Should the Government Be Allowed to Engage in Racial, Sexual or Other Acts of Discrimination?

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INTRODUCTION

This paper attempts to address the question of whether the government should be allowed to engage in racial, sexual or other acts of discrimination. Part I does so by analyzing extant law to determine whether or not such acts are compatible with the United States Constitution. Using Arkansas as a case study, this paper takes as an initial point of departure governmental discrimination against blacks in the field of education.¹

In Part II, the paper analyzes this issue from the libertarian perspective. Generalized government discrimination in fields other than education, as well as discrimination based on numerous criteria other than race are examined.

I. EXTANT LAW AND ITS COMPATIBILITY WITH THE UNITED STATES CONSTITUTION

A. THE LAW OF ARKANSAS

The State of Arkansas provides to graduates of Arkansas secondary schools who demonstrate “extraordinary academic ability” a full academic scholarship for enrollment in a state approved public or private Arkansas

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institution of higher education.\(^2\) The sole measure of the graduate’s “extraordinary ability” is demonstrated by scoring 32 or above on the American College Test (ACT), or at least 1410 on the Scholastic Aptitude Test (SAT), and selection as a finalist in the National Merit Scholarship competition or achievement of a high school grade point average of at least 3.5 on a scale of 4.0.\(^3\) The purpose of the Governor's Scholarship Program, according to the enabling legislation, is “that outstanding students are an essential ingredient for the economic and social benefit of the State of Arkansas. Benefits accrue to the state when a majority of National Merit Scholars, National Achievement Scholars, and superior students attend Arkansas institutions of higher learning and remain in the state.”\(^4\) The scholarship award dollar amount equals the tuition, room and board, and mandatory fees charged for a regular full-time student by the approved institution of higher education in which the student is enrolled.\(^5\) For students who are first-time entering freshman after July 1, 2002, a new $10,000.00 maximum will be in effect.\(^6\) There are eight public and seven private, church-related, approved institutions participating in the program.\(^7\)

The dollar value of the scholarship award varies considerably between public and private institutions. It is estimated, for example, that a scholarship recipient enrolled in Hendrix, a private church-related institution, costs the state about $15,474 per year. In contrast, a distinguished scholar enrolled at Southern Arkansas University, a public institution, will cost the state only about $5,088 per year.\(^8\) It is critical to understand that the scholarship funds are dispersed from the state directly to the approved public and private, church-related institutions.\(^9\) No funds are sent to the parents or recipients.\(^10\) The responsibility for selecting the


\(^7\) Ark. Dep’t of Higher Educ., Student Enrollments, Table III, State Appropriations Per Student for Arkansas Governor’s Distinguished Scholars for 1999-00 Fiscal Year, May 2000.

\(^8\) Id.


\(^10\) Id.
scholarship recipients rests with the Arkansas Department of Higher Education (DHE).\textsuperscript{11}

As a condition of participation in the program, each institution of higher education, public or church-related, has to agree to provide to the state the same level of administrative services in administering the program. Among these services are the following: appointing an institution representative to act as administrator of the program for that campus; receiving all disbursements; completing all forms and rosters; verifying all data; and ensuring compliance with all DHE program rules and regulations.\textsuperscript{12} In addition, the institution, public or private, must do the following: maintain disbursement records; prepare an annual Institutional Financial Information Sheet for all programs administered by DHE; prepare a list of program drop-outs; certify full-time enrollment; provide DHE with an institutional verification of compliance at least twice yearly; and, finally, submit from time to time to a DHE review of the institution's records to demonstrate its due diligence as a \textit{steward of state funds}.

The program has been much used. The state awarded a total of 808 Distinguished Governor's Scholarships for the 1997-98, 1998-99, and 1999-2000 academic years.\textsuperscript{13} Of those, 425 (52.6\%) chose to attend a public institution, and 383 (47.4\%) chose to attend a private, church-related institution. The approximate expenditure of state funds for the scholarship program has resulted in disbursements of $6,149,087.00 to the private, church-related, institutions and $3,666,371.00 to their public counterparts.\textsuperscript{14} As a result, 62.6\% of the total state distinguished scholarship funds were forwarded directly to the former, and 37.4\% to the latter.\textsuperscript{15} Of the scholarship recipients, 4 (0.4\%) were African American, 19 (2.0\%) Asian, 5 (0.5\%) Native American, 885 (94.6\%) Caucasian, 3 (0.3\%) Hispanic, and 20 (2.1\%) were other or unknown. Finally, 532 (56.8\%) of the scholars were male, and 404 (43.2\%) female.\textsuperscript{16}

\begin{itemize}
\item \textsuperscript{11} ARK. CODE ANN. § 6-82-304 (3) (Michie 1996), amended by 2001 Ark. Acts 1761.
\item \textsuperscript{12} Ark. Dep't of Higher Educ., Rules and Procedures, Rule 5.
\item \textsuperscript{13} Ark. Dep't of Higher Educ., Student Enrollments, Table 1, Comparison of The Number of Arkansas Governor's Distinguished Scholarship Awards by Institution for the 1997-98 Through 1999-00 Academic Years.
\item \textsuperscript{14} Ark. Dep't of Higher Educ., Table II, Amount of Arkansas Governor's Distinguished Scholarship Awards by Institution.
\item \textsuperscript{15} \textit{Id.}
\item \textsuperscript{16} \textit{Id.}
\end{itemize}
B. FEDERAL GOVERNMENT JURISDICTION OVER STATE DISCRIMINATION

Does the federal government have jurisdiction over states when and if they engage in racial discrimination against their citizens? Some argue that state courts lack jurisdiction over a plaintiff's federal damage claims under § 1983 because states are not persons amenable to suit under § 1983. However, it is well-settled in the judicial circuit including Arkansas that, to survive a motion to dismiss, all a plaintiff must do is plead that a facially neutral practice's adverse effects fall disproportionately on a group protected by Title VI.

As the Court of Appeals for the Eighth Circuit explained in the Fair Housing Act discrimination case of Ring v. First Interstate Mortgage, "the prima facie case under [disparate impact] analysis is an evidentiary standard – it defines the quantum of proof plaintiff must present to create a rebuttable presumption of discrimination." According to the Federal Rules of Civil Procedure, "an evidentiary standard is not a proper measure to determine whether a complaint fails to state a claim." Additionally, the Supreme Court has stated, "[W]hen a federal court reviews the sufficiency of a complaint . . . the issue is not whether the plaintiff will ultimately prevail but whether the claimant is entitled to offer evidence to support such claims."

The State of Arkansas has promulgated a program that clearly has a disparate impact on black students. They are under-represented among the scholarship winners. Given this, a clear implication exists that they are entitled under Ring to offer evidence to support their claims.

C. GETTING PAST THE NOTION OF STATE IMMUNITY

Under certain circumstances the United States Congress can pass laws that give individual citizens a right of action in federal court against an unconsenting state. The circumstances require, first, that "Congress has unequivocally expressed its intent to abrogate the immunity," which

18. 984 F.2d 924 (8th Cir. 1993).
19. Id.
20. Id. at 926.
22. See supra text accompanying notes 14-20.
must be obvious from a ‘clear legislative statement.’”25 Second, Congress must have acted “pursuant to a valid exercise of power.”26 The High Court has held that Congress can abrogate state immunity when it acts pursuant to Part 5, the enforcement provision of the Fourteenth Amendment, which provides that “the Congress shall have the power to enforce, by appropriate legislation, the provisions of this article.”27

Congress, through the legislation that established Title VI, abrogated state immunity in order to give effect the provisions of the Fourteenth Amendment of the United States Constitution.28 A private right of action under a federal statute requires analysis of the factors set forth in Cort v. Ash.29 The Cort factors ask:

First, is the plaintiff ‘one of the class for whose especial benefit the statute was enacted’—that is, does the statute create a federal right in favor of the plaintiff? Second, is there any indication of legislative intent, explicit or implicit, either to create such a remedy or to deny one? Third, is it consistent with the underlying purposes of the legislative scheme to imply such a remedy for the plaintiff? And finally, is the cause of action one traditionally relegated to state law, in an area basically the concern of the States, so that it would be inappropriate to infer a cause of action based solely on federal law?30

Plaintiffs fit squarely under the Cort rationale.

D. A PRIVATE CAUSE OF ACTION FOR ARKANSAS PLAINTIFFS

An individual affected by the disparate impact of the Arkansas scholarship distributions fits squarely within the circumstances where private citizens have a right of action in federal court. Section 601 of Title VI of the Civil Rights Act of 1964 provides that “No person in the United States shall, on the grounds of race, color, or national origin, be excluded from participation in, be denied the benefits of, or be subjected to

25. Id. at 55.
30. Id. at 78 (citations omitted).
discrimination under any program or activity receiving Federal financial assistance.\textsuperscript{31} Moreover, section 602 of Title VI authorizes and directs federal departments and agencies that extend federal financial assistance to particular program or activities to effectuate the provision of 2000d by issuing rules, regulations, or orders of general applicability.\textsuperscript{32}

The Department of Education, in exercising statutory authority under section 602, promulgated such a regulation, which prohibits a funding recipient from “utiliz[ing] criteria or methods of administration which have the effect of subjecting individuals to discrimination because of their race, color, or national origin, or have the effect of defeating or substantially impairing accomplishment of the objectives of the program as respect individuals of a particular race, color, or national origin.”\textsuperscript{33} So any action alleging disparate impact resulting from administration of the Arkansas Distinguished Scholarship Program [hereinafter Program] would be fairly based on the foregoing statutes and regulations prohibiting discriminatory effects in educational programs.

While it is well established that a private cause of action exists under § 601 of Title VI of the Civil Rights Act of 1964 to redress intentional discrimination,\textsuperscript{34} the Supreme Court has never specifically ruled that a private right of action exists where regulations promulgated under § 602 have resulted in disparate impact as opposed to intentional discrimination.\textsuperscript{35} In fact, in \textit{Alexander v. Sandoval} the Supreme Court recently found there is no such private right of action under § 602, a decision referred to in the dissent as “unfounded in our precedent and hostile to decades of settled expectations.”\textsuperscript{36}

While this recent Supreme Court decision precludes a private cause of action for Arkansas plaintiffs under § 602, a viable claim under 42 U.S.C. § 1983 nevertheless still exists. In \textit{South Camden Citizens in Action v. New Jersey Department of Environmental Protection}\textsuperscript{37} the United States District Court of New Jersey acknowledged the \textit{Sandoval} ruling that no private right of action exists under § 602.\textsuperscript{38} The \textit{Camden} court went on to find that, “[I]t is equally clear that \textit{Sandoval} did not address, nor does it affect,

\begin{itemize}
  \item \textsuperscript{32} \textit{Id.}
  \item \textsuperscript{33} 34 C.F.R. § 100.3(b)(2) (2000).
  \item \textsuperscript{34} \textit{Alexander v. Sandoval}, 121 S.Ct. 1511, 1516 (2001) (5-4 decision) (Stevens, J., dissenting).
  \item \textsuperscript{35} \textit{Id.} at 1524 (Stevens, J., dissenting).
  \item \textsuperscript{36} \textit{Id.} at 1524 (Stevens, J., dissenting).
  \item \textsuperscript{38} \textit{Id.}
Plaintiffs' right to bring a claim for disparate impact discrimination in violation of the § 602 regulations under § 1983.  

With respect to whether the plaintiffs would have a claim under 42 U.S.C. § 1983, we begin with the statute:

Every person who, under color of any statute, ordinance, regulation, custom, or usage, of any State or Territory or the District of Columbia, subjects, or causes to be subjected, any citizen of the United States or other person within the jurisdiction thereof to the deprivation of any rights, privileges, or immunities secured by the Constitution and laws, shall be liable to the party injured in an action at law, suit in equity, or other proper proceeding for redress.  

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

When a § 1983 plaintiff seeks damages against state officials in their official or personal capacities, the action may be maintained even if a named individual acted in his official capacities in the matter at issue. A “government official in the role of personal capacity . . . fits comfortably within the statutory term ‘person.’" The Supreme Court has held that a state official sued for injunctive relief is a person under § 1983 because the action of prospective relief is not treated as a suit against the state. “[A] state official in his official capacity when sued for injunctive relief, would be a person under § 1983 because “official-capacity actions for prospective relief are not treated as actions against the State.”

Once a plaintiff has identified a federal right that has allegedly been violated, there arises a “rebuttable presumption that the right is enforceable under § 1983.” The presumption is rebutted “if Congress ‘specifically

39.  Id.
41.  See Powell v. Ridge, 189 F.3d 387, 400 (3d Cir. 1999).
43.  Id. (quoting Will v. Mich. Dep’t of State Police, 491 U.S. 58, 71 n.10 (1989)).
45.  Id. (quoting Kentucky v. Graham, 473 U.S. 159, 167 n.14 (1985)).
foreclosed a remedy under § 1983 . . . [either] expressly, forbidding recourse to § 1983 in the statute itself, or impliedly, by creating a comprehensive enforcement scheme that is incompatible with individual enforcement under § 1983.\footnote{47}

Neither Title VI, nor the regulation promulgated there, restricts the availability of relief under § 1983. Thus, defendants must make the difficult showing that allowing a § 1983 action to go forward in these circumstances would be inconsistent with Congress's carefully tailored scheme.\footnote{48} Neither Title VI, nor the Department of Education regulations, establishes an elaborate procedural mechanism to protect the rights of plaintiffs.\footnote{49} Plaintiffs in such a case would have identified and pled disparate impact discrimination, the Fourteenth Amendment "evil" or wrong that Congress intended to remedy by Title VI.\footnote{50} It is thus clear that the propriety of the Section 5, Fourteenth Amendment legislation must be judged with reference to the historical reference of racial discrimination it reflects.\footnote{51} Consequently, given the historical record of racial discrimination in violation of the Fourteenth Amendment's Equal Protection Clause, arising from the State of Arkansas' Program, plaintiffs would be entitled to maintain their § 1983 action against the individual defendants pursuant to the enforcement provisions of the Fourteenth Amendment.

E. RIPENESS

The doctrine of ripeness poses the query of "whether the harm asserted has matured sufficiently to warrant judicial intervention."\footnote{52} The Supreme Court has held that the ripeness doctrine's purpose is "to prevent the courts, through avoidance of premature adjudication, from entangling themselves in abstract disagreements over administrative policies, and also to protect the agencies from judicial interference until an administrative decision has been formalized and its effects felt in a concrete way by the challenging parties."\footnote{53}

\footnotesize{47. \textit{Id.} (quoting Smith v. Robinson, 468 U.S. 992, 1005 n.9 (1984)).
49. \textit{Id.}
51. \textit{Id.}
52. \textit{Sierra Club v. Marita, 46 F.3d 606, 611 (7th Cir. 1995) (quoting Warth v. Seldin, 422 U.S. 480, 499 n.10 (1975)).
In *Columbia Broadcasting System v. United States*, the Court held ripe for review a Federal Communications Commission regulation that pronounced that the Agency would not license local stations that maintained certain contracts with chain broadcasting networks. The Court stated, although the rule was only a statement of intentions and that no license had yet been denied or revoked, this type of regulation had the effect of law both before and after its sanctions were enforced. The regulation could be challenged because expected conformity to the rule caused an injury that a court could recognize.

In *Frozen Food Express v. United States*, an order of the Interstate Commerce Commission exempting vehicles that carried certain commodities from licensing regulations was held reviewable. The Court held that the order was a final agency action under the A.P.A. *Frozen Food* holds that "where there has been formal action, as the adoption of a regulation . . . presumptively the action is reviewable."  

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

F. FITNESS OF ISSUES FOR JUDICIAL REVIEW

The issues raised by the type of lawsuit contemplated by this paper are fit for judicial decision because Arkansas has enacted the Governor's Distinguished Scholarship program into law. This law, and the connected implementing regulations, has been in effect for a period of over three years. The critical and concrete factor dispositive of the issue of justiciability is that there has been formal action on the part of the Arkansas General Assembly, the Governor of Arkansas, and the Arkansas Department of Higher Education. The law and DHE regulations have a concrete and lasting effect on the citizens of Arkansas. It is entirely

55. *Id.*
56. *Id.*
59. *Abbott Labs.*, 387 U.S. at 149.
60. See *Frozen Food*, 351 U.S. at 44-45.
appropriate that the state's formal action be reviewed by a court, particularly in light of the seriousness of the continuing disparate impact on minority citizens of the state.

G. HARDSHIPS TO THE PARTIES CAUSING ACTIONABLE HARM

A hardship has been suffered by plaintiffs because, as stated in Columbia Broadcasting System v. United States, the "expected conformity" to the rule causes an injury that a court can recognize. The authors of Griggs v. Duke Power Co. and of Connecticut v. Teal would be astonished if the continuing disparate impact on African Americans resulting from conformity to the present regulations of this program were not considered to cause them actionable harm.

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

62. Id. at 418-19.
64. 457 U.S. 440, 448-49 (1982).
66. Id. at 393.
H. VIOLATION OF THE ESTABLISHMENT CLAUSE

The First Amendment to the United States Constitution says "Congress shall make no law respecting an establishment of religion, or prohibiting the free exercise thereof." It is settled that "the Fourteenth Amendment has rendered the legislatures of the states as incompetent as the Congress to enact such laws." Consequently, the Arkansas General Assembly is constitutionally prohibited from enacting laws respecting an establishment of religion. But what sort of state action offends the Establishment Clause? Does the Distinguished Scholarship Program that provides for direct payment of state funds to private, church-related institutions of higher education offend the prohibitions of the First Amendment? The answer lies in the intent of the founders and the relevant cases.

First, let us visit James Madison. Thomas Jefferson's famous letter about the separation of church and state to the Danbury Baptist Association is often cited as the primary authority regarding the intent of the Establishment Clause. However, two Madison veto messages and a letter to the Baptist Churches of Neal's Creek and Black Creek, North Carolina, are arguably more revealing of the intent of the writers of the Constitution and the First Amendment. Jefferson's letter reflected his concern over the establishment of a state religion. Madison's veto messages and letter dealt with situations like the Arkansas scholarship program and revealed his notion that religious societies should remain pure and apart from government influence.

In 1811, Congress passed a bill giving certain powers to an Episcopal Church in Virginia. Among them was the authority to provide for the support of the poor, and the education of their children. On February 11, 1811, President Madison returned the bill to Congress with a veto message. Madison argued that the government had no authority over the affairs of the church because of the Establishment Clause. He said the bill violated the Constitution because it "would be a precedent for giving religious societies, as such, a legal agency in carrying into effect a legal and public duty." Again, in February, 1811, Madison vetoed another bill that, in

69. U.S. CONST. amend. I.
71. 22 ANNALS OF CONG. 982-85 (1853).
72. Id.
73. Id.
part, reserved a parcel of government land in the Mississippi Territory for the Baptist Church at Salem Meeting House. He maintained that the bill violated the principle of the Establishment Clause prohibiting the use of government money to support religious societies.  

Shortly thereafter, Madison received a letter from two Baptist churches in North Carolina indicating approval of his veto of the bill to provide support to the Mississippi Baptist church. In his response, Madison wrote that “having regarded the practical distinction between Religion and Civil Government as essential to the purity of both and as guaranteed by the Constitution of the United States, I could not have otherwise discharged my duty.”

It is clear that Madison believed that government possesses no authority to impose a duty or responsibility on a religious body. Nor is it authorized, as evidenced in the Baptist Church at Salem Meeting House matter, to use government funds to directly support a religious society. Madison believed that the Constitution granted the government absolutely no power over religion. Religion was to be entirely removed from governmental influence, and the best way to separate them is to forbid the government from imposing any responsibilities or duties on religious societies. To maintain this “purity,” government was given no constitutional authority or cause to directly support religious societies. This attitude arose not from hostility to religion, but from a desire to protect it from the heavy hand of government regulation. Why? Because we know that government regulation follows government funds. What better witness than Madison himself?

How has the Supreme Court dealt with this issue? In Lemon v. Kurtzman, the Supreme Court announced a three-pronged test to determine whether the Establishment Clause had been violated. According to Lemon, a statute does not violate the Establishment Clause when: (1) it has a secular legislative purpose; (2) its primary effect neither advances nor inhibits religion; and (3) it does not excessively entangle government with religion. In Lemon, the Court considered a Pennsylvania statute that authorized the state to “[purchase] certain ‘secular educational services’ from nonpublic schools, directly reimbursing those schools solely for teacher salaries, textbooks, and instructional materials.” Most of the

74. Id.
75. Id.
76. Id.
78. Id.
79. Id. at 602 (citations omitted).
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schools were affiliated with the Roman Catholic Church. These schools were subject to state audit and had to “identify the ‘separate’ cost of the ‘secular educational service’” to receive reimbursement.

Here, the Court decided that the State statute violated the Establishment Clause because “schools seeking reimbursement must maintain accounting procedures that require the State to establish the cost of the secular as distinguished from the religious instruction.”82 The court then warned of the dangers of providing state financial aid directly to a church-related school citing Waltz v. Tax Commission83 for the proposition that “obviously, a direct money subsidy would be a relationship pregnant with involvement and, as with most government grant programs, could encompass sustained and detailed administrative relationships for enforcement of statutory or administrative standards.”84

According to the Supreme Court, the history of government grants reveals that they typically result in various measures of government control and surveillance.85 Here, the state’s power to audit, inspect, and evaluate a church-related school’s expenditures creates an intimate and continuing relationship between church and state.86 The Pennsylvania arrangement violated the First Amendment because the intent of the Establishment Clause is to protect religion from government interference or supervision.87 Direct payments and state supervision would certainly violate Mr. Madison’s expressed “purity” view of the proper relationship between church-related schools and the state.

In Committee for Public Education and Religious Liberty v. Nyquist,88 the Supreme Court dealt with a program that provided direct money grants to certain nonpublic schools for the following: repair and maintenance; reimbursements to low-income parents for a portion of the cost of private school tuition, including sectarian school tuition; and granting to other parents certain tax benefits.89 The Justices decided that the maintenance and repair provisions of the New York statute violated the Establishment Clause because its effect was to subsidize and advance the religious

80. Id.
81. Id. at 609-10.
82. Id. at 620.
84. Lemon, 403 U.S. at 621.
85. Id.
86. Id. at 621-22.
87. Id. at 623.
89. Id. at 756-57.
mission of sectarian schools. The Court also held that the tuition reimbursement plans, if given directly to sectarian schools, would similarly violate the Establishment Clause. This was notwithstanding the fact that the grants were delivered to the parents rather than the schools, as the effect of the aid is unmistakably to provide financial support for nonpublic sectarian institutions.

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

Consequently, Agostini supports the proposition that when parents or students choose to use funds provided to them by the state to attend a church-related school, the Establishment Clause is not offended. This is because the state funds are paid to the student or parent rather than directly to the church-related school. The state, then, has no call to compel a church-related school to perform administrative tasks for it, or submit to its audit. This benefit to the parent approach (allowing a tax deduction for parents for certain educational expenses whether they were incurred in private, church-related or public schools) is also seen in Mueller v. Allen. The Court stressed that all the decisions invalidating aid to parochial schools have involved direct transmission of assistance from the states to the schools themselves. However, the decision left the Nyquist prohibition of aid "directly" paid to a church-related school unaffected.

In School District of the City of Grand Rapids v. Ball, the Supreme Court dealt with a district that adopted a shared time and community

90. Id. at 779-780.
91. Id. at 780.
92. Id.
94. Id. at 225.
95. Id. at 226.
96. Id. at 230.
98. Id. at 399.
education program with nonpublic schools. The program was conducted for nonpublic school children at state expense in classrooms located in, and leased from, the private schools. It offered state-funded classes during the regular school day that were intended to supplement, for the private school students, the "core curriculum" courses required by the state. The shared-time teachers were full-time employees of public schools. Of the forty-one private schools involved in the program, forty were church-related.

The Supreme Court decided that this initiative had the "primary or principal" effect of advancement of religion, and, therefore, violated the Establishment Clause. According to the Justices, even the praiseworthy secular purpose of providing for the education of school children "cannot validate government aid to parochial schools when the aid has the effect of promoting a single religion or religion generally or when the aid unduly entangles the government in matters religious." They said:

The symbolic union of church and state inherent in the provision of secular state-provided public instruction in the religious school buildings threatens to convey a message of state support for religion to students and to the general public . . . the programs in effect subsidize the religious functions of the parochial schools by taking over a substantial portion of their responsibility. . . .

The Court also said that the Establishment Clause "rests on the belief that a union of government and religion tends to destroy government and degrade religion."

Clearly, the most instructive case for our purposes is Witters v. Washington Department of Services for the Blind. In Witters, the Supreme Court ruled on the denial of funds to Mr. Witters under the state of Washington's vocational rehabilitation program for the visually handicapped. The funds were sought to finance petitioner’s training at a

100.  Id.
101.  Id. at 375.
102.  Id. at 376.
103.  Id. at 379.
104.  Id. at 397.
105.  Id at 382.
106.  Ball, 473 U.S. at 397.
107.  Id. at 398.
109.  Id.
The record showed that, were assistance provided to Mr. Witters, the funds would have gone directly to the student, who would then have transmitted them to the educational institution of his choice. The Washington statute authorized the state to “provide for special education and/or training in the professions, business or trades” so as to ‘assist visually handicapped persons to overcome vocational handicaps and to obtain the maximum degree of self-support and self-care.” Mr. Witters, who suffered from a progressive eye disease, was eligible for vocational rehabilitation assistance under the terms of the statute. He attended Inland Empire School of the Bible, a private Christian College in Spokane, Washington. He was studying the “Bible, ethics, speech, and Church administration in order to equip himself for a career as a pastor, missionary, or youth director.”

The Washington court ruled that the “principal or primary effect” of the state financial assistance to Witters was to train him to become a pastor, missionary, or church youth director. In the view of the court, the state aid clearly had the primary effect of advancing religion and violated the Establishment Clause. On appeal, the Supreme Court reversed this decision. It said:

It is well settled that the Establishment Clause is not violated every time money previously in the possession of a State is conveyed to a religious institution. For example, a State may issue a paycheck to one of its employees, who may then donate all or part of that paycheck to a religious institution, all without constitutional barrier; and the State may do so even knowing that the employee so intends to dispose of his salary.

The Court continued, “[i]t is equally well settled, on the other hand, that the State may not grant aid to a religious school, whether cash or in kind, where the effect of the aid is ‘that of a direct subsidy to the religious

110. Id. at 482.
111. Id. at 487.
112. Witters, 474 U.S. at 483 (quoting WASH. REV. CODE § 74.16.181(1981)).
113. Id.
114. Id.
115. Id. at 485.
116. Id. at 484-85.
117. Id. at 486-87.
The issue "is whether, on the facts . . . [the] extension of aid to petitioner and the use of that aid by petitioner to support religious education is a permissible transfer similar to the hypothetical salary donation described above, or is an impermissible direct subsidy."  

In the opinion of the United States Supreme Court the facts central to the inquiry in the *Witters* case were the following: whether "[a]ny aid provided under Washington's program that ultimately flows to religious institutions does so only as a result of the genuinely independent and private choices of aid recipients.," that "it is not one of the ingenious plans for channeling state aid to sectarian schools that periodically reach this Court;" that "[i]t creates no financial incentive for students to undertake sectarian education;" that "[i]t does not tend to provide greater or broader benefits for recipients who apply their aid to religious education;" and that "[i]n this case, the fact that aid goes to individuals means that the decision to support religious education is made by the individual, not the State."

Importantly, "nothing in the record indicates that . . . any significant portion of the aid expended under the Washington program as a whole will end up flowing to religious education." The Court stated, "*amici* supporting respondent are correct in pointing out that aid to a religious institution unrestricted in its potential uses, if properly attributable to the State, is 'clearly prohibited under the Establishment Clause.'" But the respondent's argument did not apply in that case because there was no direct aid to the religious school. The Court decided, on the facts presented, the Washington program did not constitute sufficiently direct support of religion so as to violate the Establishment Clause. Justice Powell, concurring, said that the Washington scheme was constitutionally permitted because the student or parent directly received the State payments. He cited *Mueller v. Allen* for the proposition that payments
directly to parents are constitutional because any benefit to religion results from "numerous private choices of individual parents of school-age children." 129

Before we turn to the Arkansas scholarship program, it will be helpful to review the common threads woven through these cases that bind them together. First, requiring church-related schools to maintain administrative and accounting procedures for review by the state offends the Establishment Clause. 130 Second, payment of financial aid directly to a church-related school offends the Establishment Clause. 131 Third, when there is a disparity in the amount of state funds spent on public and church-related students the Establishment Clause is offended. 132 Fourth, the Establishment Clause is offended if the scholarship program creates a financial incentive for the student to attend a church-related school. 133 Finally, perhaps the most troubling issue is whether the Arkansas Program is an ingenious scheme designed to channel state aid directly to church-related schools, a practice condemned by the decision in Committee For Public Education and Religious Liberty v. Nyquist. 134

I. ARKANSAS LAW AND THE ESTABLISHMENT CLAUSE

The State of Arkansas attempts to cloak itself in the recent case of Mitchell v. Helms. 135 Unfortunately for the State of Arkansas, the cloak does not fit because the Mitchell case concerned Chapter II of the Education Consolidation and Improvement Act of 1981. 136 Chapter II channels federal funds to the local educational agencies, which are usually public school districts, through state educational agencies, to implement programs to assist children in elementary and secondary schools. Among other things, Chapter II provides aid for "the acquisition and use of instructional and educational materials, including library services and materials (including media materials), assessments, reference materials,

132. See Witters, 474 U.S. at 488.
133. Id.
134. See Nyquist, 413 U.S. at 785; Witters, 474 U.S. at 488.
computer software and hardware for instructional use, and other curricular materials."\footnote{137} In effect, the Chapter II program was a neutral, per capita aid program. In sharp contrast, however, the Arkansas scholarship program is clearly not a per capita aid program.

Further, as Justice O'Connor highlights in her concurring opinion, Justice Thomas, writing for the \textit{Mitchell} plurality, did not even consider issues important and decisive to Arkansas plaintiffs.\footnote{138} The issues for litigation in Arkansas are: whether any aid provided under the Arkansas program that ultimately flows to a religious institution does so only as a result of the genuinely independent private choices of scholarship recipients; whether or not the program is one of the ingenious plans for channeling state aid to sectarian schools that periodically occur; whether or not it creates a financial incentive for students to undertake sectarian education; whether or not it intends to provide greater or broader benefits for recipients who apply their aid to religious institutions; and whether any aid that ultimately flows to a church related institution does so only as a result of the genuinely independent and private choice of aid recipients.

As Justice O'Connor wrote in concurring with the plurality in \textit{Mitchell}, "Specifically, we decided \textit{Witters} and \textit{Zobrest} on the understanding that the aid was provided directly to the individual student who, in turn, made the choice of where to put that aid to use . . . \[a\]ccordingly, our approval of the aid in both cases relied to a significant extent on the fact that '[a]ny aid . . . that ultimately flows to religious institutions does so only as a result of the genuinely independent and private choices of aid recipients.'\footnote{139}

Justice O'Connor continued by saying she believed that the distinction between a per capita school aid program and a true private choice program is significant for the purposes of endorsement.\footnote{140} "In terms of public perception, a government program of direct aid to religious schools based on the number of students attending each school differs meaningfully from the government distributing aid directly to individual students who, in turn, decide to use the aid at the same religious schools."\footnote{141}

Finally, Justice O'Connor wrote that "the distinction between a per capita aid program and a true private-choice program is important when considering aid that consists of direct monetary subsidies."\footnote{142} The Supreme

\begin{footnotes}
\item[138] \textit{Mitchell}, 530 U.S. at 841 (O'Connor, J., concurring).
\item[139] \textit{id} (quoting \textit{Witters}, 474 U.S. at 487).
\item[140] \textit{id}. at 842.
\item[141] \textit{id}. at 842-43.
\item[142] \textit{id}. at 843.
\end{footnotes}
Court has recognized special Establishment Clause dangers when the government makes direct money payments to sectarian institutions. Consequently, there are important distinctions between the issue dealt with in the *Mitchell* case and the line of cases finding direct payments of state monies to church-related institutions offensive to the Establishment Clause.

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

Second, the state funds are paid directly to church-related institutions. This direct aid offends the Establishment Clause. If there is one thing certain under all these cases, it is that state money paid directly to a church-related school is unconstitutional. This is so because the scholarship funds are a direct subsidy condemned in all the cases cited. This issue was not even raised in *Mitchell*.

Third, there is a considerable disparity between the amount of state funds per distinguished scholarship provided church-related institutions and public institutions under the program. Recall that, for example, Hendrix will typically receive $15,000 and Southern Arkansas $4,730 per scholarship student. There is also a disparity in the total funds sent to private and public schools. Church-related schools received $2,182,000

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143. *Id.*
145. *Id.*
147. *Revised Rules and Regulations for the Arkansas Governor’s Scholarship Program*, D.H.E. Rule 5.1.A.
and public institutions $1,334,000 in the years 1998-99. 151 This disparity in treatment of public and church-related institutions offends the Establishment Clause. 152

Fourth, the program creates a financial incentive for the Distinguished Scholarship student to attend a church-related school because the program provides more funds to do so. The state formerly paid whatever the church-related institution considered a reasonable level of tuition and fees, and now only caps that amount at $10,000. 153 The state sponsored creation of a considerable financial incentive to attend a church-related school is offensive to the Establishment Clause. 154

Finally, the distinguished scholarship program, if newspaper reports are accurate, may be a scheme to channel state aid directly to church-related schools, offending the Establishment Clause under Witters. 155 This is most disturbing. According to Doug Smith, the impetus for the distinguished scholars program did not emanate from the Department of Higher Education. 156 Rather, state senators proposed it. 157 The legislation that came back was not that proposed to the General Assembly by the DHE. The DHE had little choice because thirty-five senators sponsored the enabling legislation. One of its sponsors is quoted as stating that the bill was brought to him by the President of the Independent Colleges and Universities Association, and by the Association’s lobbyist. 158 This certainly raises the issue of a scheme to support religious schools. It will be interesting to see why the Association would want the State rummaging around in their private, church-related educational programs to determine stewardship of state funds. The North Carolina Baptists who wrote to Mr. Madison would surely be offended. 159

Mr. Madison would be saddened by the abuse of his Amendment on the part of the DHE of the State of Arkansas. His two veto messages, and letter to the Baptist Churches of Neal’s Creek and Black Creek, North Carolina, in 1811, sent a powerful message that government has no (none at all) business regulating a religious society, giving a religious society

151. Id.
152. Witters, 474 U.S. at 487.
154. Witters, 474 U.S. at 487.
155. Id.
156. Id.
157. Id.
158. Id.
159. See 22 ANNALS OF CONG. 982-85 (1853).
legal agency to carry into effect a public duty, or giving direct aid to a religious society. The Arkansas Distinguished Scholars Scholarship Program has the unique and dubious distinction of offending all of Madison's notions of separation of religion from influence and regulation by the government.

This was not so because of hostility toward religion but rather to protect religion from the government. He believed that the Constitution granted government no power over religion. It surely follows, as in the Arkansas example, that when a religious society accepts government funds in this manner the heavy hand of government regulation is sure to follow. It makes no Constitutional difference that church-related schools volunteer for regulation. It still offends the Constitution!

II. POLITICAL PHILOSOPHY

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

A. LIBERTARIANISM

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

160. Id.
161. Id.
What is the proper role of government in this system? For most libertarians,\textsuperscript{163} it consists solely of the duty to protect persons and property from invasion.

Given that government should exist at all, there are three, but only three, legitimate state institutions: armies to keep foreign aggressors from attacking us; police to quell crimes emanating from local evil doers; and courts to distinguish between victims and criminals.¹⁶⁴

B. DISCRIMINATION

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


This implies that all laws which seek to compel people to engage with one another, such as the so called Civil Rights Act of 1964, would be invalid under libertarian law. If the authors of this article believed that left handers are the spawn of the devil, and placed a sign on front door of their hotel reading, "No dogs or left handed people allowed on the premises," we would not be subjected to any legal penalty under the libertarian code of law.

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


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

167. The same goes for Jews, blacks, homosexuals, females, old people, young people, or any other supposedly "victimized" groups.
But government is not an individual person, with rights to associate with those it wishes to, and to avoid those with whom it wishes to have no interaction. Very much to the contrary, the state has responsibilities, not rights.

If the limited government and anarchist wings of libertarianism are united on the claim that private individuals or groups have a complete and total right to discriminate on any basis they choose, and against any group or individual they wish, both would also agree that government, if it is justified at all, should \textit{not} be allowed to do so.\footnote{We shall henceforth consider the views of the minarchists, or limited government advocates alone, so as to obviate for argument’s sake the point made by the anarchist libertarians, that government should not exist at all.} The point here is that the purpose of the state is to protect the lives, liberties, and fortunes of all of its citizens, and on a basis that does not distinguish between them. Government, in this philosophy, is not only to be blind to the race, color, natural or ethnic origin, religion, sex, disability, age, sexual orientation or veteran status, the usual suspects, but is to totally ignore \textit{all} other criteria as well.\footnote{There is only one exception to this general rule. If the legitimate function of the government pertains to any of these distinctions, then that may be taken into account. For example, if the police must infiltrate the Mafia, it cannot ask a black cop to do so; for the Bloods or the Crypts, a Jewish officer simply will not do; if the police must send someone in to spy on a gang of criminals composed of females, or lesbians, a male is counter indicated.} For example, the state must not discriminate on the basis of intelligence, athletic ability, eye color, business acumen, initiative and ambition, unless these characteristics are somehow related to conducting its business of protecting personal or property rights.

Let us consider a few examples. First, as mentioned above,\footnote{\textit{See supra} text accompanying note 2.} the State of Arkansas provides a full academic scholarship to a state-approved public or private Arkansas institution of higher education for graduates of Arkansas secondary schools who demonstrate “extraordinary academic ability.”\footnote{\textit{See supra} text accompanying note 2.} Previously, we criticized this policy on the ground that a disproportionately high number of the members of one racial group wins these scholarships, whites, and a disproportionately low number of another, blacks, fail to do so.
We are now in a position to criticize this scholarship plan on a much more radical basis. Even if the same proportion of white and blacks won these scholarships, the program would still be contrary to libertarian law, since it would continue to make invidious comparisons between inept and brilliant students, awarding tax money to virtually all of the latter and none to the former.\footnote{172}

That is to say, even if the program were not problematic on racial grounds, it would be so on the basis of intelligence. The scholarships would be awarded to smart students of either race, while ignorant students of both races would be victimized by state discrimination. But where is the warrant for governments to divide the population on the basis of intelligence, supporting those who exhibit this characteristic to a great degree and ignoring those who do not?\footnote{173} There is no such justification. If it is illegitimate for the government to discriminate on the basis of IQ, then it may not give out scholarships on this basis. If it wishes to award scholarships to students, it must do so in an actuarially “fair” way, for example, by lottery.

The same goes for entrance requirements at public universities. They are also part of the apparatus of government. If the state is prohibited by libertarian law from awarding scholarships on the basis of perspicaciousness, then colleges cannot do this either, nor can they pick and choose among applicants for admission on this basis. It cannot be denied that the University of California at Berkeley,\footnote{174} for example, would lose its reputation for prestige under these conditions. However, it is no part of libertarian law to preserve or enhance the renown of institutions such as these which are illegitimate in the first place. Short of complete privatization of state colleges, reducing their level of excellence would be entirely acceptable from the perspective of this political philosophy.

\footnote{172. We abstract from the question of whether or not the testing instrument accurately distinguishes the one group from the other, assuming for the sake of argument that it does.}

\footnote{173. See Robert B. Reich, \textit{How Selective Colleges Heighten Income Inequality}, CHRON. HIGHER ED. REV., Sept. 15, 2000, available at http://www.prospect.org/webfeatures/2000/reich-r-09-15.html (last visited Dec. 3 2001). Mr. Reich criticizes analogous policies (elite universities accepting only very sharp-witted students) because they increase income inequality. This reason should be sharply distinguished from our own: that awarding scholarships to the “best and the brightest” is an instance of statist discrimination. In our view, private citizens, in sharp contrast to governmental agencies, are entirely justified in acting in ways which increase income inequality.

\footnote{174. What about ostensibly “private” institutions of higher learning such as Harvard, Yale, and Columbia? These, too, would be considered public in that an inordinate percentage of their budgets emanate from coercive tax levies.}
The point is, if something is illegitimate at its core, as public education is from the libertarian perspective, but somehow we stipulate that it must exist, then it is a positive benefit for it be run as inefficiently as possible. True, it would be the death knell for prestigious public institutions of higher learning to be forced not to discriminate in favor of the highly intelligent. But this is precisely what is required by considerations of justice. If an institution should not exist at all, but somehow persists, then equity entails that it be ineffective.\footnote{For the application of this argument to Nazi concentration camps, and the voluntary army employed to support an unjust war, see Walter Block, \textit{Against the Volunteer Military}, \textit{Libertarian F.}, Aug. 15, 1969, at 4.}

Let us now consider the characteristic of athletic ability. It is a well-known fact\footnote{See \textit{Thomas Sowell, The Vision of the Anointed} 35 (1995) ("No one regards the gross disparity in 'representation' between blacks and whites in professional basketball as proving discrimination against whites in that sport."); see also \textit{Jon Entine, Taboo: Why Black Athletes Dominate Sports, and Why We're Afraid To Talk About It} (2000).} that, with the exception of a few sports such as swimming and diving, yachting, hockey and handball, blacks exceed whites in terms of athleticism.\footnote{See, e.g., \textit{White Men Can't Jump} (20th Century Fox 1992). Also, "white man's disease" is now common parlance in basketball circles, and refers to the inability of white men to jump high for rebounds, blocks, or slam-dunks.} Certainly, in football and basketball, whether at the college or professional level, blacks are vastly over-represented.\footnote{See infra Appendix 1.}

Therefore, the logic of our case against the Governor's Scholarship Program of Arkansas based on intelligence mitigates against any and all athletic scholarship awards on the part of all state institutions. If the academic scholarships favor whites at the expense of blacks, and must therefore be rescinded, then athletic scholarships that elevate blacks to the detriment of whites must be repealed on the same ground.

Furthermore, just as we were able to offer a more radical critique of the Governor's Scholarship Program in that it disadvantaged the ignorant, so can we criticize all athletic scholarships in that they discriminate against those who are inept in sports. That is, even if it were the case that blacks and whites won athletic scholarships in exact proportion to their overall numbers, these awards would still be unjustified in that athletic whites and blacks would be treated better than their more awkward counterparts in both racial groups. The authors of the present paper realize full well that if athletic scholarships were bestowed in a manner unrelated to athleticism, this would spell the death knell for competitiveness. Yet, from a libertarian perspective, promoting competitiveness is certainly not part of the mandate.
of limited government. If institutions wish to field excellent teams, they would have the option of privatizing. Otherwise, mediocrity would be their (deserved) fate. 179

C. OBJECTIONS TO THE LIBERTARIAN ANALYSIS

Let us conclude by considering two objections to the foregoing. First, advocates of free enterprise and economic freedom, such as ourselves, 180 typically oppose affirmative action, quotas, and equal proportionality. In the present case, the very opposite is true. Namely, we are on record herein as supporting these programs. We consider in some detail scholarships based on intelligence and athletic ability as cases in point, but would generalize to cover any other such criteria. Why the difference?

This is because, while we oppose the imposition of quotas for private individuals or firms, this certainly does not hold true with regard to the minions of the state. Very much to the contrary, in this philosophy, anything to rein in the unjustified use of government power is all to the good. Not only schools, but also libraries, museums, art galleries, opera, and symphony orchestras, for example, discriminate against blacks, vis a vis whites, since the latter make greater proportional use of them. Moreover, and just as important, expenditures in these directions vitiate against the stupid and those who are, and wish to remain, ignorant. Even if blacks and whites availed themselves of these services strictly according to their proportion to the overall population, this would still be an unwarranted discrimination on the part of the government against various elements of the population. As long as smart people use these resources to a greater degree than their ignorant counterparts, this is an illegitimate incursion of government into the economy. Therefore, government is

179. See supra note 156.
unjustified in offering these goods and services no matter what the relative utilization of them by blacks and whites.

Further, if government purchases from the private sector the land, labor and capital necessary to provide those “intellectual” services, then this holds true for things such as desks, pencils, paper, computers, jet planes, pistols, bazookas, battle ships, police and soldiers’ uniforms, paper clips, rubber bands, and envelopes. These, too, discriminate against those on the low end of the bell curve. Thus, if government is prevented from financing the former, this holds for the latter as well. This is obviously an attempt at a *reductio ad absurdum* of the libertarian position in that, were the state not allowed to purchase this latter set of items, it could not fulfill its obligations under minarchism.

The reply is that the provision of armies, courts and police are part and parcel of the proper scope of government, while competing with industries which do or could provide intellectual services is not. This applies, as well, for the myriad of other services supplied by government (i.e. in health and welfare) which have nothing to do with upholding the rights to personal safety and property mandated by the libertarian vision. It must be conceded that it would be possible for the public sector to provide all sorts of goods and services on a non-discriminatory basis, not only in terms of race, sex, and ethnicity, but also intelligence and other abilities. each could be supplied on a “fair” basis through lottery selection. However, this would still be inappropriate in the libertarian view, since these concepts are not within the proper scope of a limited government.

**CONCLUSION**

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

181. HERNSTEIN & MURRAY, *supra* note 165, at 556-558. Whites and males are likely to be over represented in the provision of these goods and services to the government.

There are three possible theories on this matter which, when taken together, are seemingly exhaustive. First, the federal government always has jurisdiction over the states. Second, the states are supreme vis a vis the federal government; therefore, the federal government never has jurisdiction over the states. Third, whenever there is a conflict between the two levels of government, the presumption is in favor of the least centralized. Thus, the nod must go to the state when in conflict with the federal and to the town or county when in conflict with the state.

It is our contention, however, that there is a fourth alternative that is superior to any of these three. It is to ignore the level of government which is taking any given position on the ground that it is irrelevant to libertarianism. Instead, take the correct position, regardless of the level from which government it is emanating.

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

Racial and Ethnic Composition of Professional Athletic Employment
(in %)\textsuperscript{183}

\begin{tabular}{lcccc}
 & White & Black & Hispanic & Other \\
\hline
**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 \\
\end{tabular}