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THE BLACK ATHLETES’ EQUAL PROTECTION CASE AGAINST THE NCAA’S NEW ACADEMIC STANDARDS*

Ray Yasser†

I. BACKGROUND

In January 1983, the National Collegiate Athletic Association (NCAA) adopted new academic standards for students participating in intercollegiate sports in the top competitive division (Division I). Effective August 1, 1986, freshman athletes at Division I institutions are eligible to play only if they have:

1. A high school cumulative grade point average of at least 2.0 on a 4.0 scale;
2. A 2.0 cumulative grade point average in a specified high school curriculum consisting of eleven academic courses, including at least three in English, two in Mathematics, two in Social Science, and two in Natural or Physical Science (including at least one laboratory class if available at the school);
3. A combined score of at least 700 on the Scholastic Aptitude Test (SAT) or 15 on the American College Test (ACT).¹

Students who have an overall cumulative grade point average of 2.0 or above but who fail to meet the other standards can receive athletic scholarships but may not play or practice with a team during their freshman year. Moreover, such a student uses up one year of eligibility during that freshman year.³

These new “get tough” standards were adopted at the January 1983 NCAA annual meeting following heated debate.⁵ The higher

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*I would like to express appreciation to my research assistant, Jim Lammendola, who contributed substantially to the text and made these footnotes possible.
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1. 1983-84 Manual of the NCAA, Bylaws 5-1-(G) at 79.
2. Id.
standards proposal was introduced by L. Donald Shields, president of Southern Methodist University. Some twenty college presidents or chancellors spoke in favor of adopting the standards. The proponents pointed out that the existing standards were being abused by both high schools and colleges. It was contended that high schools graduated athletes unprepared for college work, while colleges restructured their curricula in order to keep athletes eligible. These abuses had in turn led to an intolerable degree of illiteracy among college athletes, many of whom never graduated from college. The backers of the proposal viewed the vote as a referendum on the integrity of both the NCAA and higher education generally. The dramatic denouement for the reform advocates occurred when Joe Paterno, the well-known and generally respected football coach of Penn State, the reigning national champion, addressed the meeting to express support for the proposal and to rebut the charges of its opponents that the standards are racially discriminatory.

The new rules were opposed by several black college presidents who contended that the rules are a racially motivated attempt to reduce the number of black athletes competing at the Division I level. Jesse N. Stone, Jr., president of Southern University, was particularly incensed at the inclusion of the standardized test score cutoff, pointing out that the use of such tests has a disproportionately negative impact on black students. Edward B. Fort, chancellor at North Carolina A & T University, charged that the test does not predict success in college. In the end, the measures were approved by a hand vote of the Division I members.

4. It is fair to say that Paterno's remarks constituted the debate's most theatrical moment. Paterno's Nittany Lions had just won the National Championship:

    It isn't fair for us to take unprepared students into our universities. . . . This isn't a race problem. . . . For the past 15 years we have had a race problem, however. . . . We've told black kids who bounce balls, run around tracks and catch touchdown passes that that is an end unto itself. We've raped a whole generation of black students. We can't afford to do it again.

Crowl, supra note 3, at 20, col. 3.

5. Stone later added that "underlying much of this . . . is the desire to reduce the number of black faces that we see dominating collegiate athletics. . . . I can say from experience and substantial authority that this move is racist inspired." Jarrett, Why Blacks Fought the NCAA, Chicago Tribune, Jan. 16, 1983, § 2, at 7.

6. Crowl, supra note 3.
Division I consists of 277 institutions. Seventeen of these institutions are predominantly black. Immediately following the meeting, black college presidents caucused to consider possible courses of action. The alternatives discussed included dropping out of the NCAA, and filing a lawsuit to prevent the rules from going into effect. This paper explores one potential cause of action—an equal protection challenge to the new rules by black athletes.

It should be noted that in the months following the adoption of the new rules, statistical data emerged outlining the "effects that may not have been realized before this decision was reached."
Gregory R. Anrig, the President of Educational Testing Service (ETS), which develops and administers the SAT, stated opposition to the use of a fixed cutoff. Anrig revealed that had the regulations been in effect in 1981, fifty-one percent of all black male freshmen and sixty percent of all black female freshmen would not have qualified. Anrig stated that the use of the cutoff affected minorities "disproportionately." Figures compiled by the Big Eight Conference indicated that the new rules would have an even greater disproportionate impact on blacks than was revealed by Mr. Anrig. The Big Eight report indicated that more than sixty percent of black athletes at member institutions would have been ineligible under the new rules, with the figure going as high as eighty percent at some institutions. At the same institutions, the rules would operate to bar only between ten and twenty-seven percent of the white athletes, according to the Big Eight study.

II. THE EQUAL PROTECTION CHALLENGE: MEETING THE STATE ACTION REQUIREMENT

A. Basis in Constitutional Theory

In American constitutional theory, the distinction between governmental action and nongovernmental action is crucial. Nearly all of the constitution's guarantees of individual freedom, including the right to the enjoyment of the equal protection of the laws, protect individuals from governmental action. Although the acts of individuals may infringe upon the rights of other individuals, such private action does not generally invoke the restraints of the Constitution. Only action of the government is constrained by those portions of the Constitution which define individual freedom. The language and structure of the Constitution make this abundantly clear. Moreover, judicial interpretations of the language and struc-
ture of the Constitution make this point virtually unassailable. Thus, a person who alleges a denial of constitutionally protected rights must at the outset demonstrate that it is indeed the action of the government that is being challenged. In fact, the merits of the claim will not be reached unless it can be shown that, somehow, the government has acted. This is the so-called "state action" requirement.

In some cases, it is very easy to see the governmental action. For example, a person challenging the constitutionality of a state statute under the equal protection clause will have little difficulty meeting the state action requirement. Clearly, the state acts when it passes a statute. Similarly, in some cases, it will be very easy to conclude that the state is really not involved in the controversy. Purely private disputes do not ordinarily raise constitutional issues no matter how egregious the private act. The difficulty arises in cases where state action is not apparent but where the state is nonetheless somehow involved. The boundaries separating the acts of the government from the acts of the individual are not always so clear in a society where government plays such a pervasive role.

When the acts of a private entity are the subject of a controversy, the state action inquiry involves a determination as to "whether there is a sufficiently close nexus between the State and the challenged action of the [private] entity so that the action of the latter may be fairly treated as that of the State itself."14 The state must have "significantly involved itself with invidious discriminations"15 when there has been discrimination by a private entity for a finding of state action. Additionally, under the public function doctrine, state action may be found when a private entity exercises "powers traditionally exclusively reserved to the State."16 The NCAA is "private" in the sense that it is not a formal creature of the state. The state, however, is "involved" with NCAA operations. The question is whether the NCAA action in adopting the academic standards under attack is "state action" for constitutional purposes. A review of the following case law indicates that the NCAA's action would be regarded as state action for constitu-

tional purposes.

B. The NCAA-State Action Cases: Buckton and Its Progeny

In Buckton v. NCAA, a two Boston University hockey players sought injunctive relief against the NCAA's declaration of ineligibility. The hockey players, both Canadian citizens residing in Boston, alleged that the NCAA eligibility rules discriminated against aliens in a manner prohibited by the equal protection clause. In addressing the state action issue, the court noted that formally private conduct may become "so entwined with governmental policies or so impregnated with a governmental character as to become subject to the constitutional limitations placed upon state action." According to the court, in supervising and policing intercollegiate athletics, the NCAA "perform[ed] a public function, sovereign in nature" that subjected it to constitutional constraints. The court stated that "[o]nly by sifting facts and weighing circumstances can the nonobvious involvement of the State in private conduct be attributed its true significance." The court noted that state universities made up approximately one-half the membership of the NCAA, that those state institutions paid dues to the NCAA, and that state facilities were provided for NCAA contests. The court concluded that the plaintiffs had made the requisite showing of state action.

With one exception, every other court to confront the issue has concluded that the NCAA's acts are to be treated as state acts for constitutional purposes. The Fifth Circuit in Parish v. NCAA affirmed the district court's finding that the NCAA's ineligibility determination was "under color of state law," pointing out that

18. Id. at 1156 (quoting Evans v. Newton 382 U.S. 296, 299 (1966)).
19. Id. at 1156 (quoting Curtis v. NCAA., C-71 2088 ACW (N.D. Cal. Feb. 1, 1972) (unreported)).
20. Id. at 1156, (quoting Burton v. Wilmington Parking Auth., 365 U.S. 715, 722 (1961)).
21. Id. at 1157.
22. 506 F.2d 1028 (5th Cir. 1975).
23. Id. at 1032. The "under color of state law" finding is required to bring a cause of action under 42 U.S.C. § 1983. The Parish court viewed the under color of state law finding as equivalent to a finding of state action. In fact, the Parish court used the two terms interchangeably. It should be pointed out, however, that a defendant's actions under color of state law may not necessarily constitute state action. See Gresham Park Community Org. v.
the NCAA performed a "traditional governmental function . . . by taking upon itself the role of coordinator and overseer of college athletics."24 As in Buckton, the court also noted the substantial involvement of state supported institutions in the NCAA's program and found that the state participation in and support of the NCAA was a "well recognized basis for finding state action."25 The D.C. Circuit reached a similar conclusion in a case once again involving an athlete seeking injunctive relief from an NCAA determination of ineligibility in Howard University v. NCAA:26

As support for its conclusion, the court pointed out that public institutions provide most of the NCAA's capital and that state instrumentalities are a "dominant force in determining NCAA policy and in dictating NCAA actions."28 NCAA actions appeared "impregnated with a governmental character."29 The NCAA and its member public institutions are "joined in a mutually beneficial . . . symbiotic relationship"30 sufficient to trigger constitutional


24. 506 F.2d at 1032-33. The court went on to say that it had "little doubt . . . that were the NCAA to disappear tomorrow, government would step in to fill the void." Id. at 1033.
25. Id. at 1032.
27. Id. at 220.
28. Id. at 219.
29. Id. at 220 (quoting Evans v. Newton, 382 U.S. 296, 299 (1966)).
30. Id. at 220. See, e.g., Regents of Univ. of Minn. v. NCAA, 560 F.2d 352 (8th Cir. 1977) (due process afforded to ineligible student athletes who reasonably understood NCAA rules); Rivas Tenorio v. Liga Atletica Interuniversitaria, 554 F.2d 492 (1st Cir. 1977) (Puerto Rican athletic association rule that denied non-Puerto Rican student athletes who entered member institutions after their 21st birthday the right to participate in annual competitions was "under color of" commonwealth law); Associated Students, Inc. v. NCAA, 493 F.2d 1251 (9th Cir. 1974) (university and NCAA 1.600 grade point average eligibility rule "state action" for constitutional purposes); Colorado Seminary v. NCAA, 417 F. Supp. 885 (D. Colo. 1976) (NCAA actions in imposing sanctions on the university for failure to declare several hockey players ineligible for participation was "under color of state law"); Jones v. NCAA,
scrutiny.

*McDonald v. NCAA*\(^{31}\) stands alone in support of the view that the NCAA’s actions are not state actions for constitutional purposes. Once again, the case arose in the context of a request for injunctive relief by athletes declared ineligible by the NCAA. The court observed that “[w]hat must appear is that the state must be so inextricably involved in the ‘private’ action or must be able to so control the ‘private’ action that this activity necessarily becomes the functional equivalent of an act of the sovereign.”\(^{32}\) According to the court, the NCAA was an essentially private entity and was thus unconstrained by the constitutional requirements of due process and equal protection. The plaintiffs therefore had “no standing to claim invasion of any protectable interest under the United States Constitution as to the NCAA.”\(^{33}\) However, the continued validity of *McDonald* is in serious doubt.\(^{34}\)

Based on the conclusions of the cases confronting the issue, it appears that a challenge to the new academic standards would pass the state action obstacle. Assuming this to be the case, the standards would then be tested on the merits under constitutional principles. The gist of the constitutional attack upon the standards is that they deny to blacks the equal protection of the laws. The section that follows addresses the equal protection issues raised by the challenge.

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\(^{33}\) Id. at 630. Although *McDonald* is clearly out of step with the other NCAA state cases, a good argument can be made that the *McDonald* approach more accurately reflects how the Supreme Court might decide the issue. The Supreme Court’s recent state action cases reveal a decidedly narrow state action view. See, e.g., Jackson v. Metropolitan Edison Co., 419 U.S. 345 (1974); Flagg Bros., Inc. v. Brooks, 436 U.S. 149 (1978); Blum v. Yaretsky, 102 S.Ct. 2777, ___ U.S. ___ (1982); Rendell-Baker v. Kohn, 102 S.Ct. 2766 (1982).

\(^{34}\) 370 F. Supp. at 632.

\(^{34}\) Associated Students, Inc., Etc., v. NCAA, 493 F.2d 1251 (9th Cir. 1974) (following the majority approach, found state action and thus, while not expressly overruling *McDonald*, seriously undercut it); Parish v. NCAA, 506 F.2d 1028 (5th Cir. 1975) (presumed *McDonald* overruled).
III. The Equal Protection Challenge: Attacking the Classification Scheme

The success of the equal protection challenge will depend largely upon how the court characterizes the classification scheme embodied in the new standards. Absent a showing that the standards are in fact purposefully racial classifications, the court will likely engage in the rather undemanding "minimum rationality" review. If, on the other hand, it could be shown that the new standards should be viewed as purposeful racial classifications, the court will most likely view them with great suspicion under the standards of "strict scrutiny." In short, the characterization of the academic standards as purposefully racial is the key to the equal protection litigation. A review of the relevant recent Supreme Court cases provides the guide for resolving the question.

A. Proving Purposeful Racial Discrimination: The Burger Court's Approach


Washington v. Davis established that purposeful discrimination was necessary to trigger heightened judicial scrutiny. The case involved a facially neutral requirement of a written personnel test to become a police officer. The test operated to disproportion-

35. Minimum rationality review has been aptly characterized as undemanding in theory and non-existent in fact. Classification schemes reviewed under the minimum rationality test invariably pass the test. See Gunther, Foreword: In Search of Evolving Doctrine on a Changing Court: A Model For a Newer Equal Protection, 86 Harv. L. Rev. 1 (1972). It should also be pointed out that a new "middle tier" has emerged. Utilized first in gender discrimination cases, middle tier analysis has recently become more prominent. It is conceivable that the NCAA scheme could be regarded as a benign racial classification subject to middle tier analysis. Middle tier analysis is not outcome determinative.

ately exclude blacks. Justice White delivered the opinion of the Court. He said that a disproportionate impact alone is not enough to trigger strict scrutiny; it must also be shown that the classification scheme is purposefully discriminatory:

[O]ur cases have not embraced the proposition that a law or other official act, without regard to whether it reflects a racially discriminatory purpose, is unconstitutional solely because it has a racially disproportionate impact. . . . 41

. . . A purpose to discriminate must be present . . . to such an extent as to show intentional discrimination. 42

White went on to point out that disproportionate impact, however, is relevant to the issue of discriminatory purpose:

This is not to say that the necessary discriminatory racial purpose must be express or appear on the face of the statute, or that a law's disproportionate impact is irrelevant. . . .

Necessarily, an invidious discriminatory purpose may often be inferred from the totality of the relevant facts, including the fact, if it is true, that the law bears more heavily on one race than another. . . . Disproportionate impact is not irrelevant, but it is not the sole touchstone of an invidious racial discrimination. . . . 43 Standing alone, it does not trigger the rule . . . that racial classifications are to be subjected to the strictest scrutiny. . . . 44

In Davis, the plaintiff failed to make out a prima facie case; thus, the burden never shifted to the state to rebut "the presumption of unconstitutional action by showing that permissible racially neutral selection criteria and procedures have produced the monochromatic result." 45

In Arlington Heights, Justice Powell's majority opinion elaborated on the proper subjects of inquiry in determining whether discriminatory purpose exists. 46 The case involved the refusal of a Chicago suburb to grant a request to rezone for multiple family development. The effect of the refusal was that low income tenants were deprived of the chance to live in subsidized housing and that

41. Id. at 239.
42. Id. (quoting Akins v. Texas, 325 U.S. 398, 403-04 (1945)).
43. Id. at 241-42.
44. Id. at 242 (citing McLaughlin v. Florida, 379 U.S. 184 (1964)).
45. Id. at 241 (quoting Alexander v. Louisiana, 405 U.S. 625, 632 (1972)).
racial minorities were disproportionately burdened. Powell reiterated that it is the plaintiff's burden to make the threshold showing "that [a] discriminatory purpose has been a motivating factor in the . . . decision." Once this showing is made, the burden will shift to the state to establish that "the same decision would have resulted even had the impermissible purpose not been considered." Admittedly, proving that invidious discriminatory purpose is no easy task:

Determined whether invidious discriminatory purpose was a motivating factor demands a sensitive inquiry into such circumstantial and direct evidence of intent as may be available. The impact of the official action . . . provide an important starting point. Sometimes a clear pattern, unexplainable on grounds other than race, emerges. . . . The evidentiary inquiry is then relatively easy. But such cases are rare. Absent a pattern . . . the Court must look to other evidence.

Powell then articulated the appropriate evidentiary inquiries to be made in the more common, difficult cases:

The historical background of the decision is one evidentiary source. . . . The specific sequence of events leading up to the challenged decision also may shed some light on the decisionmaker's purposes. . . . Departures from the normal procedural sequence also might afford evidence that improper purposes are playing a role. Substantive departures too may be relevant, particularly if the factors usually considered important by the decisionmaker strongly favor a decision contrary to the one reached.

The legislative or administrative history may be highly relevant, especially where there are contemporary statements by members of the decisionmaking body, minutes of its meetings, or reports. In some extraordinary instances the members might be called to the stand at trial to testify concerning the purpose of the official action, although even then such testimony frequently will be barred by privilege.

After completing this litany, which was not "exhaustive,"

47. Id. at 270.
48. Id. at 271, n.21.
49. Id. at 266.
50. Id. at 267-68. In regard to the testimonial privilege, Powell pointed out in a footnote that "judicial inquiries into legislative or executive motivation represent a substantial intrusion into the workings of . . . government. Placing a decisionmaker on the stand is therefore "usually to be avoided." Id. at 268 n.18 (quoting Citizens to Preserve Overton Park v. Volpe, 401 U.S. 402, 420 (1971)). Note, then, the plaintiff's predicament—he must show 'purpose' but is precluded from making obviously relevant inquiry by a testimonial privilege. A challenge to such a privilege would itself present an interesting constitutional case.
Powell turned to the record in this particular case and found no demonstration of "racially discriminatory intent."\textsuperscript{51} The challengers had "simply failed to carry their burden of proving that discriminatory purpose was a motivating factor."\textsuperscript{52}

That the Arlington Heights guidelines did not wholly clarify the purposefulness issue for a wide range of cases is demonstrated in both Mobile v. Bolden\textsuperscript{53} and Rogers v. Lodge.\textsuperscript{54} The Court has splintered badly on the issue.

Mobile v. Bolden was originally brought as a class action suit on behalf of all black citizens of Mobile.\textsuperscript{55} The complaint alleged that the method of electing city commissioners at-large, adopted by Mobile in 1911, unconstitutionally diluted the voting strength of Mobile's blacks, who comprised approximately 35.4\% of the city's population but who had never elected a City Commissioner. The district court found that the constitutional rights of plaintiffs had been violated and ordered the establishment of single member districts. The court of appeals affirmed. The Supreme Court reversed, finding that the discrimination was not "purposeful."\textsuperscript{56}

Justice Stewart announced the judgment of the Court and delivered an opinion in which the Chief Justice, Justice Powell, and Justice Rehnquist joined. The plurality opinion noted that the plaintiff had the burden of showing that the "disputed plan was conceived or operated as [a] purposeful [device] to further racial discrimination"\textsuperscript{57} and that the plaintiffs had failed to meet their burden. The lower courts had supported their conclusion that purposefulness had been shown by drawing upon the substantial history of de jure racial discrimination in the state. Justice Stewart rejected this approach, saying "past discrimination cannot, in the manner of original sin, condemn governmental action that is not itself unlawful. The ultimate question remains whether a discriminatory intent has been proven in a given case."\textsuperscript{58} And in this case,

\begin{itemize}
  \item \textsuperscript{51} \textit{Id.} at 265.
  \item \textsuperscript{52} \textit{Id.} at 270.
  \item \textsuperscript{53} 446 U.S. 55 (1980).
  \item \textsuperscript{54} 102 S.Ct. 3272 (1982).
  \item \textsuperscript{55} 446 U.S. 55 (1980).
  \item \textsuperscript{56} \textit{Id.}
  \item \textsuperscript{57} \textit{Id.} at 66 (quoting Whitcomb v. Chavis, 403 U.S. 124, 149 (1980)).
  \item \textsuperscript{58} \textit{Id.} at 74.
\end{itemize}
it had not been proven.

Justices Blackmun and Stevens wrote separate concurring opinions. Justice Blackmun thought that the findings of the district court supported an inference of purposeful discrimination but concurred in the court's judgment because he believed the district court order to establish single member districts was an abuse of discretion. Justice Stevens took a different tack entirely on the issue of purposefulness. Although he was persuaded that some support for the disputed 1911 plan came from members of the white majority who were "motivated by a desire to make it more difficult for members of the black minority to serve," he was unwilling to conclude that that was enough to invalidate the scheme. Justice Stevens simply does not believe that "otherwise legitimate political choices can be invalidated simply because an irrational or invidious purpose played some part in the decision-making process."

Justices White, Marshall, and Brennan dissented. White believed, along with Blackmun, that the lower courts had properly inferred invidious discriminatory purpose from the totality of facts. He condemned the plurality's reasoning:

"[T]he plurality today rejects the inference of purposeful discrimination apparently because each of the factors relied upon by the courts below is alone insufficient to support the inference. . . . By viewing each of the factors relied upon below in isolation. . . the plurality rejects the "totality of circumstances" approach we endorsed in . . . Arlington Heights."  

Justice Marshall acknowledged that under Davis, a showing of discriminatory purpose is necessary to impose strict scrutiny on facially neutral classifications which have a racially discriminatory impact, so long as the fundamental rights strand of equal protection analysis is not triggered. In his discussion of purposefulness,

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59. Id. at 80.
60. Id. at 92.
61. Id. at 92. In a scathing dissent, Justice Marshall takes Stevens to task for approving a scheme in which both discriminatory impact and discriminatory intent are acknowledged. "An approach that accepts intentional discrimination against Negroes. . . strikes at the very hearts of the Fourteenth and Fifteenth Amendments." Id. at 139, n.37.
62. Id. at 103.
63. It should be noted Marshall thought that the plaintiffs in this case did not have to show discriminatory purpose because the fundamental right of voting was infringed. In Marshall's dissenting view, proof of discriminatory purpose was not required to support a claim of vote dilution. In an extended footnote, he referred to Ely, The Centrality and Limits of
Marshall quarreled with the plurality:

If it is assumed that proof of discriminatory intent is necessary . . . the question becomes what evidence will satisfy this requirement.

. . . .

This Court has acknowledged that the evidentiary inquiry involving discriminatory intent must necessarily vary depending upon the factual context. . . . One useful evidentiary tool, long recognized by the common law, is the presumption that "[e]very man must be taken to contemplate the probable consequences of the act he does." . . .

I would apply the common-law foreseeability presumption. . . . [In this case], [b]ecause the foreseeable disproportionate impact was so severe, the burden of proof should have shifted to the defendants . . . to show that they refused to modify the districting schemes in spite of, not because of, their severe discriminatory effect. 64

Marshall also took the plurality to task for failing to recognize that the maintenance of the system in the face of the discriminatory consequences suggested that state officials were blinded by "racially selective sympathy and indifference." 65

Like outright racial hostility, selective racial indifference reflects a belief that the concerns of the minority are not worthy of the same degree of attention paid to problems perceived by whites. . . . It takes only the smallest of inferential leaps to conclude that the decisions to maintain multi-member districting having obvious discriminatory effects re-

Motivation Analysis, 15 SAN DIEGO L. REV. 1155, 1160-61 (1978), which articulated the danger of requiring that discriminatory purpose be shown in all cases:

The danger I see is . . . that the Court, in its newfound enthusiasm for motivation analysis, will seek to export it to the fields where it has no business. It therefore cannot be emphasized too strongly that analysis of motivation is appropriate only to claims of improper discrimination in the distribution of goods that are constitutionally gratuitous (that is, benefits to which people are not entitled as a matter of substantive constitutional right). However where what is denied is something to which the complainant has a substantive constitutional right—either because it is granted by the terms of the Constitution, or because it is essential to the effective functioning of a democratic government—the reasons it was denied are irrelevant. It may become important in court what justifications counsel for the state can articulate in support of its denial or nonprovision, but the reasons that actually inspired the denial never can: To have a right to something is to have a claim on it irrespective of why it is denied. It would be a tragedy of the first order were the Court to expand its burgeoning awareness of the relevance of motivation into the thoroughly mistaken notion that a denial of a constitutional right does not count as such unless it was intentional.

446 U.S. at 121 n.21 (1980) (emphasis original).

64. 446 U.S. at 136-37.

65. Id. at 139 (quoting Brest, The Supreme Court, 1975 Term - Foreword: In Defense of the Antidiscrimination Principle, 90 HARV. L. REV. 1, 7 (1976)).
present, at the very least, selective racial sympathy and indifference. . . .

If this Court refuses to honor our long recognized principle that the Constitution 'nullifies sophisticated as well as simple-minded modes of discrimination, it cannot expect the victims of discrimination to respect political channels of seeking redress.'

The most recent chapter in the purposefulness book written by the court produced some interesting twists and shifts. In Rogers v. Lodge, a still sharply divided court elaborated upon the requirements and implications of Mobile, but this time, a majority affirmed the lower courts' holdings that a sufficient showing of purposefulness had been made. In Rogers, the plaintiffs attacked the long-standing at-large system for electing county commissioners. The district court decided the case prior to the Mobile decision. It found that the electoral method was being maintained for invidious purposes and ordered the county divided into districts for purposes of electing county commissioners. The court of appeals affirmed.

Justice White, a dissenter in Mobile, wrote for the new majority. He reviewed the evidence relied upon by the lower courts and concluded that "none of the factual findings are clearly erroneous." Relevant facts included a showing of disproportionate impact—no black had ever been elected under the scheme. Additionally, the plaintiffs offered evidence that past discrimination had had an impact on "the ability of blacks to participate effectively." It was also shown that the elected white officials had been "unresponsive and insensitive to the needs of the black com-

66. Id. at 139, 141 (citation omitted). Justice Brennan dissented with a brief notation: I dissent because I agree with Mr. Justice Marshall that proof of discriminatory impact is sufficient [here]. I also dissent because, even accepting the plurality's premise that discriminatory purpose must be shown, I agree with Mr. Justice Marshall and Mr. Justice White that the appellees have clearly met that burden.

67. Id. at 94.

68. 102 S.Ct. 3272 (1982).

69. The factual setting parallels Mobile. Both at-large schemes were adopted in 1911. In both venues, blacks were never elected under the scheme. Mobile's population was approximately 35.4% black. Burke County, Georgia (the county challenged in Rogers) had a slight majority of whites.

70. The new majority consisted of Chief Justice Burger and Justices Brennan, White, Marshall, Blackmun and O'Connor.

71. Id. at 3280.
The state had "retained a system which [had] minimized the ability of . . . blacks to participate in the political system." The proof in the case was sufficient "to support an inference of intentional discrimination." Justice White concluded, "[a]lthough a tenable argument can be made to the contrary, we are not inclined to disagree with the Court of Appeals' conclusion that the District Court applied the proper legal standard."

Justice Stevens filed a lengthy dissent elaborating upon his views, which were previously articulated in Mobile. He stated his concern about the Court's "emphasis on subjective intent as a criterion for constitutional adjudication."

For in the long run constitutional adjudication that is premised on a case-by-case appraisal of the subjective intent of local decisionmakers cannot possibly satisfy the requirement of impartial administration of the law that is embodied in the Equal Protection Clause. . . . The costs and the doubts associated with litigating questions of motive, which are often significant in routine trials, will be especially so in cases involving the 'motives' of legislative bodies."

He condemned particularly the majority's unscientific, seat-of-the-pants motivation analysis:

It is incongruous that subjective intent is identified as the constitutional standard and yet the persons who allegedly harbored an improper intent are never identified or mentioned. Undoubtedly, the evidence relied upon . . . proves that racial prejudice has played an important role in the history of Burke County and has motivated many wrongful acts by various community leaders. But unless that evidence is sufficient to prove that every governmental action was motivated by a racial animus, . . . the Court has failed under its own test to demonstrate that the governmental structure of Burke County was maintained for a discriminatory purpose.

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72. Id. at 3280.
73. Id. at 3280.
74. Id. at 3279. It is extremely difficult to explain the difference between Rogers and Mobile. Perhaps it is simply a matter that the plaintiffs in Rogers did a better job of proving their case. If this is true, plaintiffs in such cases are well-advised to be meticulous in offering their evidence of purposefulness.
75. Id. at 3278.
76. Id. at 3289.
77. Id. at 3289-90.
78. Id. at 3291.
And he stated his belief that "the Court errs by holding the structure of the local governmental unit unconstitutional without identifying an acceptable, judicially-manageable standard."79

Justice Powell was joined in his dissenting opinion by Justice Rehnquist. Powell failed to see the distinction between this case and Mobile:

The [lower courts] based their findings . . . on the same factors held insufficient in Mobile. . . . [T]he court's opinion [here] cannot be reconciled persuasively with [Mobile]. There are some variances in the largely sociological evidence presented in the two cases. But Mobile held that this kind of evidence was not enough.80

He bemoaned the subjective approach of the majority. "Federal courts thus are invited to engage in deeply subjective inquiries into the motivations of local officials. . . . Inquiries of this kind not only can be "unseemly" . . . they intrude the Federal courts—with only the vaguest constitutional direction—into an area of intensely local . . . concern."81 Unwilling to go quite as far as Stevens in rejecting subjective intent entirely, he nonetheless stated his agreement with Stevens that "'objective' factors should be the focus of inquiry."82 Objective factors were "direct, reliable, and unambiguous indices of discriminatory intent."83 Powell summed up his position by stating: "[I]n the absence of proof of discrimination by reliance on . . . objective factors . . . I would hold that the factors [here] are too attenuated as a matter of law to support an inference of discriminatory intent."84

B. Proving Purposeful Racial Discrimination by the NCAA: The Black Athletes' Case

To trigger the judicial scrutiny most likely to invalidate the new standards, the black athlete must offer sufficient proof of "purposeful" discrimination. A successful prima facie case will have to explore the "totality of relevant facts" related to the NCAA's deci-

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79. Id. at 3284.
80. Id. at 3281-82.
81. Id. at 3282 (citing Karst, The Costs of Motive-Centered Inquiry, 15 SAN DIEGO L. REV. 1163, 1164 (1978)).
82. Id. at 3283.
83. Id.
84. Id.
sion to adopt the new academic standards. What follows is an outline of the critical areas to be considered.

1. **Disproportionate Impact**

   Although disproportionate impact alone is not sufficient to trigger strict scrutiny, it is a useful starting point. It is relevant to the issue of purposefulness: the fact that the NCAA scheme bears more heavily on blacks than on whites tends to prove that the purpose of the scheme is invidious. In this regard, the black athletes’ case would include statistical studies showing the disproportionate impact. Studies by ETS and the Big Eight already noted would be introduced as evidence. Additional statistical evidence should be gathered which helps define the extent to which the NCAA rules disproportionately burden black athletes. There appears to be no disagreement on the fact of disproportion, but only disagreement as to the extent of it. Convincing evidence of the disproportionate impact, though not the sole touchstone of a constitutionally purposeful racial discrimination, is an essential component of the black athletes’ case.

2. **Historical Background**

   The historical background of the decision is obviously one evidentiary source. Both the “track record” of the decisionmaking body on racial issues and the more immediate sequence of events leading up to the decision would appear relevant to the issue of purposefulness. Although it is true that a pattern of past discrimination will not be equivalent to a showing that the particular decision under attack is motivated by racial animus, surely such a pattern will be regarded as relevant to the issue of purposefulness. In this regard, the history of race relations in the NCAA could appropriately be reviewed for evidence of racial discrimination. Although the ultimate question remains whether a discriminatory intent has been proven in a given case, a showing that past discrimination has infringed on the ability of black athletes to participate effectively is relevant and admissible. Assuming that some evidence of past racial discrimination by the NCAA can be shown, the plaintiff should then focus attention on the more immediate “sequence of

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event leading up to the challenged action.”

3. **The More Immediate Sequence of Events**

“Frequently, the most probative evidence of intent [of purposefulness] will be objective evidence of what actually happened rather than evidence describing the subjective state of mind of the actor.” In this regard, the black athletes' case should focus upon the specific process by which the new rules were adopted, with an eye out for objective manifestations of both “outright racial hostility” and “racially selective sympathy and indifference.” In other words, the decision-making process must be gone over with a fine-toothed comb to isolate both the “sophisticated as well as simple-minded modes of [racial] discrimination.”

For example, the following facts would be constitutionally relevant to the issues of purposefulness:

1. Blacks were not represented on the planning committee which drafted the new standards during its deliberative phase;
2. A black was appointed to the planning committee one week before the NCAA Convention;
3. The tenor of the debate at the convention revealed that the decisionmakers were aware of the fact that the new standards could be viewed as racial classifications;
4. A black was appointed to the NCAA Executive Committee shortly after the convention.

This list is by no means exhaustive. The point is that the plaintiff must painstakingly review the entire decisionmaking process and marshal facts in support of the theory that the line-drawing implicit in the new standards reveals that a discriminatory pur-

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89. 446 U.S. 55, 139 (Marshall, J., dissenting in Mobile).
92. Id. The inference to be drawn here is that the appointment was made for cosmetic reasons to give the appearance of a lack of racial bias.
93. See supra note 8. Again, the inference to be drawn is that the appointment was for cosmetic reasons.
pose has been a motivating factor in the decision.\textsuperscript{94} It should also be remembered that it may be appropriate to elicit testimony directly from the decision-makers.\textsuperscript{96}

\section*{4. Maintaining the Plan}

It is one thing to show discriminatory purpose through a review of "the specific sequence of events leading up to the decision"\textsuperscript{96} and quite another to show discriminatory purpose by proof that the plan is being "maintained for invidious purposes."\textsuperscript{97} Rogers v. Lodge is premised on the view that maintenance of a discriminatory scheme, which may have been racially neutral when adopted, nonetheless might constitute purposefully racial discrimination.\textsuperscript{98} In our hypothetical lawsuit, the maintenance argument would seem to provide the appropriate setting for introducing a whole new range of evidence. This argument would focus attention on the less racially burdensome alternatives available. The hypothesis here is that the maintenance of a scheme which disproportionately burdens blacks is invidious if it can be shown that equally effective, less burdensome alternatives are readily available. By way of illustration, it might be shown that a rule which prohibits freshmen from competing at the varsity level, when coupled with an extensive tutorial program, is a more effective, less burdensome alternative. Moreover, evidence of the ineffectiveness of the maintained plan is relevant to the issue. In this regard, it might be shown that the 700 SAT score cut-off is arbitrary and is not equivalent to the 15 ACT cut-off. If this is so, there is an inherent contradiction in the plan which reduces its effectiveness. In short, the maintenance argument opens the door wide for evidence of the effectiveness of the maintained plan and alternatives to the maintained plan.

\begin{itemize}
  \item 95. At this point it would be appropriate to review Justice Powell's guide. See supra note 50.
  \item 96. 429 U.S. at 267.
  \item 97. The trial court in Rogers found that the plan was "racially neutral when adopted," [but was] being maintained for invidious purposes." 102 S.Ct at 3275) (emphasis original).
  \item 98. 102 S.Ct. at 3278.
\end{itemize}
The black athletes' equal protection challenge to the NCAA's new academic requirements is by no means frivolous. With proper attention to detail and precedent, the black athletes may in fact succeed. But success in such a case will not be achieved unless the decisionmaker is ready and willing to recognize and appreciate the fact that racism today is generally more subtle than the traditional kind. The traditional brand of racism was marked by outright racial hostility. The modern version more often takes the form of "racially selective sympathy and indifference." Both reflect "a belief that the concerns of the minority are not worthy of the same degree of attention paid to problems perceived by whites." The success of the black athletes' claim will depend largely on the willingness of the court to find that the subtle modern manifestations of racism are to be treated as the constitutional equivalents of outright racial hostility. The question is whether the courts will honor the long recognized principle that "the Constitution 'nullifies sophisticated as well as simple-minded modes of discrimination.'"  

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99. 446 U.S. at 139 (Marshall, J., dissenting).
100. Id.
101. Id. at 141. Marshall continued by saying that if the court refused to honor the principle, "it cannot expect the victims of discrimination to respect political channels of seeking redress." Id. at 141.