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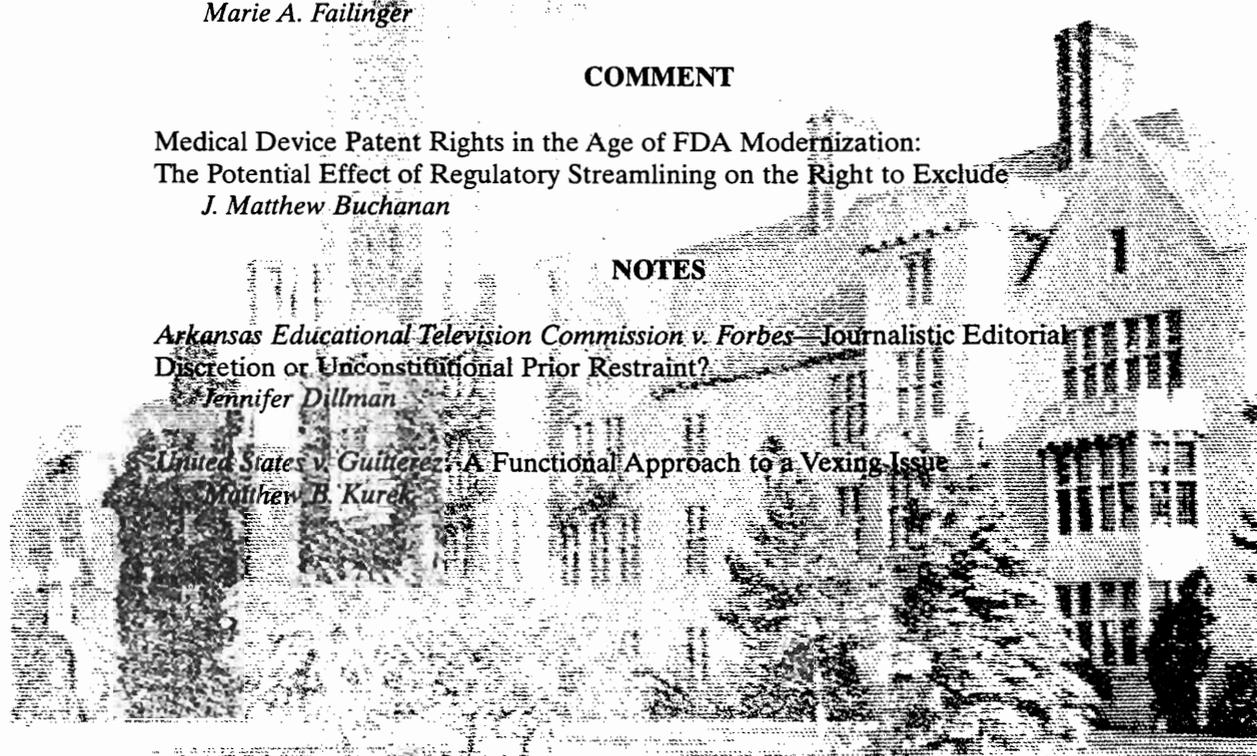
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GENDER EQUITY IN ATHLETICS: SHOULD WE ADOPT A NON-DISCRIMINATORY MODEL?

Roy Whitehead, Walter Block,** and Lu Hardin****

BACKGROUND

FOR years intercollegiate athletics has offered interested and able students opportunities to experience the lessons of competition, develop physical and leadership skills, be a part of a team, and perhaps most important, enjoy themselves. Good intercollegiate athletics programs require competitive parity, universal and consistently applied rules, and an opportunity to participate according to one's interest and ability. The majority of NCAA members have sought to assure the foregoing conditions, but there is considerable evidence that they have not fully succeeded with regard to women.

Because there was no assurance of equal opportunity in the range of components of education, Congress enacted Title IX of the Educational Amendments of 1972.¹ The federal law stipulates that "[n]o person in the United States shall, on the basis of sex, be excluded from participation in, be denied the benefits of, or be subjected to discrimination under any education program or activity receiving federal financial assistance."²

Interestingly, an often ignored subsection of the statute, often quoted by football coaches, provides:

[N]othing contained in subsection (a) . . . shall be interpreted to require any educational institution to grant preferential or disparate treatment to the members of one sex on account of an imbalance that may exist with respect to the total number or percentage of persons of that sex participating in or receiving the benefits of any federally supported program or activity, in comparison with the total number or percentage of persons of that sex in any community, State, section or other area . . .³

In 1991, the NCAA surveyed its members' expenditures for women's and men's athletics programs. The survey revealed that undergraduate enrollment was roughly equally divided by sex, but men constituted 69.5% of the participants in intercol-

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1. Title IX of the Educ. Amends. of 1972, 20 U.S.C. §§ 1681-1688 (1972).

2. 20 U.S.C. § 1681(a).

3. *Id.* § 1681(b).

legiate athletics and their programs received approximately 70% of the athletics scholarship funds, 77% of operating budgets, and 83% of recruiting money.⁴

In response to the study, the NCAA appointed a Gender Equity Task Force that submitted its report during July 1993. In its report, the Task Force defined gender equity as follows: "An athletics program can be gender equitable when the participants in both men's and women's sports programs would accept as fair and equitable the overall program of the other gender."⁵ The report also defined the ultimate goal of gender equity as: "The ultimate goal of each institution should be that the numbers of male and female athletes are substantially proportionate to their numbers in the institution's undergraduate population."⁶

In January 1994, the NCAA members gave a lukewarm endorsement of gender equity by voting to encourage member institutions to follow the "law" concerning gender equity.⁷ One purpose of this article is to review the guiding regulations and cases that interpret the "law" for the benefit of those who are interested in effectively accommodating the interest and abilities of women athletes. We are concerned that the federal court decisions that have dealt specifically with Title IX and "gender equity" have generally failed to focus on the real meaning of Title IX, "fully and effectively accommodating the interests and abilities of women athletes."⁸ This is due to a misguided focus almost solely on proportionality in numbers rather than on a real accommodation of athletic abilities.

Another goal of this article is to philosophically and legally examine the underlying principles of gender equity in athletics. To this end we will criticize this "law" from a perspective based on property rights and economic freedom.

I. THE LEGAL AND REGULATORY REQUIREMENTS

The primary sources of gender equity responsibilities are found in Title IX, the implementing regulations,⁹ and, perhaps more important, the Title IX Athletics Investigators Manual used by the Department of Education, Office of Civil Rights (OCR).¹⁰ Judges who are involved in Title IX cases frequently cite the OCR Manual as authority. The OCR takes several major factors into account in determining whether intercollegiate athletic programs are gender equitable. The program components are accommodation of athletic interests and abilities; equipment and supplies; scheduling of games and practice times; travel per diem allowance; opportunity to receive coaching and academic tutoring; assignment and compensation of coaches and tutors; locker rooms, practice and competitive facilities; medical and training

4. See NATIONAL COLLEGIATE ATHLETIC ASS'N, FINAL REPORT OF THE NCAA GENDER-EQUITY TASK FORCE 1 (1993) [hereinafter THE REPORT].

5. THE REPORT, *supra* note 4, at 2.

6. *Id.* at 3.

7. See Amendment No. 2-1, Principle of Gender Equity, NCAA Convention, Jan. 1994.

8. 34 C.F.R. § 106.41(c) (1992).

9. See 34 C.F.R. pt. 106, effective July 21, 1975.

10. See VALERIE M. BONNETTE & LAMAR DANIEL, U.S. DEP'T OF EDUC., TITLE IX ATHLETICS INVESTIGATOR'S MANUAL (1990) [hereinafter THE MANUAL].

facilities and services; housing and dining facilities and services; publicity; and, athletic scholarships.¹¹

Although all the program components are considered important, perhaps the most relevant issue is whether the university is providing an effective accommodation of student interests and abilities. The regulations require institutions that offer athletic programs to accommodate effectively the interests and abilities of students of both genders to the extent necessary to provide equal opportunity in selection of sports and levels of competition.¹² The OCR uses three factors to assess the opportunity for individuals of both genders to compete in intercollegiate programs:

1. Whether intercollegiate level participation opportunities for male and female students are provided in numbers substantially proportionate to the respective enrollments;
2. Where members of one sex have been and are under represented among intercollegiate athletics, whether the institution can show a history and continuing practice of program expansion which is demonstrably responsive to the developing interests and abilities to that sex; and,
3. Where members of one sex are under represented among intercollegiate athletics, and the institution cannot show a continuing practice of program expansion such as that cited above, whether it can show that the interests and abilities of the members of that sex have been fully and effectively accommodated by the present program.¹³

Unfortunately, very few institutions, especially those with football programs, are able to meet the first test, proportionality. Additionally, a training session with an author of the OCR Investigators Manual reveals that no institution, to his knowledge, has ever met the second test consisting of a history and practice of program expansion responsive to the interests and abilities of women.¹⁴

Given that few institutions can meet parts one and two of the test, we must focus on whether the institution is effectively accommodating the interests and abilities of the under represented sex.

Recall that the NCAA Gender Equity Task Force defined gender equity as having the same proportion of female and male athletes as in the undergraduate student body.¹⁵ Much to the dismay of some interest groups, OCR has ruled that the third part of the test may be satisfied by the institution showing it has accommodated the interest and abilities of its female students although there may be a substantial disproportionateness of numbers between male and female athletes. According to the OCR, this may be demonstrated by showing that the opportunity to participate in intercollegiate athletics is consistent with the interests of enrolled women undergraduates who have the ability to play college sports, which can be determined

11. See 34 C.F.R. § 106.41; 34 C.F.R. § 106.37.

12. See 34 C.F.R. § 106.41(c)(1).

13. See *id.*

14. Remarks of Lamar Daniel, Office of Civil Rights, Gulf South Conference Meeting, Birmingham, Ala., Jan. 26, 1994.

15. See *supra* text accompanying note 5.

by an external survey of the university's recruiting area, including high school and junior college competition, summer league competition, and sanctioned state sports. The university need only accommodate women who have the ability to play at the intercollegiate level.¹⁶

The OCR does not generally interview undergraduates who cannot play at the intercollegiate skill level. It is clear, however, that if the undergraduate survey, or external survey of the recruiting area, suggests that potential female students who possess the required interest and ability are present, and there is a reasonable availability of competition for a team, they must be accommodated. If the conference, for example, has women's softball, and softball interests and abilities are discovered in the undergraduate population and the recruiting area, the university must accommodate this by inaugurating a woman's softball team.

Secondly, there is perhaps the most misunderstood area of gender equity compliance—athletic financial assistance. OCR's manual provides that "institutions must provide reasonable opportunities for athletic scholarships awards for members of each sex in proportion to the number of students of each sex participating in . . . intercollegiate athletics."¹⁷

OCR will determine compliance with this provision of the regulation primarily by means of a financial comparison. The requirement is that proportionately equal amounts of financial assistance (scholarship aid) are available to men's and women's athletics programs. This rule is often misinterpreted as mandating that the amount of financial assistance to male and female athletes be proportionate to their undergraduate enrollments. For example, if a university is 60% female and 40% male, 60% of the financial assistance would have to go to female athletes. Fortunately, or unfortunately, depending on one's point of view, the foregoing is not the test for compliance.

OCR measures compliance with the athletic financial assistance standard by dividing the amounts of aid available for members of each sex by the numbers of male or female participants in the athletic program and tabulating the results. Institutions may be found in compliance if this comparison results in substantially equal amounts (plus or minus two to four percent) or if a resulting disparity can be explained by adjustments that take into account a legitimate, nondiscriminatory factor.¹⁸ Because of this interpretation, the institution described above with an undergraduate enrollment of 60% female and 40% male may be in compliance if it spends equal amounts on each male and female athlete even if there are more male than female athletes. For example, if an institution has an athletic financial assistance budget of \$1 million and spends \$700,000 of that on 70 male athletes and \$300,000 on 30 female athletes, it has complied with OCR's requirements. Note that if 60% of the participants in athletics programs are men, then male athletes should receive about 60% of the available athletic financial assistance even if the undergraduate female enrollment exceeds the male undergraduate enrollment.

If the financial assistance provided is not substantially equal, the OCR will determine whether there is a legitimate nondiscriminatory factor to explain the

16. See THE MANUAL, *supra* note 10, at 21-28. See also 34 C.F.R. § 106.41(c)(1) (1992).

17. THE MANUAL, *supra* note 10, at 14.

18. See *id.* at 14-20.

difference.¹⁹ For example, the institution can justify the differences in awards by noting the higher tuition costs for out-of-state students that, in some years, may be unevenly distributed between men's and women's programs. These differences are nondiscriminatory if they are not the result of policies or practices that limit the availability of out-of-state scholarships to either men or women. Further, an institution may decide the awards most appropriate for program development. Often this practice may initially require the spreading of scholarships over as much as four years for developing programs, resulting in fewer scholarships in the first few years than would be necessary to create equality between male and female athletes. The OCR Investigators Manual, however, directs investigators to investigate carefully "reasonable professional decisions" when there is a negative effect on the under represented sex.²⁰

The regulations require "equitable" treatment for female athletes in the provision of equipment and supplies.²¹ The OCR defines equipment and supplies as uniforms, other apparel, sports-specific equipment and supplies, instructional devices, and conditioning and weight training equipment. In assessing compliance the OCR takes a careful look at the quality, amount, suitability, maintenance and replacement, and availability of equipment and supplies to both male and female athletes. If there is a disparity, the university is in violation. The OCR permits nondiscriminatory differences based on the unique aspects of particular sports, and the regulations do not require equal expenditures for each program. For example, the equipment for the (male) football team may be more expensive than the equipment for the women's volleyball team.²²

The regulations also require equality in the scheduling of games and practice time.²³ OCR assesses five factors in determining compliance: (1) number of competitive events per sport; (2) number and length of practice opportunities; (3) time of day competitive events are scheduled; (4) time of day practice opportunities are scheduled; and (5) opportunities to engage in preseason and post-season competition.²⁴

Considerable emphasis is placed on practice and game time. It is usual for women's practice to be scheduled immediately before or immediately after men's. As a result, female athletes may have to skip lunch or dinner or eat a very light lunch or dinner to effectively participate. Additionally, it is common to schedule women's games before men's games, starting them at about 5:30 p.m. This results in denying female athletes the opportunity to have their parents, friends, and acquaintances present at the event unless they live nearby or can get off work early. To be in compliance some programs have adopted a rotating schedule for practice and/or games. For example, every other women's game would start at 7:30 rather than 5:30 p.m. The men's team would alternate, correspondingly.

19. *See id.* at 19.

20. *See id.* at 20.

21. *See* 34 C.F.R. § 106.41(c)(2) (1992).

22. *See* THE MANUAL, *supra* note 10, at 29.

23. *See* 34 C.F.R. § 106.41(c)(3).

24. *See* THE MANUAL, *supra* note 10, at 35-42.

The regulations require an assessment to decide whether the athletic program meets the travel and per diem allowances requirement.²⁵ OCR assesses the following factors in deciding compliance: modes of transportation; housing furnished during travel; length of the stay before and after competitive events; per diem allowance; and dining arrangements.²⁶

The easy way for an athletic program to ensure compliance is to treat male and female teams alike. If male athletes stay two to a room, they should house female athletes in the same manner. If the male team travels by airplane, the comparable female team should similarly travel. If they provide the male team a catered meal before the event, this arrangement should apply to the female team as well.

The regulations also require equality in the opportunity to receive academic tutoring, and assignment and compensation of tutors.²⁷ OCR looks for the academic qualifications, training, experience, and compensation of tutors. If there is any disparity in these opportunities, the university is violating Title IX.²⁸

The regulations require equality in the opportunity to receive coaching and assignment and compensation of coaches.²⁹ The OCR looks at three factors in this regard: (1) relative availability of full-time coaches; (2) relative availability of part-time and assistant coaches; and (3) relative availability of graduate assistants.³⁰

The OCR lists two factors to be assessed in determining compliance in assignment of coaches: (1) training, experience, and other professional qualifications; and (2) professional standing.³¹ The policy interpretation lists seven factors in determining compliance in compensation of coaches: (1) rate of compensation; (2) duration of contract; (3) conditions relating to contract renewal; (4) experience; (5) nature of coaching duties performed; (6) working conditions; and (7) other terms and conditions of employment.³²

It has been difficult to determine whether opportunity to receive coaching assignments and compensation of coaches is "equitable" because of the subjectivity involved in assessing the training, experience and professional qualifications of coaches assigned to men's and women's programs. Although the OCR seems to limit its investigation to the experience and qualifications of the coaches, at least one case seems to suggest that another factor—the size of the crowds and the ability to attract boosters—may be a factor in compensation.³³ The regulation's intent is that equal athletic opportunity be provided to participants, not coaches. When a coach's

25. See 34 C.F.R. § 106.41(c)(4).

26. See THE MANUAL, *supra* note 10, at 43-48.

27. See 34 C.F.R. § 106.41(c)(5) (1991).

28. See THE MANUAL, *supra* note 10, at 49-54.

29. See 34 C.F.R. § 106.41(c)(5)-(6).

30. See THE MANUAL, *supra* note 10, at 55.

31. See *id.*

32. See *id.*

33. In the case of *Stanley v. University of Southern California*, the court found that evidence of the male coach's greater responsibility in raising funds and level of responsibility justified the disparity in salary. See *Stanley v. Univ. of S. Cal.*, 13 F.3d 1313 (9th Cir. 1994). The court said that the men's team "generated greater attendance, more media interest, and larger donations" and that the men's coach, George Raveling, has fund raising duties not required of the women's coach. See *id.* at 1322. The court found that the university was not responsible for "societal discrimination in preferring to witness men's sports in greater numbers." *Id.* at 1323.

compensation is based on seniority or longevity, a recognized method of paying employees, alleging that a female team coach with five years experience is somehow being discriminated against because he or she receives less than a coach with fifteen years experience is difficult to prove. This situation brings up an interesting point because it is possible for a male coach of a female team to be protected under this provision because the intent of the Act is to provide effective coaching to females.

Perhaps the most important regulation from the health and safety aspect of athletics is the regulation that requires equal medical and training facilities and services.³⁴ In the recent past, and perhaps in some institutions today, female athletes only have access to trainers after male athletes, or access to only assistant trainers or graduate assistants. It is not unusual for the head trainer to travel with the men's teams and a graduate assistant or an assistant trainer to travel with the women's teams. One can be assured that the discovery of such information during the compliance review will result in a finding of discrimination in violation of Title IX. Schools must either hire a trainer for the women's programs who possesses the same qualifications as the counterpart for the men's programs, or have them travel with the teams on a rotating basis. There can also be other considerations; for example, some women's team coaches prefer a female trainer because she can room with the female players and reduce expenses.

To assess compliance and provision of medical training facilities, OCR investigates five areas: (1) availability of medical personnel and assistants; (2) health, accident and injury insurance coverage; (3) availability and quality of weight and training facilities; (4) availability and quality of conditioning facilities; and (5) availability and qualification of athletic trainers.³⁵ The regulations specifically require gynecological care where such health problems are a result of participation in the athletics program.³⁶

To achieve substantial proportionality in accommodating interests and abilities of both male and female athletes, it is clear that OCR will carefully review the recruitment of student athletes.³⁷ OCR looks at three factors in assessing compliance: (1) whether coaches or other professional athletic personnel in the program serving male and female athletes are provided with substantially equal opportunities to recruit; (2) whether financial and other resources made available for recruitment in male and female athletic programs are equivalently adequate to meet the needs of each program; and (3) whether differences in benefits, opportunities, and treatment afforded prospective student athletes of each sex have a disproportionately limiting effect on the recruitment of students.³⁸

OCR carefully checks the recruitment funds allotted to each team and compares the proportionate recruitment funds with the proportion of male and female athletes in the athletics program. In judging whether the resources are equivalently adequate to meet the needs of each program, the OCR determines the availability of

34. See 34 C.F.R. § 106.41(8) (1992).

35. See THE MANUAL, *supra* note 10, at 72-80.

36. See 34 C.F.R. § 106.39.

37. See 34 C.F.R. § 106.41; THE MANUAL, *supra* note 10, at 97-101.

38. See THE MANUAL, *supra* note 10, at 97.

recruitment resources to both men's and women's programs, including access to telephones, recruitment brochures, mailing costs, and travel.³⁹

The rules allow nondiscriminatory differences in some cases. For example, the recruiting of budget for a particular team—either male or female—may be increased because of a disproportionate number of student athletes who either graduated or dropped out of the program in a particular year, thereby requiring extra effort to replace them.⁴⁰

II. WHAT IS COMPLIANCE?

In at least three instances, the federal courts have appeared to impose a more stringent accommodation test than the OCR.⁴¹ Recall that the regulations state an institution is in compliance if it can show that it "fully and effectively accommodates the interests and abilities of female students who have the ability to participate in intercollegiate sports."⁴² Most federal court cases stress that the percentage of accommodated female athletes has to be proportionate to the total female undergraduate enrollment rather than relate solely to those women who have the interests and abilities to participate.

For example, in a case involving Colorado State University, the court found that there was a 10.5% disparity in the percentage of women athletes and undergraduate women students.⁴³ It determined that the female participation in intercollegiate sports was not substantially proportionate to female enrollment and ordered the university to reinstate a women's softball team, hire a coach, and maintain a competitive schedule.⁴⁴

In an ongoing case involving Brown University, the court ordered reinstatement of female teams when there was about a 13% disparity between the percentage of female athletes and the percentage of females in undergraduate enrollment.⁴⁵ Both the *Colorado State* and *Brown University* cases are difficult to square with Title IX because the opinions appear to rely solely on the proportionality test and to de-emphasize the "interest and abilities test." This strong reliance on proportionality is contrary to the OCR regulations that tend to treat the prongs of the three-part test equally.⁴⁶

The statute also prohibits reliance solely on proportionality by providing "[n]othing contained in subsection (a) . . . shall be interpreted to require any educational institution to grant preferential or disparate treatment to the members of

39. See *id.* at 99.

40. See *id.* at 100.

41. See generally *Cohen v. Brown Univ.*, 991 F.2d 888 (1st Cir. 1993); *Cohen v. Brown Univ.*, 879 F. Supp. 185 (D.R.I. 1995); *Roberts v. Colorado State Bd. of Agric.*, 998 F.2d 824 (10th Cir. 1993); *Favia v. Indiana Univ. of Pa.*, 812 F. Supp. 578 (W.D. Pa. 1993), *aff'd*, 7 F.3d 322 (3d Cir. 1993).

42. See 34 C.F.R. § 106.41(c)(1) (1992); THE MANUAL, *supra* note 10, at 21.

43. See *Colorado State*, 998 F.2d at 830.

44. See *id.* at 834.

45. See generally *Cohen v. Brown Univ.*, 809 F. Supp. 978 (D.R.I. 1992) (*Brown Univ. I.*), *aff'd*, 991 F.2d 888 (1st Cir. 1993) (*Brown Univ. II.*).

46. See 34 C.F.R. § 106.41(c)(1) (1992).

one sex on account of an imbalance which may exist with respect to the total number or percentage of persons of that sex participating in or receiving the benefits of any federally supported program or activity, in comparison with the total number or percentage of persons of that sex in any community, State, section or other area⁴⁷

The question posed is whether the strong emphasis on proportionality in the *Colorado State* and *Brown Univ.* cases is, or should be, the trend in the law. Unfortunately for this determination, the U.S. Supreme Court denied certiorari in both cases.⁴⁸ To provide appropriate guidance, the question we must answer is: How will other circuit courts of appeals deal with the regulatory three-prong test and ultimately, what will the U.S. Supreme Court do when they eventually grant certiorari?

To answer the question, the remainder of part I of this article deals with the merits and appeals in the four separate decisions involving *Cohen v. Brown University*,⁴⁹ the district court decision in *Pederson v. Louisiana State University*,⁵⁰ and the recent "Clarification of Intercollegiate Athletics Policy Guidance: The Three Part Test"⁵¹ distributed by the U.S. Department of Education, Office of Civil Rights.

A. Brown University I and II

The district court, in *Brown University I*, while assessing this university's compliance with Title IX, specifically addressed whether it accommodated effectively "the interest and abilities of students to the extent necessary to provide equal opportunity in the selection of sports and levels of competition available to members of both sexes."⁵² The appellate court commenced by stating that it may not find a violation solely because there is a disparity between the gender composition of the educational institution and student constituency, on one hand, and its athletic programs, on the other.⁵³ The appellate court, however, stated that subsection (b) of Title IX also provides that it "shall not be construed to prevent the consideration in any proceedings . . . of statistical evidence tending to show that such an imbalance

47. 20 U.S.C. § 1681(b) (1972).

48. See generally *Roberts v. Colorado State Bd. of Agric.*, 998 F.2d 824 (10th Cir. 1993), cert. denied, 510 U.S. 1004 (1993); *Cohen v. Brown Univ.*, 101 F.3d 155 (1st Cir. 1996), cert. denied, 520 U.S. 1186 (1997).

49. Prior to trial on the merits of the *Brown Univ.* cases, the district court granted the plaintiffs a preliminary injunction, ordering the women's volleyball and gymnastics teams be restored from club to university funded status. See *Brown Univ. I*, 809 F. Supp. at 1001. The first circuit upheld the district court's decision after reviewing the district court's analysis of Title IX and the implementing regulations. See *Brown Univ. II*, 991 F.2d at 906. On remand, the district court found that Brown's intercollegiate program violated Title IX and the supporting regulations. See *Cohen v. Brown Univ.*, 879 F. Supp. 185 (D.R.I. 1995) (*Brown Univ. III*). *Brown Univ.* appealed and on November 21, 1996, the First Circuit affirmed. See *Cohen v. Brown Univ.*, 101 F.3d 155 (1st Cir. 1996) (*Brown Univ. IV*), cert. denied, 520 U.S. 1186 (1997).

50. 912 F. Supp. 892 (M.D. La. 1996).

51. Letter from Norma Cantu, Assistant Secretary for Civil Rights, U.S. Dep't of Education, to Colleges and Universities (Sept. 20, 1995) (on file with author).

52. *Brown Univ. I*, 809 F. Supp. at 985.

53. See *Brown Univ. II*, 991 F.2d at 895.

exists with the respect to the participation in, or the receipt of benefits of, any such program or activity by the members of one sex."⁵⁴

The appellate court judges concluded that an institution satisfies prong one (proportionality) if the gender balance of its intercollegiate athletic program substantially *mirrors* the gender balance of its student enrollment.⁵⁵ Taking the view that the phrase "substantially proportionate" must be a standard stringent enough to effectuate the purposes of the statute,⁵⁶ the court said that Title IX established a presumption that discrimination exists if the university does not provide participation opportunities to men and women in substantial proportionality to their respective student enrollments.⁵⁷ It found that the numerical disparity between male and female athletes in Brown University's program, approximately 13%, was not "substantially proportionate" and was certainly not a mirror image of the gender of the respective male and female enrollments.⁵⁸ The court concluded that Brown University did not meet the requirements of prong one of the three-part test.⁵⁹

With regard to prong two, the issue was whether the institution can show a history and continuing practice of program expansion which is demonstrably responsive to the developing interest and abilities of the members of the underrepresented sex.⁶⁰ Prong two illustrates that Title IX does not require the university to leap to complete gender parity in a single bound. It does, however, require an institution to show that it has a history and continued practice of program expansion to increase the number of underrepresented athletes participating in intercollegiate athletics.⁶¹ The court stated that schools may not twist the ordinary meaning of "expansion" to find compliance under prong two when schools have increased their relative percentage of women participating in athletics by making cuts in both men's and women's sports.⁶² Because Brown University had attempted to comply with prong two by reducing both men and women's sports to equalize proportionality, the court found it had failed the prong two test.⁶³

The court said that prong three—interests and abilities—requires a relatively simple assessment of whether there is unmet need in the underrepresented gender that rises to a level sufficient to form a new team or require the upgrading of an existing one.⁶⁴ Thus, if athletes of the underrepresented gender have both the ability and interest to compete at the intercollegiate level, they must be fully and effectively accommodated.⁶⁵ Institutions need not upgrade or create a team where the interest and ability of the students are not sufficiently developed to field a varsity team.⁶⁶

54. *Id.*

55. *See* Cohen v. Brown Univ. (Brown Univ. II), 991 F.2d 888, 897 (1st Cir. 1993).

56. *See id.*

57. *See id.* at 898.

58. *See id.*

59. *See id.*

60. *See id.*

61. *See id.*

62. *See id.*

63. *See id.* at 906.

64. *See id.* at 898.

65. *See* Cohen v. Brown Univ. (Brown Univ. II), 991 F.2d 888, 898 (1st Cir. 1993).

66. *See id.*

Brown University argued that "to the extent students interests in athletics are disproportionate by gender, colleges should be allowed to meet those interests incompletely as long as the schools response is in direct proportion to the comparative levels of interest."⁶⁷ In other words, Brown University claimed that it may accommodate *fewer* than all of the interested and able women if, on a proportionate basis, it accommodates *fewer* than all the interested and able men.

The court took considerable pains to address why this reading of Title IX was flawed. Brown University argued that they could read the third prong, providing for accommodation of interests and abilities, separately from prong one, requiring substantial proportionality. This view was rejected because the policy interpretation, which requires full accommodation of the underrepresented gender, draws its essence from the statute and requires an evaluation of the athletic program as a whole.⁶⁸

Secondly, the court stated that any argument is wrong where prong three somehow countervails the meaning of prong one. Such a position overlooks the accommodation test's general purpose: to decide whether a student has been "excluded from participation in, or denied the benefits of" an athletic program on the basis of sex.⁶⁹ The test is whether the athletic program as a "whole" is reasonably constructed to carry out the statute.⁷⁰ Brown University's proposal would be contrary to the purpose of the statute. It would determine athletic interest and abilities of students in such a way as to take into account the nationally increasing levels of women's interest and abilities as related to their population in the student body. The court clearly did not agree that full and effective accommodation can satisfy the statute when prong one proportionality is not found.

Brown University's reliance on student surveys of interest and abilities was also found at fault. The *Athletic Investigator's Manual* (The Manual) stated that the intent of its provisions was to use surveys of interest and abilities to follow a determination that an institution does not satisfy prong three⁷¹: they could not use it to make that determination in the first instance.⁷² The court was also concerned that a survey of interests and abilities of the students at Brown University would not be a true measure of their interest and abilities because the school's recruiting methods could predetermine such interests and abilities in the first place.⁷³ The judges noted that the test was full and effective accommodation in the whole program, not solely an accommodation of interests and abilities at the expense of disregarding proportionality.⁷⁴ Prong three would excuse Brown University's failure to provide substantial proportionate participation and opportunities only if the university fully and effectively accommodate the underrepresented sex. However, Brown University did not comply with prong three because it failed to increase the number of intercollegiate participation opportunities available to the underrepresented sex and also failed to maintain and support women's donor-funded teams at Brown

67. *Id.* at 899.

68. *See id.*

69. *See id.* at 899-900.

70. *See id.* at 900.

71. *See* THE MANUAL, *supra* note 10, at 9.

72. *See Brown Univ. II*, 991 F.2d at 901.

73. *See id.*

74. *See id.* at 902-03.

University's highest level, thus preventing athletes on those teams from fully developing their competitive abilities and skills.⁷⁵

Finally, the court found that far more male athletes were being supported at the university-funded varsity level than female athletes, and thus, women receive less benefit from their intercollegiate varsity programs as a whole than do men.⁷⁶

B. Brown University IV—*The Appeal*

Brown University appealed the district court's order to effect changes (*Brown University III*)⁷⁷ and challenged the analysis of the three-part test employed by the district court in *Brown University I*, which was approved by the first circuit in *Brown University II*. The appeals court stunned Brown University by announcing it had squarely rejected Brown University's reading of the three-part test and that, under the "law of the case" doctrine, the court was precluded from relitigating the issues previously decided.⁷⁸ It affirmed the district court's finding concerning Brown University's obligation to fully and effectively accommodate the interests and abilities of women athletes.⁷⁹ The appellate court did, however, again take strong issue with Brown University's argument that it could meet prong three of the three-part test by failing to meet the interests and abilities of women to the same extent that it failed to meet the interests and abilities of men. If there are sufficient unmet interest and ability among the underrepresented sex, the institution necessarily failed the test, said the court.⁸⁰ "Brown University reads the 'full' out of the duty to accommodate 'fully and effectively.' Prong three 'demands not merely some accommodation, but full and effective accommodation.'"⁸¹ Brown University's interpretation of full and effective accommodation is not the law because it cannot withstand scrutiny on legal or policy grounds.

The appellate court again stressed the importance of the proportionality "mirror" image test by observing that a school creates a presumption if it is in compliance when it has achieved a statistical balance.⁸² Further, when a statistical balance is not present, the school must fully and effectively accommodate women's interests and abilities even when that requires a larger slice of the athletic department pie go to women's programs.⁸³

Finally, the court viewed with distaste Brown University's argument that there is a gender-based difference in the level of sports participation interest that should be considered to allow fewer participation opportunities for women. It viewed such a position as an attempt to ignore the purpose of Title IX and to rely on an outdated

75. See *Cohen v. Brown Univ.*, 991 F.2d 888, 903 (1st Cir. 1993) (*Brown Univ. II*).

76. See *id.* at 904.

77. *Cohen v. Brown Univ.*, 879 F. Supp. 185, 186 (D.R.I. 1995) (*Brown Univ. III*).

78. *Cohen v. Brown Univ.*, 101 F.3d 155, 167 (1st Cir. 1996) (*Brown Univ. IV*), *cert. denied*, 520 U.S. 1186 (1997).

79. See *id.* at 162.

80. See *id.* at 174.

81. *Id.* (citation omitted).

82. See *id.* at 175.

83. See *id.* at 176.

stereotyping of women's interests.⁸⁴ In the court's view, the perceived lack of interest evolves directly from the historical lack of opportunity for women to participate in sports; precisely what Title IX is designed to remedy. Several times the court pointed out that Title IX implementation deserves some credit for the showing of American women athletes in the Olympic summer games.⁸⁵

C. *The Dissent*

Schools with football programs may find some comfort in the dissenting opinion in *Brown University* because, for the first time, a judge advocated that contact sports, like football, "should be eliminated from the calculus in determining membership numbers for varsity sports."⁸⁶ The judge cited 34 C.F.R. section 106.41(b), which states that a school may have separate teams for members of each sex "when selection is based on . . . activity involving a contact sport."⁸⁷ In counting participation opportunities for comparison of proportionality, it does not make sense to compare athletes who participate in contact sports that include only men's teams, said the judge. He believed that not all sports are the same and the school should be able to choose those most beneficial.⁸⁸

D. Louisiana State

In *Pederson v. Louisiana State University*,⁸⁹ the district court examined each prong of the three-part test in the context of whether the university had fully and effectively accommodated the interests and abilities of its female students. The plaintiffs argued that LSU failed to accommodate its female athletes by providing greater athletic opportunities to its male students at a time when sufficient interest and ability existed in its female student population to justify increasing women's sports opportunities.⁹⁰ The specific complaint concerned a perceived failure to provide a women's fast pitch softball team.

Relying on *Colorado State* and the foregoing *Brown University* cases, both plaintiffs and defendants asked the court to find that so long as males and females are proportionally represented in athletics as found in the general student undergraduate population and are given numerically proportionate opportunities to participate in advanced competition, the university should be in compliance with Title IX. Further, if numerical proportionality is not found, the university should be deemed in violation of Title IX.⁹¹ The court rejected this proposition and specifically stated that it disagreed with the rationale of the *Brown University* and *Colorado State* opinions. "Title IX does not mandate equal numbers of participants. Rather, it prohibits

84. *See id.* at 179.

85. *See id.* at 180.

86. *Id.* at 188 (Torruella, J., dissenting).

87. 34 C.F.R. § 106.41(b) (1992).

88. *See Cohen v. Brown Univ.*, 101 F.3d 155, 188 (1st Cir. 1996) (Brown IV) (Torruella, J., dissenting).

89. 912 F. Supp. 892 (M.D. La. 1996).

90. *See id.* at 904-05.

91. *See id.* at 913.

exclusion based on sex and requires equal opportunity to participate for both sexes.⁹² Therefore, ending the inquiry at the point of numerical proportionality does not comport with the mandate of the statute. Title IX specifically does not require preferential disparate treatment based on proportionality.⁹³ Rather, those percentages should be considered as evidence "tending to show that such an imbalance exists with the respect to the participation in, or receipt of benefits of, any such program or activity by members of one sex."⁹⁴ Consequently, the clear language of the statute prohibits the requirement of numerical proportionality and regarded the *Brown University* cases as a "safe harbor" for a university.⁹⁵

Clearly, the pivotal element of the LSU analysis is the question of effective accommodation of interests and abilities.⁹⁶ Given the foregoing, it was imperative that LSU be acquainted with the interests and abilities of its female students.

Because LSU had not conducted a survey of its female students, the court found that there was no credible evidence to establish their actual interests and abilities. LSU simply had no method, discriminatory or otherwise, by which a determination could be made. This school was, and had been, ignorant of the interests and abilities of its student population for some time.⁹⁷

The trial evidence found that LSU's student population during the relevant period was approximately 51% male and 49% female and its athletic participation for the same period was about 71% male and 29% female.⁹⁸ Throughout the relevant period, LSU fielded a men's baseball team. The court accepted evidence that women's fast pitch softball was the closest approximation to this sport.⁹⁹

The plaintiffs established that since 1979 there was sufficient interest and ability at LSU to fill a successful Division I varsity fast pitch softball team and that in 1983, for some unknown reason, LSU disbanded that program. The plaintiffs also were able to establish that the interest in fast pitch softball increased since 1979.¹⁰⁰ Finally, and most critical, the plaintiffs established that intercollegiate play is provided for male students with similar interests and abilities by way of the varsity baseball team.¹⁰¹ At the same time, LSU provided absolutely no opportunity for women to compete in fast pitch softball at any level.

By not fielding a women's fast pitch softball team, LSU failed to accommodate the female plaintiffs' interests and abilities individually because the interest and abilities to support a softball team existed in the student undergraduate population. The court's findings suggested that sex discrimination accounted for the discrepancy.¹⁰²

The court then examined the history of expanding opportunities for women athletes at LSU and concluded that the university has demonstrated a practice not to

92. *Id.* at 914.

93. *See id.* at 913.

94. *Id.* (citing Title IX, 20 U.S.C. § 1681(a) (1972)).

95. *See id.*

96. *See id.* at 913-15.

97. *See id.*

98. *See id.* at 915.

99. *See Pederson v. Louisiana State Univ.*, 912 F. Supp. 892, 915-16 (M.D. La. 1996).

100. *See id.* at 915.

101. *See id.* at 916.

102. *See id.* at 916-18.

expand its women's athletics before it became absolutely necessary to do so.¹⁰³ The court could find no evidence of a workable plan of action by the university to address the failure to accommodate interests and abilities of women students and concluded that LSU was in violation of Title IX, noting that LSU was a national leader in resisting gender equity.¹⁰⁴

In a harsh assessment of the athletic department, the court wrote that its director's one-dimensional assessment of programs created an atmosphere of arrogance by management that had continued to be undaunted by the facts, up to the date of the trial.¹⁰⁵ LSU's action was seen as a direct result of the director's belief that his "women's athletics" program was "wonderful."¹⁰⁶ He equated winning teams, rather than participation, as accommodating interest and abilities. The judge interpreted the violations a result of an arrogant ignorance, and confusion regarding the practical requirements of the law, and a remarkable outdated view of women athletes which created the resistance to change.¹⁰⁷

A comparison of *LSU* with *Brown University* clearly shows a potential split in the circuits concerning the proportionality requirement. According to the *LSU* court, the theory that numerical proportionality is a "safe harbor" contradicts the prescriptions of Title IX because it treats women as a class rather than as individuals.¹⁰⁸ This decision appears to support the use of surveys to determine the unmet interests and abilities of the student body. In contrast, *Brown University* shows surveys are inherently unreliable because they only reflect the predetermined interest of the student body.

E. Policy Guidance

On January 16, 1996, the OCR released its long overdue "Clarification of Intercollegiate Athletics Policy Guidance: Three Part Test" as an enclosure to a letter from the assistant secretary for the OCR.¹⁰⁹ It begins by focusing on the athletics programs as a whole. This focus is interesting because the same language is adopted in *Brown University* and *LSU* as well as in the Clarification.¹¹⁰ The Clarification states that an institution's failure to provide nondiscriminatory participation opportunities for the whole student body usually amounts to a denial of equal athletic opportunity.¹¹¹

The Clarification appears to follow past policy interpretation concerning prong one of the three-part test. It states that "where an institution provides intercollegiate level athletic participation opportunities for male and female students in numbers substantially proportionate to the respective full-time undergraduate enrollments,

103. *See id.*

104. *See id.*

105. *See id.*

106. *Id.* at 919.

107. *See id.* at 916-18.

108. *See id.* at 913-14.

109. Office for Civil Rights, U.S. Dep't of Educ., Clarification of Intercollegiate Athletics Policy Guidance: The Three-Part Test (1996) [hereinafter *The Clarification*].

110. *See id.* at 1-2.

111. *See id.* at 2.

OCR will find that the institution is providing nondiscriminatory participation opportunities for individuals of both sexes."¹¹² The so-called "safe harbor" test is still safe as far as the OCR is concerned despite the reluctance of the *LSU* court.¹¹³

The test for part two remains essentially the same. Under part three, OCR says that the institution must provide equal athletic opportunity to its admitted and enrolled students. Accordingly, the policy interpretation does not require an institution to accommodate the interests and abilities of merely potential students. This would appear to mean an institution need not accommodate the interests and abilities of potential female athletes in its recruiting area. How does that advance the interest of the underrepresented sex? This question is left unanswered by the policy.

Among the factors OCR uses to determine whether female interests and abilities are being accommodated are requests by students and admitted students that a particular sport be added; requests that an existing club sport be elevated to intercollegiate team status; participation rates in particular or intramural club sports; interviews with students, admitted students, coaches, administrators, and others regarding interest in particular sports; results of questionnaires of students and admitted students regarding interest in sports; and participation in particular interscholastic sports by admitted students.¹¹⁴

Finally, the Clarification suggests that schools have flexibility in choosing a nondiscriminatory method of determining athletic interests and abilities provided they meet the appropriate requirements.¹¹⁵

III. DISCUSSION

Given the law, the *Brown University* case was properly decided because the university failed all three parts of the test, not just mandating proportionality. But there are several problems with both the courts' and the OCR's strong emphasis on a "substantially proportionate to female enrollment test."¹¹⁶ First, failure to achieve strict proportionality need not be evidence of discrimination and therefore cannot be used as a short cut to determine whether an institution is unlawfully discriminating based on sex.¹¹⁷ Congress explicitly held that proportionality alone was not relevant when it stated that the statute should not "be interpreted to require . . . preferential or disparate treatment to the members of one sex on account of an imbalance which may exist with respect to the total number or percentages of persons of that sex participating in . . . institutional programs."¹¹⁸

112. *Id.* at 5.

113. *See supra* note 108 and accompanying text.

114. *See* The Clarification, *supra* note 109, at 6.

115. *See id.*

116. *Id.* at 192.

117. The Supreme Court has strongly cautioned lower courts against comparisons to the general population when special interests or qualifications are required. *See Hazelwood Sch. Dist. v. United States*, 433 U.S. 299, 308 n.13 (1977). In a recent voting rights case, the Supreme Court held that proportionality cannot serve as a shortcut to determine whether a set of districts unlawfully dilutes minority voting strength. *See Johnson v. Florida*, 512 U.S. 997 (1994).

118. 20 U.S.C. § 1681(b) (1972).

Secondly, the courts have no authority to impose liability under a federal antidiscrimination law like Title VI and VII unless a defendant has unlawfully discriminated.¹¹⁹ Title IX simply provided that no individual may be excluded from a federally funded program on "the basis of sex."¹²⁰ A holding, as in *Colorado State*, that the lack of proportionality creates a disparate impact without considering the impact on accommodating interest and ability, runs contrary to cases that indicate that "a violation of Title VI requires an intentional discriminatory act and that disparate impact alone is not sufficient to establish a violation."¹²¹ There must be a failure to accommodate interests and abilities for a violation to occur. Because Title IX provisions are virtually identical to those of Title VI of the Civil Rights Act of 1964, the court should look to Title VI cases which hold that the act only "reaches instances of intentional discrimination."¹²²

Colorado State and, to some extent, *Brown University I, II* and *IV* disregard the statute's plain meaning concerning proportionality. These decisions are not in the institutions' best interest subject to the law nor to the intended beneficiaries, female students. *Colorado State* holds conduct discriminatory that the statute does not prohibit and appears to specifically permit without regard to the actual interest of female students.¹²³ Educational and other institutions should be able to rely on reasonable implementing regulations promulgated by the responsible government agency. That agency has published regulations that contain the three-part test including accommodation of interest and abilities of members of both sexes. The OCR regulations explicitly provide that a sports team must be established when there is interest; ability to play the sport; a likelihood that the team can be sustained for a number of years; and a reasonable expectation of competition within the institution's normal competitive region.¹²⁴ Admittedly, it may be difficult in some instances to fashion an instrument to achieve a good measure of the interest and abilities in the particular area. However, a properly designed and conducted study of the institution's drawing and recruiting area can be used to accurately determine whether

119. See *St. Mary's Honor Ctr. v. Hicks*, 509 U.S. 502, 514 (1993) (interpreting a Title VII employment discrimination claim). See also *Cannon v. University of Chicago*, 648 F.2d 1104, 1109 (7th Cir. 1981), cert. denied, 454 U.S. 1128 (1981) (stating that "a violation of Title VI requires an intentional discriminatory act and that disparate impact alone is not sufficient to establish a violation. We shall therefore adopt that standard under Title IX . . .").

120. See 20 U.S.C. § 1681(b).

121. *Cannon*, 648 F.2d at 1109.

122. *Alexander v. Choate*, 469 U.S. 287, 293 (1985). Additionally, Title IX is patterned after Title VI. See *Grove City v. Bell*, 465 U.S. 555, 566 (1984). By setting up the same administrative structure and using virtually the same language, Congress intended that the interpretation of Title IX was to be the same as Title VI. See *Hearing Before the Subcomm. on Post Secondary Education of the House Comm. on Education and Labor*, 94th Cong. 16, 150 (1971).

123. The *Roberts* Court was apparently relying on *Guardians Association v. Civil Service Commission of New York* to justify a holding that a federal agency, or in this case a court, may proscribe, as discriminatory, conduct which the statute itself does not prohibit. See *Roberts v. Colorado State Bd. of Agric.*, 998 F.2d 824, 832 (10th Cir. 1993); *Guardians Ass'n v. Civil Serv. Comm'n of New York*, 463 U.S. 582, 584 (1982). The court's reliance is misplaced because the *Guardians* court found that the authority was delegated to the agency by statute. Unlike *Guardians*, Congress in Title IX specifically withheld authority to take action on account of a statistical imbalance between the sexes. See 20 U.S.C. § 1981(b) (1972).

124. See 34 C.F.R. § 106.41(c)(1) (1992).

the interest and abilities of female athletes are being fully accommodated. Such a survey is a better, and more intellectually honest, measure of compliance with the intent of Title IX than an unreasoning reliance on numbers.

The analysis should focus on the athlete's interest and ability to participate in college sports. One cannot seriously argue that all students have the same ability to participate at the university level. Data collected must focus on the disparity between male and female athletes who have the interest in and ability to compete rather than on the number of males and females in the entire educational community. A simplistic percentage comparison without considering competitive qualifications for varsity athletics lacks real meaning.¹²⁵ The rationale of *Colorado State* and *Brown University IV*, insofar as they are based solely on statistical disparity, does not allow the university reasonably to present possible interest and ability justifications.

Finally, a reasonable fact-finder should be able to listen to evidence and decide if a college is making a good faith effort to meet the "interests and abilities" test. In an article appearing in the *Arkansas Democrat-Gazette* regarding the lack of junior women golfers in the state of Arkansas, Arkansas State University's women's golf coach, Neil Able stated, "I would love to recruit girls from Arkansas, but they are not here. There is not a lot of emphasis on girls golf, nobody seems to be pushing it. It is really a shame because if a girl can shoot between 78 and 82, she can get her education mostly paid for."¹²⁶

Clearly, this kind of information would be relevant evidence of whether there is sufficient female interest and ability to justify a golf team in Arkansas. The bottom line is that when a college or university is honestly accommodating the interests and abilities of its female undergraduates and potential participants in its recruiting area, the intent of Title IX and OCR guidelines have been met.

IV. ANALYSIS: WHAT DOES IT ALL MEAN?

Some athletic administrators, particularly at football playing institutions with a majority female enrollment, have placed considerable faith, or maybe hope, in their ability to comply with Title IX by accommodating the interests and abilities of female athletes who have the ability to participate at the collegiate level. This faith, or hope, has been shattered by several courts' perceived reliance solely on proportionality, the first of the three factors used by OCR to assess the equality of opportunity for individuals of both sexes to participate in intercollegiate programs. In *Indiana University*,¹²⁷ *Brown University II & III*,¹²⁸ and *Colorado State*¹²⁹ the courts found that the participation rates for male and female students were not proportionate to their respective enrollments. In analyzing these decisions, most commentators have

125. *City of Richmond v. J.A. Croson Co.*, 488 U.S. 469, 501 (1989); *Mayor of Philadelphia v. Educ. Equity League*, 415 U.S. 605, 620 (1974).

126. Todd Traub, *While Footing the Bill: Football Also Creates Title IX Imbalance*, ARKANSAS DEMOCRAT-GAZETTE (Little Rock, Ark.), Nov. 14, 1996, at C1.

127. *Favia v. Indiana Univ. of Pa.*, 812 F. Supp. 578 (W.D. Pa. 1993), *aff'd*, 7 F.3d 322 (3d Cir. 1993).

128. *Cohen v. Brown Univ.*, 991 F.2d 888 (1st Cir. 1993) (*Brown Univ. II*); *Cohen v. Brown Univ.*, 879 F. Supp. 185 (D.R.I. 1995) (*Brown Univ. III*).

129. *Roberts v. Colorado State Bd. of Agric.*, 998 F.2d 824 (10th Cir. 1993).

focused solely on the first prong and concluded that effective accommodation always requires substantial proportionality of numbers. There has been an unquestioned acceptance that only the first part of the test is relevant.¹³⁰

This analysis, however, is factually incorrect and even disingenuous. These decisions were compatible with the law: the three universities all failed to meet the participation opportunity, a history and practice of program expansion, or fully and effectively accommodate the interests and abilities test. Because the three universities failed all three parts of the test, their cases offer no precedent relevant to a school which meets the interest and abilities test.

A compelling argument can be made that a college which meets the third part of the test—that is, accommodates the interests and abilities of its male and female students—is in compliance with Title IX. The statute's purpose is to provide equality of opportunity, as supported by *Louisiana State*.¹³¹ Use of the proportionality test, without considering the interests and abilities of female students, would have little value in providing equal opportunity to the actual students who have the ability to play at the college level. What is the logical extension of the proportionality argument which does not include interests and abilities? Proportionality would demand female teams even if there were no interest on the part of the women students. Should a university force female students to participate in varsity sports in which they have no interest or ability? Substantial proportionality erroneously presumes that men and women in the general student body will have the same interest and ability to participate at the same rates in intercollegiate athletics. There is no valid statistical or any other kind of evidence to support that presumption. Additionally, a strict proportionality approach violates the Supreme Court's holding concerning the use of statistical analyses to support discrimination claims.¹³² Finally, the purpose of the statute and its implementing regulations is to accommodate the interests and abilities of both male and female students who have the ability to participate in intercollegiate sports, not to establish some mechanical numerical quota based on a student population ratio. The slavish and unreasoned reliance on numbers has already created an unfavorable backlash harmful to gender "equity."¹³³

There is another factor that should reduce administrators' comfortable reliance on the Athletic Investigator's Manual and the three-part test. This is the stated goal of the NCAA Gender Equity Task Force report that the numbers of male and female athletes should be substantially proportionate to their numbers in the institution's

130. See generally Denise K. Magner, *Judge Blocks Bakerfield Plan to Cap Size of Wrestling Team*, CHRON. HIGHER EDUC., Mar. 12, 1999, at A44.

131. See generally *Pederson v. Louisiana State Univ.*, 912 F. Supp. 892 (M.D. La. 1996).

132. See, e.g., *Hazelwood Sch. Dist. v. United States*, 433 U.S. 299 (1977); *Castaneda v. Partida*, 430 U.S. 482 (1977).

133. For example, the backlash in football has been very strong. See generally Bob Holt, *Court Ruling Raises Alarm on Title IX: ASU's Dowd Calls Decision "Idiotic,"* ARKANSAS DEMOCRAT-GAZETTE (Little Rock, Ark.), Apr. 22, 1997, at C1. Unfortunately, some schools have helped justify its decisions to cut men's sports by blaming Title IX, according to NCAA president Cedric Dempsey, and a recent GAO study shows a drop in men's participation in NCAA sports. See generally *GAO Study Shows Drop in Men's Participation, but Reason Is Unclear*, NCAA NEWS, July 5, 1999, at A1; Erik Lords, *More Women and Fewer Men Participate in Intercollegiate Athletics, Study Finds*, CHRON. HIGHER EDUC., July 9, 1999, at A40.

undergraduate population.¹³⁴ This report language may soon start appearing in future decisions, given the perceived rationale of *Indiana University*, *Brown University*, and *Colorado State*.

V. SUMMARY OF ISSUES FACING ADMINISTRATORS

Obviously, athletic administrators and boards of trustees are presently in an untenable position because of the dramatic conflict between the provisions of Title IX, its implementing regulations promulgated by the Office of Civil Rights, and the outcome of federal court cases, particularly *Colorado State* and *Brown University*. Certainly the safe harbor approach is to insure a strict proportionality of percentages of female athletes compared with the number of females in the total university enrollment. The recent OCR clarification clearly underscores this.

The strict proportionality approach, while attractive on its face, is in fact counterproductive to athletes who have the ability to participate at the collegiate level, and is contrary to the meaning of the statute and its implementing regulations. Many contend that female athletes have been subjected to discrimination in the past and in many cases are still being victimized by institutions of higher learning. Even so, an unthinking reliance on proportionality at the expense of accommodating the interest of women who have the ability to participate at the collegiate level is not only contrary to the law, it is not even in the best interests of such female athletes.

When the federal courts are persuaded to carefully read the statute and its implementing regulations, and properly evaluate the intent of the statute and its impact on female athletes, as the court did in *Louisiana State*, they will conclude that a university may comply with the statute by effectively and fully accommodating the interest and abilities of female athletes.

VI. A SOCIOBIOLOGICAL AND ECONOMIC CRITIQUE OF GENDER "EQUITY"

The goal of this section is to take issue with the OCR and to criticize the regulations against discrimination it has promulgated. In our view, the basic premise from which government "equity" laws proceed is that absent discrimination, all groups, whether based on race, ethnicity, or, in the present case, gender, would be exactly alike in all major regards;¹³⁵ that if virtually exact proportional representation of all categories of people in all activities and accomplishments has not been achieved, this is "inequitable;" and that this inequity represents an exploitation of the "victims" by the "privileged."

134. The NCAA Gender-Equity Task Force Report states that it should be the ultimate goal of each institution that the numbers of male and female athletes are substantially proportionate to their undergraduate population. See THE REPORT, *supra* note 4, at 3. The Report also stresses that maintaining current revenue-enhancing programs like football is essential to enhancing opportunities for women athletes. See *id.*

135. The conventional wisdom does make one set of exceptions in the case of sex: it "concedes" that men and women have different biological characteristics, and that only females can become pregnant and give birth. We applaud this concession to reality.

This politically correct perspective is so well entrenched in legal thinking that to even question it is to call forth the charge of irrational and "outdated stereotyping."¹³⁶ It is so inviolable that to question it is to open the critic to charges of "racism" or "sexism," which are fighting words in any person's lexicon. The view that all groups are equally endowed with all sorts of interests and abilities is so impregnable that to even mention evidence for the opposite contention is widely seen as rude, unseemly, or in some other way improper. Such claims are refuted not by providing evidence, but through ad hominem attacks. The findings of Thomas Sowell and Walter Williams,¹³⁷ which challenge this conventional wisdom, are dismissed not based on errors that have been found in the logic or empirical evidence they offer, but through personal attacks on these researchers.

Sowell points to the following facts about which "it is virtually impossible to claim that the statistical differences in question are due to discrimination."¹³⁸

- ▶ American men are struck by lightning six times as often as American women;
- ▶ Cognac consumption in Estonia was more than seven fold, per capita, than in Uzbekistan;
- ▶ In the 1960s, members of the Chinese minority in Malaysia received over 400 degrees in engineering, compared to only 4 for the majority Malays;
- ▶ Afrikaners in 1946 South Africa earned less than half the income of the less politically powerful British;
- ▶ Orientals in the United States in 1985 scored over 700 on the mathematics SAT at twice the rate of whites;
- ▶ Germans were only 1% of the population of czarist Russia but accounted for some 40% of that army's high command;
- ▶ Japanese immigrants accounted for more than 66% of potato and 90% of tomato production in the Brazilian state of Sao Paulo;
- ▶ In the 1850s, over 50% of Melbourne's clothing stores were owned by Jews, who were less than 1% of the Australian population.¹³⁹

136. See generally *Cohen v. Brown Univ. University*, 809 F. Supp. 978 (D.R.I. 1992) (Brown Univ. I).

137. See generally THOMAS SOWELL, *CIVIL RIGHTS: RHETORIC OR REALITY* (1984); THOMAS SOWELL, *A CONFLICT OF VISIONS: IDEOLOGICAL ORIGINS OF POLITICAL STRUGGLES* (1987); THOMAS SOWELL, *THE ECONOMICS AND POLITICS OF RACE: AN INTERNATIONAL PERSPECTIVE* (1983); THOMAS SOWELL, *ETHNIC AMERICA* (1981); THOMAS SOWELL, *PINK AND BROWN PEOPLE* (1981); THOMAS SOWELL, *RACE AND CULTURE: A WORLD VIEW* (1994); THOMAS SOWELL, *RACE AND ECONOMICS* (1975); THOMAS SOWELL, *THE VISION OF THE ANOINTED* (1995); WALTER E. WILLIAMS, *SOUTH AFRICA'S WAR AGAINST CAPITALISM* (1989); WALTER E. WILLIAMS, *THE STATE AGAINST BLACKS* (1982); Thomas Sowell, *Preferential Policies*, in *THINKING ABOUT AMERICA: THE UNITED STATES IN THE 1990S* (Annelise Anderson & Dennis L. Bark eds., 1988); Thomas Sowell, *Weber and Bakke and the Presuppositions of 'Affirmative Action,'* in *DISCRIMINATION, AFFIRMATIVE ACTION AND EQUAL OPPORTUNITY* (Walter Block & Michael Walker eds., 1982); Walter E. Williams, *On Discrimination, Prejudice, Racial Income Differentials, and Affirmative Action*, in *DISCRIMINATION, AFFIRMATIVE ACTION AND EQUAL OPPORTUNITY*, *supra*.

138. SOWELL, *THE VISION OF THE ANOINTED*, *supra* note 137, at 33.

139. See *id.* at 35-37.

All of these facts are simply incompatible with the "vision of the anointed" that absent anything untoward, there would be homogeneity of all groups of people over all activities. Sometimes, this basic premise has annoying, and perhaps even infuriating, results, but mostly on an intellectual plane. An example might be its influence generally in the United States at the close of the twentieth century, and particularly the debate over female participation in college athletics. At other times, however, this flawed philosophy has had far more serious repercussions. For example, the Nazi attempt to exterminate the Jews was, at bottom, due to Hitler's resentment that this minority was more than proportionately represented amongst German bankers, professors, university students, playwrights, businessmen, doctors and lawyers, and was far more wealthy than the average citizen.¹⁴⁰ It is crucial to realize that there is a notion of proportionality of representation as the norm at work in both examples.¹⁴¹

It is a matter of great interest that failure to register statistical homogeneity should be interpreted as discrimination in some cases, but not others. Returning to our focus on athletics, consider this statement by Sowell: "No one regards the gross disparity in 'representation' between blacks and whites in professional basketball as proving discrimination against whites in that sport."¹⁴² Were it not for the miasma of political correctness, this statistical disparity would occasion as much criticism as any other. That this situation is not widely resented is thus more than passing curiosity.

What are the facts of the case? Let us consider both professional basketball and football:

RACIAL AND ETHNIC COMPOSITION OF PROFESSIONAL ATHLETIC
EMPLOYMENT (IN %)¹⁴³

		White	Black	Hispanic	Other
Total Population		73	12	11	4
NBA	Players	20	79	0	0
	General Managers	72	28	0	0
	Coaches	67	33	0	0
	Staff	77	17	2	3
NFL	Players	31	66	1	0
	General Managers	83	17	0	0
	Coaches	75	24	1	0
	Staff	80	15	3	2

140. See generally Steven Farron, *Naziism and the Holocaust*, J. LIBERTARIAN STUD. (forthcoming 1999) (manuscript on file with author).

141. One might expect Jews to be among the most vociferous opponents of affirmative action, given their historical experiences with this phenomenon. Why this is not the case is explored by Walter Block, *The Mishnah and Jewish Dirigisme*, in 23 INT'L J. SOC. ECON. 35-44 (1996); Milton Friedman, *Capitalism and the Jews*, in MORALITY OF THE MARKET: RELIGIOUS AND ECONOMIC PERSPECTIVES 429-42 (Walter Block et al. eds., 1985).

142. SOWELL, THE VISION OF THE ANOINTED, *supra* note 137, at 35.

143. See Michael Lynch & Rick Henderson, *Team Colors*, REASON, July 1998, at 21.

As indicated in the table, the roster of professional athletes includes far fewer whites than would occur were they distributed to this employment slot from a random sampling of the population; and, obversely, we must also reject the null hypothesis that blacks are randomly distributed as well. Yet there is not one person in a million who thinks that the owners of these sports leagues (100% white) engage in anti-white, pro-black prejudice; that they turn away better scoring, higher jumping, stronger whites to make room on their rosters for weaker, smaller, less athletic blacks. The thought never occurs that black success in this field is due to anything but the fact that blacks bring to the table a great amount of athleticism, power, strength and grace.¹⁴⁴

Having introduced our topic with a discussion of the fallacious homogeneity hypothesis, and applied it to male sports, let us now consider how it applies to females vis-à-vis males.

First, if we are to take seriously the non-discrimination ethic, there should be no division between female and male sports programs. Given the feminist contention¹⁴⁵ that the genders are alike (apart from unimportant biological matters), it is an egregious matter of segregation to separate the sexes into two different categories. Gender integration is now commonly practiced for children's soccer leagues, and based on the premises of the anointed, there is no reason not to follow this practice at the university level.

The problem, here, is that while seven-year-old girls are reasonably competitive with boys of that age, the same does not at all apply to adult men and women. A perusal of any of the male and female world's records in activities such as swimming, running, throwing, jumping, rowing, skiing, skating, and bicycling suggests that were there no segregation by sex, there would be virtually no females with the requisite strength, speed or other physical attributes to even earn a berth on a university team.¹⁴⁶ In order to be competitive, males and females of very different vintages must confront one another (e.g., the famous tennis match between Billie Jean King, then at the apex of her tennis game versus Bobby Riggs, who was long past his prime and

144. See *id.* at 20. It is often charged that while blacks are hired as players in professional sports leagues, there is in effect a "glass ceiling" which prevents them from rising to management, coaching and other staff positions after they retire as athletes. This contention cannot be supported by the reported facts. Blacks comprise only 14% of the U.S. population. See U.S. CENSUS BUREAU, STATISTICAL ABSTRACT OF THE UNITED STATES: 1998, at 14 tbl. 13 (1998). Thus, they are statistically overrepresented in the NBA and NFL not only as players, but also as managers, coaches and staff. Therefore, were employment equity strictly applied to the professional athletics industry, at least insofar as these two leagues are concerned, there would be a massive firing of blacks as players, as well as roughly half of the black general managers and coaches in the NBA, and coaches in the NFL would have to be dismissed.

145. For antidotes, see generally RICHARD A. EPSTEIN, FORBIDDEN GROUNDS: THE CASE AGAINST EMPLOYMENT DISCRIMINATION LAWS (1992); MICHAEL E. LEVIN, FEMINISM AND FREEDOM (1987).

146. Golf may well be an exception. If so, and to that extent, its pedigree as a legitimate athletic event comes into question. In other words, we may perhaps distinguish between "real" sporting activities and mere "play" on the basis of whether adult males and females are competitive with each other. True, female Olympic athletes of 1998 can swim rings around males of an earlier era (e.g., Buster Crabbe, Johnny Weismuller), but records have been significantly improving over the intervening decades. These two swimmers, Crabtree and Weismuller, who later played the role of Tarzan in the movies, could best their female contemporaries of the day by similar margins as men now out distance women in the pool.

never had attained King's stature amongst men even at the apex of his abilities).

Surely, it is inequitable, in at least some reasonable senses of the word, to have special categories for female athletes at all. Were there not any such categories, and universities wished to field as many athletes as they now do, there would be a large number of relatively mediocre male athletes who could instead enjoy this experience. On this basis, then, women "athletes" are favored when universities spend *any* money on these pursuits, for in a purely "fair" world, where slots on teams were awarded strictly in accordance with ability, few women would be able to break through the "sports ceiling."

Clearly, we believe this state of affairs is not due to the early conditioning of "culture," or of females by male misogynist fathers. Mothers do most of the early childhood rearing, of both boys and girls.¹⁴⁷ Nor is it due to "self hating" mothers, who conspiratorially undermine athletic abilities on the distaff side. Instead, there are good and sufficient sociobiological reasons why females should be weaker and slower, on average, than males, and therefore make poorer athletes.

According to scholars of sociobiology and evolutionary psychology, we are the way we are now in large part because of what it took to survive and leave progeny hundreds of thousands of years ago. In those days, and at present as well, for that matter, women were the genetic bottleneck. Or, to put this the other way around, most males were genetically superfluous. That is, one man could fertilize hundreds of women; the others were, biologically speaking, in effect, drones. In contrast, each female was precious in terms of preserving the human race, in that she could leave progeny with the genetic contribution of a single male. Suppose, a long time ago, there were two tribes of (pre)humans: one of which sent the women out hunting (which sharply penalized nonathleticism) and accorded the men the role of staying in the relatively safer caves with the children while the other group inverted this process. Which of them would survive and leave descendants? To ask this question is to answer it. In fact, we have a name for the first (presumably imaginary) tribe: "extinct."¹⁴⁸ Thus, the reason men are now far better athletes than women is that males without such attributes were weeded out of the genetic stock to a far greater extent than females. Stated differently, male but not female athleticism contributed to evolutionary success.

With success, of course, comes interest. That is, there tends to be a positive correlation between what we do well at and what we are interested in. Nerds and

147. See LILLIAN B. RUBIN, *FAMILIES ON THE FAULT LINE: AMERICA'S WORKING CLASS SPEAK ABOUT THE FAMILY, THE ECONOMY, RACE AND ETHNICITY* 79 (1st ed. 1994); Rodney Stark, *Socialization and Social Roles*, in *SOCIOLOGY* 160-62 (7th ed. 1997).

148. See generally ROBERT M. AXELROD, *THE EVOLUTION OF COOPERATION* (1984); DAVID M. BUSS, *THE EVOLUTION OF DESIRE: STRATEGIES OF HUMAN MATING* (1994); RICHARD DAWKINS, *RIVER OUT OF EDEN: A DARWINIAN VIEW OF LIFE* (1995); RICHARD DAWKINS, *THE SELFISH GENE* (1989); R.H. FRANK, *PASSION WITHIN REASON: THE STRATEGIC ROLE OF THE EMOTIONS* (1988); DONALD SYMONS, *THE EVOLUTION OF HUMAN SEXUALITY* (1979); ROBERT TRIVERS, *SOCIAL EVOLUTION* (1985); E.O. WILSON, *SOCIOBIOLOGY: A NEW SYNTHESIS* (1975); ROBERT WRIGHT, *MORAL ANIMAL: THE NEW SCIENCE OF EVOLUTIONARY PSYCHOLOGY* (1994); R. Axelrod & W.D. Hamilton, *The Evolution of Cooperation*, 211 *SCIENCE* 1390-96 (1981); John Tooby & Leda Cosmides, *Evolutionary Psychology and the Generation of Culture*, 10 *ETHNOLOGY & SOCIOBIOLOGY* 375-424 (1989); John Tooby & Leda Cosmides, *On the Universality of Human Nature*, 58 *J. PERSONALITY* 17-67 (1990); R. Wright, *Feminists, Meet Mr. Darwin*, *NEW REPUBLIC*, Nov. 28, 1994, at 43.

geeks tend to be interested in computers and mathematics because they succeed in mastering their intricacies. And, of course, there is a positive feedback loop between them where interest breeds success which, in turn, leads to yet greater involvement. Likewise, those who achieve in athletic arenas tend to focus on them and are positively reinforced for doing so. This being the case, it should not occasion any surprise that boys are not only better at sports, but also more occupied with them as well.

But sociobiology is merely an explanation of the human (and other species') condition. We can transcend our "selfish genes"¹⁴⁹ if we wish. That is, this academic discipline can only account for the fact that girl students would have less interest and ability to pursue intercollegiate competition than boys. However, it is not at all *prescriptive*. Just because female athletes are vastly inferior to their male counterparts does not mean that their desires to indulge in such activities, lesser though they be, should not be accommodated in modern society. On the other hand, given these sociobiological insights, it is difficult to credit the findings of various courts that lesser support for female athletic programs is evidence of sexist discrimination on the part of university administrations.

How, then, would the more limited interests of females in athletic pursuits be accommodated, absent the Office of Civil Rights, Title IX of the Education Amendments of 1972, the Civil Rights Law of 1964, Gender "Equity" Task Forces and all the rest of the panoply of government intervention into private arrangements? Access to athletics would be allocated through the free enterprise system, just as access to health clubs and golf courses is now allocated in the world beyond colleges.

Even though men have very little interest in wearing women's clothes, this has not prevented a gigantic industry from arising, dedicated to satisfying women's desires in fashion. Industries which provide makeup, hair styling, nail polish, hair removal, and weight loss services are similarly "biased" in the direction of females: they disproportionately serve women. These phenomena would be very difficult to understand on the feminist model that female wants are ignored or deprecated in the male's favor.

Why is it that the market is lead by "an invisible hand"¹⁵⁰ to provide goods and services for women, who are not "dominant," or "aggressive" and are thought to be "victims" of discrimination? It is based on profit and loss. The market provides goods and services in proportion to the dollars which are "voted" in their behalf.¹⁵¹

149. DAWKINS, *supra* note 148, at 1.

150. See generally ADAM SMITH, *AN INQUIRY INTO THE NATURE AND CAUSES OF THE WEALTH OF NATIONS* (Modern Library 1965) (1776). The invisible hand was thought by Smith to be God's ordering of the human condition such that we are automatically led, by selfish interest and even greed, to do that which is in the best interests of our fellow human beings. See *id.*

151. For an economic account of male/female earnings differentials in terms of unequal sharing of family, household and child rearing tasks, see generally WALTER E. BLOCK & MICHAEL A. WALKER, *FOCUS ON EMPLOYMENT EQUITY: A CRITIQUE OF THE ABELLA ROYAL COMMISSION ON EQUALITY IN EMPLOYMENT* (1985); *DISCRIMINATION, AFFIRMATIVE ACTION AND EQUAL OPPORTUNITY* (Walter Block & Michael Walker eds., 1982); Walter Block & Walter Williams, *Male-Female Earnings Differentials: A Critical Reappraisal*, 2 J. LAB. RES. 385, 385-88 (Fall 1981). But doesn't this just put back the real question? The claim might be made that women have fewer dollar votes in the first place because of male discrimination in the labor market. Even if, then, goods and services are provided according to spending power, females still get the short end of the stick due to this prior injustice.

If, for example, females have 55% of the spending power, then this proportion of the GDP will tend to be allotted to their demands, and 45% to that of males. This can be proven by the following considerations. Suppose that, given this division of income, the market has somehow produced 70% of its wares according to males tastes, and only 30% in the direction of female wants. This would imply relative satiety for things such as golf clubs, baseball bats, power boats, and beer, but an under supply relative to demand of makeup, high-heeled shoes and jewelry. Profits would rise in the latter industries and fall in the former ones. Entrepreneurs would be led by Adam Smith's invisible hand into producing more products that appeal to females and fewer that appeal to males. If they failed to do so, there would continue to be more bankruptcies amongst firms serving preponderantly male needs.

A similar analysis applies to male and female sports programs at the university level. Assume that such spending for each gender was on a 50-50 basis. Suppose, for argument's sake, that the optimal proportion of expenditure for women's and men's teams is 25:75 in terms of actual demand. Then, on the assumption of private schools which are subjected to the market forces of profit and loss, educational "firms" (e.g., universities) would be led to conform their practices to this proportion. The same principle applies no matter what the statistical assumption. If tastes somehow change, and women athletes now are willing to spend, say, 70% of the sports dollar, and men only 30%, then a similar shift would again occur, this time in the direction of more money for female teams.

The assumption of private universities is crucial for the case that government intervention is not needed to fully accommodate the demand for intercollegiate sports teams. To the extent that there are public institutions of higher learning, we can no longer rely on market forces to bring about any such result. Thus, any feminists who pay attention to economics should advocate the privatization of higher education.¹⁵² In public universities, there is no economic profit and loss oversight to counteract any tendencies toward anti-female discrimination.

So far, we have been discussing sexual discrimination from a biological and economic perspective. Let us now conclude with a normative analysis. Setting aside the causes and effects of gender discrimination, and the issue of whether it exists on

This may well be the popular view, but it is erroneous. Wages tend to be proportional to productivity, and male and female productivity is roughly equal. Why, then, do women earn less in the market? This is not because of favoritism toward males. Rather, it is due to the fact that females have less attachment to the labor force, and have invested in less work specific human capital. And the explanation for this state of affairs, in turn, is the unequal sharing of child rearing and household tasks in marriages. Again there are good and sufficient sociobiological reasons why this should be the case, but whether or not this explanation for unequal household duties is true, it is a bit of a stretch to blame this state of affairs on the market, or capitalism, or employers, or discrimination, or any other of the feminist whipping boys.

152. This is on the assumption that the feminist agenda is actually one of promoting the welfare and best interests of women. An alternative hypothesis emanates from the Public Choice School of Economics, according to which there may be, in addition or possibly instead, a hidden agenda. The disparate treatment accorded President Bill Clinton and Supreme Court Justice Clarence Thomas suggests that it is to promote Democrats, or socialists, at the expense of Republicans, or conservatives, and not at all to help females. See generally JAMES M. BUCHANAN & GORDON TULLOCK, *THE CALCULUS OF CONSENT: LOGICAL FOUNDATIONS OF CONSTITUTIONAL DEMOCRACY* (1971); CHRISTINA HOFF SOMMERS, *WHO STOLE FEMINISM? HOW WOMEN HAVE BETRAYED WOMEN* (1994).

college campuses (or is due to lesser female interest in sports teams) let us ask the question of whether schools should have a right to discriminate in this regard. Non-discrimination rules apply to "public" accommodations,¹⁵³ such as stores, hotels, and movie theaters, but not to certain private choices. That is, it is illegal for a commercial firm's owner to discriminate on the basis of sex,¹⁵⁴ race, ethnicity, etc., but this may be done, and commonly is done, in dating, friendship patterns, and marriage. If discrimination is such an utter evil, why should it be countenanced in *any* realm of human endeavor?

Secondly, even within the area of commerce, there is a curious lack of symmetry. Customers are allowed to discriminate between, say, restaurants selling Chinese, Italian, Indian and Mexican food, while none of these establishments would be allowed by law to reciprocate in a similar manner. That is, none of them could legally restrict their clientele to any one ethnic group, or, indeed, exclude any of them.¹⁵⁵

CONCLUSION

So the philosophical premise upon which gender equity is built, far from being impregnable, is, in our view, intellectually incoherent. Perhaps, then, an alternative may one day come to take its place: the right of free association. According to this doctrine, people should be free to associate with whomever they wish, on whatever basis they choose; there should be no law compelling them to deal with those they wish to avoid. Strong historical and moral precedent exists for this approach. It is the philosophy upon which the anti-slavery movement is built.¹⁵⁶ The kidnaping of innocent people is the paradigm case of the violation of the law of voluntary association. Forcing individuals to interact with one another when it is not on a mutually agreeable basis is a form of slavery. This basic principle still resonates widely, even in this benighted age of gender "equity."

153. This is a bit of a misnomer, since enterprises of this sort are *privately* owned. Nor are they necessarily "open to the public." On the contrary, this is precisely the point at issue.

154. Both heterosexuals and homosexuals discriminate in their choice of bed partner on the basis of gender. Of all groups, only bisexuals are completely without sexual bias. The law, if logically consistent, would thus impose this practice upon us all. But even bisexuals discriminate on the basis of other characteristics: beauty (they are guilty of "lookism"), talent, sense of humor, intelligence, etc. It would appear that there are no people innocent of prejudice in this regard. Perhaps all of humanity ought to be incarcerated on this ground.

155. See Civil Rights Act of 1964, 42 U.S.C. § 2000c to 2000c-17.

156. See THE ANTISLAVERY ARGUMENT (W. & J. Pease eds., 1965) (citing WILLIAM LLOYD GARRISON, DECLARATION OF SENTIMENTS OF THE AMERICAN ANTI-SLAVERY CONVENTION (1833)).

SOME RANDOM THOUGHTS ON TEACHING UNIVERSITY ECONOMICS

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Unfortunately, I do not have anything I am willing to dignify with the appellation "Philosophy of Teaching." Perhaps this is because I never formally studied or even paid much attention to this subject. However, in my more than 20 years of instructing at university, and in my more than 30 years of lecturing to widely disparate audiences (university faculty, graduate and undergraduate college students, clergy, journalists, high school students, business organizations, labor unions, etc.) I have picked up a few random thoughts I could share in lieu of a carefully crafted philosophy.

1. I think it is a crime and a disgrace that I, and thousands of others, were able to earn our Ph.Ds, and then be set loose upon an unsuspecting student population, without having had a single shred of training in this regard. My preparation in many other areas was fully adequate; even superb. But not one iota of thought was given to this aspect of learning, at least in my own case.
2. The business and economics library of Columbia University (from whom I received my Ph.D. in 1972) featured a sign in a prominent place which I saw just about every day as a graduate student. It affected me mightily. It said "It's not what is taught here that counts, it is what is learned."
My lectures can be absolutely brilliant, riveting, and fascinating, but if they are
3. pitched too high or too low, or miss the students for any other reason, I might as well be speaking to the walls. This is why, when teaching, I try, every few minutes or so, to pick out students at random and ask them to paraphrase what I have just said, or to make a comment on it, etc. Unless I can elicit from them evidence that I am being understood, I had better go back and reiterate. (Inviting students to ask questions at any time is worthwhile, but all too often they are embarrassed to expose what they think is their ignorance, but may well be my own flaws as an instructor.)

ent emphases, employ different body language, use different illustrations, etc. This can sometimes carry the day even when I can only reach some students, but not all.

4. I am a firm believer in multi dimensionality. What I mean by this is that each mode of teaching has something to contribute to different students, but that as many methods as possible should be employed in order to obtain the best results. For example reading a textbook, doing homework, writing an exam, listening to a lecture, watching a movie, t.v. or play (given that there is strong economic content; e.g., "The Man in the White Suit¹," one of my favorite economically relevant movies) have all been very helpful to me as a student. (I was about to say "helpful to me in my student days, but then I realized that when I stop being a student, I also stop being a good teacher.) I try to employ all of these in my classes. Even more important, however, is the chance to articulate economic insights -- and not just in response to my attempts at Socratic dialogue. This is why I think it important that students be given the privilege of preparing a talk, on a subject of their own choosing - in consultation with the instructor -- right in front of the whole class. It is sometimes difficult to arrange for this, especially with large class sizes, but even a 3 to 5 minute talk -- and especially preparing for it, is an important learning tool. As well, essay type questions on exams, or oral exams when possible, and term papers, are important aspects of a robust education.
5. Except to a few students, economics is not the most interesting subject. I try to spice up my presentations with jokes, examples, personal experiences, in order to keep my classes in focus. If I thought that doing a tap dance on the top of the desk would work, I think I'd try it.
6. I never read lectures. Some people can do this in an interesting way; I cannot. Instead, I speak based on short organizing notes. I attempt to attain the same level of informality in front of a class or a large lecture hall as I would employ in a one to one conversation. I don't always succeed, but I am convinced I achieve more in this regard than if I didn't even try.
7. Writing. If my students are to become scholars, or to be able to take on important challenges after university, it is exceedingly likely that they shall have to at least be comfortable with writing. But our institutions of higher learning fall down in the task of training students to write. Let me give a case in point from my own educational experience. I don't know the exact statistics on this, but in my own graduate school days (at Columbia University, a not untypical seat of higher learning) of 100 students accepted to the graduate program, the overwhelming majority, say, 85, would make it to the stage where they were expected to write their Ph.D. dissertations. So the failure rate to this stage was a reasonably small 15%. But then, of the 85 who passed their comprehensive exams and were thus qualified to write a thesis, a very small

number indeed would finish this arduous task and complete their studies, perhaps 25.

Why the remarkable fall off? It is not because they were not smart enough to write a dissertation. They were, or they would not have survived to this stage. The reason, in my opinion, is that writing of this sort was something for which my classmates were not prepared by their previous educational experiences. Many students are rarely asked to write an any length. Yes, there are term papers, but these are few and far between. They are the exception, not the rule. There are all too many multiple choice questions, and all too few essay exams.

There is an obvious explanation for this state of affairs: it is easier for the instructor, and few faculty members place a great enough importance on writing to overcome the inertia. Given my feelings on the subject, I place a great emphasis on writing: term papers, essay exams, discussions of writing skills.

8. Here is one twist on this theme I try out

on students: I require that they submit their work to outside sources (scholarly journals, magazines, newspapers -- for op ed pieces and letters to the editor) and obtain *rejection slips*. That is to say, if their material is accepted, they will still not have passed my requirement, because they will not be able to present me with a letter of rejection.

The reason I utilize such a perverse sounding course of action is that I am convinced that a lot of the fear of writing stems from fear of being rejected. But a few rejection slips, when nothing much is riding on the issue (and, actually, a premium is placed on actually being rejected) may serve like cow pox. That is to say, it may ward off the debilitating effects of more serious rejection later in life (analogous to small pox.)

Footnotes

1. Other economically relevant movies I have used to good effect include "Wall Street," "Norma Rae," "Other People's Money," and "FernGully."

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The Moral Dimensions of Poverty, Entitlements, and Theft

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In the view of many commentators and pundits, all citizens have an entitlement to be relieved of their poverty, which, they believe, would best be accomplished by throwing other people's money at the poor. This article makes the case that not only do the impoverished not have any such right, but the attempt to furnish them with wealth earned by others constitutes theft and does not help them in any case. Given, however, that such entitlements exist, what is the proper moral response? To approach an answer to this question, this article defines and then applies "libertarian class analysis" to the question and derives from this perspective some counterintuitive conclusions regarding welfare recipients and reparations for past invasions of person and property.

The Ideal World

For the limited government, free-enterprise-oriented classical liberal, there is only one type of entitlement the citizen may properly receive from the state: security of his person and property. This entitlement entails an army to protect him from foreign despots, a police force to shield him from domestic villains, and a court system to determine who is and who is not an initiator of violence against another person or his property. Any and all other entitlements are illegitimate—at least from the perspective of this economic philosophy.¹ One defense of this limited notion of government is that entitlement programs² are counterproductive, which means such programs actually hurt their presumptively intended beneficiaries.

The list of such instances is long and woeful. Perhaps the most egregious is the welfare program, Aid to Families with Dependent Children (AFDC). Originally introduced as a means of helping the needy,³ AFDC has instead promoted dependency, eviscerated personal ambition, and created whole generations of unwanted and often abused children.⁴ These children, in turn, often graduate to a life of crime and continue the practice of rearing still other children of the same ilk.⁵ The reason for this is not difficult to discern: Supply curves slope in an upward direction, the more one pays for an item, the more of it is called forth in the market. Welfare is the offer of money for people who are poor. The

more money offered for this purpose, the more incentive people have to change their behavior to be eligible for these funds, which is not to say that a Bill Gates or a Donald Trump will be attracted to this lifestyle. But there are always people on the margin, teetering on the edge, where, on one side, lies the (lower) middle class life of honesty and probity, and, on the other, the underclass of dissolution. In their precarious position on the fence they are particularly vulnerable to a slight push in either direction. AFDC provides that impetus, and it is all in the wrong direction—for our society in general, as well as for the particular people involved.⁶

Then there is the issue of public housing. Originally based on similar benevolent motives,⁷ this attempt to help the poor, too, has instead boomeranged into disaster. The Cabrini Green projects in Chicago are world-famous for feces and urine in the (often nonfunctioning) elevators, ripped out light bulbs, boarded-up windows, crime, gangs, drugs, and other accouterments of a return to barbarism. The Pruitt-Igoe homes in Saint Louis were so uncivilized that they had to be bombed, not by terrorists,⁸ but by the government housing authority charged with their upkeep and maintenance.

The cause of this dissolution is not hard to understand. Socialist to the core, the governments involved with these entitlements precluded commercial establishments such as stores, banks, and restaurants from these environs. But without the pedestrian traffic of shoppers, people living in the apartments above are less likely to keep their "eyes on the street."⁹ This, in turn, leads to increased crime rates as criminals prefer to ply their trade without witnesses. Tipper income cut-offs are generally used by bureaucrats to determine eligibility for public housing. Thus, when a poor tenant family surpasses a certain level of income, it is booted out of its accommodation. One can easily appreciate the disincentive effects here. Worse yet, those who prosper and then are forced to leave, are the most successful among the inhabitants. They are the natural neighborhood leaders, typically adult males, who are desperately needed to serve as role models for teenagers. In this situation, the cream rises to the top and then is skimmed off, leaving a helpless and victimized mass of people in its wake.

Another criticism of entitlements is that they have perverse income effect.¹⁰ While most people see transfers as helping the poor at the expense of the rich, in fact, an inordinate number go to (sectors of the) middle class and the rich.¹¹ Listed under this rubric are farm subsidies (which go mainly to large-scale agri-business), bailouts for big business (Lockheed, Chrysler), rescues for the banks (e.g., the billions spent to undergird the Mexican peso), protective tariffs (which benefit domestic manufacturers while despoiling local consum-

ers and Third World industry), minimum wages (which oppress poor, unskilled, minority group workers to further aggrandize rich, well-organized labor unions).¹² It is not without good reason that such recipients have been well and truly castigated as "corporate welfare bums."

If we have learned anything from the Public Choice School¹³ it is that the more well-off are able to assert their will not only in the private but also in the public sector. It should not occasion much surprise that this also holds true with regard to transfers. The rich are simply too well-organized to allow a system of subsidies to function contrary to their own best interests.

A further difficulty with government largesse with taxpayers' money is that it engenders the idea that these funds come as a matter of right. The so-called welfare rights movement is only the tip of the iceberg. People now believe that they have the "right" to such diverse benefits as social security, education, food stamps, Workers Compensation, unemployment insurance, to mention only a few. But how can two separate people have the right to one-and-the-same thing? How is it possible for both the rightful owner (the one who earned the money through voluntary market activity), as well as for the recipients of all these programs, to have a right to this wealth? This is impossible, since, if properly construed, there can be no such thing as a conflict in rights.

Adherents of entitlements often argue that these programs came about as a result of democratic institutions. Duly constituted politicians, who derive their authority from the electorate, inaugurated them. They, in turn, appointed bureaucrats and administrators who received a warrant for their subsequent actions indirectly from the voters through Congress and the President. Entitlements, then, are justified as part and parcel of our democracy.

While this may sound reasonable, in my opinion, it fails utterly. The argument is a variation on legal positivism—the claim that the law is always just—since it can trace its beginnings back to a majority vote. Why is a forced transfer of money rendered any less of a theft because more than half the voters supported it? Suppose two hoodlums break into my apartment and are walking off with my television set. When I object that they are stealing my property, they agree to hold a referendum on the issue. One of them (a philosophical robber) says, "How many object to us taking Block's television set?" Whereupon I raise my hand. He then asks, "How many favor this action?" and the two thieves register their approval. Does this veneer of democracy legitimize their act of theft? Hardly. Nor can it be objected that in the case of the United States—unlike the democratic robbers—we had all agreed beforehand to be bound by the results of elections because of the Constitution. In point of fact, no one ever signed any such agreement.¹⁴ Hitler, to cite one extreme case, came to power as

the result of an exercise of the ballot. Does this fact alone legitimize all his political acts? Certainly not. But if not, how can mere democracy justify the United States government's forcibly transferring money from some to give to others?

In addition to harming the poor both directly (e.g., welfare creates dependency) and indirectly (elements¹⁵ of the middle class and the rich attain the lion's share of the wealth) these entitlements are immoral. We have focused thus far on the harm to the supposed beneficiaries of these programs, but no discussion of the moral dimensions of poverty and entitlements can ignore the fact that these initiatives are financed by coercive tax levies. The money to pay for welfare, public housing, and other such transfers, is taken from innocent taxpayers at gunpoint. If the sole justification for the limited state is to protect the person and property of the citizen, then these entitlements must be seen as a contradiction or violation of that principle. The point is, if we are to undertake a thorough moral analysis of entitlements, we must not constrict the scope of our deliberations merely to the recipients. Even on the unwarranted assumption that the people who receive these monies actually benefit from them, the transfers cannot be morally sanctioned because they violate the rights of those who made the contributions.

The Real World

So far, we have discussed the ideal classical liberal world in which entitlements would be entirely absent.¹⁶ In the real world, however, such programs are all too common, which furnishes us with the opportunity to engage in further analysis. To wit, *given* the fact that entitlement programs exist, how should the moral agent act in regard to them?

One possibility, which is the simplest and perhaps the most emotionally satisfying response, is that they simply be ignored.¹⁷ After all, if these initiatives are unjust, what could be more appropriate than remaining detached from them? But there are problems with this view. Superficially, such a course of action is highly impractical. If a person were to eschew benefiting from any government expenditures or to refrain from taking part in any welfare or public housing programs, this would mean that citizens could not use the post office, streets, roads, highways, lighthouses, schools, libraries, museums, symphony halls, and so forth. Life under such conditions might not approach Hobbes' description of society as "nasty, brutish, and short," but would come too close for comfort, and public life would be impoverished.

Another possibility is that participation in entitlement programs is a matter of mere pragmatism unworthy of moral analysis. More important, it might be

argued, is that classical liberal principles simply do not mandate avoiding governmental largesse, for advocates of strictly limited government, too, have been forced to finance these entitlements. If they avail themselves of the benefits thereto, their actions can be interpreted as merely seizing (the use of) their own money back and not as theft.

Contrary to this simplistic solution, the problem with entitlements is *the whole process* of government seizing our wealth and giving it to others. Since we are all victims *and* beneficiaries of this game, the whole process of forcing the entire society to pay for things its members are unwilling to finance themselves is morally objectionable. In isolation, then, it is not improper for people to seek to recover the taxes that have been levied against them.

Who, then, should accept government entitlements? To what extent should this be occurring in society? To answer the first question, we must avail ourselves of libertarian class theory.¹⁸ Suppose, for instance, there were a classical liberal Nuremberg Trial, the purpose of which was to discern who was guilty for perpetuating the welfare state entitlement system. Would everyone be responsible, since, willy-nilly, all people (excluding a few hermits) participate in it? No. As we have seen, it is morally justified for at least some people to get their own money back. Instead, the answer is given that the ruling class is guilty for perpetuating the entitlement system.¹⁹ Members of this class are considered to be in violation of the strictures of free enterprise. But who are members of the ruling class? How can they be distinguished from other people, all of whom accept government transfers?

First of all, the distinction is based on whether a person actively works to support, aid, and abet the entitlement system, or works to dismantle it.²⁰ As a first approximation, the former at least potentially qualify for ruling class status, the latter do not, but this is only a presumption. It can be defeated on several grounds. Take, for example, the issue of free speech. In a free society, anyone can say nearly anything he pleases.²¹ Mere verbal support of entitlements will not suffice. Another exception is for low-level administrators. Not every mail carrier or typist in the Social Security administration, would be deemed to be in violation of libertarian law.

Standard protocol in war may shed some light on these deliberations. Typically, in war, the officers of the defeated army are found guilty. By contrast, the enlisted men, who were usually drafted in any case, are incorporated into the victor's army, and subsequently treated as relative equals with the other soldiers. Likely to be in the dock, then, are the politicians who enacted entitlement legislation, and the senior bureaucrats who carry it out. The senior bureaucrats would be equivalent to the officers in our model. Furthermore, all

those involved at any level in impermissible activities would be forced to defend their actions. Candidates for this category might include the East German soldiers who shot their compatriots who were fleeing to the West, or to a lesser extent, our own police forces who systematically violate civil rights.

According to the philosophy of classical liberalism, it is to members of the ruling class that we owe the forced transfer society and who alone would be ineligible from receiving entitlement benefits. All others would not be precluded from accepting government grants on moral grounds.

An immediate objection might be registered to this scenario. According to this analysis, then, the welfare mother will still receive her benefits. She, after all, is a poor candidate for membership in the ruling class. I concede that this conclusion may seem paradoxical coming from a perspective that condemns welfare root and branch. If the logic of the case leads in this direction, then it really does not matter whether it is counterintuitive. The point is, given that there are entitlement programs, anyone who is not a member of the ruling class can possibly (but is not required to) make a moral claim to the existing benefit. While there is no justification, in my estimation, for entitlement benefits in the first place, the fact that they exist in the real world places no ethical barrier against the aggrieved making use of them.

Reparations

While reparations and entitlements share some characteristics—both are payments from one party to another—there is a gigantic moral chasm between the two. Entitlements, as we have seen, amount to no less than theft. Parties of the first part, taxpayers, are forced by law to subsidize parties of the second part, welfare recipients, corporate welfare bums, and agribusiness. Reparations, by contrast, are the opposite of theft because they attempt to reverse the effects of stealing by returning property to its rightful owner. Indeed, a large part of libertarian punishment theory is predicated upon restitution.²²

But can entitlements such as welfare not be justified on the ground that they are an implicit form of reparation? After all, AFDC recipients are poor; the taxpayers, on average, are certainly richer than those at the lowest income brackets. The problem with this line of reasoning is that mere wealth does not imply theft. Mere poverty does not imply victimization by robbers since people can become rich without stealing and become poor without being pilfered. It is only a bit of vulgar Marxism to contend that the rich are rich because the poor are poor. Whom, after all, did Ray Kroc, Steve Jobs, or Bill Gates rob? The millions of dollars of new wealth they created simply did not exist before them, nor, by definition, did anyone rob a starving group of Stone Age tribesman who

were suddenly discovered in Africa or South America. No one denies that robbery can sometimes be a sufficient condition for wealth, but it is certainly not a necessary one as implied by this argument.

But what about the case of slavery? Indeed, this institution amounted to theft of labor (and much more, of course). Therefore, a classical liberal perspective certainly could justify reparations in the case of slavery.²³ However, if the payments are to be morally enacted, several conditions must be met. First, if there is any case for reparations, these should come from guilty parties, not from the entire citizenry through the tax system. To make all citizens pay for the crimes of a few would be to extend—not diminish—the effects of robbery. Second, if the reparations are for an act that took place many years ago, a direct link between the historical victims and the present recipients must be forged. For example, although virtually all slaves in the United States were black, and many present welfare recipients are of the same race, not all of the latter can trace their roots to the former. That is, many present African-Americans are the children not of slaves, but of people who came to this country after 1865, from Africa, from the Caribbean, and so forth. Third, for historical cases, a close connection between the guilty and those called upon to make the payments must be established. Most important, in all such cases, we must cleave mightily to the basic legal axiom: "Possession is nine-tenths of the law." That is, the presumption must always be that the present owner is the rightful owner. It is the burden of the one who would upset property titles to prove, beyond a reasonable doubt, that reparation is justified.

In the case of slavery, these somewhat stringent conditions can conceivably be met.²⁴ It is common knowledge that plantations throughout the old Confederacy were established with slave labor. When the Civil War ended, if more complete justice were to have taken place, the slaves would not merely have been freed. The lands they had been forced to cultivate would have been given to them and would not have remained in the hands of their former owners. Full compensation might even have contemplated enslaving these former masters to the newly freed slaves—a sort of poetic justice.

Unfortunately, in 2001, those slaveholders are beyond reach of the civil authorities. But the plantations, houses, farms, and the wealth that was left to their progeny, which should have been given to the newly freed slaves, are still in existence and now owned by the great grandchildren of the slave masters. If any present black person can prove family connection with a slave who endured forced labor at a specific plantation, he should be given that property. If there is more than one claim to the property, then it should be divided equally among all legitimate claimants.

One objection to this modest proposal is that to enact this idea would be to punish the grandchild for the sins of the grandparent. But this is simply not true. To take away a farm from a white person in Alabama and give it to an African-American person is, in some sense, to "punish" the former. But this is not really true—the white relative should not have been given the farm, in the first place. The reparation is merely the return of stolen property to the heir of the rightful owner. If my grandfather stole your grandfather's ring and then gave it to me, I am not the rightful owner of the ring even though I have possession of it. On the contrary, *you* are the rightful owner. If justice is to prevail, I must turn it over to you. I will not have been punished—only made to do what returning stolen property implies.

Another objection to reparations is that there should be statute of limitations on past crimes. The enslavement of blacks by white Americans, or of biblical Jews by Egyptians, land theft from the Indians, the seizing of Japanese-American property during World War II, Arab-Israeli land conflict, the latifundia, are lost in the winds of time and should remain so. But why should there be any statute of limitations on justice? Suppose that we know that A stole X from S, and then gave it to his progeny, a, and we also know of b, the latter's grandchild. Surely justice requires that we right this wrong, even if it is an ancient one.²⁵

Finally, there are legitimate concerns about fairness. How do we know the reparations are actually justified, when the theft took place so long ago? At this point, the classical liberal conditions come back to the forefront of discussion. Possession is nine-tenths of the law and the burden of proof is always on those who seek to overturn present property titles. If the robbery took place in biblical times, or before there was a written language, then, to that extent, it is exceedingly unlikely that anyone can prove anything. This stricture lends a conservative element to the reparation proceedings. Reparations are very different from entitlements. When properly construed, they amount to no more and no less than a return of stolen property; however, by contrast, entitlements constitute the theft of legitimately owned property.

Notes

1. Observe that this conclusion is similar—but not precisely equal—to the vision of appropriate entitlements as provided for in the United States Constitution. There, in addition to the aforementioned courts, armies, and police, the citizen is also entitled to a post office and other public enterprises. These services and institutions would be strictly prohibited under a libertarian limited-government vision, the model we shall assume for the purpose of this article.

2. Now and henceforth, we use the term *entitlement program* to refer to other initiatives of the state over and above armies, courts, and police. These latter three we characterize not as entitlement programs, which are always illegitimate uses of government force, but as the sole legitimate functions of government. For a critique of this limited government philosophy from within libertarianism, see Bruce L. Benson, *The Enterprise of Law: Justice Without the State* (San Francisco: Pacific Research Institute, 1990); "The Impetus for Recognizing Private Property and Adopting Ethical Behavior in a Market Economy: Natural Law, Government Law, or Evolving Self-Interest," *The Review of Austrian Economics* 6, 2 (1993): 43–80; "Customary Law as a Social Contract: International Commercial Law," *Constitutional Political Economy* 2 (1992): 1–27; "An Evolutionary Contractarian View of Primitive Law: The Institutions and Incentives Arising under Customary Indian Law," *The Review of Austrian Economics* 5, 1 (1991): 41–65; "Enforcement of Private Property Rights in Primitive Societies: Law Without Government," *The Journal of Libertarian Studies* IX, 1 (Winter 1989): 1–26; "Legal Evolution in Primitive Societies," *Journal of Institutional and Theoretical Economics* 144 (1988): 772–88; "The Lost Victim and Other Failures of the Public Law Experiment," *Harvard Journal of Law and Public Policy* 9 (1986): 399–427; Anthony De Jasay, *The State* (Oxford: Basil Blackwell, 1985); David Friedman, *The Machinery of Freedom: Guide to a Radical Capitalism*, 2nd ed. (La Salle, Ill.: Open Court, 1989); "Private Creation and Enforcement of Law: A Historical Case," *Journal of Legal Studies* 8 (1979): 399–415; Hans-Hermann Hoppe, *The Economics and Ethics of Private Property: Studies in Political Economy and Philosophy* (Boston: Kluwer, 1993); "The Economics and Sociology of Taxation," in *Taxation: An Austrian View*, ed. L. Rockwell (Boston: Dordrecht, 1992); *A Theory of Socialism and Capitalism: Economics, Politics, and Ethics* (Boston: Kluwer, 1989); David Osterfeld, "Anarchism and the Public Goods Issue: Law, Courts, and the Police," *The Journal of Libertarian Studies* 9, 1 (Winter 1989): 47–68; Joseph R. Peden, "Property Rights in Celtic Irish Law," *The Journal of Libertarian Studies* 1, 2 (Spring 1977): 81–96; Murray N. Rothbard, *For a New Liberty* (New York: Macmillan, 1973); *Power and Market: Government and the Economy* (Menlo Park, Calif.: Institute for Humane Studies, 1970); *The Ethics of Liberty* (Atlantic Highlands, N.J.: Humanities Press, 1982); Lysander Spooner, *No Treason* (Larkspur, Co.: Tannehill, Morris, and Linda, 1966 [1870]); *The Market for Liberty* (New York: Laissez-Faire Books, 1984); William C. Woolridge, *Uncle Sam the Monopoly Man* (New Rochelle, N.Y.: Arlington House, 1970).

3. For an alternative Marxist perspective, one that analyzes welfare as enabling capitalists to control labor markets, see Frances Fox Piven and Richard A. Cloward, *Regulating the Poor: The Functions of Public Welfare* (New York: Random House, 1971).

4. See Thomas Sowell, *The Vision of the Anointed* (New York: Basic Books, 1995); *Race and Economics* (New York: Longman, 1975); *Ethnic America* (New York: Basic Books, 1981); *The Economics and Politics of Race: An International Perspective* (New York: Morrow, 1983); *A Conflict of Visions: Ideological Origins of Political Struggles* (New York: Morrow, 1987); *Race and Culture: A World View* (New York: Basic Books, 1994); Charles Murray, *Losing Ground: American Social Policy from 1950 to 1980* (New York: Basic Books, 1984); *In Pursuit of Happiness and Good Government* (New York: Simon & Schuster, 1990); Walter I. Williams, "Good Intentions—Bad Results: The Economic Pastoral and America's Disadvantaged," *Notre Dame Journal of Law, Ethics, and Public Policy* 2, 1 (1985): 179–99; Gary M. Anderson, "Welfare Programs in the Rent Seeking Society," *Southern Economic Journal* 54 (1987): 377–86; Martin Anderson, *Welfare: The Political Economy of Welfare Reform in the United States* (Stanford: Hoover Institution Press, 1978); Marvin Olasky, *The Tragedy of American Compassion* (Chicago: Regnery Gateway, 1992).

5. Observe how the illegitimate entitlement of the dole is incompatible with the legitimate state function provided by the courts, armies, and police. One protects person and property from attack; the other exacerbates these problems.

6. Anderson, "Welfare Programs in the Rent Seeking Society."

7. Of course, as the old adage goes, "The road to hell is paved with good intentions."

8. This is a debatable point.

9. Jane Jacobs, *The Death and Life of Great American Cities* (New York: Vintage, 1989).

10. This phraseology is particularly unfortunate because it implies that while there is something perverse about robbing the poor to enrich the wealthy, no such opprobrium applies to

stealing from the rich and giving their money to the poor. However, at least for the classical liberal, theft is theft, no matter what the income status is of the victim or the recipient of the stolen goods.

11. Terry Anderson and P. J. Hill, *The Birth of the Transfer Society* (Lanham, Md.: University Press of America, 1989).

12. This is perhaps the most egregious and deceitful entitlement plan in that all experts know full well the effects of minimum wages on the poor. See Walter E. Williams, *The State Against Blacks* (New York: McGraw-Hill, 1982).

13. Thomas J. DiLorenzo, "Competition and Political Entrepreneurship: Austrian Insights into Public Choice Theory," *The Review of Austrian Economics* 2 (1988): 59–71; James M. Buchanan, *Cost and Choice: An Inquiry into Economic Theory* (Chicago: Markham, 1969); James M. Buchanan and Gordon Tullock, *The Calculus of Consent: Logical Foundations of Constitutional Democracy* (Ann Arbor: University of Michigan Press, 1971); Robert Lloyd and Joseph P. McGarrity, "A Profit Analysis of the Senate Vote on Gramm-Rudman," *Public Choice* 85 (November 1995): 81–90; Kevin B. Grier and Joseph P. McGarrity, "The Effect of Macroeconomic Fluctuations on the Electoral Fortunes of House Incumbents," *Journal of Law and Economics* XI.1 (April 1993): 143–61; James M. Buchanan, Robert D. Tollison, and Gordon Tullock, eds., *Toward a Theory of the Rent-Seeking Society* (College Station: Texas A&M University Press, 1980).

14. Nor can our agreement to abide by majority rule be predicated on the fact that we continue to reside in the United States. Some might argue, "If you do not like the way we run things here, you are always free to leave. Since you choose to stay, this indicates your willingness to be bound by electoral processes." As Spooner makes clear, many present residents can trace their property titles, in an unbroken chain, back to a time before the birth of our nation. The government, presumably, is set up to safeguard our property. How, then, can such people be told to leave if they do not support democratic conclusions? See Spooner and Lysander, *No Treason*.

15. It is impossible for the entire middle and upper classes to benefit at the expense of the poor. By definition, the poor have little that can be taken from them. The former cannot exploit them to a great degree since "You can't get blood out of a stone." But different categories of the rich and middle classes most certainly enrich themselves at the expense of other members of society. Agricultural subsidies, for example, benefit wealthy and middle class farmers. The same is true for tobacco subsidies, automobile subsidies, subsidies to scientific research and development, and so forth. When all of the taxes and subsidies are taken into account, there are only two possibilities: (1) everyone ends up with exactly what he had before, rendering the whole process absurd and nugatory, or (2) there are winners and losers. The contention here is that segments of the rich and middle class are the main beneficiaries, not the poor. See Franz Oppenheimer, *The State* (New York: Free Life Editions, 1975 [1914]).

16. In the economic literature there are numerous attempts to justify entitlements. For a criticism of these attempts, see Robert McGee, "Mergers and Acquisitions: An Economic and Legal Analysis," *Creighton Law Review* 22, 3 (1938): 665–93; Jack High, "Bork's Paradox: Static Versus Dynamic Efficiency in Antitrust Analysis," *Contemporary Policy Issues* 3 (1984–1985): 21–34; Walter Block, "Total Repeal of Anti-Trust Legislation: A Critique of Bork, Brozen, and Posner," *The Review of Austrian Economics* 8, 1 (1994): 1–64; Fred McChesney, "Antitrust and Regulation: Chicago's Contradictory Views," *Cato Journal* 10 (1991): 775–98; Hoppe, *A Theory of Socialism and Capitalism*; "Fallacies of the Public Goods Theory and the Production of Security," *The Journal of Libertarian Studies* IX, 1 (Winter 1989): 27–46; Jeffrey Rogers Hummel, "National Goods Versus Public Goods: Defense, Disarmament, and Free Riders," *The Review of Austrian Economics* 4 (1990): 88–122; Walter Block, "Public Goods and Externalities: The Case of Roads," *The Journal of Libertarian Studies* 7, 1 (Spring 1983): 1–33; David Osterfeld, "Anarchism and the Public Goods Issue: Law, Courts, and the Police," *The Journal of Libertarian Studies* 9, 1 (Winter 1989): 47–68; Robert Nozick, *Anarchy, State and Utopia* (New York: Basic Books, 1974).

17. By stipulation, we cannot ignore paying for these programs since they are foisted on us. But there is no law compelling us to take part in them as recipients.

18. Murray N. Rothbard and Jerome Tuceille, eds., *Left and Right: Selected Essays, 1954–1965* (New York: Arno Press, 1972); Rothbard, *For a New Liberty*; Hans-Hermann Hoppe, "Marxist and Austrian Class Analysis," in *Marxism: Economics, Religion, Politics, and Philosophy*, ed. Yuri Maltsev (Boston: Dordrecht, 1992).

19. Marxists have given ruling class theory, as they have everything else they have touched, a bad name. In their view, to employ someone is to exploit him, and thus to be a member of the ruling class. For a critique of this viewpoint, see Eugen von Böhm-Bawerk, *Capital and Interest*, trans. George D. Hunkle and Hans F. Sennholz (South Holland, Ill.: Libertarian Press, 1959 [1884]), particularly Part I, Chapter XII, "Exploitation Theory of Socialism-Communism."

20. Conservatives often ridicule the notion of ruling class. While their criticisms do indeed refute the Marxist version, they leave libertarians unscathed. Consider the following statement by David Horowitz, "Clarence Page's Race Problem and Mine," *Heterodoxy* (May/June 1996): 6. "The very phrase 'institutional racism' is, of course, of leftist provenance. It is also a totalitarian term. Like 'ruling class', it refers to an abstraction, not a responsible individual being. You are a class enemy (or in this case a race enemy) not because of anything you actually think or do, but 'objectively'—because you are situated in a structure of power that gives you (white skin) privilege."

This author is clearly denigrating Marxist ruling-class theory but not the libertarian variety. For in the latter case, it is one's actions and not status that is responsible for membership in the ruling class. For classical liberals, it is not sufficient (nor, even strictly speaking, necessary) to be rich to be included in this category. All one need do is engage in theft, which is certainly something any person can do.

21. Hitler himself may have never directly or personally killed a single Jew but he gave the orders to do so. Commands of this sort must be distinguished from free speech, at the very least, on the ground that the former implies physical threat while the latter does not.

22. Randy Barnett, "Pursuing Justice in a Free Society, Part One: Power vs. Liberty," *Criminal Justice Ethics* 4 (1985): 50–72; *The Structure of Liberty: Justice and the Rule of Law* (Oxford: Clarendon Press, 1998); Randy Barnett and John H. Jagel, eds., *Assessing the Criminal* (Cambridge, Mass.: Ballinger, 1977); Hoppe, *The Economics and Ethics of Private Property*; Rothbard, *For a New Liberty*.

23. Curiously, several classical liberal writers have rejected the notion of reparation. They did so not for slavery but for land theft perpetrated on the peasants by the conquistadors in Latin and South America, a case certainly analogous to slavery. Included here are Milton Friedman, David Friedman, Walter Berns, and Edmund Opitz. See Walter Block, Geoffrey Brennan, and Kenneth Elzinga, eds., *Morality of the Market: Religious and Economic Perspectives* (Vancouver, B.C.: The Fraser Institute, 1985), 495–508. For a response to the anti-reparation position, see Walter Block and Guillermo Yeatts, "The Economics and Ethics of Land Reform: A Critique of the Pontifical Council for Justice and Peace's *Toward a Better Distribution of Land: The Challenge of Agrarian Reform*," *Journal of Natural Resources and Environmental Law* 15, 1 (1999–2000): 37–69; and Walter Block, "On Reparations to Blacks for Slavery," forthcoming.

24. This lends support to Malcolm X's claim for reparations to blacks. See Malcolm X, *Malcolm X Speaks: Selected Speeches and Statements*, ed. George Breitman (New York: Merit Publishers, 1965).

25. To be sure, there are practical objections to reparations. Enacting them is certain to create hard feelings and to rekindle ancient animosities, but we are concerned here with justice not practicality. We are analyzing payments from a moral point of view and not necessarily from a practical one. In any case, a large part of the present conflict is due to occurrences that took place a long time ago. It is possible that reparations might also reduce hard feelings and not exacerbate them.



LAW REVIEW

WHITTIER

**MANDATORY STUDENT FEES: FORCING
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WALTER BLOCK

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MANDATORY STUDENT FEES: FORCING SOME TO PAY FOR THE FREE SPEECH OF OTHERS

ROY WHITEHEAD, JR.*
WALTER BLOCK**

I. INTRODUCTION

Higher educational institutions typically compete for student enrollment by disclosing rudimentary facts such as the costs of tuition and room and board. However, most universities and colleges are less inclined to advertise mandatory assessment of student fees, which are used to subsidize various academic, infrastructure, and student activities. For example, student fees are typically collected for funding new chemistry labs, libraries, computer labs, new campus buildings, student health services, athletics, and student organizations. Thus, the mandatory assessment student fees are usually approved and justified by the governing board as being relevant to students' overall educational experience, because the fees promote campus diversity and extracurricular activity.

The student fees, even when employed to fund student organizations that support on and off-campus political activity, are said to be germane to the university's educational mission. Some governing boards contend that denying mandatory fees to student organizations that promote on campus and off-campus political activity would violate an organization's freedom of speech. But, what of the freedom of speech of students who object to their hard-earned money being used to

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subsidize ideological or political views that they find offensive or disagreeable? Must they pay for speech that they find objectionable? Is their objection and attempt to withhold their support somehow an infringement on the student organization's right to free speech? Is forcing students who object to paying for another student's speech somehow germane to the university's educational mission? Finally, does the First Amendment require one student to pay for another's speech?

This article reviews a long line of cases where university administrators demonstrate an embarrassing ignorance towards the proscriptions of the First Amendment.¹ In particular, this article will analyze *Southworth v. Grebe*,² and several of its predecessors, as a framework for discussing these issues and demonstrating the court's methodology in reconciling the competing interests. This article will then suggest ways for universities to resolve these issues. Next, this article will propose conservative measures for universities in their attempt to resolve these issues. Finally, this article concludes with a more radical philosophical perspective on free speech and private property rights.

II. BACKGROUND

Full-time enrollees at the University of Wisconsin-Madison must pay a mandatory student activity fee of \$165.75 per semester.³ This fee is compulsory "because students who refuse to pay cannot receive their grades or graduate."⁴ Wisconsin law gives both the Board of Regents and the students control over funds generated by the mandatory student fee.⁵ "The Regents classify a portion of the student fees as non-allocable," which they control, "and a portion as allocable."⁶ "The non-allocable fees [not in issue here] cover expenses such as debt service, fixed operating costs," student health services, and the recreational

1. *UWM Post, Inc. v. Board of Regents*, 774 F. Supp. 1163, 1172 (E.D. Wisc. 1991); *Doe v. University of Michigan*, 721 F. Supp. 852, 856 (E.D. Mich. 1989). In both cases the courts found the speech codes vague and overbroad because they might prohibit protected student speech. The words, "stigmatize" and "victimize" are general terms that lack precise definitions. The *Doe* court noted the fact that words might stigmatize or victimize someone does not strip away their First Amendment protection. 721 F. Supp. at 867.

2. 151 F.3d 717 (7th Cir. 1998), cert. granted sub nom. *Board of Regents v. Southworth*, No. 98-1189, 1999 WL 42270 (Mar. 29, 1999).

3. *Id.* at 719.

4. *Id.*

5. WIS. STAT. ANN. § 36.09 (West 1997).

6. *Southworth*, 151 F.3d at 719.

sports budget.⁷ On the other hand, the Associated Students of Madison (ASM), the representatives of the student body, has complete authority over distribution of most of the allocable funds.⁸

The ASM-controlled fees fund the General Student Service Fund (GSSF) and the Associated Students of Madison budget.⁹ “[B]oth the GSSF and the ASM distribute the mandatory student fees to other private organizations”¹⁰ The GSSF’s portion “is distributed to private organizations by a committee of the ASM, called the Student Services Finance Committee (SSFC).”¹¹ “Registered student organizations, university departments, and community-based service organizations qualify for funding from the GSSF.”¹² To obtain money, the requesting organization must apply to the SSFC.¹³ The SSFC reviews the application and “determines whether to grant or deny the request.”¹⁴ “The SSFC also determines the amount of funding the private organization will receive.”¹⁵ “During the 1995-1996 school year, the SSFC distributed about \$974,200 in student fees to private organizations.”¹⁶

“In addition to obtaining money from the GSSF and the ASM budget, a registered student organization may seek funding through a [campus] referendum.”¹⁷ Here, the students vote at large on whether or not to approve an assessment for a student group.¹⁸ “The Wisconsin Student Public Interest Research Group (WISPIRG) obtained \$49,500 in student fees during the 1995-96 academic year”¹⁹ Once the ASM and SSFC have made their funding decisions, the decisions are sent to the chancellor and the Board of Regents for their review and approval.²⁰

7. *Id.*

8. *Id.*

9. *Id.*

10. *Id.*

11. *Id.*

12. *Id.*

13. *Id.*

14. *Id.*

15. *Id.*

16. *Id.*

17. *Id.* at 720.

18. *Id.*

19. *Id.*

20. *Id.*

III. THE COMPLAINT

Several students sued the university objecting to funding of organizations engaging in political and ideological activities with fees collected from students who object to such activities.²¹ The plaintiffs presented evidence of eighteen organizations that received student fees and engaged in political and ideological activities.²² The organizations included the Wisconsin Student Public Interest Research Group; the Lesbian, Gay, Bi-Sexual Campus Center; the Campus Women's Center; the University of Wisconsin Greens; the Madison AIDS Support Network; the International Socialist Organization; the Ten Percent Society; the Progressive Student Network; Amnesty International; the United States Student Association; Community Action on Latin America; La Colectiva Cultural De Aztlan; the Militant Student Union of the University of Wisconsin; the Student Labor Action Coalition; Student Solidarity; Students of National Organization for Women; and the Madison Treaty Rights Support Group.²³

The monies were used in various ways. For example, WSPIRG contributed its money directly to its off-campus parent organization for use in lobbying Congress and developing candidate and voter guides.²⁴ They "also published a voter's guide, which ranked congressional candidates based on their views on various pieces of federal legislation."²⁵ "The University of Wisconsin Greens . . . lobbied the Wisconsin state legislature and encouraged legislators to introduce three bills . . . limit[ing] mining in the state."²⁶ They also distributed literature for the Green Party and campaign literature for Ralph Nader during his bid for President on the Green Party ticket.²⁷ "[T]he International Socialist Organization advocated the over-throw of the government," and, along with other groups, sponsored a partisan rally at the state capitol near a congressman's office.²⁸ "The Campus Women's . . . Center used its bi-monthly newsletter to advocate its political and ideological views."²⁹ For example, they "published a lengthy article opposing the Informed

21. *Id.*

22. *Id.* at 718.

23. *Id.* at 720.

24. *Id.*

25. *Id.*

26. *Id.*

27. *Id.*

28. *Id.*

29. *Id.* at 721.

Consent Bill,³⁰ which proposed certain state regulations o[n] abortion.”³¹ The article urged people to contact the Campus Women’s Center to learn how they could work against the legislation. The Ten Percent Society used its funding to establish an Internet home page, where it advocates legislation authorizing same sex marriages, and, in no uncertain terms, condemned attempts by the Wisconsin Legislature to ban them. Amnesty International worked publicly for the abolition of the death penalty.³²

Properly, the Board of Regents did not deny that these and other organizations engaged in political or ideological speech. The Regents, instead, argued that the First Amendment protects the rights of the organizations to engage in such speech.³³ Indeed it does, but, as we shall see, the issue is whether objecting students can be compelled, for example, to pay for the speech of the Ten Percent Society. The plaintiffs contended they were not asking to *restrict* the speech of any of the student organizations, they were merely asserting that they should not “be forced to financially *subsidize* speech with which they disagree[d].”³⁴ Instead, they argued the First Amendment does not guarantee that the government will subsidize speech because there is no right to have speech subsidized by the Government.³⁵

IV. THE ISSUE

The question for the appellate court was whether the Regents can force objecting students to fund private organizations that engage in political and ideological activities, speech, and advocacy.³⁶ Compulsory fees, applied by organizations presenting objectionable viewpoints to the students forced to pay such fees, raise concerns about expression. Naturally, the First Amendment is implicated.

The First Amendment provides: “Congress shall make no law respecting an establishment of religion, or prohibiting the free exercise thereof; or abridging the freedom of speech, or the press; or the right of the people to peaceably assemble, and petition the government for any

30. 1995 Wis. Legis. Serv. 309 (West).

31. *Southworth*, 151 F.3d at 721.

32. *Id.*

33. *Id.*

34. *Id.* (emphasis added).

35. *Federal Election Comm’n v. Massachusetts Citizens for Life*, 479 U.S. 238, 256 (1986). “There is no right to have speech subsidized by the government.” *Id.*

36. *Southworth*, 151 F.3d at 722.

regress of grievances."³⁷ The Supreme Court has long recognized two necessary corollaries to the First Amendment as a result of the right to free speech: the right not to speak³⁸ and the right not to be compelled to subsidize the speech of others.³⁹

The Supreme Court has never determined whether or not these First Amendment corollaries protect objecting students from being forced by state universities to subsidize private, political, and ideological organizations. In *Rosenberger v. Rector and Visitors*,⁴⁰ however, the high court did provide guidance on the appropriate analysis for such a challenge. In that case, the university used student fees to pay for printing costs for non-religious newspapers, but denied the plaintiff's request to fund their newspaper's religious viewpoint.⁴¹ The Justices felt the student activity fees created a fora of money, and once established, the fora had to be made available on a viewpoint neutral basis.⁴² Because the University of Virginia discriminated on the grounds of the religious viewpoint of the newspaper, it violated the First Amendment.⁴³

Rosenberger did not directly consider the question of forcing objecting students to fund private organizations; however, the court briefly discussed the issue.⁴⁴ Justice O'Connor indicated, "[f]inally, although this question is not presented here, I note the possibility that the student fee is susceptible to a Free Speech Clause challenge by an objecting student, that she should not be compelled to pay for speech with which she disagrees,"⁴⁵ citing *Keller v. State Bar*⁴⁶ and *Abood v. Detroit Board of Education*.⁴⁷

In *Abood*, employees of the Detroit Board of Education challenged the constitutionality of an agency-shop agreement requiring non-union teachers to pay a service fee to the union.⁴⁸ The teachers

37. U.S. CONST. amend. I.

38. *West Virginia State Bd. of Educ. v. Barnette*, 319 U.S. 624, 642 (1943). Were this to be followed in a logically consistent manner, it would vitiate against laws compelling cigarette manufacturers to carry health warnings on their products.

39. *Abood v. Detroit Bd. of Educ.*, 431 U.S. 209 (1977); *Keller v. State Bar*, 496 U.S. 1 (1990).

40. 515 U.S. 819 (1995).

41. *Id.*

42. *Id.*

43. *Id.* at 825-27.

44. *Id.* at 819.

45. *Id.* at 850.

46. 496 U.S. 1 (1990).

47. 431 U.S. 209 (1977).

48. *Id.*

argued that the mandatory fee violated their First Amendment rights of free speech and free association.⁴⁹ The Court held that the board of education could compel non-union teachers to pay the service fee explaining that "such interference as exists is constitutionally justified by the legislative assessment of the important contribution of the union shop to the system of labor relations established by Congress."⁵⁰ Thus, so "long as they act to promote the cause that justified bringing the group together, the individual cannot withdraw his financial support merely because he disagrees with the group's strategy."⁵¹ In the decision, the Court recognized the "common cause" of both the union and nonunion teachers. The *Abood* Court continued:

[w]e do not hold that a union cannot constitutionally spend funds for the expression of political views, on behalf of political candidates, or toward the advancement of other ideological causes not germane to its duties as a collective bargaining representative. Rather, the Constitution requires only that such expenditures be financed from charges, dues, or assessments paid by employees who do not object to advancing those ideas and who are not coerced into doing so against their will.⁵²

Thirteen years later, in *Keller v. State Bar*,⁵³ the Supreme Court revisited the issue of compelled funding. Here, a group of lawyers challenged the use of mandatory state bar dues to fund lobbying on social issues.⁵⁴ In *Keller*, the Supreme Court said *Abood* meant unions could not expend the dissenting individual's dues on ideological activities not germane to the purpose for which the compelled association was justified: collective bargaining.⁵⁵ The court in *Keller* said that the compelled association and integrated bar was justified by the state's interest in regulating the legal profession and improving the quality of legal services.⁵⁶ "The State Bar may, therefore, constitutionally fund activities germane to the common purposes of regulating the bar and improving legal services out of the mandatory dues of all members."⁵⁷

49. *Id.* at 212.

50. *Abood*, 431 U.S. at 222.

51. *Id.* at 223.

52. *Id.* at 235-36. This ignores the issue that some members of unions are coerced into joining these organizations themselves.

53. 496 U.S. 1 (1990).

54. *Id.* at 1.

55. *Id.* at 13.

56. *Id.*

57. *Id.* at 14.

It may not do so, however, in such manner as to fund activities of an ideological nature, such as lobbying the state legislature on social issues like gun control or nuclear weapons initiatives, which falls outside of the scope of those common activities.⁵⁸ These issues clearly fall at the extreme end of the spectrum, not germane to the bar's common cause.⁵⁹

From *Keller's* holding, "the State Bar may therefore constitutionally fund activities germane to those goals . . ."⁶⁰ and *Abood's* qualification, the constitution requires that expenditures for ideological causes not germane be financed by voluntary funds, the courts have named the analysis born from *Abood* as the "germaneness analysis."⁶¹ Sadly, the holding in *Abood* did not provide much guidance on how to apply the test. *Keller*, however, did more, by setting forth guidelines for deciding permissive expenditures. In *Keller*, the guiding standard is "whether the challenged expenditures are necessarily or reasonably incurred for the purpose of regulating the legal profession or improving the quality of the legal service available to the people of the state."⁶²

Beyond *Abood* and *Keller*, the Supreme Court has addressed the issue of germaneness in several other cases. The most important is *Lehnert v. Ferris Faculty Association*,⁶³ where the Supreme Court considered the constitutionality of various union expenditures under the germaneness analysis originating in *Abood* and *Keller*. *Lehnert*, however, went further, by explaining that the analysis required a three-step process. The three steps, or prongs, for determining whether union expenditures violate the objecting employees' First Amendment rights are:

1. The expenditure must be "germane to collective bargaining";
2. Justified by the government's vital policy interest in labor and avoiding "free riders" and,
3. Not significantly add to the burdening of free speech that is inherent in the allowance of an agency or union shop.⁶⁴

The court announced that *Lehnert's* three-prong analysis is the test that it would follow in deciding the *Southworth* case.⁶⁵ The Su-

58. *Id.* at 1.

59. *Id.* at 13-14.

60. *Id.* at 14.

61. *Southworth v. Grebe*, 151 F.3d 717, 723 (7th Cir. 1998).

62. *Keller*, 496 U.S. at 14.

63. 500 U.S. 507 (1991).

64. *Id.* at 519.

65. *Southworth*, 151 F.3d at 724.

preme Court recently reaffirmed this test in *Air line Pilots Ass'n v. Miller*,⁶⁶ where it again followed the *Lehnert* test to determine if pilots were entitled to a refund of part of their agency fees.⁶⁷

V. GERMANENESS

Under the *Lehnert* test, the question is whether the challenged activity is germane to the Regent's asserted interest.⁶⁸ The Regents asserted an interest in education by contending that funding private organizations engaging in political and ideological activities is germane to education because it allows for more diverse campus expression and this, in turn, is educational.⁶⁹ The Court, however, indicated that "germaneness" cannot be read so broadly as to justify funding of private organizations that engage in political or ideological advocacy, activities, or speech.⁷⁰ In *Keller*, for example, the State Bar defended its funding of lobbying on nuclear weapons, abortion, and prayer in public schools arguing that it was authorized to fund those activities "in all manners pertaining to the science of jurisprudence or to the improvement to the administration of justice."⁷¹ The Supreme Court rejected such an over-encompassing reading of germaneness, holding instead that expenditures "to endorse or advocate a gun control or nuclear weapons freeze initiative," clearly fall at the "extreme end of the spectrum" of expenditures not germane and, therefore, unconstitutional.⁷²

In *Lehnert*, the Supreme Court again rejected a broad interpretation of "germaneness."⁷³ *Lehnert* involved a challenge to the union's use of dues to fund lobbying related to financial support of public employees in general. The Court held that when "the challenged lobbying activities relate not to the ratification or implementation of the center's

66. 523 U.S. 866 (1998).

67. *Id.*

68. *Southworth v. Grebe*, 151 F.3d 717, 724 (7th Cir. 1998).

69. *Id.*

70. *Id.* Even if the Regent's view of germaneness were upheld, this would still not account for the left wing ideological bias of the funding at the University of Wisconsin. In other words, given that politics and ideology is germane to the educational mission, why should this be almost totally confined to one end of the political economic philosophical spectrum. Why, that is, should there not be equal funding for groups such as the National Rifle Association, Phyllis Schlafley's Eagle Forum, The Mises Institute, the Libertarian Party, the Four H Clubs, the Boy Scouts, the Young Republicans, the American Conservative Union, the Objectivist Society, etc.

71. See *Southworth*, 151 F.3d at 725.

72. *Keller v. State Bar of Cal.*, 496 U.S. 1, 15-16 (1990).

73. *Lehnert v. Ferris Faculty Ass'n*, 500 U.S. 507, 557 (1991).

collective bargaining, but to financial support of the employee's profession or of public employee's generally, the connection to the union's function as bargaining representative is too attenuated to justify compelled support by objecting employees."⁷⁴ It concluded that "the state constitutionally may not compel its employees to subsidize legislative lobbying or other political union activities outside the limited context of contract ratification or implementation."⁷⁵ In *Keller and Lehnert*, the Supreme Court rejected arguments that political and ideological speech is germane to the union contract interest involved.⁷⁶ In fact, in *Lehnert*, the Supreme Court specifically stated that germaneness cannot be read so broadly in the context of a private sector union as to "include political and ideological activities."⁷⁷

To justify compelling objecting students to fund private organizations, the Regents pointed to the expansive government interest they had in education, as compared to the limited union representation interest involved in *Abood's* and *Keller's* collective bargaining and bar oversight.⁷⁸ They argued that educational interests are "so broad, that more activities are germane, including political and ideological activities."⁷⁹ This is not unreasonable, in that, just about everything is in a sense educational.⁸⁰ However, when presented with a similarly expansive interest in *Keller*, the advancement of law, the Supreme Court rejected such a broad meaning of germaneness.⁸¹ In *Keller*, the Court indicated that germaneness cannot be so broadly construed as to include forced funding of private, political, and ideological groups.⁸² The Court pointed out that many of the campus groups mirror organizations that exist outside the university setting, whose primary goal is promotion of ideological beliefs.⁸³ The Court considered any educational benefit that comes from this outside activity as secondary, and therefore not sufficiently germane to overcome the objecting student's constitutional rights.⁸⁴ The Court forcibly stated that the mere incantation of the rubric "Educational Profession" cannot justify a tactic, repugnant to the

74. *Id.* at 520.

75. *Id.* at 522.

76. *Id.* at 516; *Keller*, 496 U.S. at 1.

77. *Lehnert*, 500 U.S. at 516.

78. *Southworth v. Grebe*, 151 F.3d 717, 725 (7th Cir. 1998).

79. *Id.*

80. *Id.*

81. *Keller*, 496 U.S. at 15-16.

82. *Id.* at 14.

83. *Southworth*, 151 F.3d at 725.

84. *Keller*, 496 U.S. at 14.

constitution, of requiring objecting students to fund private, political, and ideological organizations.⁸⁵

VI. THE GOVERNMENT'S VITAL POLICY INTERESTS

The second prong under *Lehnert* considers whether the compelled fee is justified by a vital policy interest of the government.⁸⁶ In the context of unions, those policy interests include labor peace and avoiding free riders, and with the bar, "the state's interest in regulating the legal profession and improving the quality of legal services."⁸⁷ The Court indicated that there can be no doubt that there is a vital interest in education, and in allowing students to share in the governance of the university system.⁸⁸ For the vital policy interests, however, to survive scrutiny under *Lehnert*, they must justify compelled funding of the private or quasi-private activity involved,⁸⁹ like the advancement of partisan political and ideological causes.

In *Lehnert*, a plurality of the Supreme Court analyzed the policy interest involved (labor peace and providing representation for free riders) and concluded that "labor peace is not especially served by . . . charging objecting employees for lobbying, electoral or other political activities that do not relate to their collective bargaining agreement."⁹⁰ *Lehnert* further stated that the cause of labor peace would not be advanced: "Because worker and union cannot be said to speak with one voice, it would not further the cause of harmonious industrial relations to compel objecting employees to finance union political activities as well as their own."⁹¹

This quotation illustrates the importance of a common cause for justifying compelled funding. In the context of labor cases, if the union and non-union members share a common cause, such as negotiating the terms and conditions of employment, a common vital policy interest may justify compelled funding.⁹² But where that was missing, as in

85. *Southworth*, 151 F.3d at 725.

86. *Lehnert*, 500 U.S. at 520.

87. *Keller*, 496 U.S. at 13-14.

88. *Southworth*, 151 F.3d at 727.

89. *Id.* at 724.

90. *Lehnert*, 500 U.S. at 521.

91. *Id.*

92. It is not necessarily true that union and non-union members share the common cause of negotiating pay scales and working conditions. Assuming this to be true implies unions are necessary and/or sufficient to better the lives of workers. But remuneration and safety protection are rising in such industries as computers, banking and

Lehnert,⁹³ or when union funds are used solely for partisan campaign contributions, the expenditure cannot be justified. In the case of compelled student funding, while there may be a common educational cause in shared governance, there is certainly no common cause between private organizations that rightly engage in highly emotional, political, and ideological speech, such as advocating same sex marriages, informed consent laws, or overthrow of the government; and the objecting students. The *Southworth* Court could discover no vital policy interests supporting compelled funding of these private organizations.⁹⁴ The Court, citing *Lehnert*, said, "And we might even conclude that far from serving the school's interest in education, forcing objecting students to fund objectionable organizations undermines that interest."⁹⁵

The next concern dealt with the "free-rider" problem. The *Southworth* Court indicated that universities are unlike unions, which have the duty to represent fairly all employees, including those who do not belong to the union.⁹⁶ The Court said that the union's common cause of collective bargaining often "entails expenditure of much time and money"⁹⁷ on non-members (free riders). Conversely, in the university context, the private organizations to which the students object to funding, do not act in a representative capacity for the students (because there is no common cause) and have no obligation to fairly represent the students, as the union does for non-union members.⁹⁸ The Regent's policy allows non-students to join student organizations and attend campus activities, in fact, "[f]ree riders' might accurately describe those organizations that receive a share of the mandatory fees."⁹⁹ Also, "many of the ideological and political activities and speech to which the students objected occurred off-campus, further limiting any possible

insurance, which have never been unionized, and falling in such smoke-stack and rust belt industries as steel, autos, and rubber, which are unionized. Moreover, as wages and working conditions in the U.S. have been improving, the rate of unionization has been falling.

93. *Lehnert*, 500 U.S. at 521.

94. *Southworth*, 151 F.3d at 728.

95. *Id.*

96. *Id.*

97. *Id.*

98. *Id.*

99. *Id.*

benefit to objecting students.”¹⁰⁰ The Court found that the union free rider¹⁰¹ concern was inapplicable in a student-funding situation.

VII. BURDENING FREE SPEECH

The third prong of *Lehnert* recognizes that any time the government forces individuals to fund private organizations, a burden on free speech and association may incidentally result, but that burden may be justified by an important governmental interest.¹⁰² In *Lehnert*, the Court explained that “although first amendment protection is in no way limited to controversial topics or emotionally charged issues, the extent of one’s disagreement with the subject of compulsory speech is relevant to the degree of impingement upon free expression that compulsion will affect.”¹⁰³ The Court explained:

[t]he burden upon freedom of expression is particularly great where, as here, the compelled speech is in a public context. By utilizing the petitioner’s funds for political lobbying and to garnish support of the public in its endeavors, the union would use each dissenter as an instrument for fostering public adherence to an ideological point of view he finds unacceptable.¹⁰⁴

The First Amendment protects the individual’s right of participation in these spheres from precisely this type of invasion.¹⁰⁵ “When the subject of compelled speech is the discussion of governmental affairs, which is a core of our First Amendment freedoms, the burden upon the dissenters’ rights extends far beyond the acceptance of the agency shop and is constitutionally impermissible.”¹⁰⁶

In *Southworth*, the students objected to speech concerning “such emotionally charged issues as abortion, homosexuality, and the United States’ democratic system of government.”¹⁰⁷ The source of the plain-

100. *Id.*

101. For a critique of the free rider concept, particularly as the justification for public policy, see HANS-HERMANN HOPPE, *Fallacies of the Public Goods Theory and the Production of Security*, in *THE ECONOMICS AND ETHICS OF PRIVATE PROPERTY: STUDIES IN POLITICAL ECONOMY AND PHILOSOPHY* (1993); HANS-HERMANN HOPPE, *THE PRIVATE PRODUCTION OF DEFENSE* (1998); HANS-HERMANN HOPPE, *A THEORY OF SOCIALISM AND CAPITALISM* (1989).

102. *Lehnert v. Ferris Faculty Ass’n*, 500 U.S. 507, 521 (1991).

103. *Id.* at 521-22.

104. *Id.*

105. U.S. CONST. amend. I.

106. *Southworth v. Grebe*, 151 F.3d 717, 729 (7th Cir. 1998).

107. *Id.*

tiffs' disagreement . . . was their deeply held religious and personal beliefs.¹⁰⁸ Consequently, *Lehnert's* common cause requirement makes clear that the Regent's funding policy cannot stand. The *Southworth* Court said that the burden on the objecting students' speech is "particularly great" because of their deeply held beliefs.¹⁰⁹ The funded organization's use of the funds to "garnish support of the public in its endeavors," and as "an instrument for fostering public adherence and ideological view," which the students find objectionable, offends the First Amendment.¹¹⁰

The Regents attempted to justify forcing the objecting students to fund these organizations because "hateful speech has a place in our society too."¹¹¹ However, while hateful speech is indeed protected, the Constitution does not mandate that objecting citizens pay for it. According to James Madison, "to compel a man to furnish contributions and money for the propagation of opinions which he disbelieves is sinful and tyrannical."¹¹² The students, like "the objecting union members in *Abood*, have a First Amendment interest in not being compelled to contribute to an organization, whose First Amendment protected expressive activities conflict with one's 'freedom of belief.'"¹¹³

One of the Supreme Court's recent cases, *Glickman v. Wileman Brothers & Elliott*,¹¹⁴ confirms the *Southworth* approach. *Glickman* involved Department of Agriculture regulations that imposed assessments on growers for the costs of administrative expenses for marketing orders.¹¹⁵ Among the expenses were the costs of generic advertising of California peaches and plums.¹¹⁶ The growers contended that the compelled funding abridged their First Amendment rights.¹¹⁷ The Supreme Court, citing *Abood* and *Keller*, found that unlike those cases, the administrative fees did "[n]ot compel the producers to endorse or

108. *Id.*

109. *Id.* at 717.

110. *Id.* at 729.

111. *Id.* See *Regan v. Taxation with Representation of Wash.*, 461 U.S. 540, 545 (1983) (holding that the Constitution does not confer an entitlement to funds that might be necessary to realize all the advantages of free speech). It is ironic that a school with a "hate speech" code advances a "hateful speech" argument.

112. *Abood v. Detroit Bd. of Educ.*, 431 U.S. 234-35 n.31 (1977) (quoting IRVING BRANT, *JAMES MADISON: THE NATIONALIST* 354 (1948)).

113. *Southworth*, 151 F.3d at 730.

114. 521 U.S. 457 (1997).

115. *Id.* at 460.

116. *Id.*

117. *Id.* at 460-61.

finance any political or ideological views.”¹¹⁸ In approving the assessment, the Court said, “[t]he germaneness test is clearly satisfied because the generic advertising is unquestionably germane to the purposes of the marketing orders” and “[i]n any event, the assessments are not used to fund ideological activities.”¹¹⁹ The marketing orders, at least in the Court’s view, benefited all the growers, including the Wileman brothers.¹²⁰

On petition for rehearing, the dissent claimed that *Southworth* was wrongly decided because diversity of views are important on campus and because dues only go to the student government, not directly to the organizations.¹²¹ Judge Rovner wrote that the only “direct” speech being funded is that of the student government.¹²² He said, under *Rosenberger*, the radically different views of the listed organizations cannot be attributed to the student government.¹²³ “Indeed, the student government constitutionally must determine funding in a content-neutral manner.”¹²⁴ He says, “because the ‘speech’ of the individual groups cannot be attributed to the student government, it necessarily cannot be attributed to the students paying the fees to the student government.”¹²⁵

Diversity of views on a college campus is important, but so is the First Amendment. The objecting students do not contest the First Amendment’s importance of contrasting views. They simply contend,

118. *Id.* at 469-70.

119. *Id.* at 473.

120. There are problems with this finding, however. If these expenditures really benefited the Wileman brothers, why did they object? Their objection constitutes evidence that they did *not* benefit. Suppose A takes a shower and bills B, his neighbor, for the soap costs on the ground that B benefits. Should B be compelled by a court to pay A? Not in a court of law that recognizes private property and contract rights. Under such jurisdictions, B is forced to pay only for goods and services he *agreed to purchase*, not for those who in the view of third parties, even Supreme Court judges, he benefits. Were we to extend the doctrine that free riders must be forced to pay for their alleged benefits to its logical conclusion, we would open up a Pandora’s Box. Anyone, pretty much, could charge anyone else for services rendered. If we brush our teeth and drink our milk and take our vitamins, this presumably benefits many people. Were we to attempt to charge them for these services, we would be laughed out of any rational court. Thank goodness this pernicious doctrine has not been carried out consistently through our legal system.

121. *Southworth v. Grebe*, 157 F.3d 1124, 1125 (Rovner, J., dissenting).

122. *Id.* at 1125 (Rovner, J., dissenting).

123. *Id.*

124. *Id.*

125. *Id.*

and rightly so, that they should not have to pay for them.¹²⁶ Does the First Amendment require Democrats to contribute to Republicans so they can deliver their message? Obviously not. Additionally, to say the student fees only fund the student government is disingenuous. The money flows through the student government and would not be available to the International Socialist Organization, for example, absent the mandatory fees. As has already been established in *Abood*, there is no requirement that the dues be "earmarked" to the organizations, or that the organizations purport to speak for all students.¹²⁷ "Therefore, whether or not the student fees directly fund the political or ideological activities is irrelevant; the First Amendment is offended by the Regents use of objecting students' fees to subsidize organizations which [sic] engage in political and ideological activities."¹²⁸ To hold otherwise would, in effect, allow money laundering, that is prohibited in, for example, campaign finance laws.

Finally, on appeal to the U.S. Supreme Court, the Regents will argue that *Southworth* deprives University students of a diversity of viewpoints and violates the First Amendment because *Rosenberger*¹²⁹ required the University of Virginia to fund a student newspaper with a religious viewpoint.¹³⁰ Again, the Regents' attempt to shoehorn this case into *Rosenberger* is misplaced because, in that case, the Supreme Court made it clear it was only considering the issue of the constitutionality of "content-based" regulations in ruling that the newspaper had to be funded.¹³¹ The Court made it abundantly clear that compelled funding of views that students disagreed with was not an issue.¹³²

VIII. PHILOSOPHICAL CONSIDERATIONS

These issues can be considered from a more philosophical point of view, one best grounded on the rights found in private property and contract; e.g., libertarianism. This is the view that all human interac-

126. *Southworth*, 151 F.3d at 718.

127. *Abood*, 431 U.S. at 237 n.35.

128. *Southworth*, 151 F.3d at 732.

129. *Rosenberger v. Rector & Visitors*, 515 U.S. 819, 845 (1995).

130. Patrick Healy, *U. of Wisconsin Will Ask Supreme Court to Uphold Broad Use of Mandatory Student Fees*, THE CHRON. HIGHER EDUC., Nov. 9, 1998, at 7.

131. *Rosenberger*, 515 U.S. at 849.

132. *Id.* at 851. (O'Connor, J., concurring). "Finally, although the question is not presented here, I note the possibility that the student fee is susceptible to a Free Speech Clause challenge by an objecting student, that she should not be compelled to pay for speech with which she disagrees." *Id.*

tions should take place on a voluntary basis, with no force or fraud committed against individuals who are themselves non-aggressing.¹³³

Suppose the authors of the present article set up a new entirely private institution, Block Whitehead University¹³⁴ (BWU) and charge a certain amount for tuition. The hypothetical institution also imposes a student fee. As in the case of the University of Wisconsin-Madison, part of this is non-allocable, and non-contentious.¹³⁵ But, the other part is indeed allocable, and goes, via the hand-picked pet student government, to a whole host of feminist, socialist, multicultural, homosexual, minority racist, deconstructionist, "peace," and Marxist groups.

The university attracts thousands of paying customers to the esteemed establishment under these conditions, whereupon a few students protest that their payments are going toward the promotion of ideas they find detestable. Would it be proper for a court to find in their favor and overturn a leftish brainwashing scheme? The answer is "No."

The university hypothesized above is a private one. Nobody need enroll lest he agrees to be bound by all university rules and procedures. Such a high profile program allocates a hefty portion of the students' fees to these outside activities in the name of diversity. If a student does not wish to have his money spent for such purposes, he has an easy remedy. He should enroll elsewhere. This university can do anything it wishes¹³⁶ to, and with, its students, provided only that they agree to enroll under the conditions it sets down. For example, BWU could demand that the students recite the Declaration of Independence, or the Lord's Prayer, before every class. That such a requirement may lead the university directly to bankruptcy is entirely another matter. Certainly, BWU may expose its students to a series of biased and one-sided outside speakers, and use their money to finance its own pet projects, as is done in Wisconsin.¹³⁷

How, then, can this position be reconciled with the authors' claim that the case of the Wisconsin student plaintiffs should be upheld? It is simple. BWU is a private venture, while the Wisconsin institution of

133. See MURRAY N. ROTHBARD, FOR A NEW LIBERTY 202-18 (1973); MURRAY N. ROTHBARD, THE ETHICS OF LIBERTY (1982); HANS-HERMANN HOPPE, A THEORY OF SOCIALISM AND CAPITALISM: ECONOMICS, POLITICS AND ETHICS (1989); HANS-HERMANN HOPPE, THE ECONOMICS AND ETHICS OF PRIVATE PROPERTY: STUDIES IN POLITICAL ECONOMY AND PHILOSOPHY (1993).

134. Known, affectionately, as "Blockhead U."

135. See discussion *supra* Part II.

136. Subject, of course, to the usual proscriptions against murder, fraud, etc.

137. See discussion *supra* Part II.

higher learning is a public one. A public university is an exercise in coercion. A large part of its revenues come not from willing customers, but from compulsory levies. In the libertarian view, such enterprises should not exist at all—they should be privatized.

The authors of the present paper are both employees of a public university. Is it hypocritical for us to advocate that our, and all other such institution(s), be privatized, while continuing to work for one of them? If so, then we admit to hypocrisy, not only for education, but also for numerous other institutions we come into contact with virtually every day, such as streets, highways, sidewalks, post offices.¹³⁸

That is one way to look at this matter. But there is another entirely different interpretation. Under this view, we are not at all hypocrites. Consider a libertarian living under a totalitarian regime, such as Cuba, North Vietnam, or the former Soviet Union (USSR). If he wants to eat, he must work, but the only jobs legally available are those offered by the government, which he opposes on philosophical grounds. Nevertheless, he becomes an employee of the state, while still maintaining his libertarian principles. In so doing, he is not hypocritical, but rather in the position of a victim of an armed robbery who gives up his money rather than being shot, but still cleaves to the view that the entire enterprise of theft is illegitimate.

Were total educational privatization to occur, the solution to the problem of forcing tax-paying students to yield part of their college fees for the promotion of ideas they find abhorrent would be simple.

138. On the case for road privatization, see Walter Block, *Public Goods and Externalities: The Case of Roads*, 7 THE J. LIBERTARIAN STUD. 1 (1983); Walter Block, *Congestion and Road Pricing*, 4 J. LIBERTARIAN STUD. 299 (1980); Walter Block, *Free Market Transportation: Denationalizing the Roads*, 3 J. LIBERTARIAN STUD. 209 (1979); Michelle S. Cadin & Walter Block, *Privatize Public Highways*, FREEMAN, Feb. 1997, at 96-97; Gerald Gunderson, *Privatization and the 19th-Century Turnpike*, 9 CATO J. 191 (1989); Daniel B. Klein, *The Voluntary Provision of Public Goods? The Turnpike Companies of Early America*, 28 ECON. INQUIRY 788 (1990); Daniel B. Klein et. al., *Economy, Community and the Law: The Turnpike Movement in New York, 1797-1845*, J. ECON. HIST., Mar. 1993, at 106-22; Christopher T. Baer et. al., *From Trunk to Branch: Toll Roads in New York, 1800-1860*, 11 ESSAYS ECON. & BUS. HIST. 191 (1993); Daniel B. Klein & Gordon J. Fielding, *Private Toll Roads: Learning from the Nineteenth Century*, 46 TRANSP. Q. 321 (1992); Daniel B. Klein & Gordon J. Fielding, *How to Franchise Highways*, 20 J. TRANSPORT ECON. & POL'Y 133 (1993); Daniel B. Klein & Gordon J. Fielding, *High Occupancy/Toll Lanes: Phasing in Congestion Pricing a Lane at a Time*, POLICY STUD., Nov. 1993 No. 170; GABRIEL ROTH, *THE PRIVATE PROVISION OF PUBLIC SERVICES IN DEVELOPING COUNTRIES* (1987); GABRIEL ROTH, *PAYING FOR ROADS: THE ECONOMICS OF TRAFFIC CONGESTION* (1967); GABRIEL ROTH, *A SELF-FINANCING ROAD SYSTEM* (1966); MURRAY N. ROTHBARD, *FOR A NEW LIBERTY* (1973); WILLIAM C. WOOLDRIDGE, *UNCLE SAM, THE MONOPOLY MAN* (1970).

Since there would be no public universities, the entire problem would evaporate. That is, given that while fully private but not public colleges may engage in such brainwashing activities, and that there are none of the latter, there will arise no issue of the illegitimacy of forcing some students to pay to promote the views of others. The only time something of this sort could arise would be in a private school. This, as we have already seen, would be entirely legitimate because although a given student finds a specific allocation of his money to be untoward, he has consented to the entire process, by enrolling in that private institution of higher learning in the first place.

There is an argument that a student, as a United States citizen, has implicitly agreed to certain duties, such as paying taxes based on our democratic institutions. Taxes for, amongst many other uses, institutions of higher learning, have been determined through legitimate procedures and it has been determined that part of student fees financially support ideas that some find unwelcome. Such disbursements are every bit as voluntary as those occurring in a purely private setting. In other words, these payments are akin to club dues, only the "club" is now the United States.

There are grave problems with this contention. First, and most superficially, nowhere does the Constitution provide for public education.¹³⁹ Some might say the Constitution speaks of the general welfare,¹⁴⁰ but nowhere does it specifically mention public education.¹⁴¹ Indeed, public education has been the exception rather than the rule for most of our history. This being the case, public education is usurpation, similar to nationalizing, for example, the steel works or auto plants. This may be appropriate under a communist regime, but certainly not in the "land of the free."

Second, and more basically, no living person signed the Constitution. Therefore, it cannot be used as evidence of agreement, albeit indirectly, for the program of paying for the free speech of some at the expense of others.¹⁴² As for student fees as voluntary club dues, this is

139. *San Antonio Indep. Sch. Dist. v. Rodriguez*, 411 U.S. 1, 37 (1973) (holding that education is not a fundamental right).

140. U.S. CONST. art. I, § 8, cl. 1.

141. *Rodriguez*, 411 U.S. at 37 (holding that education is not a fundamental right).

142. See Bruce L. Benson, *Enforcement of Private Property Rights in Primitive Societies: Law Without Government*, 9 J. LIBERTARIAN STUD. 1 (1989); Lysander Spooner, *No Treason*, Larkspur, Colorado, (1870) 1966; MORRIS & LINDA TANNEHILL, *THE MARKET FOR LIBERTY* (1984); MURRAY N. ROTHBARD, *FOR A NEW LIBERTY* (1973); MURRAY N. ROTHBARD, *THE ETHICS OF LIBERTY* (1982); HANS-HERMANN

how Joseph Schumpeter reacted to such a contention: "[t]he theory which [sic] construes taxes on the analogy of club dues or of the purchase of the services of, say, a doctor only proves how far removed this part of the social science is from scientific habits of mind."¹⁴³

But state universities obviously do exist. How does one analyze their actions from the libertarian perspective? What is proper public policy given that there are government universities that compel some students to pay for the "free speech" of others?

One scenario, propagated by Milton Friedman in many areas of public policy, is that the goal is to make the particular government enterprise as efficient as possible, not to end it.¹⁴⁴ For example, Mr. Friedman favors school vouchers, rather than the complete, total, and immediate privatization of public education.¹⁴⁵ Mr. Friedman suggests, for example, the negative income tax instead of the elimination of welfare; flexible exchange rates and a three-percent rule for monetary expansion in preference to market money (a gold standard); and the voluntary military during the Vietnam War as an alternative to ending hostilities.¹⁴⁶

Mr. Friedman argues that such initiatives will not only lead to full economic freedom, but also that they are the best means toward this end. But it is not clear how making a government enterprise more efficient (e.g., more market "based," as opposed to genuinely an aspect of the market) will lead to its demise. One would have thought that an efficient state corporation is far more stable than an inefficient one.

How would these Friedmanite solutions apply to the issue at hand? There might be a "voucher" set up on campus whereby each student is able to earmark his student fees for the outside speaker or program of his choice. The only restriction would be that the part of

HOPPE, A THEORY OF SOCIALISM AND CAPITALISM: ECONOMICS, POLITICS AND ETHICS (1989); HANS-HERMANN HOPPE, THE ECONOMICS AND ETHICS OF PRIVATE PROPERTY: STUDIES IN POLITICAL ECONOMY AND PHILOSOPHY (1993); RANDY E. BARNETT, THE STRUCTURE OF LIBERTY: JUSTICE AND THE RULE OF LAW (1998).

143. JOSEPH A. SCHUMPETER, CAPITALISM, SOCIALISM AND DEMOCRACY 198 (1942).

144. See generally, MILTON FRIEDMAN, *The Role of Government in Education*, in CAPITALISM AND FREEDOM 85-107 (1962).

145. See Marilyn Brown, *Brogan Pushes School Vouchers During Debate*, TAMPA TRIB., Feb. 26, 1999, at 2.

146. See generally, FRIEDMAN, *supra*, note 144; MILTON FRIEDMAN, MONEY MISCHIEF: EPISODES IN MONETARY HISTORY (1992); MILTON FRIEDMAN, THE OPTIMUM QUANTITY OF MONEY, AND OTHER ESSAYS (1969); MILTON FRIEDMAN ET AL., POLITICS AND TYRANNY: LESSONS IN THE PURSUIT OF FREEDOM (Pacific Institute for Public Policy Research 1984); MILTON FRIEDMAN, THERE'S NO SUCH THING AS A FREE LUNCH (1974); MILTON & ROSE FRIEDMAN, TYRANNY OF THE STATUS QUO (1994).

these payments allotted for extracurricular academic programs are spent in some manner for this purpose. The same "economic freedom" argument applies to public education. If public education is the ultimate evil, then removing the burr under its saddle (e.g., the plaintiff students) will hardly render it more likely to fail.

This voucher plan would render it more difficult for the administration and the highly politicized students to impose their views of a proper extracurricular education on the majority. However, if we assume the legitimacy of their ideological views, why shouldn't they be imposed on the entire student body? And if we do not, why should they be able to dispose of not only the student fees for these programs, but of all the tax revenues, which now flow into their control?

Framing our questions differently allows a varying approach to the solutions. Should public elementary schools require that pupils wear school uniforms? Should public universities have tenure for their professors? Should diversity and multiculturalism be mainstays of education? Should affirmative action be employed in decisions over student admission, faculty hiring, or course coverage?

For the Milton Friedmans of the world, these questions are straightforward, and elucidate answers based on their likelihood of promoting the efficiency of these institutions. They are of course highly complex, and there are great problems of empirical measurement, but at least the research program is clear—engage in these initiatives if they promote societal well being, and eschew them if they do not. As a heuristic device, these questions might almost translate into a query about which policies would maximize revenue, were this industry a private one. Alternatively, they might be asking which policies would maximize gross domestic product or some other measure of wealth.

In sharp contrast, however, matters for the libertarian are quite different. The answer to the question of, "What policies should be pursued by a public educational establishment?" is akin to asking him for day to day advice on how best to run a North Korean steel mill, a Cuban sugar cane plantation, or a USSR automobile factory. The only answer is to privatize these enterprises, and to allow market participants to make these decisions.¹⁴⁷

147. How many free market economists does it take to change a light bulb? None. They leave it to market forces.

This answer seems evasive and is possibly no answer at all. The answer may be Clinton-like, that is, merely avoiding the question. By considering a "taxicab theory" we can refute such a criticism.¹⁴⁸

Suppose you are in the south quadrant of the city and you get into a taxicab, telling the driver to take you to the western sector. He responds, "I can drive from here only to the north or east, but not to the west." What do you do? Do you ask him to take you to the north, as this is closer to your western destination than is your only other option, to the east? Not at all. Instead, you hop out of that cab as quickly as you can, thank your lucky stars you got away from a maniac, and throw in your lot with another driver who will take you where you want to go.

Similarly, when asked how the government can best run steel mills it should not even own or, how public schools can best promote education it should have nothing to do with, the only rational answer is to insist, parrot-like if need be, that it is not a proper role for the government at all. The question is an invalid one, which should not even arise.

However, an objection could be launched against our own opposition to the administration of public universities commandeering student fees and using them to promote ideas and activities detested by the plaintiffs. Why don't we stick to our knitting, and instead of criticizing these practices, content ourselves with calling for privatization? We were happy to remain "above the fray" with regard to the management of unjustified steel mills and universities. Why don't we follow our own advice in the present situation?

The reason is that in the present context we are discussing additional funds, over and above those spent on tuition. In the Wisconsin case, the administrators are appropriating an extra \$165.75 per semester, apart from, and in addition to, the other monies paid by the students for tuition.¹⁴⁹ It is as if the gunman has just stolen \$20,000 from his victim, and now realizes that the latter has another \$165.75 in his back pocket. Should the criminal return to the scene of the crime and relieve the poor unfortunate of those funds as well? We answer in the negative, and in so doing, certainly do not commit ourselves to the legitimacy of the first and larger seizure.

148. The authors wish to express a debt of gratitude to Michael Edelstein and Nando Peluci for this insight.

149. *Southworth v. Grebe*, 151 F.3d 717, 719 (7th Cir. 1998).

IX. CONCLUSION

We started off this essay by calling into question the propriety of forcing some students to subsidize the carrying out of the free speech rights of others. We ended by calling for the privatization of public universities. How did we get from one point to the other? Why is the second goal an implication of the first?

The point is, there is nothing wrong, *per se*, with "forcing" some students to pay to support the views that others favor. It all depends upon whether there was mutual agreement, on all sides, that this sort of policy be carried out. We demonstrated that when this was done in the context of the purely private college, it was unobjectionable. Surely as part of advanced education, it is totally reasonable for faculties to introduce students to ideas they might at first (and even always) consider abhorrent (which, as it happens, find favor with other students). This is part and parcel of the educational enterprise. No good teacher can shrink from this challenge. What is wrong with doing this is not the act itself, but the fact that the entire educational experience (at least in the public sector) is not one of complete voluntarism. We cannot ignore the more basic underlying issue. We think we have fully considered the relatively more superficial question of student fees being hijacked. The result is consistent under either the First Amendment or free-market approach. The Regents of a public university may not compel one student to pay for another student's free speech.

