PROTECTION: PREFERENTIAL ADMISSIONS TREATMENT FOR STUDENT ATHLETES

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INTRODUCTION

College athletics is one of the most successful and profitable enterprises in the United States. Although the image that one may envision when talking of college athletics is of a sold-out football stadium in the cool months of fall or of a jam-packed arena in the middle of March Madness, competition in college athletics takes place twelve months a year from large campuses in college towns such as Ann Arbor, Eugene, and Tuscaloosa, to remote areas with names that few recognize such as Valdosta, Ithaca, and Boone.

Although the landscape at these schools is vastly different, one trend is taking place across the country. At all colleges and universities, whether they are Division I powerhouses, Ivy League institutions, academically "elite" private schools, or small Division II or Division III schools, athletes are receiving preferential treatment in the admissions process.

This Note will begin in Part I by discussing the National Collegiate Athletic Association (NCAA) and the initial eligibility requirements put into place for student athletes, as well as the problems associated with these requirements. Part II will explore the admissions process itself, the reasons for differing treatment of athletes from non-athletes, academic performance of student athletes after admission, and attempts at reform in this area. Part III will address the provisions surrounding the Fourteenth Amendment and the Equal Protection Clause, the cases discussing admissions in higher education, and how the doctrine of academic freedom affects these admissions decisions. Part IV will discuss the legal arguments for and against preferential admissions standards for athletes, including the practice of setting aside seats in an incoming class for athletes and possibilities of future judicial action in this area. The Note will conclude by taking a hypothetical look at the potential effects of a shift in the law regarding equal protection. This Note comes with the disclaimer that the author is a passionate sports fan, and quite possibly falls within that category of persons who turn their head away from these potential problems.

I. NCAA INITIAL ELIGIBILITY REQUIREMENTS

Although initial eligibility standards, as set by the National Collegiate Athletic Association (NCAA), are themselves probably not major factors that an admissions officer weighs in making an admission decision, since a player must always meet these minimum requirements set by the NCAA, eligibility has an indirect impact on the admissions process. A look at the NCAA's eligibility requirements throughout the years gives an overview of how the NCAA has attempted to set guidelines for admission of student athletes, as well as the problems that the NCAA has faced in making these efforts.

A. History of Initial Eligibility Standards

It is unquestioned that all colleges and universities that participate in athletics under the banner of the NCAA must abide by the rules and regulations set by the NCAA, including minimum initial eligibility standards.¹ The first main attempt by the NCAA in making substantive guidelines for eligibility of student athletes came in 1965 with the “1.6 Rule.”² This rather complex formula attempted to predict the ability of incoming athletes to maintain a 1.6 grade point average (GPA) during their first year of college.³ Included in the formula were the prospective student athlete’s high school GPA, high school class rank, and college admissions standardized test score.⁴ If the student failed to meet this 1.6 prediction standard, he or she was ineligible for admission.⁵

In 1973, the NCAA replaced this “1.6 Rule” with a new “2.0 Rule” that simply stated that a prospective student athlete had to have a 2.0 high school GPA to be eligible for admission.⁶ In the years that followed, this “2.0 Rule” received criticism due to athletes being admitted with shockingly low admissions test scores, despite maintaining a 2.0 high school GPA.⁷ In response, the NCAA implemented Proposition 48 in 1986, which added a minimum Scholastic Aptitude Test (SAT) score of 700 or American College Test (ACT) score of 14 to the minimum GPA requirement.⁸ Proposition 48 was developed by a committee of the American Council on Education.⁹ However, this standard received criticism as a low threshold, as evidenced by the fact that almost 85% of college-bound freshman could meet the minimum requirements.¹⁰ Proposition 48 was replaced in 1996 by Proposition 16, which increased the number of core

1. See *Nat’l Collegiate Athletic Ass’n v. Lasege*, 53 S.W.3d 77, 87 (Ky. 2001) (noting that NCAA membership is voluntary).

2. 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, 192 (2003).

3. *Id.*

4. *Id.*

5. *Id.*

6. *Id.*

7. See Jay Cherwin, Note, *Not-So-Great Expectations: The NCAA’s Initial Eligibility Requirements*, 9 KAN. J.L. & PUB. POL’Y 706, 709 (2000) (noting that one Iowa State University official said that 10% of the football and basketball players were illiterate and that two Florida State University football players had SAT scores of less than 450).

8. Waller, *supra* note 2, at 192–93. The range of scores for the ACT is from 1 to 36, whereas the range of scores for the SAT is 400 to 1600 (there is also a possible SAT score of 2400, which includes an additional section, though this is not used as frequently). See ACT Score Information: National Ranks for Test Scores and Composite Score, <http://www.actstudent.org/scores/norms1.html> (last visited Mar. 31, 2009); SAT Percentile Ranks: 2006 College-Bound Seniors, http://www.collegeboard.com/prod_downloads/highered/ra/sat/SATPercentileRanksCompositeCR_M.pdf (last visited Mar. 31, 2009).

9. WALTER BYERS WITH CHARLES HAMMER, *UNSPORTSMANLIKE CONDUCT: EXPLOITING COLLEGE ATHLETES* 297 (1995).

10. *Id.*

high school classes—such as mathematics, science, and history—that a student athlete must complete to be included in GPA calculation and implemented a scale allowing for students with lower standardized test scores to still be eligible if they had higher GPAs.¹¹ Proposition 16 also allowed for student athletes to be partial qualifiers—with its own separate scale of standardized test scores and GPAs—where they would be allowed to be a member of the team and receive financial aid but would not be allowed to compete their freshman year.¹² Recently, in 2005, the NCAA adopted a full sliding scale that eliminated partial qualifier status.¹³ This sliding scale expands on Proposition 16 and allows for students having as low as a 400 SAT score—which is the lowest possible score—to be eligible under NCAA standards if they have a 3.55 high school GPA.¹⁴ On the opposite side of the scale, a student who has only a 2.0 high school GPA will be eligible with an SAT score of 1010, which is in approximately the 48th percentile.¹⁵

B. Attacks on Initial Eligibility Standards

The NCAA has consistently been subject to attacks on the eligibility standards it implements.¹⁶ The most notable cases included two separate actions involving Proposition 16 and the minimum standardized test score requirements, specifically in regards to race.¹⁷ In 1997, several African-American athletes sued the NCAA under Title VI, challenging the minimum standardized test requirements of Proposition 16 and the alleged discriminatory effects of the requirements on African-Americans.¹⁸ In reversing the decision of the lower court, the Court of Appeals for the Third Circuit held that the NCAA was not subject to Title VI; therefore the plaintiffs had no cause of action.¹⁹ In addition, the court upheld the requirements of Proposition 16, noting that the NCAA members give the NCAA “power to enforce its eligibility rules directly against students.”²⁰

11. Waller, *supra* note 2, at 193–94.

12. Doug Bakker, *NCAA Initial Eligibility Requirements: The Case Law Behind the Changes*, 3 DEPAUL J. SPORTS L. & CONTEMP. PROBS. 160, 174–75 (2006).

13. *Id.* at 187; *see also* NCAA Freshman-Eligibility Standards Quick Reference Sheet, http://www.ncaa.org/wps/wcm/connect/resources/file/eb1afe0c529230b/Quick_Reference_Sheet_for_IE_Standards-5-2-08.pdf?MOD=AJPERES (last visited Mar. 31, 2009).

14. NCAA Freshman-Eligibility Standards Quick Reference Sheet, *supra* note 13.

15. *Id.*

16. *See, e.g.*, Hall v. Nat'l Collegiate Athletic Ass'n, 985 F. Supp. 782 (N.D. Ill. 1997); Ganden v. Nat'l Collegiate Athletic Ass'n, No. 96 C 6953, 1996 WL 680000 (N.D. Ill. Nov. 21, 1996); Parish v. Nat'l Collegiate Athletic Ass'n, 361 F. Supp. 1220, 1221 (W.D. La. 1973) (challenging the “1.6 Rule”).

17. *See* Pryor v. Nat'l Collegiate Athletic Ass'n, 288 F.3d 548 (3d Cir. 2002); Cureton v. Nat'l Collegiate Athletic Ass'n, 198 F.3d 107 (3d Cir. 1999).

18. *Cureton*, 198 F.3d at 111–12.

19. *Id.* at 118.

20. *Id.* at 117–18.

However, despite the favorable ruling by the *Cureton* court, the NCAA, as mentioned above, did choose to tweak Proposition 16 by implementing the current eligibility standards.²¹

C. The Current Initial Eligibility System

As previously mentioned, the NCAA currently employs a sliding-scale system that allows for differing standardized test score requirements in relation to a prospective student athlete's high school GPA.²² This system also requires a student to obtain credit for fourteen core courses, with this number increasing to sixteen in 2008.²³ In order for a potential student athlete to be eligible for admission through the NCAA's minimum standards, a company called the NCAA Clearinghouse—which reviews the academic performance of potential student athletes and authorizes them for freshman admission—must certify them.²⁴ After passing this initial authorization from the NCAA Clearinghouse, student athletes must then gain admission to the schools to which they seek to attend.²⁵ There has yet to be a challenge to the NCAA's new requirements, and the NCAA is working to make eligibility requirements more stringent.²⁶ In the current eligibility system, partial qualifiers do not have a separate sliding scale.²⁷ However, players who do not meet initial eligibility requirements do have options, including applying for a waiver of non-eligibility.²⁸ On behalf of the prospective student athlete, a school may apply for a waiver that will allow for admission to non-qualifiers.²⁹ However, the NCAA grants waivers of initial eligibility requirements only in rare situations where extraordinary circumstances arise.³⁰ Another possible option for non-qualifiers is attendance at a junior college or preparatory school to get their grades in order, a strategy that schools and non-qualifiers across the country use.³¹

21. See Bakker, *supra* note 12, at 187.

22. See NCAA Freshman-Eligibility Standards Quick Reference Sheet, *supra* note 10 and accompanying text.

23. *Id.*

24. BRUCE FELDMAN, MEAT MARKET: INSIDE THE SMASH-MOUTH WORLD OF COLLEGE FOOTBALL RECRUITING 168 (2007).

25. *See id.*

26. See Bakker, *supra* note 12, at 174–75.

27. *See id.* at 174–75.

28. See NCAA, Eligibility FAQ: Initial Eligibility, <http://www.ncaa.org/wps/ncaa?ContentID=265> (last visited Mar. 31, 2009).

29. *See id.*

30. See *Hall v. Nat'l Collegiate Athletic Ass'n*, 985 F. Supp. 782, 791 (N.D. Ill. 1997).

31. *Cf. BYERS WITH HAMMER*, *supra* note 9, at 188 (examples of local players who have chosen this path include Kerry Murphy of Alabama and Enrique Davis of Ole Miss, who attended Hargrave Military Academy in Virginia).

D. Initial Eligibility Problems

There are differing standards among the major college conferences for initial eligibility of potential student athletes.³² In addition to the potential problem of differing standards among the differing conferences, the NCAA eligibility standards—though generally embraced—have prompted some school athletic officials to question whether academic fraud or misconduct will arise out of the NCAA requirements.³³ According to Gerald Gurney, the Senior Associate Athletic Director for Academics at the University of Oklahoma, the NCAA's current reform effort "has encouraged academic fraud and dishonesty."³⁴ The idea is that although the admissions standards have been lowered for athletes, the continuing eligibility requirements for athletes rise once they arrive on campus, which could lead to academic fraud in the form of preferential treatment for athletes in school, grade changing, and other academic misconduct.³⁵

E. Likelihood of Continued Initial Eligibility Problems

Although the NCAA's efforts in setting initial eligibility requirements have evolved to a standard that is currently free from legal challenges, it is clear that the eligibility requirements still pose potential problems in the future. Although the NCAA has set eligibility requirements, the various athletic conferences continue to disagree over the standards that they set for themselves.³⁶ In addition, despite the good intentions of the NCAA, the lower standards for admission, changed to avoid more *Cureton*-like litigation, have still resulted in a large number of potential student athletes failing to qualify. In 2007, forty-five players recruited by Southeastern Conference (SEC) schools to play football did not qualify academically, an average of almost four players per school.³⁷ In addition, even if these players qualify and gain admittance to school, there is a danger that these students will be exposed to academic fraud to keep them eligible once in school. As the NCAA has discovered, the current system is the correct one for now. The other methods that the NCAA has used over the years

32. Some conferences prohibit the admission of non-qualifiers and some allow for a limited number of non-qualifiers with qualifying exceptions. See Knight Commission of Intercollegiate Athletics, *Academic Requirements & Eligibility: Tougher Standards or Not* (April 23, 2006), http://www.knightcommission.org/index.php?option=com_content&view=article&id=169%3Aapril-23-2006-academic-requirements-a-eligibility-tougher-standards-or-not&catid=22%3Apress-room&Itemid=21.

33. See John Maher, *Athletes Caught Between Standards: Lower Entrance Levels, Stricter NCAA Criteria Creating Catch-22*, AUSTIN-AM. STATESMAN, Oct. 29, 2007, at C1.

34. *Id.*

35. *See id.*

36. *See id.*

37. Ray Melick, *SEC Academic Policies Setting New Benchmark*, BIRMINGHAM NEWS, Aug. 30, 2007, at C1.

all came with legal challenges and problems. However, despite the standards that the NCAA imposes on all schools, every school may set their own individual admission guidelines.³⁸ The real problem lies in the schools determining their admission guidelines. Although schools are complying with the low threshold set by the NCAA standards, as this Note will explore in the upcoming part, schools are setting admission standards differently for athletes than they are for other students.

II. ADMISSIONS AND ACADEMIC PERFORMANCE OF STUDENT ATHLETES

A. Overview

Admission in colleges and universities across the country is at an all-time high with competition fierce for spots in incoming classes.³⁹ Some parents spend countless dollars on counseling and tutoring for their children, attempting to increase the likelihood of admission to elite schools.⁴⁰ Admissions officers face enormous pressures from all directions including alumni, the local community, and the desire to have a diverse class.⁴¹ However, perhaps the most daunting task of an admissions officer is analyzing the application of a potential student athlete, especially one whose recruitment to attend that school is directly due to athletic ability.

It is common knowledge that the number of students who excel in both academics and athletics is too small for schools to fill rosters with only student athletes that meet usual admissions standards—at least too small to stay competitive on the field.⁴² Studies in 1999 showed that athletes had a 48% better chance of admission than regular students with similar academic achievements in high school and similar standardized test scores.⁴³ In comparison, family of alumni, also known as “legacies,” stood only a 25% better chance of admission and minorities stood only an 18% better chance of admission.⁴⁴ Based on the way this data has changed over the years, it is likely that this gap will continue to rise in the future.⁴⁵

Perhaps the easiest way to see the different standards used for recruited athletes versus other potential students in the admissions process is

38. See Bakker, *supra* note 12, at 163.

39. See JAMES L. SHULMAN & WILLIAM G. BOWEN, THE GAME OF LIFE: COLLEGE SPORTS AND EDUCATIONAL VALUES 29 (2001) (noting that it is common to receive ten applications for every spot in an entering class).

40. See Jon Cohen, *Scrutinizing Special Admissions Policies*, YALE HERALD, Nov. 1, 2002, <http://www.yaleherald.com/article.php?Article=1318>.

41. SHULMAN & BOWEN, *supra* note 39, at 30.

42. See JAMES J. DUDERSTADT, INTERCOLLEGIATE ATHLETICS AND THE AMERICAN UNIVERSITY: A UNIVERSITY PRESIDENT'S PERSPECTIVE 193 (2000).

43. SHULMAN & BOWEN, *supra* note 39, at 41.

44. *Id.*

45. *See id.*

to acknowledge the statistics that show that Division I athletes in “high-profile” sports such as football and basketball at public universities average almost 250 points lower on SAT scores than regular students.⁴⁶ The problem extends to other sports as well, with athletes participating in golf, tennis, swimming, and other “low-profile” sports averaging almost 100 points lower on standardized tests than regular students.⁴⁷

Many of these student athletes gain admission through “special admit” programs where schools accept a group of applicants who do not meet regular admission standards.⁴⁸ In 1991, a survey of admissions processes among Division I schools showed that football and men’s basketball players were six times more likely as other students to receive “special admissions” status.⁴⁹ When including every sport, athletes were still four times more likely to be candidates for special admission.⁵⁰

At San Diego State University, from 2003 to 2006 more than half of the scholarship athletes had lower standardized test scores and high school GPAs than other admitted students.⁵¹ Many of these athletes were classified as “special admits.”⁵² In the San Diego State admissions process, many students with academic credentials that fall far below the average of San Diego State incoming freshman gain admission. These students are classified as “special admits” and are selected, according to the school, through criteria such as socioeconomic background, local residency, special talents, and other factors.⁵³ However, between fall 2003 and spring 2006, San Diego State admitted 248 students classified as “special admits.”⁵⁴ Of these 248, only 105 gained admission intentionally, with the rest admitted through various processing errors.⁵⁵ All of these 105 intentional “special admit” students were athletes.⁵⁶

This noted disparity seems to be common knowledge among most people, as well as among admissions officers themselves. Admissions officers often give half-hearted explanations about the disparity among athletes and the rest of the student body.⁵⁷ One admissions officer argued that

46. *Id.* at 44.

47. *Id.*

48. See Brent Schrottenboer, *Athletes Going to College Get ‘Special’ Treatment; Many Schools Waive Academic Standards*, SAN DIEGO UNION-TRIB., Dec. 10, 2006, at C-1.

49. William C. Rhoden, *Educators Examine Standards for Athletes*, N.Y. TIMES, May 3, 1991, at B14 (noting that 27% of football and men’s basketball players received “special admits” status).

50. *Id.*

51. Brent Schrottenboer, *High SDSU Standards Led to More ‘Specials,’* SAN DIEGO UNION-TRIB., Dec. 10, 2006, at C-12.

52. *Id.*

53. *Id.*

54. *Id.*

55. *Id.*

56. *Id.*

57. See Mark Alesia, *‘Special’ Treatment for Athletes*, INDIANAPOLIS STAR, Sept. 7, 2008, at 1.

athletes only receive admissions preferences if they are strong students.⁵⁸ This argument seems to contradict itself. It would seem logical that the best way to determine whether an applicant is a strong student would be to examine his academic records coming out of high school, including test scores and GPA.

B. Case Studies

The examples of the divide in the admissions process between prospective student athletes and regular students are evident at a variety of schools across the country. North Carolina State basketball player Chris Washburn gained admission with a 470 SAT score, compared with a 1030 SAT average among all incoming freshmen in 1984.⁵⁹ At the University of Minnesota, two football players, Gary Russell and Danny Upchurch, both gained admission between 2002 and 2006 despite standardized test scores well below the average for other Minnesota students.⁶⁰ Kevin Ross of Creighton University gained admission despite scoring in the bottom fifth percentile among all ACT test-takers.⁶¹ A former director of admissions at the University of Kentucky recalled the automatic admission of athletes during his tenure if they simply met the low NCAA initial eligibility standards.⁶² Wide gaps between standardized test scores of athletes and regular students are present at all schools.⁶³

Although some may believe that this problem is only present in large public universities, evidence shows that this problem extends nationwide, from prestigious Ivy League schools, to small private schools and Division III schools that do not even allow for athletic scholarships.⁶⁴ Although some schools do have higher academic standards than other schools, these so-called “academic” schools are also lowering their admissions standards in order to admit athletes.⁶⁵ For example, Georgetown University is one of the most prestigious universities in the country and its students have an

58. *See id.*

59. BYERS WITH HAMMER, *supra* note 9, at 304–05.

60. Dennis Brackin et al., *Academic Standards Lower for U Athletes*, MINNEAPOLIS STAR TRIB., Oct. 1, 2006, at 1A (also noting that almost one-third of the University of Minnesota football players scored a 17 or below on the ACT, more than eight points below the average at Minnesota).

61. *See infra* Part II.E.

62. *See* James Moye, *A Slam Dunk of the Hypocrisy: The Case Against Preferential Higher Education Admission Standards for Student-Athletes in Light of Attacks on Racial Preferences*, 3 VA. J. SPORTS & L. 33, 39–40 (2001).

63. *See id.* at 39 (noting that the SAT score gap at the University of Georgia is over 200, the gap at Notre Dame is over 300, the gap at Georgia Tech is over 400, and the gaps at Wake Forest University and the University of California are even higher).

64. *See* SHULMAN & BOWEN, *supra* note 39, at 44.

65. *See, e.g.*, Anna Dolinsky, *Affirmative Action for Athletes?*, YALE HERALD, Jan. 12, 2001, <http://www.yaleherald.com/archive/xxx1/2001.01.12/sports/p29.html> (discussing differing admissions standards at Yale University).

average SAT score of 1400. However, Georgetown basketball player Marc Egerson carried a 1.33 GPA in high school, even failing physical education.⁶⁶ Despite the poor academic credentials—which were clearly below the usual Georgetown student—Egerson attended preparatory school and Georgetown admitted him.⁶⁷ In addition, statistics show that male athletes at Ivy League schools have a 30%–50% better chance of gaining admission than other students who fall within the same standardized test score range.⁶⁸

This admissions advantage extends to female athletes as well.⁶⁹ Although the problem generally arises in women's college basketball, the gap in standardized test scores extends to other women's sports such as gymnastics, swimming, softball, and others.⁷⁰ The admission rate for female athletes can be more than double the admission rate for the entire freshman class.⁷¹

C. *Why the Lower Admission Standards for Student Athletes?*

The first step in investigating the differing admissions standards for athletes is to pinpoint the reasons why these differing standards exist. A variety of possible reasons, all of which contribute to the increased admission of prospective student athletes who do not have the academic qualifications of their classmates, shed light on the answer to this question.

1. *Recruiting and Coach Involvement*

First, the concept of recruiting plays a large role in the admissions process.⁷² As has often been stated, “recruiting is the lifeblood of any [athletic] program.”⁷³ Collegiate recruiting, while always important to coaches and athletic programs, has recently emerged as an obsession among fans across the country.⁷⁴ Recruiting is a complex system, taking place year-round at high schools, college campuses, and the homes of potential stu-

66. Pete Thamel, *At Georgetown, a Player and His Ignominious Mark*, N.Y. TIMES, March 30, 2007, at D1.

67. *Id.*

68. WILLIAM G. BOWEN & SARAH A. LEVIN, RECLAIMING THE GAME: COLLEGE SPORTS AND EDUCATIONAL VALUES 74 (2003).

69. SHULMAN & BOWEN, *supra* note 39, at 131.

70. *Id.* at 133.

71. See Barbara H. Fried, *Punting Our Future: College Athletics and Admissions*, CHANGE, May/June 2007, at 8, 11.

72. See SHULMAN & BOWEN, *supra* note 39, at 35.

73. Otis Kirk, *Recruiting: Coaching Search Affects Recruiting*, ARK. DEMOCRAT-GAZETTE, Dec. 9, 2007, <http://www.wholehogsports.com/adg/210107>.

74. The success of websites such as Rivals.com, Scout.com, and ESPN.com all contribute to collegiate recruiting becoming a profitable business.

dent athletes.⁷⁵ Schools employ compliance directors to help make sure they do not violate any of the thousands of NCAA recruiting rules, as well as to monitor questionable students who may be fringe applicants for admission.⁷⁶

Recruitment generally plays a substantial role in determining a candidate's chance of admission if that candidate has test scores or a high school GPA that is below the average of other admitted students.⁷⁷ Because a potential student athlete usually attends a school because of recruitment, coaches now play a much larger role in the admissions process.⁷⁸ Many coaches have incentives in their contracts and many are coaching with their jobs in jeopardy.⁷⁹ Although some coaches have referred to admissions offices as "heartbreak house[s],"⁸⁰ statistics show that recruited athletes generally receive preference over other applicants.⁸¹ This increased pressure from coaches and the athletic department on admissions officers to admit recruited athletes is one of the reasons why athletes receive treatment that is more preferential.⁸² The pressure that a coach may put on the admissions process is clear, as evidenced by the recent comments of University of South Carolina coach Steve Spurrier. Spurrier, in response to two of his potential recruits being denied admission, stated, "As long as I'm the coach here, we're going to take guys that qualify [under NCAA standards]. If not, then I have to go somewhere else"⁸³ Two days after his comments, Spurrier said that he was confident that the University of South Carolina would revise the athletic admissions policies.⁸⁴ At the University of Southern California (USC), Athletic Director Mike Garrett once called the office of the provost in the middle of the night to advocate for the admission of a player on behalf of head football coach Pete Carroll.⁸⁵ Why might a call on behalf of Pete Carroll spring an admissions office into action? Perhaps USC's 88–15 record since Carroll's arrival in 2001, with two national championships,⁸⁶ has something to do

75. See FELDMAN, *supra* note 24, at 5.

76. See *id.* at 60–61.

77. See SHULMAN & BOWEN, *supra* note 39, at 36.

78. *Id.* at 39.

79. DUDERSTADT, *supra* note 42, at 191–93.

80. BOWEN & LEVIN, *supra* note 68, at 57.

81. *Id.* at 70 (noting that Ivy League schools admitted 59% of all athletes on coach recruiting lists, while admitting only a total of 16% of all other applicants); see also DUDERSTADT, *supra* note 42, at 193 (noting that most schools have certain minimum standards that must be met for admission, with recruited athletes often failing to even meet these minimums).

82. See SHULMAN & BOWEN, *supra* note 39, at 39.

83. Travis Haney, *USC Plans No Changes to Admission Standards*, POST & COURIER, Aug. 7, 2007, at C1.

84. Spurrier 'Positive' South Carolina to Revise Athlete Admissions Policies, Aug. 9, 2007, <http://sports.espn.go.com/nf/news/story?id=2968224>.

85. FELDMAN, *supra* note 24, at 61.

86. University of Southern California Official Athletic Site, Pete Carroll Profile, http://uscetrojans.cstv.com/sports/m-footbl/mtt/carroll_pete00.html.

with it. Questionable cases at USC, referred to as “Presidentials,” result in many of these athletes gaining admission due to Carroll’s success.⁸⁷ “The more the Trojans won, the more green lights Carroll earned in dicey admissions cases.”⁸⁸

Involvement in the admissions process is something that most coaches do not hide. In discussing a potential recruit during the fall of 2006, then-Ole Miss head football coach Ed Orgeron acknowledged that he would have to try to influence the Ole Miss administration to approve the admission by saying, “We’ll go to bat for him!”⁸⁹

This intertwining between members of the athletic department and the admissions office spills over into every college or university, not simply large Division I schools. The University of North Carolina, a school that often points to its academic excellence, allows the athletic department to recommend up to 140 athletes for admission each year.⁹⁰ This behavior even occurs at the University of Chicago, a Division III school, where “[c]oaches give the admissions office lists of students they are interested in, and [the athletic department tries] to advocate for them.”⁹¹

Where is the line between academic integrity in the admissions process and the desire of a coach, a school, and the fan base to have a successful athletic program? Regardless of where this line is, it is doubtful that one could argue that it is appropriate for a coach or an athletic department to advocate for admission of players they have recruited. The majority of schools have some type of presumptive cap on people that may enroll in a freshman class, especially at private schools; the result is that for every applicant that gets in, another does not. In turn, every instance of a coach or athletic department advocating for a recruited athlete turns into advocating against a faceless third-party applicant.⁹² Although this is not illegal per se, it does raise the concern that non-athletes do not have people advocating on their behalf for their admission.⁹³ It also raises basic fairness questions as to whether it is appropriate for recruited athletes to come in under a “no questions asked” admissions policy, while other students do not.⁹⁴

87. *Id.* at 92.

88. *Id.*

89. *Id.* at 90–91.

90. Shari Feld et al., *Doors Open for Athletes Seeking Entry*, DAILY TAR HEEL, Apr. 23, 2007, <http://www.dailytarheel.com/2.3569/1.163303>.

91. Matt Barnum, Editorial, *More than a Game*, CHICAGO MAROON, Mar. 4, 2008, <http://www.chicagomaroon.com/2008/3/4/more-than-a-game>.

92. *See id.*

93. *See* Jacob Remes, Editorial, *Yale Should Revoke Special Admissions for Athletes*, YALE DAILY NEWS, Jan. 30, 2002, <http://www.yaledailynews.com/articles/view/3095> (noting that members of other sectors of school, such as the history department or singing club, do not get to advocate submitted lists of applicants).

94. *See* DUDERSTADT, *supra* note 42, at 194.

2. *Outside Pressures on Admissions Offices*

Second, admissions officers receive pressure from fans and boosters, as well as the schools themselves, to admit potential student athletes in order to field competitive teams.⁹⁵ In the words of one student, “I think as long as they win, that’s the most important thing for most people.”⁹⁶ Some schools may view fielding competitive teams as a good investment because competitive teams will in turn provide high revenues, increased fundraising, extra finances and resources for other areas, etc.⁹⁷ For example, a school that fields a successful football team that reaches a bowl game receives a revenue in the form of a “bowl payout.”⁹⁸ These payouts range from \$300,000 for minor bowl games to \$17 million for Bowl Championship Series games.⁹⁹

Additionally, there is the important question of whether fans really care about the academic integrity of their institutions. Unless that fan is someone who did not get into a particular school, and they feel as though an athlete with a less impressive academic record got in ahead of them, it is doubtful that a normal fan gives much consideration to the thought. As an influential radio personality in Alabama wondered, “How many Alabama people and how many Auburn people are sitting around tonight going, ‘[that recruit is] gonna be a good student’? . . . I just wanna know that he’s gonna make big-time catches and win SEC football games.”¹⁰⁰ Statistics show that more than half of college students believe that athletes should meet the same admissions requirements as the rest of the students.¹⁰¹ However, those same students have no problem throwing their full support into athletic programs that they claim are tarnished.¹⁰²

Obviously, outside considerations weigh heavily on admissions offices when they make decisions on student athletes. They face pressure from select groups of students who claim that they want athletes to face the same admission standards as the rest of the student body. They face pressure from some parts of university administration to uphold academic integrity. They face pressures from third parties who want to attack the system. However, on the other side of this, they receive enormous pressures from those same groups to admit student athletes at all costs. Students want to be a part of winning athletic programs. Administrators want to see

95. See SHULMAN & BOWEN, *supra* note 39, at 41.

96. Thamel, *supra* note 66 (quoting former Georgetown student body president Nick Murchison).

97. SHULMAN & BOWEN, *supra* note 39, at 41–42.

98. Thomas O’Toole, *\$17M BCS Payout Sounds Great, But . . .*, USA TODAY, Dec. 6, 2006, at C1.

99. *Id.*

100. Audio file: Paul Finebaum Radio Network (Feb. 6, 2008) (on file with author).

101. See MURRAY SPERBER, BEER AND CIRCUS: HOW BIG-TIME COLLEGE SPORTS IS CRIPPLING UNDERGRADUATE EDUCATION 240 (2000).

102. See *id.* at 242–43.

their respective schools garner large amounts of revenue, publicity, and popularity. Most third-party fans just want to see success and have a place to come and show their support on a Saturday afternoon, regardless of how a certain student athlete got into school. It is likely that most fans share the same sentiment of Tom Parker, admissions director at Amherst College: "Here we are with only 400 slots and I'm not just looking for a football player or a linebacker with [test] scores that are respectable, I'm looking for a . . . linebacker who can blitz."¹⁰³ Because of this sentiment, it is easy to see why many prospective athletes gain admission while having lower academic credentials.

3. *Other Considerations*

Finally, some will argue many prospective student athletes are African-Americans who may come from disadvantaged socioeconomic backgrounds.¹⁰⁴ Without these potential athletic scholarships, these young men and women may not have the opportunity to get a quality education at the collegiate level.¹⁰⁵ This may also add to the argument for diversity on college campuses. As one athletic director noted, "If it weren't for our [athletic] programs, you wouldn't see a black face on this campus."¹⁰⁶ While the diversity argument is certainly compelling, others argue that the impact on diversity of admitting African-American athletes is minimal.¹⁰⁷ This argument presupposes that if admissions offices denied the admission of these athletes, other African-American students would fill those slots.¹⁰⁸ In addition, the proportion of black athletes admitted is a much higher percentage than other black students, tending to show that athletes receive preferential treatment anyway.¹⁰⁹

Diversity is certainly something that is important to every college and university. However, there are other ways to achieve diversity outside of athletic admissions. The presence of both race-based affirmative action and an increased push to admit students from underprivileged backgrounds negates the argument that admitting student athletes is the answer to these problems. When a school grants admission to hundreds of student athletes every year, it is doubtful that they are thinking about the great boost in diversity numbers that come from this. It is more likely that schools are thinking about successful athletic programs. The bottom line is that the practice of admitting African-American athletes in colleges or universities

103. See SHULMAN & BOWEN, *supra* note 39, at 29.

104. See *id.* at 52.

105. *Id.*

106. *Id.* at 53.

107. See *id.* at 55.

108. *Id.* at 53.

109. *Id.*

is not a proxy for race-based admissions. Further, race is likely not even on the mind of decision makers when elite athletes receive offers for admission. Whatever their skin color, talented student athletes will receive an advantage regardless of whether they boost racial diversity.

D. Academic Performance of Student Athletes After Admissions

If there is one thing that is clear, it is that the preferential treatment given to athletes in the admissions process does have its consequences. One potential consequence of admitting student athletes with academic credentials below their peers is the risk of academic underperformance by these athletes.

Statistics are clear in showing that athletes are underperforming once they arrive on college campuses.¹¹⁰ Recently, as more athletes got into schools through advantages in the admissions process, their collegiate GPAs began to suffer, with a majority of athletes placing in the bottom quarter of their classes.¹¹¹ In contrast, only 9% of athletes finish in the top third of their class.¹¹² The situation is even worse at “elite” private schools such as Notre Dame and Stanford, as well as at Ivy League schools, where athletes are generally in the bottom 18% or 19% of their class.¹¹³

To further exhibit the correlation between preferential treatment in the admissions process and academic underperformance, a study shows that student athletes generally choose so-called “easy” majors—such as social sciences—rather than the “harder” majors such as math, science, and engineering.¹¹⁴ In addition, athletes in many schools receive academic credit for simply being a member of a team.¹¹⁵ University of Mississippi athletic director Peter Boone commented, “What does it mean if more kids get degrees but they are in basket-weaving?”¹¹⁶ At the University of Nevada, Las Vegas, one-time head basketball coach Jerry Tarkanian took his team on a trip to the South Pacific where the team toured the area and received

110. *See id.* at 62.

111. *Id.*

112. *Id.* at 63.

113. *Id.* at 64 (noting that this is probably because of the high academic achievement of other students at these schools); *see also* William C. Marra, *Adams Addresses GSE on Athletic Recruiting, Student Athletes*, HARVARD CRIMSON, Dec. 2, 2003, <http://www.thecrimson.com/article.aspx?ref=356540>.

114. SHULMAN & BOWEN, *supra* note 39, at 74–76.

115. Stuart Mandel, *Columns: Stuart Mandel*, THE FIFTH DOWN, Aug. 2005, at 3, 3, *available at* <http://www.sportswriters.net/fwaa/fifthdown/fifthdown0805.pdf> (noting that members of the Ohio State University football team receive four credit hours for being a member of the team and three credit hours for taking a class taught by head coach Jim Tressel called “Coaching Football”).

116. Ellen J. Staurowsky & B. David Ridpath, *The Case for a Minimum 2.0 Standard for NCAA Division I Athletes*, 15 J. LEGAL ASPECTS SPORT 113, 115 (2005).

course credit.¹¹⁷ Although the university approved the course, people mockingly coined a term for the class: “Palm Trees 101.”¹¹⁸

One argument for explaining academic underperformance, other than the fact that athletes arrive at college with noticeably lower academic credentials, is that student athletes face the rigors and responsibilities of playing a sport, practicing, and trying to divide time between athletics and academics.¹¹⁹ However, this argument may have little merit as statistics show that an analogous group to student athletes—students who participate in several extracurricular activities—do not underperform at the level of student athletes.¹²⁰ Although this analogy may not account for different types of students who are athletes as compared to those students who are heavily involved on campus, the comparison tends to show that the time that athletes spend with their respective sports does not prove, in itself, to be a clear reason for academic underperformance.¹²¹

Generally, there are few exceptions to the academic underperformance of athletes.¹²² San Diego State had an example of one student who excelled academically despite below-average academic credentials in the admission process: Lynell Hamilton, a “special admit” with below-average test scores when entering school, was eligible to graduate in less than four years with plans to attend graduate school.¹²³

It is not difficult to see the correlation between underperformance at the high school level and underperformance at the college level. Nor is it difficult to see the correlation between the admission of athletes having below-average test scores and high school GPAs and underperformance at the college level. For every success story like Lynell Hamilton and the countless others who find themselves recipients of academic honor roll awards, there are thousands of athletes who underperform. Perhaps this is an unfair stereotype, but there is a reason that this stereotype exists and there is evidence to back it up. What is the price that is paid? One example is Dexter Manley, former professional football player for the Washington Redskins. Manley testified in front of the United States Senate that he could not read, despite being admitted and staying at Oklahoma State University for four years.¹²⁴ To this, Senator Barbara Mikulski commented,

117. BYERS WITH HAMMER *supra* note 9, at 308.

118. *Id.*

119. SHULMAN & BOWEN, *supra* note 39, at 69–70.

120. *Id.* at 70.

121. *Id.*

122. *See id.* at 61.

123. Schrottenboer, *supra* note 51.

124. *Eliminating Illiteracy: Hearings on Examining Proposed Legislation to Coordinate and Strengthen Efforts at the Federal, State, and Local and Private and Non-Profit Sector Levels to Challenge and Eliminate Illiteracy in the United States Before the Subcomm. on Education, Arts and Humanities of the Comm. on Labor and Human Resources*, 101st Cong. 164–72 (1989).

“[Y]ou did not fail, sir—the system failed you.”¹²⁵ By admitting students who are not qualified to handle the workload of an undergraduate institution, the ones that are hurt the most are some of the ones who “benefit.”

E. Attempts at Academic Reform

The NCAA has always been concerned with improving academic success of student athletes. The recently implemented Academic Progress Rate (APR) index, as well as the monitoring of graduation rates of all athletic programs, evidences this. Besides being for the good of the schools in question, litigation could be another reason why the NCAA has chosen to implement these programs.

In *Ross v. Creighton University*, former Creighton basketball star Kevin Ross sued the university for negligence under three different theories: educational malpractice, negligent infliction of emotional distress, and a newly developed cause of action called “negligent admission.”¹²⁶ Ross attended Creighton University on a basketball scholarship despite scoring in the bottom fifth percentile on the ACT, while the average Creighton student scored in the upper 27% of ACT test takers.¹²⁷ The heart of Ross’s claim was that Creighton negligently admitted him and because of this, caused him to have emotional distress since he could not complete the course work at the college level. In addition, Ross claimed that the school committed educational malpractice by not providing him with a meaningful education.

The court quickly dismissed the educational malpractice claim, noting that most courts reject this cause of action.¹²⁸ The court then rejected the negligent admission claim as well, holding that this cause of action might interfere with a university’s admissions decisions.¹²⁹ The court also noted that imposing a tort of negligent admission might cause schools to admit only students who were certain to succeed, thus barring opportunities for marginal students and discouraging diversity.¹³⁰

Although schools will likely not be subject to any liability if a student does not perform well in school, the NCAA chose to implement procedures to encourage above-average academic performance from athletes using the APR.¹³¹ The APR measures how many student athletes in any

125. *Id.* at 170.

126. 957 F.2d 410, 412 (7th Cir. 1992).

127. *Id.* at 411; *see also* BYERS WITH HAMMER, *supra* note 9, at 300 (noting that Ross made a 9 on his ACT and was initially rejected by the admissions office, though eventually admitted after the athletics department appealed and the Vice-President of Creighton granted an academic exception).

128. *Ross*, 957 F.2d at 414.

129. *Id.* at 415.

130. *Id.*

131. *See* NCAA Backgrounder on Academic Reform, <http://www.ncaa.org/wps/ncaa?ContentID=339> (last visited Mar. 31, 2009).

given athletic program meet academic eligibility standards in college and are on track to graduate.¹³² A score of 925 out of 1,000 equals a nearly 60% graduation rate.¹³³ Schools that score below a 925 are subject to scholarship limitations, postseason-play bans, and other recruiting restrictions.¹³⁴ However, ironically, one commentator noted that the key to achieving success on the APR index is to “admit[] students who are qualified to be in that school.”¹³⁵ It does not take much thought to come to this conclusion, yet schools cannot seem to figure it out.

It does appear that the academic reform policies and the implementation of the APR index are working. In 2005, the first year of the APR, 183 of 326 Division I schools had at least one program under the 925 APR cut-off score.¹³⁶ In the third year of the APR index, only 11 Division I-A football programs and 13 Division I basketball programs fell below the 925 cut-off score and only 112 Division I athletic teams total were penalized or warned.¹³⁷ However, commentators warn that these numbers may go up in the future due to a full four-year sample size of data to analyze.¹³⁸

Academic underperformance for student athletes, along with below-average graduation rates, is a cause of concern for schools across the country as well as the NCAA. However, one can argue that these schools can solve the problems themselves by simply improving their admissions processes—i.e., by making it more difficult for athletes with below-average test scores and GPAs to gain admission. Statistics clearly show that there is a correlation between preferential treatment in the admissions process for athletes and their subsequent underperformance in school.¹³⁹ Instead of devising formulas to measure the academic success of athletes at the collegiate level, it may be more advantageous to prevent this from being an issue to begin with by only admitting student athletes who are capable of handling the workload at any certain university.

Recently, the NCAA investigated and issued a report advising colleges and universities to “consider developing criteria for special admission of scholarship athletes.”¹⁴⁰ Some may argue that this is a step in the right direction to alleviate the problems of preferential treatment for athletes in

132. *41 Percent of Bowl Teams Miss Academic Standards*, ESPN, Dec. 5, 2005, <http://sports.espn.go.com/ncf/bowls05/news/story?id=2248992> [hereinafter *Academic Standards*].

133. NCAA, *Defining Academic Reform*, <http://www.ncaa.org/wps/ncaa?ContentID=341> (last visited Mar. 31, 2009).

134. *See Academic Standards*, *supra* note 132.

135. *See id.*

136. Steve Wieberg, *Winning Isn't All Academic*, USA TODAY, Mar. 1, 2005, at C1.

137. David Fox, *NCAA Academic Crackdown Hits Some Hard*, May 3, 2007, <http://collegefootball.rivals.com/content.asp?CID=670080>.

138. *Id.*

139. *See discussion supra* Part II.D.

140. PRESIDENTIAL TASK FORCE ON THE FUTURE OF DIVISION I INTERCOLLEGIATE ATHLETICS, *THE SECOND-CENTURY IMPERATIVES* 34 (2006).

the admissions process. It appears as though several schools and conferences have developed criteria.¹⁴¹ However, there are flaws in these provisions. The University of California Athlete Admissions Policy allows for the “tagging” of athletes who will remain tagged throughout the admissions process.¹⁴² Additionally, the admissions standards at California allow for a set number of admissions for tagged athletes, raising the issue of possible quotas in the admissions process.¹⁴³

F. Kemp v. Ervin and Challenges to Preferential Treatment for Athletes

Currently, litigation is nonexistent in regards to challenges over preferential admissions standards for student athletes. Despite the widely known fact that athletes do receive preferential treatment in admissions, as well as in academics once they gain admission, there is only one notable case challenging this issue. In *Kemp v. Ervin*, the United States District Court for the Northern District of Georgia upheld a finding of violation of a professor’s civil rights due to her termination after being outspoken over preferential treatment for athletes at the University of Georgia.¹⁴⁴ The professor taught in the Division of Developmental Studies, established so that incoming freshman could gain admission, even though the school considered them not ready for collegiate work. In order to move on to the regular college program, a student in the program had to “exit” the developmental program or face dismissal from school. Nine student athletes received “exits” from the developmental program, while the University dismissed one non-athlete with the exact same grades as the nine student athletes. The court acknowledged that the record supported a finding of preferential treatment for athletes in a variety of situations.¹⁴⁵

141. See, e.g., UNIVERSITY OF CALIFORNIA, BERKELEY, ATHLETE ADMISSIONS POLICY [hereinafter CAL ATHLETE ADMISSIONS POLICY], available at http://academic-senate.berkeley.edu/committees/pdf_docs/consolidate/Athletics_Admissions_Policy_2005.pdf; Ivy League Admission Statement, <http://www.ivyleaguesports.com/admission-statement.asp> (last visited Mar. 31, 2009) (noting that admission standards are the same for athletes as they are for all other applicants). However, the declaration by the Ivy League Conference is rebuttable. See Cohen, *supra* note 40 (noting that a high school counselor stated that she had never seen an Ivy League school reject a recruited athlete).

142. See CAL ATHLETE ADMISSIONS POLICY, *supra* note 141, at 5 (noting that tagged athletes will show a different academic profile than other regularly admitted students); see also Cohen, *supra* note 40 (noting that Yale uses a ranking system to group student athletes and are allowed to take certain players from each ranking group).

143. See CAL ATHLETE ADMISSIONS POLICY, *supra* note 141, at 5–8 (noting that athletes are divided into different groups and the university may admit different numbers of student athletes from these groups as long as it does not exceed the maximum number of special admissions); see also discussion *infra* Part IV.

144. 651 F. Supp. 495, 509 (N.D. Ga. 1986).

145. *Id.* at 500.

III. EQUAL PROTECTION CHALLENGES TO DIFFERING ADMISSIONS STANDARDS

The Fourteenth Amendment of the United States Constitution, enacted in 1868, states: “No State shall . . . deny to any person within its jurisdiction the equal protection of the laws.”¹⁴⁶ The enactment of the Fourteenth Amendment came largely from an effort to combat racial discrimination in a post-Civil War era. Over the years since the enactment of the Fourteenth Amendment, the United States Supreme Court has struggled to explain the meaning of the Equal Protection Clause, trying to identify the situations warranting judicial scrutiny and finding equal protection guarantees in a variety of fundamental values.¹⁴⁷

A. History of Equal Protection and Basic Doctrines

A majority of the foundation of the doctrines of equal protection come from the substantive due process case of *United States v. Carolene Products Co.* and a footnote in Justice Harlan Stone’s opinion.¹⁴⁸ In this footnote, Justice Stone recognized that there might be cases where greater judicial scrutiny might be appropriate. The footnote paved the way for the levels of judicial scrutiny given to classes under equal protection challenges. During the early years of equal protection jurisprudence, all classifications outside of racial discrimination warranted “only minimal judicial intervention.”¹⁴⁹ During the years under Chief Justice Earl Warren in the 1960s, the Court began to identify areas appropriate for the use of strict judicial scrutiny, namely the presence of a suspect classification or some kind of impact on fundamental rights or interests.¹⁵⁰ Explicit reference to racial classifications being a suspect class warranting strict judicial scrutiny first appeared in *Korematsu v. United States*.¹⁵¹ Outside of strict scrutiny, which normally applies only to racial classifications, the Court added a heightened scrutiny standard for classifications based on sex, alienage, and illegitimacy.¹⁵²

146. U.S. CONST. amend. XIV, § 1.

147. See KATHLEEN M. SULLIVAN & GERALD GUNTHER, CONSTITUTIONAL LAW 640 (15th ed. 2004).

148. 304 U.S. 144, 153 n.4 (1938) (“There may be narrower scope for operation of the presumption of constitutionality when legislation appears on its face to be within a specific prohibition of the Constitution, such as those of the first ten amendments, which are deemed equally specific when held to be embraced within the Fourteenth.”).

149. See SULLIVAN & GUNTHER, *supra* note 147, at 641.

150. See *id.* at 641–42 (noting that strict judicial scrutiny requires a court to find a compelling governmental interest and a means of achieving that interest in a narrowly tailored manner).

151. 323 U.S. 214, 216 (1944) (affirming the conviction of a Japanese-American who violated a provision excluding Japanese-Americans from being in a certain military area).

152. See SULLIVAN & GUNTHER, *supra* note 147, at 643 (citing the Court’s introduction of intermediate scrutiny in *Craig v. Boren*, 429 U.S. 190 (1976)).

There have been arguments against the differing levels of scrutiny throughout the years. During the 1960s, many perceived the possibility that equal protection might spread to more areas, such as housing and education.¹⁵³ “There is only one Equal Protection Clause.”¹⁵⁴ However, the view of spreading the Equal Protection Clause to include education remains un-adopted.¹⁵⁵

Additionally, the Fourteenth Amendment explicitly refers to the “State.”¹⁵⁶ In interpreting this language, the Court has held that the Constitution does not forbid discriminatory conduct by private parties.¹⁵⁷ In applying this rationale to private colleges and universities, which do not receive funding by the States, courts generally do not consider private institutions state actors that fall under the mandates of the Fourteenth Amendment.¹⁵⁸ Because of this reluctance to apply the Fourteenth Amendment to private parties, it is unlikely that any challenge to admissions standards set by private institutions merits discussion. Generally, the ability to challenge admissions standards of private institutions is nonexistent. However, it is worthwhile to note that despite the lack of published admissions standards for private schools, as opposed to public schools that have open admissions, to say that private schools hold student athletes to the same standards as other students is an untrue statement.¹⁵⁹ For example, the Ivy League has a bottom line for student athletes that is much lower than the bottom line for the rest of the student body.¹⁶⁰ It uses an academic index number for student athletes, with the goal being to fall within one standard deviation of the rest of the student body.¹⁶¹

For purposes of the rest of this Note, the author concedes that the discussion of challenges to the current admissions system would not apply to private institutions. Though much of the evidence specifically discusses admissions standards at private institutions, any potential challenges apply only to public institutions that receive state funding.

B. Guiding Principles for Admissions: Academic Freedom Doctrine

The First Amendment-based doctrine of academic freedom is very important to the issue of admissions at colleges and universities. It serves as a guideline for any attack on the admissions system and any other issue

153. See SULLIVAN & GUNTHER, *supra* note 147, at 642.

154. Craig v. Boren, 429 U.S. 190, 211 (Stevens, J., concurring).

155. See generally Sweezy v. New Hampshire, 354 U.S. 234 (1957).

156. U.S. CONST. amend. XIV, § 1.

157. See Shelley v. Kraemer, 334 U.S. 1, 13 (1948).

158. See, e.g., Berrios v. Inter Am. Univ., 535 F.2d 1330, 1332 (1st Cir. 1976).

159. See Rhoden, *supra* note 49.

160. See Ginia Sweeney, *No More Special Standards for Athletes*, COLUM. SPECTATOR, Mar. 25, 2007, <http://www.columbiaspectator.com/2007/03/26/no-more-special-standards-athletes>.

161. See *id.*

involving higher education. The case of *Sweezy v. New Hampshire*¹⁶² largely established the doctrine of academic freedom in 1957.

In *Sweezy*, the Court reversed a conviction of a professor who taught at the University of New Hampshire.¹⁶³ The conviction arose from the professor's refusal to answer questions, on two separate occasions in front of the Attorney General of New Hampshire, regarding knowledge of the Progressive Party and subjects of class lectures thought to involve communism. The Court reversed the conviction, citing First Amendment protections of academic freedom and political expression.¹⁶⁴ The provision most cited as the guideline for academic freedom came in the concurrence, stating that there are four freedoms essential to a university: "to determine for itself on academic grounds who may teach, what may be taught, how it shall be taught, and who may be admitted to study."¹⁶⁵ The Court reaffirmed its views on academic freedom as a First Amendment right ten years later.¹⁶⁶ However, despite this deference given to academic institutions in their decision making, standards must still be constitutionally permissible under the Fourteenth Amendment.¹⁶⁷

C. Early Admissions Cases: Affirmative Action, Bakke, and Racial Quotas

The Court first saw challenges to preferential admissions programs in higher education in the early 1970s with *DeFunis v. Odegaard*.¹⁶⁸ A rejected law school applicant sued the University of Washington School of Law arguing discrimination on the basis of his race. Although the Court did not directly address the racial issue, this opened the door for further challenges on race-based admissions policies, specifically *Regents of the University of California v. Bakke*.¹⁶⁹

In 1968, the University of California–Davis began operating its medical school, and within the first two years of its existence, the faculty implemented "a special admissions program to increase the representation of 'disadvantaged' students in each . . . class . . . consist[ing] of a separate admissions system operating in coordination with the regular admissions process."¹⁷⁰ The program set differing guidelines for those seeking admission as "disadvantaged students." In addition, the faculty also set aside a

162. 354 U.S. 234 (1957).

163. *Id.* at 255.

164. *Id.* at 250.

165. *Id.* at 263 (Frankfurter, J., concurring) (quoting CONFERENCE OF REPRESENTATIVES OF UNIV. OF CAPE TOWN & UNIV. OF WITWATERSRAND, *THE OPEN UNIVERSITIES IN SOUTH AFRICA* 11 (1957)).

166. See *Keyishian v. Bd. of Regents*, 385 U.S. 589 (1967).

167. See *Martin v. Helstad*, 578 F. Supp. 1473, 1482 (W.D. Wis. 1983).

168. 416 U.S. 312 (1974).

169. 438 U.S. 265 (1978).

170. *Id.* at 272–73.

special allotment of spots in the incoming classes for these students, consisting of sixteen reserved spots. Generally, most of the African-American and Hispanic students admitted came from this special admissions program, along with a few Asian students. Allan Bakke, a white male, applied to the medical school on two separate occasions, receiving rejections each time despite having a higher GPA, higher medical entrance exam scores, and higher cumulative benchmark scores than almost all of the specially admitted students. Bakke filed suit against the school alleging that the admissions program denied him of his rights under the Equal Protection Clause of the Fourteenth Amendment and seeking admission to the school.

Although the lower court found that the special admissions program acted as a racial quota, the court denied Bakke's admission and the California Supreme Court affirmed. After granting certiorari, the United States Supreme Court reversed the decision, holding that the special admissions program, specifically the reservation of an allotment of seats in each incoming medical school class for certain individuals of a particular class of persons, acted as a racial quota and deprived Bakke of his equal protection rights.¹⁷¹ Despite citing the doctrine of academic freedom, the Court held that schools may not infringe on equal protection rights regardless of the presence of academic freedom.¹⁷²

D. Aftermath of Bakke: 1978–2003

Following the decision in *Bakke*, courts around the country began using this precedent in deciding admissions cases—most of them based on race.¹⁷³ Several issues began to arise, many of them forcing the courts to decide the issues without addressing the actual admissions processes themselves.¹⁷⁴ The confusing question facing courts was whether the *Bakke* opinion written by Justice Lewis Powell was binding in light of the split in the Court on different issues. The Court of Appeals for the Fifth Circuit voiced this concern in the late 1990s in *Hopwood v. Texas (Hopwood II)*.¹⁷⁵ The Fifth Circuit would again hear this case in 2000 and would modify its ruling (*Hopwood III*).¹⁷⁶

171. *Id.* at 319–20.

172. *See id.*

173. *See, e.g., Phelps v. Washburn Univ.*, 634 F. Supp. 556, 566 (D. Kan. 1986); *Martin v. Helstad*, 578 F. Supp. 1473, 1482 (W.D. Wis. 1983).

174. *See Hopwood v. Texas (Hopwood III)*, 236 F.3d 256, 272 (5th Cir. 2000) (holding that applicants would not have had a reasonable chance of admission even in a racially neutral system); *DiLeo v. Bd. of Regents*, 590 P.2d 486, 489 (Colo. 1978) (holding that a student lacked standing to challenge constitutionality of an admissions program).

175. 78 F.3d 932 (5th Cir. 1996).

176. *See Hopwood III*, 236 F.3d 256.

In *Hopwood II*, the Fifth Circuit chose not to adopt the opinion of Justice Powell from *Bakke* and instead held that the use of racial factors were unconstitutional for achieving student body diversity.¹⁷⁷ The case involved a challenge to the law school admissions standards at the University of Texas School of Law. On remand from that holding, the district court entered an injunction forbidding the law school from using racial preferences for admissions. In reversing the decision of the district court, the court in *Hopwood III* held that entering an injunction preventing use of all racial preferences in admissions conflicted with *Bakke*.¹⁷⁸

Other courts besides the Fifth Circuit also struggled with what weight to give the *Bakke* opinion. The Court of Appeals for the Eleventh Circuit addressed this issue in *Johnson v. Board of Regents*.¹⁷⁹ The case involved the rejection of white female applicants to the University of Georgia. The applicants sued based on racial discrimination, and the district court held that the Georgia admissions policy did not provide equal protection. In doing so, the district court opined that the Powell opinion from *Bakke* did not carry binding precedent.¹⁸⁰ Under the admissions policy—which used a numerical admissions index—all minority applicants received a “bonus” for diversity purposes. In affirming the lower court’s decision, the Eleventh Circuit questioned the binding precedent value of *Bakke*,¹⁸¹ but essentially held the admissions policy unconstitutional for its use of an arbitrary and mechanical system of awarding points to minority applicants.¹⁸²

E. The Modern Supreme Court Speaks on Affirmative Action in Admissions: Gratz and Grutter

The United States Supreme Court, after seeing some of the issues surrounding interpretation of the *Bakke* decision, decided to address these problems in 2003 with a pair of affirmative action in admissions cases: *Gratz v. Bollinger*¹⁸³ and *Grutter v. Bollinger*.¹⁸⁴ Both of these cases arose from admissions policies at the University of Michigan.

The two cases involved two separate admissions policies, one for the undergraduate school (*Gratz*) and one for the law school (*Grutter*). The Court finally affirmed the entirety of Justice Powell’s *Bakke* opinion—including the section where Powell stated that the use of race is constitutional for the compelling state interest of attaining a diverse student body—

177. See *Hopwood II*, 78 F.3d at 947–48.

178. *Hopwood III*, 236 F.3d at 277.

179. 263 F.3d 1234 (11th Cir. 2001).

180. *Id.* at 1239 (noting the district court’s reasoning).

181. See *id.* at 1248.

182. See *id.* at 1237 (noting that an arbitrary numerical bonus violates equal protection).

183. 539 U.S. 244 (2003).

184. 539 U.S. 306 (2003).

clearing up years of differing opinions on the issue.¹⁸⁵ The Court held that the use of race is constitutional in admissions decisions as long as it is for the purpose of diversity, though a school cannot use race as a factor in order to assure itself of some number of individuals from a certain group.¹⁸⁶ Additionally, the Court held that the use of a racially based quota system is unconstitutional in that this separates applicants from each other.¹⁸⁷ The Court did endorse a plus system for weighing the qualifications of applicants, with certain characteristics being an advantage in the admissions process.¹⁸⁸ The Court found that the admissions standards for the law school were constitutional and did not implement racial quotas.¹⁸⁹ The Court pointed to testimony from the director of admissions for the law school who said that there were not a set number of spots for minorities, and race was only one of the factors used in the decision process.¹⁹⁰

Using some of its new holdings, the Court did choose to strike down the admissions standards for the undergraduate school in *Gratz*.¹⁹¹ The difference between the two cases, the Court noted, was the use of a system in *Gratz* that awarded applicants points to determine admissions status.¹⁹² Specifically, minority applicants received an automatic twenty-point bonus in this calculation. The Court held that the use of this twenty-point bonus—effectively one-fifth of the points needed for admission—was not narrowly tailored to achieve diversity.¹⁹³ The Court also noted that the automatic distribution of the twenty-point bonus acted as a decisive factor for nearly all minority applicants, even those who did not meet or who barely met minimum academic qualifications, whereas other talents or factors received much lower point consideration.¹⁹⁴

After the Court's decisions in *Gratz* and *Grutter*, the landscape of permissibility in affirmative action admissions programs became clearer. The use of race as a factor for diversity satisfies a compelling state interest and is constitutional.¹⁹⁵ On the other hand, racial quotas and arbitrarily based points systems are not constitutional.¹⁹⁶ The Court also endorsed allowing certain characteristics to be plus factors, though it did not give a bright dividing line between the uses of these plus factors, racial quotas, and points-based systems.

185. *Grutter*, 539 U.S. at 324–25.

186. *Id.* at 329–30.

187. *Id.* at 334.

188. *See id.*

189. *See id.* at 335–38.

190. *Id.* at 318.

191. *See Gratz v. Bollinger*, 539 U.S. 244, 275–76 (2003).

192. *See id.* at 255 (noting that, on a 150-point scale, 100 points guaranteed admission).

193. *Id.* at 270.

194. *Id.* at 272–73.

195. *See Grutter*, 539 U.S. at 329–30.

196. *See Gratz*, 539 U.S. at 270.

IV. LEGAL ARGUMENTS FOR AND AGAINST PREFERENTIAL ADMISSIONS TREATMENT FOR ATHLETES

A. Extending Equal Protection Past Race to Athletics

The most difficult hurdle to overcome for any potential challenge to preferential admissions standards for athletes is overcoming the probable reluctance of the Supreme Court to adopt anything more than minimal judicial scrutiny for those who may be affected. As previously discussed, the Court's interpretation of the Fourteenth Amendment has evolved over the years. With the Court generally applying strict judicial scrutiny to racial classifications only, what are the likely chances that classifications based on athletics would warrant anything above minimal judicial scrutiny? Although the Court's progression of adding new classes of persons to the middle ground of intermediate scrutiny has included such classifications as gender, alienage, and illegitimacy, there has yet to be any indication that athletics will make the progression past minimal judicial scrutiny.¹⁹⁷ Before the 2003 admissions decisions, commentators wondered whether athletes would continue as a class receiving preferential treatment if the Supreme Court opted to eliminate affirmative action in admissions.¹⁹⁸ Although the Court upheld affirmative action in admissions, there are still those who recognize the preferential admissions treatment for athletes.

Perhaps the strongest argument that a potential applicant has against preferential admissions standards for athletes is to use racial quotas and points-based admissions systems as the basis for a claim. The definition of a quota is a program that "impose[s] a fixed number or percentage which must be attained, or which cannot be exceeded."¹⁹⁹ Several different situations may qualify as a quota.²⁰⁰ The existence of similar types of class allotment is present at both public and private institutions. Although applicants at private institutions do not have an argument due to the lack of being a state actor, applicants at public institutions do have a potential claim.

Examples of various forms of setting aside spots in an incoming class for athletes are present at all types of schools. Swarthmore College impos-

197. See *Grutter*, 539 U.S. at 368 (Thomas, J., concurring in part and dissenting in part).

198. See Mike Fish, *Why Should Athletes Get Special Admissions Treatment?*, SPORTS ILLUSTRATED, Feb. 3, 2003, http://sportsillustrated.cnn.com/inside_game/mike_fish/news/2003/02/03/straight_shooting/.

199. *Grutter*, 539 U.S. at 335 (quoting *Local 28 of Sheet Metal Workers' Int'l Ass'n v. EEOC*, 478 U.S. 421, 495 (1986) (O'Connor, J., concurring in part and dissenting in part)).

200. See *Gratz*, 539 U.S. at 255 (awarding "bonus" points to minority applicants in a points-based admissions system); *Regents of Univ. of Cal. v. Bakke*, 438 U.S. 265, 275 (1978) (setting aside a certain number of spots in an incoming class); *Johnson v. Bd. of Regents*, 263 F.3d 1234, 1240-42 (11th Cir. 2001) (awarding points to minority applicants in a points-based admissions system).

es a 15% cap on recruited athletes that it meets yearly.²⁰¹ Yale uses a “band” system, which allows a coach to take certain players from each band who will gain admission.²⁰² An admissions officer from Yale remarked, “[W]e need to field the teams. We always admit 30 football players, and we are bound to.”²⁰³ The NCAA allows for a certain number of recruited athletes for each separate sport, a number that schools meet yearly.²⁰⁴ At the University of California, incoming student athletes fall into four categories, A through D, according to their status in comparison to standard admissions requirements.²⁰⁵ An applicant from category A meets minimum admissions requirements, whereas an applicant from category D only meets minimum NCAA initial eligibility requirements.²⁰⁶ California admits certain numbers of student athletes who fall into each group.²⁰⁷ By doing this, they effectively allocate a certain number of spots in an incoming class to athletes, specifically athletes with poor academic records who do not even meet California minimum admissions requirements. In examining this issue, there is evidence that some schools are identifying the problem and taking action. Swarthmore College eliminated its football program because to field a team of sixty men, it would effectively set aside 10% of its classes to football players.²⁰⁸

What is most surprising is that underlying the racial issues at stake in the 2003 admissions cases, there was evidence of athletic preferences. The bonus-point system at issue in *Gratz*, which the Court pinpointed as a form of quota that arbitrarily awarded points to individual applicants, included athletics as well.²⁰⁹ In addition to receiving twenty points for being a minority, applicants might alternatively, or additionally, garner twenty points for being a recruited athlete.²¹⁰

With the explicit elimination of racial quotas from admissions standards in higher education, it is interesting that athletic quotas remain. “To a certain extent, [athletic departments and admission offices] get a quota of scholarships to award. And they get to designate who gets them, whether or not they qualify for admissions.”²¹¹ It is true that judicial scrutiny is at its highest point with racial classifications. It is also true that there has

201. See Swarthmore Coll., *Board Reaffirms Athletics Changes*, BULLETIN, Mar. 2001, <http://www.swarthmore.edu/Admin/publications/bulletin/mar01/collection.html>.

202. See Cohen, *supra* note 40.

203. *Id.*

204. *Cf. id.*

205. See CAL ATHLETE ADMISSIONS POLICY, *supra* note 141.

206. *See id.* at 7–8.

207. *See id.*

208. See Welch Suggs, *Swarthmore Kicks Football Out of the College*, CHRON. HIGHER EDUC., Dec. 15, 2000, at A55.

209. *Gratz v. Bollinger*, 539 U.S. 244, 256 (2003).

210. *See Fish*, *supra* note 198.

211. *Id.*

been no effort to increase the scrutiny of athletic classifications. However, just as the Court raised scrutiny for other classifications besides race, it is open to do so with athletic classifications if it wishes.

Perhaps one reason for the lack of any judicial movement in this area is the lack of any cases on the subject. Without the existence of any claims brought into the court system, the opportunity for judicial movement is not possible. True, potential claimants face numerous hurdles in bringing a claim under this system, especially under the current jurisprudence on equal protection and academic freedom. However, this is an issue that warrants consideration, and something that courts will have to wrestle with due to the almost blatant use of preferential standards.

As one author opined, it is unfortunate that there is constant litigation on the issue of race, as opposed to other preferential classifications like athletics.²¹² Granted, race is a protected class that evokes heated debates and high emotions. However, many purists who oppose affirmative action in regards to race argue that these systems have lowered the standards of colleges and universities across the country.²¹³ Where is the same opposition to athletic admissions, which arguably does the same thing? If anything, athletics offsets this by generating huge amounts of revenue for the institutions. Is this something that gives it a free pass? Racial affirmative action serves the more important interest of increasing diversity and remedying past discrimination, yet rejected applicants have challenged racial admissions standards for years. What is even more confusing is that preferential admissions standards are present only in the United States.²¹⁴ In other countries, athletics is not even a factor used with admissions.²¹⁵

So what are the arguments in favor of preferential admissions standards for athletes? Aside from the fact that athletics generates large amounts of revenue and is an excellent marketing and publicity tool, some argue that athletics is a gateway to give those who come from underprivileged backgrounds an opportunity to get a college education.²¹⁶ Others argue that athletic admissions are, indirectly, a good form of increasing diversity of a student body.²¹⁷ Others believe that admissions should reward other forms of excellence besides academic achievement.²¹⁸ However, why do athletes have a higher degree of admissions success than other non-athletes who may share the same underprivileged background or the same race? Why do athletes have a higher degree of admissions success

212. *Id.*

213. *Id.*

214. *See Sweeney, supra* note 160.

215. *See id.*

216. *See supra* notes 104–05 and accompanying text.

217. *See supra* notes 106–09 and accompanying text.

218. *See generally* Fried, *supra* note 71.

than non-athletes who achieve some sort of other excellence besides in the classroom?

Another argument is that large public colleges and universities may claim that they have no limits on freshman enrollment, and that rejected applicants lack a valid claim because they would not gain admission even without preferential admissions standards for athletes. This argument lacks merit. Every school must cap enrollment at some point, if for nothing else than their own academic integrity, ability to house a certain number of students, ability to pay enough teachers to instruct these students, and to maintain the correct resources to adequately prepare each student. Additionally, this claim seems to be irrelevant if quotas or points-based systems are used.

The most compelling argument is that athletics is just another factor used in the admissions process, weighed evenly with all others, and athletic talent may exist as a plus factor in admissions.²¹⁹ However, as this Note shows, athletics receives more weight than almost any other factor. As one author summarizes, it would be “a major triumph [for other extracurricular activities] even to get close to the point where athletic skill [is].”²²⁰ What is the line between athletics being a plus factor and athletics being the single characteristic that warrants admission? This line is seemingly invisible, and difficult to ascertain. Admissions officers may argue that athletes do not receive an over-the-top boost with athletics. However, it is difficult to argue with the evidence that athletics seems to be an overriding factor in the process.

Another possible wrinkle to this issue of setting aside certain spots for student athletes is the fact that, in addition to every non-athlete, those with disabilities do not even warrant consideration in this area.²²¹ By setting aside a certain number of seats in an incoming class for student athletes, this is effectively eliminating those spots from those with disabilities, who fail to warrant consideration for obvious reasons.²²²

The bottom line is that this situation is almost directly analogous to the systems eliminated in *Bakke* and *Gratz*. In those cases, where a majority of minority applicants gained admission, and where the single characteristic of race became the crucial balancing point, athletes seemingly must fail to meet low NCAA standards for individual schools to reject them. It is arguable that athletic talent alone is the single characteristic for their admission.²²³

219. See *id.* at 11.

220. See *id.*

221. See *id.* at 15.

222. See *id.* This issue may be more suited to an Americans with Disability Act argument, and is therefore outside the scope of this Note. However, this is an issue certainly worth exploring.

223. Cf. *Gratz v. Bollinger*, 539 U.S. 244, 271 (2003) (noting that Justice Powell’s constitutional admission program described in *Bakke* “did not contemplate” a single characteristic being an overrid-

B. Potential Effects and Backlash from any Judicial Action

As of now, there has been little to no litigation in this area. The reason for this is likely due to the Court's interpretation of the Fourteenth Amendment and the probable minimal scrutiny afforded to athletic classifications. However, one must remember that the Court declined to adopt anything more than minimal scrutiny for any classification other than race for many years.²²⁴ Other areas now warrant heightened scrutiny.²²⁵

Hypothetically speaking, how would the world change if the Court decided to increase judicial scrutiny for athletic classifications to a strict scrutiny level on par with racial classifications? Under strict scrutiny standards, a classification must serve a compelling governmental interest and be narrowly tailored to achieve that interest. What arguments could a school make that preferential admissions programs serve a compelling governmental interest? Likely, it would be arguments mentioned above, that it serves to increase diversity and admission of applicants from disadvantaged academic backgrounds. Alternatively, a state may argue academic freedom as a compelling governmental interest.

However, to survive strict scrutiny, a compelling governmental interest may fall into the definition of a necessary governmental interest.²²⁶ Is it necessary to use preferential admissions standards for student athletes to serve the goals of diversity and admission for those with underprivileged backgrounds? Likely, the answer is no. There are other ways to achieve these goals outside of preferences in admissions. Additionally, academic freedom, despite being a First Amendment right, is still subject to the Fourteenth Amendment. Therefore, this argument fails also.

Even if a classification falls under a compelling governmental interest, it must be narrowly tailored to achieve that interest. A system of using racial quota-type systems that separates applicants due to their singular characteristics does not fit this definition of narrow tailoring.²²⁷ A system that uses mechanical weighting systems or quotas, as a majority of athletic admissions standards do, is not narrowly tailored.

Outside of strict scrutiny there is intermediate scrutiny, which looks for classifications to serve important governmental objectives that are substantially related to achievement of those objectives.²²⁸ This is a more difficult question. Is there some sort of important objective met in having preferential admissions standards for athletes? If so, is this admissions system substantially related to this important objective? The author cannot

ing and automatic factor for admission).

224. See SULLIVAN & GUNTHER, *supra* note 147, at 641.

225. See *id.* at 642.

226. See *id.* at 643.

227. See *Grutter v. Bollinger*, 539 U.S. 306, 334 (2003).

228. See SULLIVAN & GUNTHER, *supra* note 147, at 643.

think of any argument that a school may raise as an important objective for having preferential admissions standards for athletes. Might they argue that successful athletics programs raises revenue, which helps the institution as a whole? Might they argue that positive marketing and publicity helps to strengthen enrollment and interest in the school? It is doubtful that any court would consider these important objectives.

Therefore, if the Court, in our hypothetical, chose to increase the judicial scrutiny afforded to athletic admissions classifications, there is a good chance that these admissions standards would disappear. At the least there would be a tweaking of admissions standards to eliminate any quota-type system, any mechanical weighing of singular characteristics, and anything in regards to a plus factor that may give athletics a bigger advantage than other characteristics.

CONCLUSION

“Athletic recruiting is the biggest form of affirmative action in American higher education”²²⁹ Somehow, lost in the outrage of racial preferences and racial discrimination in all aspects of life, not just race-based admissions programs, the exact same admissions preferences and discriminations in athletic admissions go by largely unaffected, though not unnoticed.

“I’m waiting for some father or mother who is a lawyer to take some institution to court on this (because their child wasn’t admitted despite having much higher test scores).”²³⁰ In *Grutter*, Justice Sandra Day O’Connor mentioned the lack of a need for use of racial preferences in twenty-five years.²³¹ How much longer will it be “necessary” to use athletic preferences? One would imagine that it would continue to be “necessary” as long as the NCAA continues to be one of the most profitable businesses in the world, with colleges and universities reaping the financial benefits of their athletic program. In other words, it will always be “necessary.” The only way to see change in the process will be for claimants to come forward and challenge the system. There is room for challenge with the evidence of the use of quota-type systems for athletic admissions and the invisible line between granting a plus factor and allowing a factor to become the single characteristic used for admission. The Supreme Court is free to interpret the Fourteenth Amendment in any manner, and challenges may move them to reconsider its current stance on

229. Edward B. Fiske, *Gaining Admission: Athletes Win Preference*, N.Y. TIMES, Jan. 7, 2001, § 4A, at 22.

230. Ed Sherman & Barry Temkin, *An Uneven Playing Field: Athletes Win in Admissions Double Standard*, CHI. TRIB., Nov. 29, 1993, at N1 (quoting an admissions official at a Midwest school).

231. See *Grutter*, 539 U.S. at 343 (O’Connor, J., concurring).

athletic admissions. Until then, it is unlikely that this problem will correct itself. In the meantime, non-athlete applicants will continue to feel the effects of displacement. For every spot in an incoming freshman class taken by a student athlete, another prospective student, likely with similar or even more impressive academic records, will receive a rejection letter.

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