Should the government be allowed to engage in racial, sexual or other acts of discrimination?

by

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Abstract

The State of Arkansas has enacted a Distinguished Governor's Scholarship Program that awards full college scholarships based solely on ACT or SAT scores. The purpose of the program is to keep "the best and brightest students" in Arkansas. As a matter of fact, fewer than one percent of the scholarships have gone to African-American and Hispanic students. Additionally, the scholarship monies are paid directly to both public and church-related institutions. The amount of aid paid to church-related colleges exceeds that awarded to public institutions.

This paper first examines the Establishment Clause (Clause) issues of whether direct payments to church-related schools violates the Clause, whether a disparity in the amount of scholarship monies paid the church schools offends the Clause, whether the program creates an incentive to attend church schools, and whether this constitutes a scheme to divert state tax money to church schools. We next examine the disparate-impact of the program on African-American students and conclude that the program violates Title VI of the Civil Rights Act.

We conclude the paper with an examination of the program and the issue of government and private discrimination from the vantage point of the libertarian philosophy. We conclude that the Arkansas program is unwholesome and discriminatory from both the Title VI disparate-impact and libertarian perspectives. We attack the plan on the more radical basis that it would be contrary to libertarian law even if the same proportion of blacks and whites had received scholarships. This is so because the government plan makes invidious comparisons between inept and brilliant students, awarding tax money all to the latter and none to the former. Where is the warrant for the government (private schools excepted) to award scholarships based on intelligence, while ignoring the stupid or ignorant? The State not only vitiates against black people but ignorant people as well. We make the case that this is unwarranted government discrimination on the part of the State.
Should the government be allowed to engage in racial, sexual or other acts of discrimination?

INTRODUCTION

This paper attempts to address the question of whether the government should be allowed to engage in racial, sexual or other acts of discrimination. It does so, in section I, by analyzing extant law, to determine whether such acts are or are not compatible with the U.S. Constitution. It takes as an initial point of departure the case of governmental discrimination against blacks in the field of education, using Arkansas as a case study\(^1\). In section II the paper analyzes this issue from the libertarian perspective, and considers generalized government discrimination in fields other than education, and on numerous criteria other than race.

SECTION I. THE LAW

The State of Arkansas provides a full academic scholarship to a state approved public or private Arkansas Institution of Higher Education to graduates of Arkansas secondary schools who demonstrate "extraordinary academic ability."\(^2\) The sole measure of the graduate’s “extraordinary ability” is demonstrated by scoring 32 or above on the American College Test (ACT), 1410 or above on the Scholastic Aptitude Test (SAT), or selection as a finalist in the National Merit Scholarship competition.\(^3\) The purpose of the Governor’s Scholarship Program, according to the enabling legislation, is "that outstanding students are an essential ingredient for the economic and social benefit of the State of Arkansas. Benefits accrue to the state when a majority of National Merit

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\(^3\) Ark. Stat. Ann. § 6-82-305(b)
Scholars and superior students attend Arkansas institutions of higher learning and remain in the state. The scholarship award dollar amount equals the tuition, room and board, and mandatory fees charged for a regular full-time course load student by the approved institution of higher education in which the student is enrolled. There are eight public and seven private, church-related, approved institutions participating in the program.

The dollar value of the scholarship award varies considerably between public and private institutions. It is estimated, for example, that a scholarship recipient enrolled in Hendrix, a private church-related institution, costs the state about $15,474 per year. In contrast, a distinguished scholar enrolled at Southern Arkansas University, a public institution, will cost the state only about $5,088 per year. It is critical to understand that the scholarship funds are dispersed from the state directly to the approved public and private, church-related institutions. No funds are sent to the parents or recipients. The responsibility for selecting the scholarship recipients rests with the Director of the Arkansas Department of Higher Education.

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4 Ark. Stat. Ann. § 6-82-301

5 Ark. Stat. Ann. § 6-82-312(b)

6 Arkansas Department of Higher Education, Student enrollments, Table III, State Appropriations Per Student for Arkansas Governor's Distinguished Scholars for 1999-00 Fiscal Year, May 2000.

7 Id.

8 Arkansas Department of Higher Education, Program Rules and Procedures, Rule 5, hereinafter DHE

9 Id

As a condition of participation in the program, each institution of higher education, public or church-related, has to agree to provide to the state the same level of administrative services in administering the program. Among these services are appointing an institution representative to act as administrator of the program for that campus, to receive all disbursements, complete all forms and rosters, verify all data, and insure compliance with all DHE program rules and regulations. In addition, the institution, public or private, must maintain disbursement records, prepare an annual Institutional Financial Information Sheet for all programs administered by DHE, prepare a list of program drop outs, certify full-time enrollment, provide DHE with an institutional verification of compliance at least twice yearly, and finally, from time to time, submit to a DHE review of the institution's records to demonstrate its due diligence as a *steward of state funds* (Emphasis added).

The program has been much used. The state awarded a total of 808 Distinguished Governor's Scholarships for the 1997-98, 1998-99, and 1999-2000 academic years. Of those, 425 (52.6%) chose to attend a public institution, and 383 (47.4%) chose to attend a private, church-related institution. The approximate expenditure of state funds for the scholarship program has resulted in disbursements of $6,149,087 to the private, church-related, institutions and $3,666,371 to their public counterparts. As a result, 62.6% of the total state distinguished scholarship funds

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11DHE Rules and Procedures, Rule 5

12Arkansas Department of Higher Education, Student Enrollments, Table 1, Comparison of The Number of Arkansas Governor's Distinguished Scholarship Awards by Institution for the 1997-98 Through 1999-00 Academic Years

13Arkansas Department of Higher Education, Table II, Amount of Arkansas Governor's Distinguished Scholarship Awards by Institution
were forwarded directly to the former and 37.4% to the latter. Of the scholarship recipients, 4 (0.4%) were African American, 19 (2.0%) Asian, 5 (0.5%) Native American, 885 (94.6%) Caucasian, 3 (0.3%) Hispanic, and 20 (2.1%) other or unknown. Finally, 532 (56.8%) of the scholars were male, and 404 (43.2%) female.

**FEDERAL GOVERNMENT JURISDICTION OVER STATE DISCRIMINATION?**

Does the federal government have jurisdiction over states, when and if they engage in racial discrimination against their citizens? Some argue that state courts lack jurisdiction over plaintiff's federal damage claims under Section 1983 and because they are not persons amenable to suit under Section 1983. However, it is well-settled in the judicial circuit which includes Arkansas that to survive a motion to dismiss, all the plaintiffs must do is plead a facially neutral practice's adverse effects fall disproportionally on a group protected by Title VI. As the Court of Appeals for the 8th Circuit explained in the Fair Housing Act discrimination case of *Ring v. First Interstate Mortgage*, the prima facie case under disparate impact analysis is an evidentiary standard—it defines the quantum of proof plaintiff must present to create a rebuttably presumption of discrimination...” Under the Federal Rules of Civil Procedure, an evidentiary standard is not a proper measure of whether a complaint fails to state a claim.” Additionally, the Supreme Court has stated, “when a federal court reviews the sufficiency of a complaint...the issue is not whether the plaintiff will ultimately prevail but whether the claimant is entitled to offer evidence to support such

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14 Id.

15 Id.

16 984 F.2nd 924 (8th Cir. 1993)

17 Id. at 926
Given that the state of Arkansas has promulgated a program which clearly has disparate impact on black students, in that they are under-represented among the scholarship winners, a clear implication is that they are at the very least entitled, under Ring, to offer evidence to support their claims.

Under certain circumstances the Congress can pass laws that give individual citizens a right of action in federal court against an unconsenting state. The circumstances require first, that "Congress has 'unequivocally expressed its intent to abrogate the immunity,’” which “must be clear and obvious from a clear legislative statement,” and second, that Congress has acted “pursuant to a valid exercise of power.” The High Court has held that Congress can abrogate state immunity when it acts pursuant to section 5, the enforcement provision of the 14th Amendment, which provides, “the Congress shall have the power to enforce, by appropriate legislation, the provisions of this article.”

A plaintiff's cause of action in such a case fits squarely within the circumstances where private citizens have a right of action in federal court. Section 601 of Title VI of the Civil Rights Act of 1964 provides:

“No person in the United States shall, on the grounds of race, color, or national origin, be excluded from participation in, be denied the benefits of, or be subjected to discrimination under any program or activity receiving federal financial


assistance.”

Moreover, section 602 of Title VI “authorizes and directs federal departments and agencies that extend federal financial assistance to particular program or activities to effectuate the provision of 2000d [Section 601]. . . by issuing rules, regulations, or orders of general applicability.”20

The Department of Education, in exercising statutory authority under Section 602, promulgated such a regulation codified at 34 C.F.R. Section 100.3(b)(2) which prohibits a funding recipient from “utilizing criteria or methods of administration which have the effect of subjecting individuals to discrimination because of their race, color, or national origin, or have the effect of defeating or substantially impairing accomplishment of the program as respects an individual of a particular race, color, or national origin.” Any such complaint, then, would be fairly based on the foregoing statutes and regulations prohibiting discriminatory effects in educational programs such as the Arkansas Distinguished Scholarship Program (Program).

Congress, through the legislation that established Title VI, abrogated the state’s immunity in order to effectuate the provisions of the 14th Amendment of the United States Constitution.21 A private right of action under a federal statute requires analysis of the factors set forth in Cort v. Ash.22 The Cort factors ask:

“First, is the plaintiff one of the class for who special benefit the statute was enacted
–that is, does the statute create a federal right in favor of the plaintiff? Second, is

2042 U.S.C. Section 2000d

21Atascadero State Hospital v. Scanlon, 105 S.Ct. 3142 (1985)

22422 U.S. 66, 78 (1975)
there any indication of legislative intent, explicit or implicit, either to create such a
remedy or to deny one? Third, is it consistent with the underlying purposes of the
legislative scheme to imply such a remedy for the plaintiff? And finally, is the cause
of action one traditionally relegated to state law, in an area basically concerns of the
states so that it would be inappropriate to infer a cause of action based solely on
federal law?"

Plaintiffs fit squarely under the *Cort* rationale. Furthermore, The 3rd Circuit Court of Appeals
has applied a three prong test in deciding whether to approve a private of action from an agency rule
such as Section 602. First, a court must ascertain whether a private of action exists under the statute
from which the rule was promulgated. If under *Cort v. Ash* a court finds that Congress did not
intend the statute to be enforced by private actions, then the inquiry is concluded. Otherwise, two
further inquiries must be made: “Whether the agency rule is properly within the scope of the
enabling statute and whether implying a private right of action will further the purpose of the
enabling statute.”

Citing *Chester Residents v. SEIF*, the Powell court determined that the agency rule (Section
602) is properly within the scope of Title VI because of the Supreme Court’s unanimous opinion in
*Alexander*, that “actions having a unjustifiable disparate impact on minorities can be redressed
through agency regulations designed to implement the purposes of Title VI.”

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24132 Fed. 3rd at 933

25468 U.S. at 293,
The court also concluded that the third prong, whether implying a private cause of action under the disparate impact regulation will further the purposes of Title VI was also satisfied. Title VI purposes are to (1) combat discrimination by entities who receive federal funds; and (2) provide citizens with effective protection against discrimination. The court concluded that a private right of action will increase enforcement and increased enforcement will further Title VI's purposes, compensating for the agencies lack of sufficient resources to adequately enforce the regulation itself.

The court in *Powell v. Ridge* cited *Chester*, for the proposition that:

"Procedural requirements in Section 602 provide a fund recipient with a formal notice that the agency has begun an investigation which may cumulate in determination of funding. We note that a private lawsuit also affords a fund recipient similar notice."

Finally, and most importantly for our purposes, the question of whether this was an area basically of the concern of the states was deemed "irrelevant" because Title VI is a federal law.

Continuing now to whether the plaintiffs would have a claim under 42 U.S.C. Section 1983, we begin with the regulation. Section 1983 states:

"Every person who, under cover of any statute, ordinance, regulation, custom, or usage, of any state or territory or the District of Columbia, subjects or causes to be subjected, any citizen of the United States or

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26 *Cannon v. University of Chicago*, 441 U.S. 677, 704 (1979)

27 132 F.3d at 936

28 *Ridge v. Powell*, 189 F.3d at 398.
other person within the jurisdiction thereof to the deprivation of any rights, privileges, or immunities secured by the Constitution and laws shall be liable to the parties injured in the proper proceeding for redress."

A 1983 action has two essential elements: (1) that the conduct complained of was committed by a person acting under cover of state law; and (2) that this conduct deprived a citizen or other person of rights, privileges, or immunities secured by the Constitution or the laws of the United States.29

When a 1983 plaintiff seeks damages against state officials in their official or personal capacities, it may be maintained even though they acted in their official capacities in the mattered issue30. A government official in the role of personal capacity...fits comfortably within the statutory term “person.”31 The Supreme Court has held that a state official sued for injunctive relief is a person under Section 1983 because the action of perspective relief is not treated as a suit against the state32. A state official in his official capacity when sued for injunctive relief, would be a person under Section 1983 because official capacity action for perspective relief are not treated as actions against the state33.

Once a plaintiff has identified a federal right that has allegedly been violated, there arises a

29Powell, 189 F.3d at 400.
31Id.
32See Will, 491 U.S. at 71n10.
33Id.
the right is enforceable under Section 1983.” The presumption is rebutted “if Congress specifically foreclosed a remedy under Section 1983...either expressly, or forbidding the recourse to Section 1983 and the statute itself, or impliedly by creating comprehensive enforcement scheme that is incompatible with the individual enforcement under Section 1983.”

Neither Title VI nor the regulation promulgated there restricts the availability of relief under Section 1983. Defendants thus must make the difficult showing that allowing a Section 1983 action to go forward in these circumstances would be inconsistent with Congress’ carefully tailored scheme. Neither Title VI nor the Department of Education regulations establish an elaborate procedural mechanism to protect the rights of plaintiffs. The plaintiffs in such a case would have identified and pled disparate impact discrimination, the 14th Amendment “evil” or wrong that Congress intended to remedy by Title VI. It is thus clear that the propriety of the Section 5, 14th Amendment legislation must be judged with reference to the historical reference of racial discrimination it reflects. Consequently, given the historical record of racial discrimination in violation of the 14th Amendment’s Equal Protection Clause, as reflected by the State of Arkansas’ Program, the plaintiffs would be entitled to maintain their 1983 action against the individual

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35 Id.
37 Id.
38 See College Savings Bank, 119 S.Ct. 2207
39 Id.
defendants pursuant to the enforcement provisions of the 14th Amendment.

RIPENESS

The doctrine of ripeness poses the query of whether the harm asserted has matured sufficiently to warrant judicial intervention. The Supreme Court has held that the ripeness doctrine's purpose is "to prevent the courts, through avoidance of premature adjudication, from entangling themselves in abstract disagreements over administrative policies and also to protect the agencies from judicial interference until an administrative decision has been formalized and its effects have been felt in a concrete way by the challenging parties," Abbot Lab v. Garner, 387 U.S. 136, 148-149 (1967).

In Columbia Broadcasting System v. United States, 314 U.S. 407 (1942), the Court held ripe for review a Federal Communication Commission regulation that pronounced that the Agency would not license local stations that maintained certain contracts with chain broadcasting networks. The Court stated although the rule was only a statement of intentions and that no license had yet been denied or revoked, that type of regulation had the effect of law both before and after its sanctions were enforced. The regulation could be challenged because of the expected conformity to the rule caused an injury that a court could recognize.

In Frozen Food Express v. United States, 351 U.S. 40, 44-45 (1956), an order of the Interstate Commerce Commission exempting vehicles that carried certain commodities from licensing regulations was held reviewable. The Court held that the order was a final agency action under the A.P.A. Frozen Foods holds that "where there has been formal action, as the adoption of

a regulation...presumptively the action is reviewable.”

In Abbot Laboratories v. Garner, the Supreme Court observed that “the cases dealing with judicial review of administrative action have interpreted the ‘finality’ element in a pragmatic way, and concluded that there was no reason to deviate from those precedents.” In that case, regulations published by the Commissioner of Food and Drug was found to be a final agency action and thus subject to judicial review under the A.P.A. and the Declaratory Judgment Act.

A. Fitness of Issues for Judicial Review

The issues raised by this lawsuit are fit for judicial decision because the State had enacted the Governor’s Distinguished Scholarship program into law. This law and the connected implementing regulations have been in effect for a period of over three (3) years. The critical and concrete factor dispositive of this issue is that there has been formal action on the part of the General Assembly, the Governor, and the Department of Higher Education. The law and DHE regulations have a concrete and lasting effect on the citizens of Arkansas. It is entirely appropriate that the state’s formal action be reviewed by a Court, particularly in light of the seriousness of the continuing disparate impact on minority citizens of that state.

B. Hardships to the Parties

The plaintiffs, in this case, have suffered a hardship because, as stated in Columbia Broadcasting System v. United States, the “expected conformity” to the rule causes an injury that

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41See Frozen Foods, supra.

42Cite to be supplied
a court can recognize. The authors of *Griggs v. Duke Power Company*\(^{43}\), and *Connecticut v. Teal*\(^{44}\), would be astonished to learn that the continuing disparate impact on African-Americans resulting from conformity to the present regulations of this program cause them no actionable harm.

An even stronger argument that harm has occurred to African-American students in Arkansas because of disparate impact is found in a Pennsylvania school funding case. The Third Circuit, in *Powell v. Ridge*\(^{45}\), decided that in order to go to trial, all the plaintiff must do is plead that a facially neutral practice's adverse effects fall disproportionately on the group protected by Title VI and its implementing regulations. The court cited *Guardians Association v. Civil Service Commission of New York*\(^{46}\), for the proposition that administrative regulation incorporating disparate impact standard (like the regulations of the Department of Higher Education), are actionable. Because the law and regulations are final and because the plaintiffs have suffered the egregious harm of disparate impact the matters raised in the complaint are ripe for judicial review. In a recent case the Supreme Court held that a school official's deliberate indifference to discrimination amounts to an intentional violation of Title IX\(^{47}\).

**PLAINTIFF'S COMPLAINT CLEARLY STATES A CLAIM FOR RELIEF**

The First Amendment to the United States Constitution says that "Congress shall, make no

\(^{43}\)U.S. 424 (1971)

\(^{44}\)457 U.S. 440 (1982)

\(^{45}\)189 F.3d 387 (3rd Cir. 1999)

\(^{46}\)463 U.S. at 582 (1982)

law respecting the establishment of a religion, or prohibiting the free exercise thereof.\textsuperscript{48} It is settled that "the Fourteenth Amendment has rendered the legislatures of the states as incompetent as the Congress to enact such laws."\textsuperscript{49} Consequently, the Arkansas General Assembly is constitutionally prohibited from enacting laws respecting an establishment of a religion. But what sort of state action offends the Establishment Clause? Does the distinguished scholarship program that provides for direct payment of state funds to private, church-related institutions of higher education offend the prohibitions of the First Amendment? The answer lies in the intent of the founders and the relevant cases.

First, let us visit James Madison. Thomas Jefferson’s famous letter about a separation of church and state to the Danbury Baptist Association is often cited as the primary authority about the intent of the Establishment Clause. However, two Madison veto messages and a letter to the Baptist Churches of Neal’s Creek and Black Creek, North Carolina, arguably are more revealing of the intent of the writers of the Constitution and the First Amendment. Jefferson’s letter reflected his concern over the establishment of a state religion. Madison’s veto messages and letter deal with situations like the Arkansas scholarship program and reveal his notion that religious societies should remain pure, e.g., apart from government influence. In 1811 Congress passed a bill giving certain powers to an Episcopal Church in Virginia\textsuperscript{50}. Among them was the authority to provide for the

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\begin{itemize}
  \item \textsuperscript{48} Amendment I, Constitution of the United States.
  \item \textsuperscript{49}\textit{Cantwell v. Connecticut}, 314 U.S. 296, 303 (1940)
  \item \textsuperscript{50}See, The Debates and Proceedings of the Congress of the United States with an Appendix containing Important State papers and The Public Documents, and all the Laws of a Public Nature; with a Copious Index; Eleventh Congress - Third Session. Comprising the Period from December 3, 1810 to March 3, 1811, Inclusive, Compiled from Authentic Materials,
\end{itemize}
support of the poor, and the education of poor children. On February 11, 1811, President Madison returned the bill to Congress with a veto message. Madison argued that the government had no authority over the affairs of the church because of the Establishment Clause. He said the bill violated the Constitution because it "...would be a precedent for giving religious societies, as such, a legal agency in carrying into effect a legal and public duty." Again, in February, 1811, Madison vetoed another bill that, in part, reserved a parcel of government land in the Mississippi Territory for the Baptist Church at Salem Meeting House. He maintained that the bill violates the principle of the Establishment Clause prohibiting the use of government money to support religious societies. Shortly thereafter, Madison received a letter from two Baptist churches in North Carolina approving his veto of the Bill to provide support to the Mississippi Baptist church. In his response Madison wrote "having regarded the practical distinction between Religion and Civil Government as essential to the purity of both and as guaranteed by the Constitution of the United States, I could not have otherwise discharged my duty..." It is clear that Madison believed that government possesses no authority to impose a duty or responsibility on a religious body. Nor, as evidenced in the Baptist Church at Salem Meeting House matter, to use government funds to directly support a religious society. Madison believed that the Constitution granted the government absolutely no power over


51 Id.
52 Id.
53 Id.
54 Id.
55 Id.
religion. Religion was to be entirely removed from government influence. And the best way to separate them is to forbid the government from imposing any responsibilities or duties on religious societies. To maintain this "purity" government was given no Constitutional authority or cause to directly support religious societies. This attitude arose not from hostility to religion but from a desire to protect it from the heavy hand of government regulation. Why? Because we know that government regulation follows government funds. What better witness than Madison himself?

How has the Supreme Court dealt with this issue? In *Lemon v. Kurtzman*, the Supreme Court announced a three-pronged test to determine whether the Establishment Clause had been violated. According to *Lemon*, a statute does not violate the Establishment Clause when (1) it has a secular legislative purpose, (2) its primary effect neither advances or inhibits religion, and (3) it does not excessively entangle government with religion. In *Lemon* the high court considered a Pennsylvania state statute that authorized the state to "purchase certain secular educational services from nonpublic schools, directly reimbursing those schools solely for teacher's salaries, textbooks, and instructional materials." Most of the schools were affiliated with the Roman Catholic Church. These schools were subject to state audit and had to "identify the separate cost of the secular educational service" to receive reimbursement.

Here, the high court decided that the state statute violated the Establishment Clause because "...schools seeking reimbursement must maintain accounting procedures that require the State to

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56 403 U.S. 602, 612-613, (1971)

57 *Id.* at 602-603.

58 *Id.* at 602-603.

59 *Id.* at 602-603.
establish the cost of the secular as distinguished from the religious instruction.”

The court then warned of the dangers of providing state financial aid directly to a church-related school citing *Waltz v. Tax Commission* for the proposition that:

“Obviously, a direct money subsidy would be a relationship pregnant with involvement and, as with most government grant programs, could encompass sustained and detailed administrative relationships for enforcement of statutory or administrative standards...”

According to the court, the history of government grants reveal that they typically result in various measures of government control and surveillance. Here, the state’s power to audit, inspect, and evaluate a church-related school’s expenditures creates an intimate and continuing relationship between church and state. The Pennsylvania arrangement violated the First Amendment because the intent of the Establishment Clause is to protect religion from government interference or supervision. Direct payments and state supervision would certainly violate Mr. Madison’s expressed “purity” view of the proper relationship between church-related schools and the state.

In *Committee for Public Education & Religious Liberty v. Nyquist*, the High Court dealt with a program that provided direct money grants to certain nonpublic schools for repair and maintenance, reimbursed low-income parents for a portion of the cost of private school tuition,

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60 Id. at 620.

61 397 U.S. 664, 668 (1970)

62 *Lemon*, 403 U.S. at 621.

63 Id. at 622.

64 Id. at 623.

65 413 U.S. 756 (1973)
including sectarian school tuition, and granted other parents certain tax benefits. The judges decided that the maintenance and repair provisions of the New York statute violated the Establishment Clause because its effect was to subsidize and advance the religious mission of sectarian schools. The court also held that the tuition reimbursement plans, if given directly to sectarian schools, would similarly violate the Establishment Clause. This was notwithstanding the fact that the grants were delivered to the parents rather than the schools, as the effect of the aid is unmistakably to provide financial support for non-public sectarian institutions.

The Nyquist holding concerning payments to parents was substantially weakened with respect to vouchers by Agostini v. Felton. Here, the High Court stated, “we have departed from the rule...that all government aid that directly aids the educational function of religious schools is invalid.” The high court rejected the argument that government and religion are too closely linked merely because a school voucher program transfers money from the government to sectarian schools. It stated, “we reject the argument, primarily because funds cannot reach a sectarian school unless the parents or student decide independently of the government, to send their child to a sectarian school.” Consequently, Agostini supports the proposition that when parents or students choose to

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66 Id. at 757.
67 Id. at 774-780.
68 Id. at 780-789.
69 Id. at 780.
71 Id. at 223.
72 Id. at 230.
use funds provided to them by the state to attend a church-related school, the Establishment Clause
is not offended. This is so because the state funds are paid to the student or parent rather than
directly to the church-related school. The state, then, has no call to compel a church-related school
to perform administrative tasks for it or submit to its audit. This benefit to the parent approach (it
allows a tax deduction for parents for certain educational expenses whether they were incurred in
private, church-related or public schools), is also seen in *Mueller v. Allen*. The court stressed that
all the decisions invalidating aid to parochial schools have involved direct transmission of assistance
from the states to the schools themselves. But, the decision left the *Nyquist* prohibition of aid
"directly" paid to a church-related school unaffected.

In *School District of The City of Grand Rapids v. Ball*, the Supreme Court dealt with a
district that adopted a shared time and community education program with nonpublic schools. The
program was conducted for nonpublic school children at state expense in classrooms located in and
leased from the private schools. It offered state-funded classes during the regular school day that
were intended to supplement, for the private school students, the "core curriculum" courses required
by the state. The shared-time teachers were full-time employees of public schools. Of the 41
private schools involved in the program, 40 were church-related. The High Court decided that this

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74 463 U.S. at 399.
75 473 U.S. 373 (1984)
76 Id. at 375.
77 Id. at 376.
78 Id. at 379.
initiative had the “primary or principal” affect of advancement of religion, and, therefore, violated the Establishment Clause.\textsuperscript{79} According to the judges “even the praiseworthy secular purpose of providing for the education of school children cannot validate government aid to parochial schools when the aid has the effect in promoting a single religion or religion generally or when the aid unduly untangles the government in matters religious.”\textsuperscript{80} They held that “the symbolic union of church and state inherent in the provision of secular state-provided public instruction in the religious school buildings threatens to convey a message of state support for religion to students in the general public.”\textsuperscript{81} Further, “the programs in effect subsidize the religious functions of parochial schools by taking over a substantial portion of their responsibility...”\textsuperscript{82} The court also said that the Establishment Clause “rests on the belief a union of government and religion tends to destroy government and degrade religion.”\textsuperscript{83}

Clearly, the most instructive case for our purposes is\textit{ Whitters v. Washington Department Of Services For The Blind}.\textsuperscript{84} In\textit{ Whitters}, the court ruled on an objection to the state of Washington’s vocational rehabilitation program for the visually handicapped that financed petitioner’s training at a Christian college. The record shows that assistance to Mr. Whitters College was provided under a Washington state program that paid money directly to the student, who then transmitted it to the

\textsuperscript{79}Id. at 397.

\textsuperscript{80}Id.

\textsuperscript{81}Id.

\textsuperscript{82}Id.

\textsuperscript{83}473 U.S. at 398.

\textsuperscript{84}374 U.S. 481 (1986).
educational institution of his choice. The Washington statute authorized the state to "provide for special education and/or training in the professions, business or trades so as to assist visually handicapped persons to overcome vocational handicaps and to obtain the maximum degree of self-support and self-care." Mr. Whitters, who suffered from a progressive eye disease, was eligible for vocational rehabilitation assistance under the terms of the statute. He attended Inland Empire School of the Bible, a private Christian College in Spokane, Washington. He was studying the Bible, ethics, speech, and Church administration in order to equip himself for a career as a pastor, missionary, or youth director.

The Washington court ruled that the "principal or primary effect" of the state financial assistance to Whitters was to train him become a pastor, missionary, or church youth director. In the view of the court, the state aid clearly had the primary effect of advancing religion and violated the Establishment Clause. On appeal, the High Court reversed this decision. It said, "it is well settled that the Establishment Clause is not violated every time money previously in the possession of the state is conveyed to a religious institution." For example, a state may issue a pay check to one of its employees, who may then donate all or part of that pay check to a religious institution, all

85 Id. at 483.
86 Id.
87 Id.
88 Id.
89 Id. at 485.
90 Id. at 484.
91 Id. at 486.
without constitutional barrier; and the state may do so even knowing that the employee so intends to dispose of his salary.\textsuperscript{92} The court continued, "it is equally well settled, on the other hand, the state may not grant aid to a religious school, whether cash or in kind, where the effect of the aid is that of a 'direct subsidy' to the religious school from the state."\textsuperscript{93} The issue "is whether, on the facts, the extension of aid to petitioner and the use of that aid by petitioner to support religious education is a permissible transfer similar to the hypothetical salary donation, described above or is an impermissible \emph{direct} (emphasis added) subsidy."\textsuperscript{94}

In the opinion of the Supreme Court the facts central to the inquiry in the \textit{Whitters} case were whether (1) "any aid provided under Washington's program that flows to religious institution does so only as a result as a genuine independent private choice of the aid recipient; (2) it is not one of the "ingenious plans for channeling state aid to sectarian schools that periodically reach the court;" (3) it creates no financial incentive for students to undertake sectarian education; (4) it does not tend to provide greater or broader benefits for recipients for recipients who apply their aid to religious education;" and (5) in this case, the fact that aid goes to individuals means that the decision to support religious education is made by the individual, not the State."\textsuperscript{95}

And, importantly, nothing in the record indicated that any significant portion of the aid spent on the Washington program as a whole will end up flowing to religious education. The court stated, "respondent is correct in pointing out that aid to a religious institution, unrestricted in its potential

\begin{itemize}
\item \textsuperscript{92}Id.
\item \textsuperscript{93}Id.
\item \textsuperscript{94}Id.
\item \textsuperscript{95}Id. at 488.
\end{itemize}
usage, if properly attributable to the state, is clearly prohibited under the Establishment Clause. But the respondent's argument does not apply in this case because there was no direct aid to the religious school. The court decided that, on the facts present, the Washington program did not constitute sufficiently direct support of religion so as to violate the Establishment Clause. Justice Powell, concurring, said that the Washington scheme was constitutionally permitted because the student or parent directly received the state payments, citing *Mueller v. Allen*, for the proposition that payments directly to parents are constitutional because any benefit to religion results from "numerous private choices of individual parents of school-age children."

Before we turn to the Arkansas Scholarship program it will be helpful to review the common threads woven through these cases that bind them together. First, requiring church-related schools to maintain administrative and accounting procedures for review by the state offends the Establishment Clause. Second, payment of financial aid directly to a church-related school offends the Establishment Clause. Third, when there is a disparity in the amount of state funds spent on

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96 *Id.* at 489.

97 *Id.*

98 *Id.*


public and church-related students the establishment clause is offended.\textsuperscript{102} Fourth, the establishment 
Clause is offended if the scholarship program creates a financial incentive for the student to attend 
a church-related school.\textsuperscript{103} And finally, and perhaps most troubling, is this program an ingenious 
scheme designed to channel state aid directly to church-related schools condemned by the decisions 
in \textit{Committee For Public Education And Religious Liberty v. Nyquist}?\textsuperscript{104}

The State of Arkansas attempts to cloak itself in the recent case of \textit{Mitchell v. Helms}.\textsuperscript{105} 
Unfortunately, for the State of Arkansas, the cloak does not fit. It does not fit because the \textit{Mitchell} 
case concerned Chapter II of the Education Consolidation and Improvement Act of 1981.\textsuperscript{106} Chapter 
II channels federal funds to the local educational agencies, which are usually public school districts, 
by state educational agencies, to implement programs to assist children in elementary and secondary 
schools. Among other things, Chapter II provides aid for “the acquisition and use of instructional 
and educational materials, including library services and materials (including media materials), 
assessments, reference materials, computer software and hardware for instructional use, and other 
curricular materials\textsuperscript{107}. In effect, the Chapter II program was a neutral, per capita aid program. In 
sharp contrast, however, the Arkansas program is clearly not a per capita aid program.

Secondly, as Justice O’Connor highlights in her concurring opinion, Justice Thomas writing

\textsuperscript{102} Whitters \textit{v. Washington}, \textit{Id.} 
\textsuperscript{103} Whitters \textit{v. Washington}, \textit{Id.} 
\textsuperscript{104} See, 413 U.S. 756 (1973), and Whitters \textit{v. Washington}, See, 474 U.S. 481 (1986) 
\textsuperscript{105} 120 S.Ct. 2330 (2000). 
\textsuperscript{106} 20 U.S.C. Section 7301-7373. 
\textsuperscript{107} 20 U.S.C. Section 7351(b)(2)
for the *Mitchell* plurality did not even consider the important and decisive issues raised by these plaintiffs in their complaint. The issues in this case are whether (1) any aid provided under Arkansas' program that ultimately flows to a religious institution does so only as a result of the genuinely independent private choices of scholarship recipients, (2) the program is not one of the ingenious plans for channeling state aid to sectarian schools that periodically occur, (3) it creates no financial incentive for students to undertake sectarian education, (4) it does not intend to provide greater or broader benefits for recipients who apply their aid to religious institutions, and (5) that any aid that ultimately flows to a church related institution does so only as a result of the genuinely independent and private choice of aid recipients.

As Justice O'Connor says in concurring with the plurality in *Mitchell*, "specifically, we decided *Whitters* and *Zobrest* on the understanding that the aid was provided directly to the individual student who, in turn, made the choice of where to put that aid to use," and "accordingly, our approval of the aid in both cases rely to a significant extent on the fact that any aid that ultimately flows to a religious institution does so only as a result of genuinely independent and private choices of aid recipients."  

Justice O'Connor continued by saying she believed the distinction between a per capita school aid program and a true private choice program is significant for the purposes of endorsement. In terms of public perception, a government program of direct aid to religion based on the number of students attending each school differs meaningly from the government distributing aid directly to individual students, who, in turn, decide to use the aid at the very same religious schools.

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108 Roy, please supply something here.
Finally, she writes that the distinction between a per capita aid program and a true private choice program is important when considering aid that consists of direct monetary subsidies. The Supreme Court has recognized special Establishment Clause dangers when the government makes direct money payments to sectarian institutions. Consequently, there are important distinctions between the issue dealt with in the *Mitchell* case and the line of cases that we cite that make direct payments of state monies to church related institutions offensive to the Establishment Clause.

A reasonable interpretation will conclude the Arkansas Distinguished Scholarship Program violates the Establishment Clause for a wide variety of reasons. First, the program requires church-related institutions to agree to perform administrative tasks and insure compliance with state regulations. The institution must submit to a review of its records and demonstrate its due diligence as a steward of state funds. One would reasonably believe that the administrators of church schools would strongly object to the grubby hands of State officials thumbing through their private school files. Does this mean they agree to having the Legislative Audit look at their books? Apparently, yes! In any case, the regulations clearly offend the Establishment Clause holdings that the state may not compel religious societies to perform state administrative tasks.

Second, the state funds are paid directly to church-related institutions. This direct aid offends the Establishment Clause. If there is one thing certain under all these cases, it is that state money paid directly to a church-related school is unconstitutional. This is so because the scholarship funds

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109 DHE Rule 6.H.


are a direct subsidy condemned in all the cases cited. This issue was not even raised in *Mitchell*.

Third, there is a considerable disparity between the amount of state funds per distinguished scholarship provided church-related institutions and public institutions under the program. Recall that for example Hendrix will typically receive $15,000 and Southern Arkansas $4,730 per scholarship student.\footnote{Arkansas Department of Higher Education, Supra note 5.} There is also a disparity in the total funds sent to private and public schools. Church-related schools received $2,182,000 and public institutions $1,334,000 in the years 1998-99.\footnote{Id.} This disparity in treatment of public and church-related institutions offends the Establishment Clause.\footnote{Whitters, 474 U.S. 481.}

Fourth, the program clearly creates a financial incentive for the distinguished scholarship student to attend a church-related school. This is so because the program is open-ended. The state pays whatever the church-related institution considers a reasonable level of tuition and fees.\footnote{Ark. Stat. Ann. 6-82-312(b).} The state sponsored creation of a considerable financial incentive to attend a church-related school is offensive to the Establishment Clause.\footnote{Whitters, 474 U.S. 481.}

Finally and most disturbing, the distinguished scholarship program, if newspaper reports are accurate, may be a scheme to channel state aid directly to church-related schools that offends the
Establishment Clause under Whittets. According to Doug Smith, the impetus for the distinguished scholars program did not emanate from the Department of Higher Education. Rather, it was proposed by state senators. The legislation that came back was not that proposed to the General Assembly by the DHE. The DHE had little choice because 35 senators sponsored the enabling legislation. One of its sponsors is quoted as stating that the bill was brought to him by the President of the Independent Colleges and Universities Association and by the Association's lobbyist. This certainly raises the issue of a scheme to support religious schools. It will be interesting to see why the association would want the state rummaging around in their private, church-related educational programs to determine stewardship of state funds. The North Carolina Baptists who wrote to Mr. Madison would surely be offended.

Mr. Madison would be saddened by the abuse of his Amendment on the part of the DHE of the state of Arkansas. His two veto messages and letter to the Baptist Churches of Neal's Creek and Black Creek, North Carolina, in 1811, sent a powerful message that government has no (none at all) business regulating a religious society, giving a religious society legal agency to carry into effect a public duty, nor giving direct aid to a religious society. The Arkansas Distinguished Scholars Scholarship Program has the unique and dubious distinction of offending all of Madison's notions of separation of religion from influence and regulation by the government. This was not so because

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117Id.

118Doug Smith, “Pushing And Shoving For The State’s Top Scholars,” Arkansas Times, Aug. 27, 1999, at 13, col.3-4.


120See, The Debates and Proceeding of the Congress of the United State, supra.
of hostility toward religion, but rather toward the government. He believed that the

Constitution granted government no power over religion. And it surely follows, as in the Arkansas
example, that when a religious society accepts government funds in this manner the heavy hand of
government regulation is sure to follow. It makes no constitutional difference that church-related
schools volunteer for regulation. It still offends the Constitution!

SECTION II, POLITICAL PHILOSOPHY

In this section we will review the issue of discrimination from a libertarian point of view. We will utilize that perspective in order to focus on the issue of whether the government should be allowed to discriminate between its citizens, and if so, on what basis. In this section we take a much broader perspective than that of the constitution as it applies to racial discrimination by the government in the field of education in one state, Arkansas. We apply this theory, generally, to all discrimination, federal, state or local government, in any field, on any basis.

LIBERTARIANISM

Since we shall be applying libertarianism to this thorny terrain, it behooves us to begin with a review of that philosophy. Libertarianism is the political philosophy which maintains that justice can only be attained by an adherence to the non aggression axiom: all acts are legitimate, except those that transgress against a person or his legitimately owned property. That is, murder, kidnaping, rape, theft, trespass, fraud, assault and battery, etc., and all such other invasive acts should be illegal, but no other deeds should be prohibited by law. Included in the latter category are victimless crimes
such as pornography, prostitution, gambling, drug taking, homosexuality, etc.\textsuperscript{122}

What is the proper role of government in this system? For most libertarians\textsuperscript{123}, it consists


solely of the duty to protect persons and property from invasion. Given that government should exist at all, there are three but only three legitimate state institutions: armies to keep foreign aggressors from attacking us, police to quell crimes emanating from local evil doers, and courts to distinguish between victims and criminals\(^\text{124}\).

DISCRIMINATION

Whichever of the two versions of this philosophy is under discussion, both are united on the proposition of free association: all interaction between people shall be voluntary; no one should be forced to deal with another person against his will. Thus discrimination against certain individuals or groups or segments of society would also be considered a "victimless crime." Since no one has a right to force anyone to interact with him against the will of the latter, it would be no crime, under libertarian law, to refuse to buy from, sell to, employ, marry, befriend, join, or in any other way whether commercial or personal, interact with people on the basis of race, religion, sex, or, indeed, any other criteria. This implies that all laws which seek to compel people to engage with one another, such as the so called Civil Rights Act of 1964, would be invalid under libertarian law.125

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If the authors of the present paper believe that left handers are the spawn of the devil, and place a sign on front door of their hotel\textsuperscript{126}, "No dogs or left handed people allowed on the premises," we would not be subjected to any legal penalty under the libertarian code of law\textsuperscript{127}.

Private discrimination, however, must be sharply differentiated from public variety. Individual citizens, in this view, have the right to freedom of association. This is so important it deserves to be underlined. To say that they do not have the freedom to associate with whomever they wish is actually to claim the legitimacy of outright slavery. For the only thing wrong with that "curious institution" was that it violated the rights of freedom of association of the slaves. Forget about the whips and the chains. There is nothing unique about these to slavery; sadomasochists engage in their use every day. The problem with slavery was that its victims had no right to quit; that is, to disassociate themselves from their masters. If they but had a right to free association, this would render slavery innocuous. It would reduce it to no worse than the status of voluntary sadomasochism.

But government is not an individual person, with rights to associate with those it wishes to,

\textsuperscript{126} Our critics might think that a good name for this hotel, in view of our last names, would be "Chez Blockhead."

\textsuperscript{127} And the same goes for Jews, blacks, homosexuals, females, old people, young people, or any other supposedly "victimized" groups.
and to avoid those with whom it wishes to have no interaction. Very much to the contrary, the state has responsibilities, not rights. If the limited government and anarchist wings of libertarianism are united on the claim that private individuals or groups have a complete and total right to discriminate on any basis they choose, and against any group or individual they wish, both would also agree that government, if it is justified at all, should not be allowed to do so. The point here, is that the purpose of the state is to protect the lives, liberties and fortunes of all of its citizens, and on a basis that does not distinguish between them. Government, in this philosophy, is not only to be blind to the race, color, natural or ethnic origin, religion, sex, disability, age, sexual orientation or veteran status, the usual suspects, but is to totally ignore all other criteria as well. For example, the state must not discriminate on the basis of intelligence, athletic ability, eye color, business acumen, initiative and ambition, unless these characteristics are somehow related to conducting its business of protecting person or property rights.

Let us consider a few examples. First, as mentioned above, the State of Arkansas provides a full academic scholarship to a state approved public or private Arkansas Institution of Higher Education to graduates of Arkansas secondary schools who demonstrate "extraordinary academic

128 We shall henceforth consider the views of the minarchists, or limited government advocates alone, so as to obviate for argument’s sake the point made by the anarchist libertarians, that government should not exist at all.

129 There is only one exception to this general rule. If the legitimate function of the government pertains to any of these distinctions, then that may be taken into account. For example, if the police must infiltrate the Mafia, it cannot ask a black cop to do so; for the Blood or the Crips, a Jewish officer simply will not do; if the police must send someone in to spy on a gang of criminals composed of females, or lesbians, a male is counter indicated.

130 Text accompanying ft. 1, supra.
ability.\textsuperscript{131} Previously, we criticized this policy on the ground that a disproportionately high number of the members of one racial group wins these scholarships, whites, and a disproportionately low number of another, blacks, fails to do so. We are now in a position to criticize this scholarship plan on a much more radical basis: even if the same proportion of white and blacks won these scholarships, the program would still be contrary to libertarian law since it would continue to make indvidious comparisons between inept and brilliant students, awarding tax money to virtually all of the latter and none of the former\textsuperscript{132}. That is to say, even if the program were not problematic on racial grounds, it would be so on the basis of intelligence. For the scholarships would be awarded to smart students of either race, while ignorant students of both races would be victimized by state discrimination. But where is the warrant for governments to divide the population on the basis of intelligence, supporting those who exhibit this characteristic to a great degree, and ignoring those who do not\textsuperscript{133}? There is no such justification. If it is illegitimate for the government to discriminate on the basis of IQ, then they may not give out scholarships on this basis. If they wish to award scholarships to students, they must do so in an actually “fair” way, e.g., by lottery.

And the same goes for entrance requirements for public universities. They, too, are part of

\textsuperscript{131} See \textsuperscript{ft. 1, supra.}

\textsuperscript{132} We abstract from the question of whether or not the testing instrument accurately distinguishes the one group from the other, assuming for the sake of argument that it does.

\textsuperscript{133} Robert B. Reich criticizes analogous policies (elite universities accepting only very sharp-witted students) because they increase income inequality. This reason should be sharply distinguished from our own: that awarding scholarships to the “best and the brightest” is an instance of statist discrimination. In our view, private citizens, in sharp contrast to governmental agencies, are entirely justified in acting in ways which increase income inequality. See on this Reich, Robert B., “," \textit{Chronicle of Higher Education}, 2000, (title, date and page number to be supplied).
the apparatus of government. If the state is prohibited by libertarian law from awarding scholarships on the basis of perspicaciousness, then, too, colleges which are part of government cannot do this either, nor can they pick and choose among applicants for admission on this basis. It cannot be denied that the University of California at Berkeley, for example, would lose its reputation for prestige under these conditions, but it is no part of libertarian law to preserve or enhance the renown of institutions such as these which are illegitimate in the first place. Short of complete privatization of state colleges, reducing their level of excellence would be entirely acceptable from the perspective of this political philosophy.

The point is, if something is illegitimate to its core, as public education is for the libertarian perspective, but somehow, we stipulate, that it must exist, then it is a positive benefit that it be run as inefficiently as possible. Yes, it would be the death knell for prestigious public institutions of higher learning to be forced not to discriminate in favor of the highly intelligent. But this is precisely what is required by considerations of justice. If an institution should not exist at all, but somehow persists, then equity entails that it be ineffective.

Let us now consider the characteristic of athletic ability. It is a well known fact that with

\[134\] What about ostensibly "private" institutions of higher learning such as Harvard, Yale, Columbia, etc. These, too, would be considered public in that an inordinate percentage of their budgets emanate from coercive tax levies.

\[135\] For the application of this argument to Nazi concentration camps, and the voluntary army employed to support an unjust war, see Block, Walter, “Against the Volunteer Military,” The Libertarian Forum, August 15, 1969, p. 4.

\[136\] Sowell, Thomas, The Vision of the Anointed, New York: Basic Books, 1995, p. 35, states: “No one regards the gross disparity in ‘representation’ between blacks and whites in professional basketball as proving discrimination against whites in that sport.”
the exception of a few sports such as swimming and diving, yachting, hockey and handball, blacks exceed whites in terms of athleticism\textsuperscript{137}. Certainly, major league football and basketball, whether at the college or professional level, are vastly over represented by blacks\textsuperscript{138}. Therefore, the logic of our case against the Governor's Scholarship Program of Arkansas based on intelligence mitigates against any and all athletic scholarship awards on the part of all state institutions. If the academic scholarships favor whites at the expense of blacks, and must therefore be rescinded, then athletic scholarships elevate blacks to the detriment of whites, and must be repealed on the same ground.

But more. Just as we were able to offer a more radical critique of the Governor's Scholarship Program in that it disadvantaged the ignorant, so can we criticize all athletic scholarships in that they discriminate against those who are inept in sports. That is, even were it the case that blacks and whites won athletic scholarships in exact proportion to their overall numbers, these awards would still be unjustified in that athletic whites and blacks would be treated better than their more awkward counterparts in both racial groups. The authors of the present paper realize full well that if athletic scholarships were bestowed in a manner unrelated to athleticism this would spell the death knell for competitiveness. Yet, promoting competitiveness is not part of the mandate of limited government, certainly not from a libertarian perspective. If institutions wish to field excellent teams, they would have the option of privatizing; otherwise, mediocrity would be their (deserved) fate\textsuperscript{139}.

\begin{footnotes}
\item[137] See on this the movie \textit{White Men Can't Jump}. Also, "white man's disease" is now common parlance in basketball circles, and refers to the inability of white men to jump high for rebounds, or blocks.

\item[138] See appendix 1, below.

\item[139] See on this footnote 135, supra
\end{footnotes}
OBJECTIONS

Let us conclude by considering several objections to the foregoing.

1. Typically, advocates of free enterprise and economic freedom, such as ourselves, oppose affirmative action, quotas, equal proportionality. In the present case, the very opposite is true. Namely, we are on record herein as supporting these programs. We consider in some detail scholarships based on intelligence and athletic ability as cases in point, but would generalize to cover any other such criteria. Why the difference?

   This is because while we oppose the imposition of quotas, etc., for private individuals or firms, this certainly does not true with regard to the minions of the state. Very much to the contrary, anything to rein in the unjustified use of government power is all to the good, in this

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philosophy. Not only schools, but libraries, museums, art galleries, opera, symphony orchestras, etc., discriminate against blacks, vis a vis whites, since the latter make greater proportional use of them. Moreover, and just as important, expenditures in these directions vitiate against the stupid and those who are and wish to remain ignorant. That is, even if blacks and whites availed themselves of these services strictly according to their proportion to the overall population, this would still be an unwarranted discrimination on the part of the government against various elements of the population. That is, as long as smart people use libraries, museums, etc., to a greater degree than their ignorant counterparts, this is an illegitimate incursion of government into the economy. Therefore government is unjustified in offering these goods and services no matter what the relative utilization of them by blacks and whites.

2. But if government purchases from the private sector the land, labor and capital necessary to provide those “intellectual” services, so does this hold true for things like desks, pencils, paper, computers, jet planes, pistols, bazookas, battle ships, police and soldiers’ uniforms, paper clips, rubber bands, envelopes, etc. These, too, discriminate against those on the low end of the bell curve. Thus, if government is prevented from financing the former, this holds for the latter as well.

This is obviously an attempt at a reductio ad absurdum of the libertarian position in that were the state not allowed to purchase these latter set of items, it could not fulfill its obligations under minarchism.

\footnote{That is, whites, and males, are likely to be over represented in the provision of these goods and services to the government. See on this footnote 125, supra., particularly, Hernstein, Richard, and Murray Charles, op. cit.}
The reply is that the provision of armies, courts and police are part and parcel of the proper scope of government, while competing with industries which do our could provide intellectual services is not. And this applies, as well, for the myriad of other services supplied by government, e.g., in health and welfare, which have nothing to do with upholding the rights to personal safety and property mandated by the libertarian vision. It must be conceded that it would be possible for the public sector to provide all sorts of goods and services on a non-discriminatory basis, not only in terms of race, sex, ethnicity, etc., but also intelligence and other abilities. They could all be supplied on a “fair” basis; through lottery. However, this will still be inappropriate in the libertarian view, since these are not within the proper scope of a limited government.

CONCLUSION

A word on federal state relations. Ordinarily, writers such as ourselves who favor markets, private property and the freedom of association also approve of subsidiarity for government. That is, when there is a conflict between different levels, we advance the cause of the most local: cities vis a vis states, and the latter when in conflict with the federal government. However, in the present case, we are taking the side of the federal government vis a vis the state of Arkansas.

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143 This is option #3, listed below.
There are three possible theories on this matter; together they are seemingly exhaustive:

1. the federal always has jurisdiction over the states;

2. the states are supreme vis a vis the federal government; therefore, the federal government never has jurisdiction over the states;

3. subsidiarity; whenever there is a conflict between the two levels of government, the presumption is in favor of the least centralized; thus, the nod must go to the state when in conflict with the federal, but also to the town or county when in conflict with the state.

It is our contention, however, that there is a fourth alternative, superior to any of these three. It is:

4. Ignore the level of government which is taking any given position on the ground that it is irrelevant to libertarianism; instead, take the correct position, regardless of from which level of government it is emanating.

In the present circumstance, this is our story, and we are sticking with it. That is, it cannot be denied that in the present case, the state of Arkansas, with its Governor's Scholarship Program not only vitiates against black people, but against those on the left side of the bell curve of intelligence as measured by IQ as well. Therefore, it is an unwarranted discrimination on the part of this state government.
Appendix 1.

Racial and Ethnic Composition of Professional Athletic Employment (in %)\textsuperscript{144}

<table>
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<th></th>
<th>White</th>
<th>Black</th>
<th>Hispanic</th>
<th>Other</th>
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</thead>
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<td>12</td>
<td>11</td>
<td>4</td>
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<tr>
<td><strong>NBA Players</strong></td>
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<td></td>
<td></td>
<td></td>
</tr>
<tr>
<td>General Managers</td>
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<td>0</td>
</tr>
<tr>
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<td>3</td>
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<td><strong>NFL Players</strong></td>
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</tr>
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