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# Direct Payments of State Scholarship Funds to Church-Related Colleges Offend the Constitution and Title VI\*

Roy Whitehead, Jr.\*\* & Walter Block\*\*\*

## I. INTRODUCTION

The State of Arkansas provides a full academic scholarship to a state approved public or private Arkansas institution of higher education to graduates of Arkansas secondary schools who have demonstrated "superior academic ability."<sup>1</sup> The sole measure of the graduate's "extraordinary academic ability" is demonstrated by scoring "32 or above on the American College Test (ACT), 1410 or above on Scholastic Aptitude Test (SAT) or selection as a finalist in the National Merit Scholarship Competition."<sup>2</sup> The purpose of the Governor's Distinguished Scholars 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 and superior students attend Arkansas institutions of higher learning and remain in the state."<sup>3</sup>

The Arkansas Governor's Distinguished Scholars program awards scholarships in amounts equal to the tuition, room and board, and mandatory fees charged a student for a regular full-time course load by the approved institution of higher education in which the student is enrolled.<sup>4</sup> There are nine public and six private, church-related, approved institutions participating in the program.<sup>5</sup> The dollar value of the scholarship

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1. ARK. CODE ANN. § 6-82-306(b)(4) (Michie 1998).

2. Doug Smith, *Pushing and Shoving For the State's Top Scholars*, ARKANSAS TIMES, Aug 27, 1999 at 13.

3. ARK. CODE ANN. § 6-82-301 (Michie 1998).

4. See ARK. CODE ANN. § 6-82-312(b) (West, WESTLAW through 1999 Sess.).

5. See ARKANSAS DEPARTMENT OF HIGHER EDUCATION, Student Enrollments Fall 1998, tbl. III, State Appropriations Per Student for Arkansas Governor's Distinguished Scholars for the 1999-2000 Fiscal Year (May 1999).

award varies considerably between public and private institutions. For example, a Distinguished Scholar recipient enrolled in Hendrix, a private church-related institution, costs the State about \$15,474 per year.<sup>6</sup> In contrast, a Distinguished Scholar enrolled at Southern Arkansas University, a public institution, will cost the State about \$5,088 per year.<sup>7</sup>

It is critical to understand that the State disperses the scholarship funds *directly* to either the approved public or the approved private, church-related institutions.<sup>8</sup> The State sends no funds directly to the parents or the Distinguished Scholar recipients.<sup>9</sup> The responsibility for selecting the scholarship recipients rests with the Director of the Arkansas Department of Higher Education.<sup>10</sup> In order to keep the scholarships, the Distinguished Scholars must pass at least 24 credit hours while maintaining a 3.25 cumulative grade-point average on a 4.0 scale per academic year.<sup>11</sup>

As a condition of participation in the program, each institution of higher education, public or church-related, must agree to provide the State with administrative services in administering the program. Key among these services is the appointment of an institution representative to act as administrator of the program for that campus.<sup>12</sup> This administrator is to receive all disbursements, complete all forms and rosters, verify all data, and insure compliance with all Department of Higher Education (DHE) program rules and regulations.<sup>13</sup> In addition, the institution, public or private, must maintain disbursement records, prepare an annual Institutional Financial Information Sheet for all programs administered by DHE, prepare a list of program drops outs, certify full-time enrollment, provide DHE with an institutional verification of compliance at least twice yearly, and finally, from time to time, submit to a DHE review of the institution's records to demonstrate its due diligence as a *steward of state funds*.<sup>14</sup>

The program has been popular with good students. The State awarded a total of 936 Distinguished Governor's Scholarships for the 1997-98, 1998-99, and 1999-2000 academic years.<sup>15</sup> Of those, 425

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6. *See id.*

7. *See id.*

8. *See* ARKANSAS DEPARTMENT OF HIGHER EDUCATION, ARKANSAS GOVERNOR'S SCHOLARS PROGRAM RULES AND PROCEDURES, Rule 5 (1999) [hereinafter DHE].

9. *See id.*

10. *See* ARK. CODE ANN. § 6-82-304 (3) (Michie 1998).

11. *See* ARK. CODE ANN. § 6-82-311(c) (Michie 1998).

12. DHE RULES AND PROCEDURES, Rule 5.

13. *See id.*

14. *Id.*

15. ARKANSAS DEPARTMENT OF HIGHER EDUCATION, *supra* n.5, tbl. 1. Comparison of the Number of Arkansas Governor's Distinguished Scholarship Awards by Institution for the 1997-98

(52.6%) chose to attend a public institution, and 383 (47.4%) chose to attend a private, church-related institution.<sup>16</sup> The approximate expenditure of state funds for the scholarship program has resulted in disbursements of \$6,149,087 to private, church-related, institutions and \$3,666,371 to their public counterparts.<sup>17</sup> As a result, 62.6% of the total state distinguished scholarship funds were forwarded directly to the former and 37.4% to the latter.<sup>18</sup> Of interest is the ethnic breakdown of the scholarship recipients: Four (0.4%) African American; nineteen (2.0%) Asian; five (0.5%) Native American; 885 (94.6%) Caucasian; three (0.3%) Hispanic, and twenty (2.1%) other or unknown. Finally, 532 (56.8%) of the scholars were male, and 404 (43.2%) female.<sup>19</sup>

This article discusses the Governor's Distinguished Scholar Scholarship Program which was designed to entice Arkansas' best and brightest students to attend Arkansas public and private institutions of higher education. While perhaps well-intentioned, the program suffers from several fatal constitutional infirmities. We first discuss the Distinguished Scholars scholarship program as it relates to the Establishment Clause of the First Amendment and the Equal Protection Clause of the Fourteenth Amendment of the Constitution. We then examine the program as it relates to Title VI of the Civil Rights Act and conclude that it has an unwholesome, disparate impact on African-American students. The article concludes with a few modest proposals to cure the infirmities of the scholarship program by achieving the intent of the program without offending the Constitution or Title VI.

## II. THE ESTABLISHMENT CLAUSE

The First Amendment to the United States Constitution states that "Congress shall make no law respecting an establishment of [a] religion, or prohibiting the free exercise thereof."<sup>20</sup> It is settled that "[t]he Fourteenth Amendment has rendered the legislatures of the states as incompetent as the Congress to enact such laws."<sup>21</sup> Consequently, the Arkansas General Assembly is constitutionally prohibited from enacting laws respecting an establishment of a religion. But what type of state action offends the Establishment Clause? Does the Governor's Distinguished

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Through 1999-00 Academic Years.

16. *See id.*

17. *See* ARKANSAS DEPARTMENT OF HIGHER EDUCATION, *supra* n.5, tbl. II, Amount of Arkansas Governor's Distinguished Scholarship Awards by Institution.

18. *See id.*

19. *See* DHE *supra* note 12.

20. U.S. CONST. amend I.

21. *Cantwell v. Connecticut*, 310 U.S. 296, 303 (1940).

Scholars Scholarship Program, which provides for the 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 Founding Fathers and relevant case law in distributing public monies directly to church organizations and church-related institutions.

### A. Intent

Thomas Jefferson's famous letter about 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 James Madison veto messages and a letter to the Baptist Churches of Neal's Creek and Black Creek, North Carolina, arguably are more revealing of the intent of these writers of the Constitution and the First Amendment. While Jefferson's letter reflected his concern over the establishment of a state religion, Madison's veto messages and his letter dealt with situations like the Arkansas scholarship program. This further reveals his notion that religious societies should remain pure, or rather, separated from government influence.

In 1811, Congress passed a bill giving certain powers to an Episcopal Church in Virginia.<sup>22</sup> Among the powers granted was the authority to provide for the support of the poor and the education of poor children.<sup>23</sup> On February 11, 1811, President Madison returned the bill to Congress with a veto message, arguing 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."<sup>24</sup> Later that same month, Madison vetoed another bill that, in part, reserved a parcel of government land in the Mississippi Territory for the Baptist Church at Salem Meeting House. He maintained that the bill violated the principle of the Establishment Clause prohibiting the use of government money to support religious societies.<sup>25</sup>

Shortly thereafter Madison received a letter from two Baptist churches in North Carolina approving his veto of the Bill to provide support to the Mississippi Baptist Church.<sup>26</sup> In his response Madison wrote:

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22. THE DEBATES AND PROCEEDINGS OF THE CONGRESS OF THE UNITED STATES WITH AN APPENDIX CONTAINING IMPORTANT STATE PAPERS AND THE PUBLIC DOCUMENTS, AND ALL THE LAWS OF A PUBLIC NATURE; WITH A COPIOUS INDEX. ELEVENTH CONGRESS - THIRD SESSION. COMPRISING THE PERIOD FROM DECEMBER 3, 1810 TO MARCH 3, 1811, INCLUSIVE. 982 - 85. (Washington: Gales and Seaton 1853).

23. *See id.*

24. *Id.*

25. *Id.*

26. *Id.*

“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 . . . .”<sup>27</sup> It is clear that Madison believed that government possesses no authority to impose a duty or responsibility on a religious body.<sup>28</sup> Nor, as evidenced in the matter of the Baptist Church at Salem Meeting House, does the government have the authority to use its funds to directly support a religious society. Madison believed that the Constitution granted the government no power over religion. Religion was to be shielded from government influence, and the best way to separate church and state was 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. Knowing that government regulation follows government funds, the most prudent approach to safeguard religious purity was to prevent government from distributing public funds directly to private religious organizations.

### B. Case Law

The United States Supreme Court has had occasion to deal with the issue of direct government aid and subsequent regulation of church-related organizations. In *Lemon v. Kurtzman*,<sup>29</sup> the Supreme Court announced a three-prong test to determine whether the Establishment Clause has been violated. According to *Lemon*, a statute does not violate the Establishment Clause when (1) it has a secular legislative purpose,

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27. To be supplied.

28. As James Madison noted in the following letter:

June 3, 1811. To the Baptist Churches in Neal's Creek and on Black Creek, North Carolina. I have received, fellow-citizens, your address, approving my objection to tile (sic) Bill containing a grant of public land to the, Baptist Church at Salem Meeting House: Mississippi Territory. Having always regarded tile (sic) 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 on the occasion which presented itself. Among the various religious societies in our Country, none has been more vigilant or constant in maintaining that distinction than the Society of which you make a part, and it is an honorable proof of your sincerity and integrity, that you are as ready to do so in a case favoring the interest of your brethren as in other cases. It is but dust, at the same time, to the Baptist Church at Salem Meeting House, to remark that their application to the National legislature does not appear to have contemplated a grant to the land in question but on terms that might be equitable to the public as well as to themselves. Accept my friendly respects. James Madison.

LETTERS AND OTHER WRITINGS OF JAMES MADISON, FOURTH PRESIDENT OF THE UNITED STATES, IN FOUR VOLUMES, Vol. II 511-12 (Philadelphia: J.B. Lippincott & Co. 1865).

29. 403 U.S. 602 (1971).

(2) its primary effect neither advances or inhibits religion, and (3) it does not excessively entangle government with religion.<sup>30</sup> In *Lemon* the Court considered a Pennsylvania state statute that authorized the state to purchase secular educational services from private schools and directly reimburse those schools only for teacher's salaries, textbooks, and other types of instructional materials.<sup>31</sup> Most of the schools were affiliated with the Roman Catholic Church.<sup>32</sup> These schools were subject to state audit and had to "identify the separate cost of the secular educational service" to receive reimbursement.<sup>33</sup>

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."<sup>34</sup> The Court then warned of the dangers of providing state financial aid directly to a church-related school citing *Walz v. Tax Commission*<sup>35</sup> for the proposition that "[o]bviously, 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 . . . ."<sup>36</sup>

According to the Court, the history of government grants reveals that they typically result in various measures of government control and oversight.<sup>37</sup> The Court further notes that 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.<sup>38</sup> The Pennsylvania arrangement violated the First Amendment because the intent of the Establishment Clause is to protect religion from government interference or supervision.<sup>39</sup> Direct payments and state supervision would certainly violate Mr. Madison's expressed "purity" view of the proper relationship between church-related schools and the state.

In *Committee for Public Education & Religious Liberty v. Nyquist*,<sup>40</sup> the Supreme Court dealt with a program that provided direct money grants to certain nonpublic schools for repair and maintenance, reim-

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30. *Id.* at 612-13.

31. *See id.* at 607-08.

32. *See id.*

33. *Id.* at 621.

34. *Id.* at 620.

35. *Lemon*, 403 U.S. at 620 (citing *Walz v. Tax Comm'n*, 397 U.S. 664 (1970)).

36. *Id.* at 621.

37. *See id.*

38. *See id.* at 622-23.

39. *See id.* at 623.

40. 413 U.S. 756 (1973).

bursed low-income parents for a portion of the cost of private school tuition, including sectarian school tuition, and granted other parents certain tax benefits.<sup>41</sup> The Court decided that the maintenance and repair provisions of the New York statute violated the Establishment Clause because its effect was to subsidize and advance the religious mission of sectarian schools.<sup>42</sup> The Court also held that the tuition reimbursement plans, if given directly to sectarian schools, would similarly violate the Establishment Clause.<sup>43</sup> Notwithstanding the fact that the grants were delivered to the parents rather than the schools, the effect of the aid was unmistakably to provide financial support for non-public sectarian institutions.<sup>44</sup>

The *Nyquist* holding concerning payments to parents was substantially weakened with respect to vouchers by *Agostini v. Felton*.<sup>45</sup> In *Agostini* the Court stated, “[w]e have departed from the rule . . . that all government aid that directly assists the educational function of religious schools is invalid.”<sup>46</sup> 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. The Court noted that “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.”<sup>47</sup> 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 constitutionally valid because the state funds are paid directly to the student or parent rather than to the church-related school. As such, the State has no right to compel the church-related school to perform administrative tasks or submit to an audit. This benefit to the parent approach, which allows a tax deduction for parents for certain educational expenses whether they were incurred in private, church-related or public schools, is also seen in *Mueller v. Allen*.<sup>48</sup> It appears, however, that the decision left the *Nyquist* prohibition of aid paid “directly” to a church-related school unaffected.

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41. *See id.* at 762-66.

42. *See id.* at 774-80.

43. *See id.* at 780-89.

44. *See id.* at 781.

45. 521 U.S. 203 (1997).

46. *Id.* at 225.

47. *Id.* at 230.

48. 463 U.S. 388 (1983). 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. *See id.* at 399.



In *School District of Grand Rapids v. Ball*,<sup>49</sup> the Supreme Court dealt with a school district that adopted a shared time and community education program with nonpublic schools. The program was conducted for nonpublic school children at state expense in classrooms located in and leased from private schools.<sup>50</sup> The program 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.<sup>51</sup> The shared time teachers were full-time employees of public schools.<sup>52</sup> Of the forty-one private schools involved in the program, forty were church-related schools.<sup>53</sup> The Court decided that this initiative had the “primary or principal effect” of the advancement of religion, and, therefore, violated the Establishment Clause.<sup>54</sup> According to the Court “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.”<sup>55</sup> The Court held that “[t]he symbolic union of church and state inherent in the provision of secular, state-provided instruction in the religious school buildings threatens to convey a message of state support for religion to students and to the general public.”<sup>56</sup> Furthermore, “the programs in effect subsidize the religious functions of the parochial schools by taking over a substantial portion of their responsibility . . . .”<sup>57</sup>

Perhaps the most instructive case for our purposes is *Witters v. Washington Department of Services for the Blind*.<sup>58</sup> In *Witters*, the Court ruled on an objection to the State of Washington’s vocational rehabilitation program for the visually handicapped that financed petitioner’s training at a Christian college.<sup>59</sup> The record showed that assistance was provided under a Washington State program that paid money directly to the student, who then transmitted it to the educational institution of his choice.<sup>60</sup> The Washington statute authorized the state to “[p]rovide for

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49. 473 U.S. 373 (1984).

50. *See id.*

51. *Id.* at 375.

52. *See id.* at 376.

53. *See id.* at 379.

54. *Id.* at 397.

55. *Ball*, 473 U.S. at 382.

56. *Id.* at 397.

57. *Id.* The Court also said that the Establishment Clause “rests on the belief a union of government and religion tends to destroy government and degrade religion.” 473 U.S. at 398. (citing *Engel v. Vitale*, 370 U.S. 421, 431 (1962)).

58. 474 U.S. 481 (1986).

59. *See id.*

60. *See id.* at 483.

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.'<sup>61</sup> Witters, who suffered from a progressive eye disease, was eligible for vocational rehabilitation assistance under the terms of the statute. He chose to attend Inland Empire School of the Bible, a private Christian College in Spokane, Washington.<sup>62</sup> 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."<sup>63</sup>

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.<sup>64</sup> In the view of the Washington court, the state aid clearly had the primary effect of advancing religion and violated the Establishment Clause.<sup>65</sup> On appeal, the United States Supreme Court reversed this lower court decision. The Supreme Court said,

[i]t 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.<sup>66</sup>

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 school' from the State."<sup>67</sup> 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.'<sup>68</sup>

The facts central to the inquiry in the *Witters* case were whether (1) "any aid provided under Washington's program that ultimately flows to religious institutions does so only as a result of the genuinely independ-

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61. *Id.* at 483 (quoting WASH. REV. CODE § 74.18.130 (1981)).

62. *See id.*

63. *Id.* at 483.

64. *Witters*, 474 U.S. at 485 (citing *Witters v. Comm'n for the Blind*, 689 P.2d 53, 56 (1984)).

65. *See id.*

66. *Id.* at 486-87.

67. *Id.* at 487 (quoting *Grand Rapids School Dist. v. Ball*, 475 U.S. 373, 394 (1985)).

68. *Id.* (emphasis added).

ent private choices of aid recipients”<sup>69</sup>; (2) “[i]t is not one of the ‘ingenious plans for channeling state aid to sectarian schools that periodically reach this court;”<sup>70</sup> (3) “it creates no financial incentive for students to undertake sectarian education;”<sup>71</sup> (4) “[i]t does not tend to provide greater or broader benefits for recipients who apply their aid to religious education;”<sup>72</sup> and (5) “[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 by the State.”<sup>73</sup>

Importantly, nothing in the record indicated that, if Witter’s petition succeeded, any significant portion of the aid spent on the Washington program as a whole would end up flowing to religious education.<sup>74</sup> The Court stated that the respondent was “correct in pointing out that aid to a religious institution, unrestricted in its potential usage, if properly attributable to the state, is clearly prohibited under the Establishment Clause.”<sup>75</sup> But the respondent’s argument did not apply in this case because there was no *direct aid* to the religious school.<sup>76</sup> The Court decided that, on the facts presented, the Washington program did not constitute sufficiently direct support of religion so as to violate the Establishment Clause.<sup>77</sup> Justice Powell, concurring, said that the Washington scheme was constitutionally permitted because the student or parent directly received the state payments.<sup>78</sup>

Before turning to the Arkansas Scholarship program it would help to review the common threads that bind these cases together. First, requiring church-related schools to maintain administrative and accounting procedures for review by the state offends the Establishment Clause.<sup>79</sup> Second, payment of financial aid directly to a church-related school offends the Establishment Clause.<sup>80</sup> Third, when there is a disparity in the amount of state funds spent on public and church-related students the es-

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69. *Id.* at 487.

70. *Witters*, 474 U.S. at 488 (citing *Nyquist*, 413 U.S. at 785).

71. *Witters*, 474 U.S. at 488.

72. *Id.*

73. *Id.*

74. *See id.*

75. *Id.* at 489 (citing *Grand Rapids*, 475 U.S. at 395).

76. *See id.*

77. *See Witters*, 474 U.S. at 489.

78. *See id.* at 491 (Powell, J., concurring) (citing *Mueller v. Allen*, 463 U.S. 388, 399 (1983) 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.”).

79. *See Lemon v. Kurtzman*, 403 U.S. 602 (1971); *Agostini v. Felton*, 521 U.S. 203 (1997).

80. *See Lemon*, 403 U.S. at 602; *Walz v. Tax Comm’n*, 397 U.S. 664 (1970); *Committee for Pub. Educ. and Religious Liberty v. Nyquist*, 413 U.S. 756 (1973); *Grand Rapids School Dist. v. Ball*, 473 U.S. 373 (1985); *Muller v. Allen*, 463 U.S. 388 (1983); *Witters v. Wash. Dept. of Servs. for the Blind*, 474 U.S. 481 (1986).

establishment clause is offended.<sup>81</sup> Fourth, the Establishment Clause is offended by a program that creates a financial incentive for a student to attend a church-related school.<sup>82</sup> Finally, the Establishment Clause is offended if the government aid is really just an ingenious scheme designed to channel state aid directly to church-related schools.<sup>83</sup>

### III. THE PROGRAM AND ITS CONSTITUTIONAL INFIRMATIES

The Arkansas Governor's Distinguished Scholars Program offends the Establishment Clause for a wide variety of reasons. First, the program requires church-related institutions to agree to perform administrative tasks and insure compliance with state regulations. The institution must submit to a review of its records and demonstrate its due diligence as a *steward of state funds*.<sup>84</sup> One would believe that the administrators of church schools would object strongly to the grubby hands of state officials thumbing through their private school financial files. It is likely that these same administrators would object to having a Legislative Audit review of their books. It is clear that the regulations run afoul of the Establishment Clause holdings under *Lemon* and *Agostini* 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 under *Lemon*, *Walz*, *Nyquist*, and *Witters*. If there is one thing certain under these cases, the payment of state monies directly to a church-related school is unconstitutional.

Third, there is considerable disparity in the amount of state funds per scholarship provided to a church-related institutions when compared to public institutions under the program. Recall that Hendrix will typically receive \$15,000 while Southern Arkansas will receive \$4,730 per scholarship student.<sup>85</sup> There is also a disparity in the total funds sent to private and public schools. Church-related schools received \$2,182,000 and public institutions \$1,334,000 in the years 1998-99.<sup>86</sup> This disparity in treatment of public and church-related institutions also offends the Establishment Clause under *Witters*.<sup>87</sup>

Fourth, the program clearly creates a financial incentive for the Distinguished Scholar to attend a church-related school. This occurs because

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81. See *Witters*, 474 U.S. at 488.

82. *Id.*

83. See *Nyquist*, 413 U.S. 756 (1973); *Witters*, 474 U.S. 481 (1986).

84. See DHE, Rule 6(H).

85. ARKANSAS DEPARTMENT OF HIGHER EDUCATION, *supra* note 5.

86. See *id.*

87. See *Whitters*, 474 U.S. at 488.

the program is open-ended. The state pays whatever the church-related institution considers a reasonable level of tuition and fees.<sup>88</sup> The state sponsored creation of a considerable financial incentive to attend a church-related school is offensive to the Establishment Clause under *Witters*.<sup>89</sup>

Finally, and most controversially, this scholarship program, if newspaper reports are accurate, may be a scheme to channel state aid directly to church-related schools, a practice that offends the Establishment Clause under *Witters*.<sup>90</sup> According to Doug Smith, the impetus for the Distinguished Scholars program did not emanate from the DHE, but rather was proposed by State Senators.<sup>91</sup> The DHE had little choice in implementation because fifty senators sponsored the enabling legislation. One of the bill's 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.<sup>92</sup> But the impetus for the program is of questionable relevance because the legislation is so blatantly unconstitutional. A legal challenge of the program will almost certainly raise the issue of a scheme to support religious schools. It would be interesting to hear the explanations the Association would offer in support of having the state rummaging around in its private, church-related educational programs to determine stewardship of state funds.

Mr. Madison would also surely be taken aback. 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 business regulating a religious society, giving a religious society legal agency to carry into effect a public duty or giving direct aid to a religious society.<sup>93</sup> The Governor's 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. He believed that the Constitution granted government no power over religion. And, as in the Arkansas example, when a religious society accepts government funds in this manner the heavy hand of government regulation is sure to follow.<sup>94</sup> It makes no constitutional difference that the church-related schools volunteer for this regulation. This government regulation offends the Constitution!

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88. ARK. CODE ANN. § 6-82-312(b) (Michie 1998).

89. See *Witters*, 474 U.S. at 488.

90. See *id.*

91. See Doug Smith, *Pushing and Shoving for the State's Top Scholars*, ARKANSAS TIMES, Aug. 27, 1999, at 13.

92. See *id.*

93. See *id.*

94. See *id.*

As we shall see, this state of affairs is regrettable because there exists a relatively simple and constitutionally pleasing way to retain Arkansas' best and brightest students. But before broaching that subject one other serious problem with the Distinguished Scholarship Program requires examination.

#### IV. TITLE VI AND DISPARATE IMPACT

Section 601 of Title VI of the Civil Rights Act prohibits discrimination "on the ground of race . . . under any program or activity receiving Federal financial assistance."<sup>95</sup> Section 602 of the Act effectuates the provisions of section 601 to racial, color and national origin discrimination predicated on recipients administering programs and activities.<sup>96</sup> The U.S. Department of Education, in exercising its authority under section 602, promulgated 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 respects individuals of a particular race, color, or national origin."<sup>97</sup> It is undisputed that the state of Arkansas receives federal funds for numerous educational programs, thereby becoming subject to this regulation.<sup>98</sup>

Does this scholarship program have a disparate impact on black students? Only four (0.4%) of the 936 Distinguished Scholar scholarship recipients are black, while about 16.1% of the state's undergraduate students have this background.<sup>99</sup> The sole basis for selection of the scholarship recipients is a score of 32 on the ACT, 1410 on the SAT or being a finalist in the National Merit Scholarship competition.<sup>100</sup> In *Griggs v. Duke Power Co.*,<sup>101</sup> the Supreme Court introduced the theory of disparate impact discrimination by holding that a plaintiff need not necessarily prove intentional discrimination in order to prove that an employer has violated Title VII of the Civil Rights Act. Since then, "facially neutral employment practices that have significant adverse effects on protected groups have been held to violate the Act without proof . . . [of] discriminatory intent."<sup>102</sup> The theory is based on the idea that even unintentional

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95. 42 U.S.C. § 2000d (1994).

96. 42 U.S.C. § 2000d-1 (1994).

97. 34 C.F.R. § 100.3(b)(2)(1999).

98. *See id.*

99. *See* ARKANSAS DEPARTMENT OF HIGHER EDUCATION, *supra* note 5, tbl. IV.

100. *See* Doug Smith, *Pushing and Shoving for the State's Top Scholars*, ARKANSAS TIMES, Aug. 27, 1999, at 13.

101. *Griggs v. Duke Power Co.*, 401 U.S. 424 (1971).

102. *Watson v. Fort Worth Bank and Trust*, 487 U.S. 977, 986-87 (1988).

discrimination can be “equivalent to intentional discrimination,” because the ultimate outcome is the same.<sup>103</sup> Finally, courts have applied the employment disparate impact theory to cases involving Title VI.<sup>104</sup>

To demonstrate a prima facie case of disparate impact discrimination, a plaintiff-student must first show that the selection practice followed has caused a disproportionate effect that excludes him from an educational opportunity.<sup>105</sup> If such a showing has been made, the burden shifts to the defendant who must demonstrate that the selection practice is justified by “educational necessity.”<sup>106</sup> However, even if the defendant meets this burden, the complainant may prevail by offering an effective alternative practice that results in less disproportionality while still serving the goals of the educational program.<sup>107</sup> The racially disproportionate effect is typically demonstrated by the use of statistical evidence comparing the racial composition of the candidates selected compared with the qualified candidates in the pool.<sup>108</sup> Applying the Title VI criteria to this case, it is evident that the program would not survive the disparate impact test. Clearly, black students have been disproportionately impacted by the Distinguished Scholars standards. Only four of the 936 students selected, or 0.4%, were African-American.<sup>109</sup>

The next inquiry is whether the sole standards adopted by the State, ACT and SAT scores and becoming a National Merit finalist, are justified by “educational necessity.” To determine if there is an educational necessity the inquiry is whether Arkansas has some independent basis for choosing the cutoff scores. For example, the state might establish a cutoff score by using a professional estimate of the requisite ability levels to succeed in the scholarship program.<sup>110</sup> However, there is no evidence of such a professional study. The enabling legislation was presented to the General Assembly complete and without state agency input.<sup>111</sup> In order to survive a disparate impact challenge, the state must establish some-

103. *Id.* at 987.

104. *See e.g.* *Elston v. Talladega County Bd. of Educ.*, 997 F.2d 1394, 1407 (11<sup>th</sup> Cir. 1993); *Powell v. Ridge*, 189 F.3d 387, 391 (3d Cir. 1999) (holding that a disparate impact claim against the Pennsylvania school funding formula could proceed under Title VI).

105. *See Wards Cove Packing Co. v. Atonio*, 490 U.S. 642, 656-57 (1989).

106. *Board of Educ. of the City School Dist. of New York v. Harris*, 444 U.S. 130, 151 (1979).

107. *See Watson*, 487 U.S. at 998.

108. *See Wards Cove*, 490 U.S. at 650-55.

109. But would these disparate impact numbers justify a private cause of action under Title VI? The answer, apparently, is yes. *See Powell v. Ridge*, 189 F.3d 387 (3d Cir. 1999) (holding that a private cause of action exists to determine whether the funding of Pennsylvania schools has a disparate impact on black students); *Ring v. First Interstate Mortgage, Inc.*, 984 F.2d 924, 926 (8<sup>th</sup> Cir. 1993).

110. *See Watson*, 487 U.S. at 994-95.

111. *See Smith*, *supra* note 2 (concerning the drafting of the legislation).

thing more than a mere articulation of the basis – in this instance, to keep good students in Arkansas – for the cutoff score.<sup>112</sup> Recently the U.S. Department of Education proposed regulations that provide:

The use of any educational test which has [a] significant disparate impact on members of any particular race . . . is discriminatory, and a violation of Title VI and/or Title IX respectively, unless . . . there is no practical alternative form of assessment which meets the educational institution's needs and would have a less disparate impact.<sup>113</sup>

Moreover, a recent district court decision found that NCAA initial eligibility rules (Proposition 16) that solely utilized a minimum test score on the ACT or SAT for eligibility to play constituted a disparate impact on African-American student-athletes.<sup>114</sup> Although reversed on other grounds, *Cureton v. NCAA* is instructive because the NCAA rule is remarkably similar to the Arkansas scholarship program in its operation and impact. The NCAA's justification for its policy was to increase the graduation rate for black student-athletes and to close the gap between white and black athlete graduation rates.<sup>115</sup> But, alas for the NCAA, the court found that African-American athletes were already graduating at a greater rate than black students generally.<sup>116</sup> The practical effect of Proposition 16 was to restrict the access of black athletes to the limited number of college athletic scholarships available.<sup>117</sup> The court questioned whether this would decrease the graduation gap. According to the judge, proffering such a "back-end" (later graduation) balancing between graduation rates and entrance requirements violates the prohibition against using a "bottom line" (the blacks we accepted did well) defense against disparate impact in cases involving pass/fail selection procedures like those found in *Connecticut v. Teal*.<sup>118</sup>

An even stronger argument that a private cause of action exists against the state because of disparate impact is found in a Pennsylvania school funding case. The Third Circuit, in *Powell v. Ridge*, decided that

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112. See ARK. CODE ANN. § 6-82-301 (Michie 1998) (stating the purpose of the legislation).

113. Walter Williams, *Killing The Messenger*, ARKANSAS DEMOCRAT GAZETTE, Sept. 1, 1999, B10.

114. See *Cureton v. NCAA*, 37 F.Supp.2d 687 (E.D. Pa.1999), *rev'd on other grounds*, No. 99-1222, (3<sup>rd</sup> Cir. Dec. 22, 1999) (providing a roadmap of how courts might treat the Arkansas allegations. The Appeals Court reversed on the basis that the NCAA was not subject to the Title VI regulations because it does not directly receive federal funds and is not a program or activity covered by Title VI, citing *NCAA v. Smith*, 525 U.S. 459 (1999), that determined that the mere fact that the NCAA received funds from members that received federal financial assistance did not subject the NCAA to coverage under Title IX. The Court took great care to state that it did not reach the question of whether Proposition 16 created a disparate impact on a protected class under Title VI.)

115. See *Cureton*, 37 F.Supp.2d at 699.

116. See *id.* at 712.

117. See *id.* at 699.

118. See *id.* at 700 (citing *Connecticut v. Teal*, 457 U.S. 440, 446 (1982)).



in order to go to trial, all the plaintiff must do is plead that a facially neutral practice's adverse effects fall disproportionately on a group protected by Title VI and the implementing section 602.<sup>119</sup>

The final inquiry in a disparate impact case is whether there are other effective alternative means. To state it another way, one would ask if there are no other practical tests that have a less disparate impact that could be adopted that will achieve Arkansas' goal of retaining the state's best and brightest students. There is a recent Equal Protection case that is helpful in identifying other relevant factors that might be considered. In *Hopwood v. Texas*,<sup>120</sup> the court decided it was a violation of the Equal Protection Clause of the Fourteenth Amendment to take into account solely a person's race when making admission decisions.<sup>121</sup> The court said, however, that race may be considered along with a number of other factors such as playing the cello, making a downfield tackle, understanding Chaos Theory, economic status, life experience, family educational background, whether parents are alumni, how fast a person can run, marital status, disability status, ACT and SAT scores, and veteran's status.<sup>122</sup> Why not consider some of those other relevant factors as qualification standards for the Distinguished Scholars Program?

## V. THE CURE

It is quite easy for pointy-headed professors to criticize administrative policy. Of greater interest, perhaps, is how the state can accomplish its stated goal of retaining more of its best and brightest high school graduates. This article suggests three possible modifications to the program. First, the "direct aid" issue can be avoided by making payments directly to the graduating senior or his parents rather than directly to the schools. By doing this state funds would be expended based on the free choice of the student or parent. It would be the recipients' obligation to assure the state that the funds are being properly used and that the recipi-

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119. See *Powell v. Ridge*, 189 F.3d 387, 393 (3d Cir. 1999) (The plaintiffs alleged that the school funding formulas had a disparate impact on the Philadelphia School District that had a 77-80% minority student body. The court cited *Guardians Ass'n v. Civil Serv. Comm'n of New York*, 463 U.S. at 582, 607 n.27 (1983), for the proposition that administrative regulations incorporating a disparate impact standard (like section 602) are valid.).

120. 78 F.3d 932 (5<sup>th</sup> Cir. 1996).

121. See *id.* at 935.

122. See *id.* at 946. This approach is adopted by The Law School Admission Council. In its new publication, *NEW MODELS TO ASSURE DIVERSITY, FAIRNESS, AND APPROPRIATE TEST USE IN LAW SCHOOL ADMISSIONS 14-15* (Oct. 1999), the Council recommends several other criteria that schools might employ in addition to SAT/ACT scores. They are other academic factors, demographic and diversity factors, leadership and extracurricular factors, life accomplishments, character and fitness, personal qualities, and skills and abilities. The Council cites *Hopwood v. Texas*, 78 F.3d 932 (5<sup>th</sup> Cir. 1996), and *Wessmann v. Gittens*, 160 F.3d 790 (1<sup>st</sup> Cir. 1998), as major cases that require consideration of several factors in the admissions process.

ent is meeting the required hours and grade point standards.

Second, each recipient could be given the same dollar amount of educational subsidy. Assume every award is \$12,000. The recipient would be free to use these dollars to attend the institution of his choice. If 80% of the students decide to attend church-related schools, this would be constitutionally acceptable because it is their individual choice. If a recipient attends a public institution that costs \$8,000 per year, that would also be acceptable as that is their individual choice.<sup>123</sup>

Third, the DHE can easily draft regulations to comply with Title VI by listing relevant factors other than ACT and SAT scores to be taken into account when awarding the scholarships. *Hopwood* and the new Law School Admission Council Models tell us that a wide variety of factors such as athletic ability, economic status, military service, geographic residence, leadership ability, parental education level, foreign travel, family language, race/ethnicity, artistic ability, and other relevant life experiences can be taken into account. Considering these factors will typically allow for inclusion of disadvantaged members of society in the Arkansas program that are currently excluded by reliance solely on the applicants' SAT/ACT scores.

## VI. CONCLUSION

By implementing these three simple corrections, the Arkansas Governor's Distinguished Scholars Program would be brought into legal and constitutional compliance. These proposals would cure the infirmities of the scholarship program by achieving the intent of the program without offending the Constitution or Title VI.

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123. As noted in the example provided, there may be instances where monies granted exceed the amount necessary for tuition and fees. This could be remedied by the State insisting that any monies granted over and above tuition be spent for educational purposes and materials such as a computer, books, etc.