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ABOLISHING ACADEMIC FREEDOM IN FUNDED UNIVERSITY RESEARCH

An Analysis of the University of Delaware Research Committee Report of April 19, 1990, on the Pioneer Fund

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The University of Delaware, a state-funded university, has denied a tenured professor access through the university to her grantor of research funds, explicitly because of its alleged ideology. It has also told her that if that grantor funds her as a private individual, none of her resulting work may use university facilities nor count toward her salaried research duty. Each of these decisions, as an overt restriction on the viewpoint of faculty research, violates both academic freedom and the First Amendment.

On April 24, 1990, without Senate action, University President E.A. Trabant barred all Delaware faculty from receiving future research money through the university from a New York foundation, the Pioneer Fund, which had been funding the work of Educational-Studies professor Linda Gottfredson.[1] Trabant, no stranger to free-speech disputes, had made national news fourteen years earlier by firing Delaware's theater director for "advocating" homosexuality in a newspaper interview. For this escapade, Trabant was personally fined $5,000 by a federal judge to punish his "pernicious insensitivity" and "wanton disregard" for a faculty member's free-speech rights.[2] Trabant's new effort, the ban on the Pioneer Fund, relied[3] on a Senate Research Committee report[4] of April 19, which he had requested after a linguistics professor accused the Fund of racism. The Committee report's reasoning is as follows. Pioneer money is offensive to the University of Delaware because most Pioneer grantees' research, by asserting genetic racial differences in intelligence, tends to discredit racial equality and affirmative action, which are "special" internal policies of the university.

This argument, consistently applied, has wide implications. As shown below, nothing about genetic theories of IQ is specially relevant to Delaware's policies. Mean racial IQ differences, about the existence of which there is scientific consensus, either are consistent with Delaware policies or contradict them whatever their cause, genetic or environmental. To maintain the Pioneer ban, Delaware must therefore ban all grants through the university from any source that funds mainly critics of affirmative action — or, by extension, critics of any other policy the university may deem "special." Affirmative action is, of course, one of the most debated ethical, legal, and political issues of the day. If there were a Legal Equity Fund whose previous grantees had been Justices Rehnquist, Kennedy, Scalia, and Brennan, no Delaware professor could now hold a grant from this fund through the university, since its politics would be too offensive. Reverse discrimination has several prominent black critics and countless female ones; it is also one of the issues that divide Republicans from Democrats in national party platforms and Presidential campaigns. Thus, on Committee principles, a state university may adopt a specific political view, dividing America's two major parties, and by enshrining this view in a "special" internal policy such as affirmative action, it may then refuse faculty grants from all grantors most of whose grantees disagree with it.

On its face, any such ideological test for research violates academic freedom, and since Delaware is a state-supported university, the First Amendment as well. Everyone agrees that a state university may not declare itself in general as Republican or Democrat, and then place special burdens on all faculty of the other party. Equally clearly, it would violate academic freedom and the First Amendment for a state university to determine research funding by the grantor's party rather than the grantee's, i.e., refuse all

research funds from sources that fund mainly Republicans or mainly Democrats. The Supreme Court often uses just such "narrowly partisan or political" attempts at state "suppression of ideas" as hypothetical examples of what is most clearly unconstitutional.[5] Can it matter if a state university bans only agencies whose grantees oppose, not the Democratic party platform, but only one plank?

Or, politics aside, may a university specially burden all research discrediting a policy of its own, like affirmative action? Surely the answer is again no. Academic freedom does not let colleges ban all criticism of them, any more than the First Amendment allows governments[6] to do so. A university may not place special burdens on faculty simply because their work might put its own acts in a bad light. After all, universities have many internal policies, educational, political, and social, that faculty research supports or discredits. All sex-difference research — a field the Committee's argument covers just as much as it covers race differences — affects university policies on the sexes. All alcoholism research affects policy on student drinking; all research in medicine or psychotherapy affects the student health service; all nutritional research affects the dining halls; all kinesiology affects athletics; and so on. All education research affects instructional policies. Does this mean that a university may adopt official dogmas in medicine, psychiatry, psychology, nutrition, education, and every other field whose findings touch its own acts, and then ban all grantors whose grantees mostly hold other theories?

Of course not. The Committee's principles, consistently applied, replace academic freedom in funded research with a system of party lines in every intellectual discipline. Official ideologies may fit education in Iran, North Korea, Nazi Germany,[7] Maoist China, or the pre-glasnost Soviet bloc, but they are intolerable and illegal in an American state university. In fact, the Committee's principles leave state universities with less academic freedom than Catholic ones, an absurd result. If any college has a "mission" -- the favored local term for Delaware's commitment to race equality — then Catholic universities have one, the mission to promote Catholicism. Trabant and the Committee seem to assume that state universities may adopt similar "missions" at will, such as affirmative action. But even Catholic schools do not use their mission to censor faculty research by denying all access to non-Catholic, or anti-Catholic, funds. Only Delaware's mission is so urgent as to limit intellectual freedom, suppressing faculty dissent via ideological funding tests.

Admittedly, Delaware's funding ban has new features not found in past academic-freedom cases. But the novelties weaken, not strengthen, its position. First, ideological tests are less defensible for external funds than for internal funds. A university, if it controls anything, controls its own money. Yet no academic-freedom expert would accept a policy barring internal grants to faculty who oppose affirmative action, or the University President, or the state of Delaware, or the Democratic party. These are not "hard cases." But if a university may not control the viewpoint of faculty research with its own money, surely it may not do so with someone else's. Second, if a university may not ban funds because of what its own faculty write, still less may it ban funds because of what other faculty write who are funded by the same source. Such reasoning is guilt by association. The Committee's argument, then, justifies the Pioneer ban a good deal less well than it justifies acts that clearly violate academic freedom and the First Amendment. If Delaware cannot politically restrict internal funds, a fortiori it cannot politically restrict external funds; if it cannot deny professors grants for what they say, a fortiori it cannot deny them grants for what other people say. The argument dissolves on a moment's scrutiny; it is intellectual sleight of hand, too irrational even to be specious, which

is probably why it has never been made before.

There is, of course, no doubt that funding bans burden faculty research, an effect implicating academic freedom and the First Amendment. Banning any source reduces the number of sources, making it harder for a professor to finance research time. And banning sources with one ideology makes it harder to finance research with that ideology than with a different one, which amounts to official pressure to hold specific views. Note also that ideological funding bans of any variety threaten academic freedom just as clearly as other denials of privilege. All faculty benefits, from salary to research support, are privileges, not rights. Yet no policy would be acceptable that denied everyone with specific views promotion, or halved their salary, or reduced it to $1, or fired them. It does not matter in the least whether political tests are used to reduce a past benefit (salary) or to refuse to grant a new one (promotion or internal grant). Either way, a public university may not, without compelling necessity, use political tests for faculty privileges, or any ideological tests except intellectual quality or disciplinary membership. Neither quality nor discipline is an issue in the Pioneer controversy; as regards quality, Delaware promoted Gottfredson for excellence in her research while banning the agency that funded it.

In short, ideological research-funding bans are indirect censorship. Since they work to channel doctrine, the university bears a burden of proof. Delaware must offer an acceptable defense, passing what the Court calls strict scrutiny, or it has violated the First Amendment. But Delaware's justifications fail. As shown below, the Committee report states no relevant difference between the Pioneer Fund and other funds, no relevant difference between race and other topics, and no policy consistent with academic freedom. It is a report written and adopted in ignorance of American free-speech principles. As part III shows, the Pioneer ban is unconstitutional on every First-Amendment theory now or recently represented on the Supreme Court.

The main points of the analysis below are as follows. The Committee claims that Pioneer has an ideology of fundamental genetic race differences, and that this ideology conflicts with Delaware's own, as shown by its commitment to race equality and affirmative action. This argument fails for four independent reasons:

(1) Pioneer does not have the genetic ideology alleged.

(2) If it did, that ideology would have no special conflict with Delaware policy because:

- (a) Trait inferiority does not imply global inferiority, and group inferiority does not imply individual inferiority.
- (b) If IQ is largely fixed by college age, only the existence of group IQ differences is relevant, not their causation.

(3) Even if Pioneer had the ideology alleged and it conflicted with Delaware policy, ideological research restrictions in public universities are unconstitutional.

I. THE COMMITTEE'S MAIN ARGUMENT.

The Committee sums up its main argument in two places, the "Abstract" [1] and the "Conclusion" [11]. The Abstract begins:

> The University of Delaware should neither seek nor accept any further financial support from the Pioneer Fund as long as the Fund remains committed to the intent of its original charter and to a pattern of activities incompatible with the University's mission. ... A preponderant proportion of the activities supported by the Fund either seek to demonstrate or start from the assumption that there are fundamental hereditary differences among people of different racial and cultural backgrounds, and the procedures of the Pioneer Fund offer no assurance that financial support is extended without prejudice and according to academic merit. ...

The Conclusion expands this argument slightly:

> ...the Pioneer Fund is committed to the proposition that people of different ethnic and cultural backgrounds are on the basis of their heredity inherently unequal and can never be expected to behave or perform equally. According to this view, which the activities supported by the Fund propagate, affirmative action plans are unjust and doomed to failure, and should be abandoned. The University of Delaware's express commitment to the equal treatment and consideration due to people of whatsoever ethnic and cultural background, and its commitment to affirmative action policies, is in sharp conflict with the position embraced and supported by the Pioneer Fund. ... Application to a funding organization under University auspices and through University procedures, and the administration of received funds through University offices, involve the University as a partner with the external funding agency, and the University has a right to decide against undertaking such a partnership. [11]

These two passages state the main argument for refusing Pioneer money: Pioneer ideology is in "sharp conflict" with Delaware's own. Besides this argument, the Report objects to various Pioneer procedures [8-11]. But it says these procedural points, discussed below,

> are not in and of themselves either singly or even taken all together sufficient grounds for the University to refuse to accept funds from that organization [8].

Thus the Committee recommendation rests on the argument of the first two quotations, and so, therefore, does the legality of the President's ban.

A. Pioneer's Nonexistent Racial Ideology.

1. The Pioneer charter. The first quotation mentions two aspects of the Pioneer Fund, "the intent of its original charter" and its "pattern of activities." But Pioneer's charter is arguably irrelevant; in fact, the Committee only uses it to show Pioneer's "activities" and their "intent." The charter authorizes two activities: giving financial aid to children and supporting human "heredity and eugenics" research [5]. Since the Fund has never used the scholarship provision, its only "pattern of activities"

has been funding research. Nevertheless, the Committee attacks the scholarship provision for its preference for

> children who are deemed to be descended predominantly from white [in 1985 "white" was deleted] persons who settled in the original thirteen states prior to the adoption of the constitution of the United States and/or from related stocks. [5; Committee insertion]

The Committee admits that just as, in its view, the "1937 Pioneer Fund charter was explicitly a 'for whites only' document," so too was the University of Delaware at that time "for whites only" [5]. But since then Delaware "has made great efforts to change." As evidence, the Committee cites Delaware's desegregation, its affirmative-action plan, and its President's Commission to Promote Racial and Cultural Diversity. But did not the Pioneer charter also "change" in 1985 by deleting the word 'white'? Yes, but this change, the Committee complains, occurred only under pressure of "public criticism."

All of this is a highly disingenuous argument for Delaware to make, and shows the Committee's low debating standards. In the first place, Pioneer was never "for whites only," while Delaware was. Pioneer's original scholarship provision had a white preference, not a ban on all blacks; Delaware had a ban on all blacks. In the second place, Delaware was cited as late as 1981 by the U.S. Education Department for still maintaining a racially segregated "dual school system."[8] Until August 1989, when Delaware was at last certified to have eliminated its last vestiges of segregation,[9] its "mission" and "commitment" to racial diversity have developed during a period of continual agency supervision and risk of federal penalty. Pioneer changed its charter under "public criticism," a weaker force than federal law. So both Delaware and the Pioneer Fund charter originally discriminated against blacks, but Delaware did it absolutely; neither discriminates today; and Delaware changed under pressure from stronger forces. In fact, since no scholarships were ever given, arguably the Fund, unlike Delaware, rejected racial preferences from the moment of its inception.

Since no scholarships were awarded, the scholarship provision's language or "intent" seems irrelevant to Pioneer's current activities. The Committee takes the provision to prove the Fund's racial "views" [6] and their "conflict" [6] with the University's own views. In fact, at the risk of being pedantic, the scholarship provision states no "views," only awards money to certain people. A bequest is not a thesis; a testator may leave money to a group of people -- to a family or a town, to Jews, Catholics, or blacks -- without thereby asserting or assuming that this group is superior to other groups. Only by misconstruing as a "view" a group preference in a never-exercised scholarship provision, whose original racial language, less offensive than Delaware's own, was struck years before Delaware met Federal race regulations, can the Committee convict the Pioneer charter of racism. The Committee does not attack the provision on heredity research. Thus the charter itself, on analysis, offers nothing that justifies a state university in banning Pioneer funds.

2. <u>Pioneer "activities</u>." That leaves the Fund's "pattern of activities." The Fund's activities are, of course, the research of its grantees, discussed on pp. 6-8. The Committee first admits that Pioneer has funded some ordinary medical research, but it criticizes the Fund's list of diseases studied. That list is said to include

> AIDS, heart disease, hemophilia, nutritional deficiencies [and their] impact on intelligence, periodontal disease, pregnancy problems, psychoses,

> schizophrenia, sickle cell anemia, Tay-Sacks [sic] disease and Tourette's syndrome [6].

One might, the Committee complains, expect this list to evoke

> a sympathetic response to diseases that exclusively or predominantly affect a wide range of racial and ethnic groups. Such suggested balance of activities is in fact seriously misleading when the amounts and numbers of the grants involved are considered. Since 1982 ... only one of the organizations involved with study or treatment of the diseases associated with ethnic communities which the Pioneer Fund states it has supported, the Tay-Sacks Prevention Program of the Shriver Center for Mental Retardation, has received any financial support, and that support was one single grant for the sum of $1,000, in 1984. [6]

Tay-Sachs disease is a fatal childhood disease striking almost exclusively Jews, not "whites" or "residents of the original thirteen colonies." Apparently, then, the Committee simply objects to the Fund's failure to cover "a wide range of racial and ethnic groups." It is using a racial/ethnic distribution test for medical research: agencies that do not show ethnic fairness, studying disease in many ethnic groups, are politically unacceptable. Such a rule would, of course, deny Delaware researchers funds from a Tay-Sachs Foundation, a Sickle-Cell Anemia Foundation, and many other actual or possible grantors. What the rule mainly shows is the extreme lengths to which the Committee is willing to go in politicizing university research.

But the Committee's main objection to the Fund's medical research is that it is dwarfed by non-medical research into racial and ethnic differences. What is objectionable about the non-medical research, however, is not so clear. On p. 1 and in italics on p. 6, the Committee charges that "a substantial, even a preponderant portion" [6] of Pioneer-funded researchers

> either seek to demonstrate or start from the assumption that there are fundamental hereditary differences among people of different racial and cultural backgrounds. [1,6]

Now clearly hereditary group differences, which define race, are not a forbidden idea _per se_. Then races would not exist, and Delaware's countless official race policies would make no sense. Apparently, then, physical race differences in skin color, anatomy, and physiology are not "fundamental." What kind of differences are fundamental, and why? For example, are physical sex differences fundamental? Physical sex differences bear on many university policies, such as women's sports teams. Will the Committee suppress research that could threaten women-only sports, such as feminist studies of how to minimize testosterone effects on muscle?

It should also be noted that many liberals believe some race differences to be "fundamental," for psychological race differences are a common liberal argument for college race diversity. This kind of view, heard from both feminists and black intellectuals, assumes that sexes and races differ mentally in a way that produces unique race- or sex-specific contributions to intellectual inquiry. The Committee does not discuss this argument. Probably its view is that psychological race differences are environmentally determined, not "hereditary." In that case, since Delaware's "diversity" and affirmative-action policies are based on race, not environment or culture, one might

ask what justifies assuming that race and culture match. Why assume that all blacks, and only blacks, have "black culture," regardless of their background, and then admit, hire, and promote on race rather than culture?

At any rate, the Committee's objection is not merely to hereditary race differences, or psychological race differences, but to hereditary psychological race differences when "fundamental." It is such race differences that Pioneer grantees are cited for asserting [7-8]. Arthur Jensen is said to believe in an inherited g factor of general intelligence 18% lower in blacks than whites. J. Philippe Rushton is said to believe in hereditary race differences in "intelligence ... sexual restraint, personality, and social organizations" [7]. Robert Gordon is said to believe that hereditary racial g-differences are related to race differences in crime. These are the three main examples of forbidden Pioneer ideas that the Committee offers. Besides these, it cites only Pioneer's support of two immigration-control organizations studying the demographic or eugenic implications of illegal aliens, and of another organization that published an ad for John R. Baker's book Race. This book is a standard 600-page treatise from Cambridge University Press. The Committee quotes the ad as asserting, among other things, that "History depends to a great extent on race" [8]. Since this is a platitude in U.S. politics or in any Black-Studies department, one can begin to detect an odor of witch-trial, where innocuous statements suddenly become proof of depravity.

The Committee's claims about its researchers are inaccurate. Gordon, like Gottfredson, his long-time collaborator, does not claim race differences in intelligence to be hereditary. One can study social effects of mental differences between races, or between any groups, without making causal claims about their origin; that is what Gordon and Gottfredson do. Since Gordon, Gottfredson, and other similar writers are major recipients of Pioneer money, the Committee cannot claim that a "preponderant" [1,6] part of Pioneer money goes to assert hereditary psychological race differences. In fact, very few Pioneer grantees assert that psychological race differences are hereditary in any Pioneer-funded publications. Most Pioneer-funded work is not about genetic effects in psychology at all, racial or otherwise; and the Fund's president, Harry Weyher, estimated that only 20% of its work is on race.

How can this be, given the charter restriction to "heredity and eugenics"? One reason is that historically (if not etymologically) the "eugenics" movement studied environmental as well as genetic influences on human development. Especially was this true of what historian Daniel Kevles calls "reform eugenics,"[10] the wing to which Pioneer founder Frederick Osborn belonged. Of the rise of reform eugenics, Kevles writes:

> Yet if the mainline movement collapsed, the eugenic idea by no means died with it. ...
>
> The large majority of [the new reform] advocates differed considerably from their mainline predecessors. Some — like Ronald A. Fisher ... were antiracist conservatives; others were social radicals in the tradition of George Bernard Shaw and Havelock Ellis. The prominent biologists among them ranged from the moderate left to the Marxist left -- from Julian Huxley and Herbert S. Jennings to Lancelot Hogben, J.B.S. Haldane, and Muller. ...
>
> Similar convictions characterized the new generation of leaders in organized eugenics, particularly Frederick Osborn, in the United States, and C.P. Blacker, in England. ... [Osborn's] reading turned him against the mainline creed, particularly the racist and anti-immigrant claims so central to the American eugenics movement. ...

> What differentiated reform eugenicists from the standard reformers of the day was [only] their conviction that biology counted — that not only did nurture figure in the shaping of man but so, significantly, did nature. ...
>
> The reformers recognized, however, that hardly anything was known about precisely what role heredity played in the achievement, or lack of it, of the bulk of the population. Inadequate housing, medical care, education, and opportunity could just as easily as heredity account for the dissolution and physical or mental disease among lower-income groups. ...
>
> ... Reform eugenicists [including Osborn] felt compelled by such [IQ] evidence to break away from the identification of innate ability with race or class ....
>
> They also argued the importance, to both eugenics and the social welfare, of adequate diet, health care, housing, and education. They called for the abolition of slums; the creation of decent housing and of recreational and day-care centers; the right to a job and a fair wage. ... In a celebrated 1936 lecture to the British Eugenics Society, Huxley said flatly that a system based on private capitalism and public nationalism was ipso facto dysgenic: it failed to utilize existing reservoirs of valuable genes and it led to the ultimate dysgenics — war. [174]

From even these brief excerpts, one can see that in Osborn's era, the "eugenics" movement was not wedded to genetic over environmental causation of individual, class, or race differences. The leftists and Marxists of reform eugenics differed from fellow leftists or Marxists mainly in giving both nature and nurture a role in human development, that is, in not being total environmentalists. Clearly, there is no historical reason why Pioneer research must be genetic to be faithful to its "eugenics" heritage. So it is not surprising that today, most Pioneer research does not depend on genetic explanations, and little asserts genetic psychological race differences.

The Committee is simply wrong, then, to claim that Pioneer research is "preponderantly" on genetic race differences. It also has a fallback term 'substantial', appearing on p. 6 but not in its Abstract [1]. Unfortunately, this term ruins its official argument. Officially, the Committee argues that the Pioneer Fund has a guiding ideology, or "view" [6] or "proposition" [11], contradicting the university's own. This is already an unacceptable reason to deny a professor research funds. But now the Committee is reduced to arguing that a university may reject any grantor a substantial proportion, though perhaps not even most, of whose grantees disagree with it. This rule could ban any fund that funded about equally both sides of any controversy on which Delaware has a position. Really, one suspects, the Committee thinks that to fund anyone with certain ideas, such as genetic psychological race differences, taints a funding agency so badly that Delaware should wash its hands of it forever. But if so, it would be more honest to say so explicitly. In any case, it is false that the Pioneer Fund has an ideology of genetic psychological race differences, and this point alone blocks the Committee argument, which is based on misrepresentation.

B. <u>Race, Sex, Genetics, Inferiority, and Affirmative Action</u>.

Secondly, why is the idea of genetic psychological race differences, alone among scientific topics, too shocking for the University of Delaware to take grant money to study it, or even for any other purpose from an agency that has paid for its study? Not because hereditary psychological race differences per se invalidate Delaware policies like "diversity" and affirmative action. Every Delaware policy the Committee mentions exists

for sex as well as for race. Delaware once barred women as well as blacks from admission; affirmative action applies to both women and blacks; there is a Commission on the Status of Women, and also women, like blacks, fall under the aegis of the Commission to Promote Racial and Cultural Diversity; there is a Women's Studies as well as a Black Studies program; etc. Indeed, when describing Delaware's "special commitment" to "racial and cultural diversity" [4], the Committee itself says that it

> is a special commitment by the University, reflecting its effort to redress the results of generations of cultural, _gender_ and especially racial discrimination. [4; italics added]

Gender is not explicit in other Committee formulations. But on its own terms, if hereditary psychological race differences per se destroy Delaware policy, then so do hereditary psychological sex differences.

So work on innate psychological sex differences may be the next to fall to Delaware's new political ax. But psychological sex differences are one of the most active research areas in social science. One important, much-studied question is their origin, whether biological, environmental, or a mixture in some proportions. Science cannot study the origin of sex, race, or any other differences while ruling out some hypotheses as impolitic; one who decides causal issues politically is not doing science, but political advocacy. For many years, feminists brought intense pressure on researchers, many of them women, to stop all work on biology in sex psychology. Recently, however, feminists abruptly reversed their field; now biological sex differences in psychology are a hot topic in feminism too. In any case, almost all scientists, including most feminists, now believe in genetically-based differences in the male and female mind. Women are widely thought naturally better in verbal ability, social empathy, nurturance, and cooperativeness, men naturally better in mathematical ability and aggression. Equally trite are differences in psychosexuality. Hardly any difference in psychology, or even in brain anatomy, is not now claimed by some to reflect sexual biology, usually via sex hormones' action on fetal brain. Thus, if Delaware's policies somehow deny hereditary psychological sex differences, they are probably wrong. But if they do not deny hereditary psychological sex differences, how can the same policies deny hereditary psychological race differences?

Some hereditary psychological race differences attributed to Pioneer grantees are, in fact, much like known sex differences. Rushton was said to claim hereditary race differences in "sexual restraint, personality, and social organizations" [7]. That women and men naturally differ in all three areas is now orthodox. Moreover, similar theories of race differences are held by some black intellectuals. Just as women assert sex differences, blacks assert race differences. New York's City College is now embroiled in a controversy about two professors, one white and one black, both of whom emphasize race differences. The white, Michael Levin, holds views similar to Pioneer researchers'. The black, Leonard Jeffries, Jr., calls blacks "sun people" and whites "ice people" and claims a long list of social and psychological differences in the two races as being the key to their respective histories. I do not know whether Jeffries thinks his differences cultural or genetic; but if they are merely cultural, their relevance to New York City black college students is questionable.

In any case, whether a group difference is cultural, genetic, or a mixture cannot be decided politically. There is no _a priori_ reason why genetic race differences must be only physical ones. Whatever evolutionary environments created race traits may have

created mental as well as physical distinctions. It is clear, for example, that Oriental babies are quieter than non-Orientals; whether this quietness is genetic, or an intrauterine effect of their mothers, or due to some other factor is unknown. Nature-nurture issues affect basic theory in all biomedical and social science. The way to decide them is by research, not research bans. That dangerous falsehoods, like Victorian or Nazi racial science, once dominated an intellectual field cannot spoil the field forever; if it does, astronomy is contaminated by astrology and neurobiology by phrenology. Science never assigns fundamental issues forever to intellectual purdah. If there are no genetic psychological race differences, science will, of course, so determine. But to forbid scientific theories on political grounds is anti-scientific and anti-intellectual. That people willing to do so can compose a university Research Committee is more appalling than any activity alleged of the Pioneer Fund.

But there is a more specific argument hinted by the Committee's text. This argument may apply to intelligence; but it does not apply to other Pioneer research topics such as "sexual restraint, personality, and social organizations," a matter of some importance. On p. 11, the offensive Pioneer view is that races are "inherently unequal," with blacks inferior to whites. The Committee writes:

> the Pioneer Fund is committed to the proposition that people of different ethnic and cultural backgrounds are on the basis of their heredity inherently unequal and can never be expected to behave or perform equally. According to this view, which the activities supported by the Fund propagate, affirmative action plans are unjust and doomed to failure, and should be abandoned. [11]

The Committee seems to be arguing as follows. Pioneer work says that some races are genetically inferior in intelligence; the university believes in race equality, i.e., "the equal treatment and consideration due to people of whatsoever ethnic and cultural background" [11]; so Pioneer ideology contradicts university ideology, which admits no genetically inferior races. This argument makes a hidden shift, from "inferior in intelligence" to "inferior" period. If we avoid the vulgar confusion of moral or legal "equality" with factual identity, obviously not just any genetic difference contradicts equality. Any two people or groups differ, so mere difference cannot destroy ideals of "equality." When the Declaration of Independence says "all men are created equal," it does not mean that all men are created identical. Similarly, the university's "commitment" to "equality" cannot require that there are no hereditary psychological race differences. If it did, then the university must also deny the innate psychological sex differences current evidence reveals. If women's mean verbal ability exceeds men's, or men's mean mathematical ability exceeds women's, that cannot contradict any legitimate ideal of sex equality.

If an egalitarian university can admit that on average, men beat women in mathematical ability, why cannot it also admit that on average, whites beat blacks (as Orientals beat whites) in intelligence? Presumably because intelligence is -- or the Committee thinks it is -- a trait so crucial that inferiority in IQ entails inferiority period, or "fundamental" inferiority, or, as I will call it, global inferiority. No one could support a ban on trait inferiority research -- inferiority in specific traits -- since that would ban sex-difference and age-difference research. But perhaps Delaware can ban statements of global inferiority, such as that blacks are inferior to whites period.

However, there are two major problems with such a rule. First, no serious writer

makes explicit global inferiority claims. It is no claim of Pioneer grantees that blacks are globally inferior to whites. The Committee offers no evidence of such a claim; it could not do so, because the statement is not a scientific one. What Pioneer writers and others claim is inferiority in measurable traits, like IQ. Given a choice of measure, trait inferiority is a fact, not a value judgment. But global inferiority can hardly be interpreted as anything but a value judgment. That is one reason explicit global inferiority claims are virtually unknown in scholarly work, as opposed to hate literature.

What the Committee really means to do is to adopt a two-part ban: to ban (i) claims of global inferiority (i.e., classic racism) and also (ii) claims of trait inferiority that imply global inferiority. The problem with this proposal is that to decide when a claim of trait inferiority "implies" global inferiority requires a debatable value judgment. Whether a trait like IQ is important enough to make trait inferiority global inferiority is a matter of opinion. A group inferior in mean IQ may be superior in other assets -- empathy, energy, moral character, creativity, etc. -- precisely as a sex inferior in mean mathematical ability can be superior in other ways. To see that intelligence isn't everything, one need only spend time with academics.

This point is far from a quibble even in a university. Delaware never assumes that IQ inferiority is global inferiority for individuals rather than groups. Delaware is "committed" to "equal treatment" of all people, not just equal treatment of race or sex groups; if it were not, it would be morally derelict. Indeed, the Diversity Commission charge specifically mentions respect for "individual differences" in parallel with "cultural differences" [4]. But individuals differ in IQ. So if individual IQ differences do not make some individuals globally inferior, or make Delaware's "equal treatment" of them impossible, then group IQ differences cannot either. Logically, therefore, race IQ differences fit the Commission charter just as well as individual IQ differences. Again, the university surely desires "equal treatment" of other kinds of group -- for example, of Delaware vs. non-Delaware residents, or of upper vs. lower Delawareans. But the university well knows IQ differences among these groups.

There is another basic distinction that the Committee loses sight of. Statistical claims of group difference prove nothing about a given pair of individuals. Race differences in IQ parallel sex differences in height. Men's mean height is greater than women's mean height, but that does not prove that in a given mixed couple, the man is taller; the woman may be twice as tall. Similarly, of a given black-white pair, the black may have an IQ twice the white's. Insofar as it may be assumed that typical Pioneer grantees are politically conservative, their view will be precisely that individuals should be treated as individuals rather than as members of a group. To conservatives, it is liberals who treat individuals unfairly by awarding them entitlements or penalties on the basis of group properties rather than individual merit. The same point also suggests that black students have no reason to be offended by claims of group mean IQ difference. They have no more reason to be so offended than white students have to be offended at claims that Orientals' mean IQ exceeds whites'. That one's race's mean IQ is higher or lower than some other race's cannot change one's own IQ in the least.

It is, therefore, very hard to see how claims of group mean IQ differences could violate any rational Delaware policy of "equality." Delaware no more ought to have a policy of factual identity between groups -- whether races or sexes -- than it has a factual policy of identity between individuals. No doubt most Delaware faculty believe that races are genetically equal in their potential for developed intelligence. But that is their belief, not university policy, and as a factual belief it risks being disproved

by research. Once one chooses an intelligence measure, which is a general psychometric issue independent of race or sex, racial equality in intelligence is a factual claim. There is no real reason for a university to have such "policies" of group factual identity. Rather, what Delaware presumably has, or ought to have, is a policy of moral equality, one that says that no one should suffer invidious discrimination because of group membership. To conservatives, such a policy not only is not the support of affirmative action, but is inconsistent with it. True equality means precisely to treat everyone as an individual, not a group member, which rules out racial preferences however "benign."

At least one kind of affirmative-action policy clearly does make a factual assumption of race and sex IQ equality: the kind that requires reverse discrimination until the sex distribution of every unit is 50:50 and its race distribution matches the population. The Committee seems to assume that Delaware has this kind of affirmative-action plan, and given recent statements by administrators, it may be right. If so, that shows that Delaware has, unwisely, chosen a policy while making empirical assumptions that science may disconfirm, and that science has already disconfirmed in the case of sex differences in motivation and race differences in intelligence. In any event, that research will make a university look foolish excuses neither its direct censorship nor its indirect censorship via funding bans.

The most important point of all is this one: the reasonableness of any variety of affirmative action does not depend on whether race IQ differences are genetic. At most it depends, first, on whether race IQ differences exist; second, on whether IQ affects college performance; and third, on whether IQ is more or less fixed by college age. The first and second views are widely held. The third is true insofar as IQ is genetic; but it is equally true on countless environmental theories of IQ. The Committee writes:

> According to [Pioneer grantees' genetic theories], affirmative action plans are unjust and doomed to failure, and should be abandoned. [11]

They are doomed, the Committee thinks, because students of different races "can never be expected to behave or perform equally." But what threatens affirmative action policy, if anything, is the racial IQ gap itself — not genetic theories of its origin. Genetics has no more power to discredit any affirmative action plan than any other theory on which adult IQ differs by race and cannot be changed by the University of Delaware.

Actually, some writers defend affirmative action even given fixed group IQ differences. Such writers argue that if a group's ability is lower, a university has a duty to try harder to help them succeed, as with any group of weaker students. So in fact, the Committee's moral premise that group IQ differences condemn affirmative action is not universal even among liberals. What is clear is that Pioneer's alleged focus on genetic theories in no way uniquely threatens affirmative action. Race IQ gaps have the same implications, or lack of them, for college life if genes have no effect on IQ, but instead IQ is wholly environmentally determined by babies' early maternal stimulation, by their diet, by their TV habits, or by their elementary-school teachers. What matters is only that IQ affects college success, that IQ is mostly fixed by age 18, and that races differ in mean IQ. But the third statement is not controversial among psychometricians, nor, for that matter, is there now significant controversy over racial test bias. So if Pioneer has a "view" contradicting university policy, that view is just the current consensus of psychology. In that case, Delaware should ban any agency making a

"significant" number of psychometric grants, i.e., many major social-science grantors.

On analysis, then, the Committee must argue one of two things. First, it may argue that the university must refuse all support for the very idea of mean race differences, however caused, in any fixed adult ability affecting college success. If so, then it should refuse funds from most, if not all, major social-science grantors. Second, the Committee may argue simply that science apart, Delaware should ban any grantor that funds a "significant" number of overt critics of affirmative action. We assumed earlier that the Committee intends the second argument, because of its constant mention of affirmative-action policy and of Pioneer's desire "to influence [public] policy" [6,7], which is otherwise a normal grantor goal. But which argument one chooses hardly matters, since the conclusion of either violates academic freedom if any funding ban can. The only theory that supports the Pioneer ban is that universities have sole discretion to reject any external funds, at their pleasure, for any reason or none. If this is false, as shown in III, then Delaware's Pioneer ban is unjustified, for the Committee's own reasoning fails on any reading. Pioneer does not have the ideology the Committee claims; and if it did, that ideology would have no unique conflict with any Delaware policy.

II. MISCELLANEOUS ISSUES.

A. The Committee's Remarks on "Academic Freedom." The Committee invites us to

> distinguish between a faculty member's right to pursue research and a faculty member's privilege to seek funding for that research through the University. [2]

Quoting Trabant and later the Faculty Handbook, it admits "the fundamental right of a faculty member to pursue research in a field of the faculty member's choice, even if that research is unpopular" [2]. But, it suggests, academic freedom cannot require university grant processing. A university, for its part, has a "right to restrict possible funding sources" so as to maintain "control over its own destiny" [3]. Such a university right is already clear from existing policies blocking grants for classified research or from corporations in which faculty hold equity, creating a conflict of interest.

The Committee names no limitation on this alleged right of a university to reject faculty research funds. It merely says that Delaware has "a right to establish its own priorities, interests, and commitments," and cites classified and proprietary research. Thus the Committee seems to give universities absolute discretion to reject external funds, including research grants. But this view is untenable for reasons stated above. The Committee believes that rejecting external research funds cannot violate academic freedom. In that case, a public university has a "right" to set its "priorities, interests, and commitments" in research to, e.g., the national platform of the Democratic party, or the Republican or Consumer or Communist party. It has a "right" to refuse all future grants to any professor who has criticized the university, its President, or its affirmative-action plan. It has a "right" to refuse funds for faculty until they recant, and stop teaching and writing that abortion is murder, or that Marx was right, or that the Vietnam war was moral, or that aid to Nicaraguan contras is unjustified.

All such policies are grotesque violations of academic freedom. The Committee's own two examples, restrictions on grants for classified or proprietary research, are procedural restrictions. Thus they resemble time-place-manner restrictions on First

Amendment free speech. By contrast, our examples are content restrictions unrelated to academic quality, as is Delaware's banning Pioneer money because Pioneer ideas threaten affirmative action. The Committee says that "some have asserted" to it that professors have an "absolute right to seek funding through the University from any source whatsoever" [2/3]. That is false. What was asserted was merely that a public university violates the First Amendment by banning external faculty-research funds on ideological or political grounds. Despite the Committee's legal research [3], it has chosen to ignore basic concepts of First-Amendment law, such as the difference between procedural and substantive limits on speech, and the bedrock principle that states may not attempt to suppress ideas via facial or intentional viewpoint-discrimination.

Even if there is no case law saying so, since other universities have so far lacked Delaware's ingenuity at indirect censorship, it is surely clear that a public university may no more use political tests to ban external research funds than it may use them to ban internal funds, to block promotion, to reduce faculty salaries, or to fire professors. It may, of course, make judgments of academic quality — as Delaware has done by promoting Gottfredson to full professor for excellence in research. It may make judgments of disciplinary or subdisciplinary membership, as when it hires in English rather than in chemistry, or in Shakespeare rather than the Victorian novel. It may reduce a psychology professor's salary or even fire him for ceasing to do psychology, and doing French poetry or witchcraft instead. What a public university may not do is burden the working conditions, including the funding opportunities, of a professor on ideological or political grounds — e.g., for doing research that tends to discredit affirmative action or some other local policy or party plank. Still less may it deny a professor research funds because someone else's research has these effects.

What is especially absurd about the Report's "Academic Freedom" section is its disclaimer of any "focus" on Gottfredson's own work.

> ... Professor Linda Gottfredson, the principal investigator and recipient of Pioneer Fund support through the University, has not been the focus of this investigation. The University has established procedures for periodic peer review of the scholarship and other activities of its faculty, and this Committee would reject any charge to conduct an ad hoc inquiry into a faculty member's work. That work enjoys the full protection of academic freedom extended to all faculty members of this University. [2]

This passage is a gem of hypocrisy. First, the Committee willingly conducted an ad hoc inquiry into Gottfredson's funding source, and recommended it be cut off. Second, many of the Committee's objections to other Pioneer work apply to Gottfredson too. Neither Gordon nor Gottfredson, Gordon's long-time collaborator, claims that race IQ differences are genetic. But both believe they are real, both believe they have major social effects, and both criticize affirmative action, the Committee's shibboleth. Third, some of the evidence of Pioneer ideology the Committee gathered was, in fact, Gottfredson's own work. It requested samples from her of her own Pioneer-funded work, and some materials it cites to prove Pioneer ideology are from her project. In short, the main difference between an ad hoc inquiry into typical Pioneer work and an ad hoc inquiry into Gottfredson's work is that the former is a slightly larger ad hoc inquiry. Clearly the Committee does not object in principle to functioning as a board of censors controlling Delaware research ideology.

Worst of all, the report logically implies that Gottfredson is unfundable at the University of Delaware, by Pioneer or anyone. Pioneer is banned because it "substantially" funds people like Gottfredson. But the same will be true of any source that funds her, unless she happens to be one of only a few grantees with her views. But by that test, the more influential her work becomes, the less Delaware will let her fund it, an absurd notion of "full academic freedom." The Committee suggests [10] that she, and presumably other awkward faculty rejecting Delaware or Democratic doctrine, can get research grants as private individuals. This requires, first, that funding agencies greatly change their habits, since most do not, for tax and other reasons, make private grants. Almost all grants to American faculty go through their universities. Second, for private grants the Committee ominously noted a "restriction that University commitments to research, teaching, and service continue to be met" [10]. This remark hinted that Delaware might not consider privately Pioneer-funded research as faculty research at all, but as consulting, subject to a 20% limit and outside the normal research duties that justify salary.

This threat became reality in an exchange of letters between Gottfredson and Associate Provost for Research Robert Varrin. Varrin, to Gottfredson's amazement, endorsed all of her parade of horrors as true. "It is," Varrin wrote, "important that the university be connected only with work it supports." Thus if, as the Committee had suggested, Gottfredson does Pioneer research as a private person, she may not use any university facilities in so doing, such as xeroxing, computing, mail, telephone, or office. Furthermore, such work will count as consulting, subject to a time limit of 20%. Worst of all, no such work can be regarded as part of the 25% of Gottfredson's time she is required to spend on research as part of her university salary. This is the most sinister of all Delaware's rulings, since it forces Gottfredson either to do her current work without funding, or develop an entirely new, politically acceptable line of research that Delaware will deign to consider worthy of her salary. If she does not do so, she could, at least in principle, lose her tenure for failing to fulfill salaried research duties. In conversation, Varrin described the general rule as follows: Gottfredson must construct a "wall" between Pioneer work and university work. This metaphor, suggestive of the wall of separation of church and state, shows how careless Delaware is about constitutional law. If Delaware's Pioneer argument were correct, Varrin would have to apply these same regulations to all religion research or violate the establishment clause. No professor doing religion research could even use a campus telephone or give a campus address. Needless to say, no state university imposes any such rules on its religion faculty.

In a word, Delaware's idea is that a public university may create a subgroup of politically unfundable faculty. It may divide its faculty by ideology into two classes: those who may apply for research funds through the university, and those who may not. Of course, all faculty will still "enjoy the full protection of academic freedom extended to all faculty members of this University" [2]. It is merely that some people's research will be unfundable through the university until politically sanitized. And if they succeed in funding it without the university, they may not use a penny of university money in performing it, including that part of salary that pays for research. Thus, every Delaware professor with unclean views must also develop a second, sanitary line of work, funded by politically clean grantors, or work without funding, or be fired for dereliction. This draconian regime will undoubtedly tend to suppress heretical tendencies in Delaware faculty, if any survived the Trabant administration. Will the Research Committee then, like the medieval Catholic church, conduct formal recantations? It is

hard to imagine a clearer violation of academic freedom than a two-caste system that denies some professors major privileges simply because the university disagrees with their work.

Delaware reaches this position because of its basic, decades-old confusion over concepts of endorsement and "partnership." Officially, of course, the Committee, the ex-President, and the Faculty Handbook admit that academic freedom protects normal, salaried faculty research. All such research is paid for by university funds, since research is some fraction of the job description. Yet the Committee recommends rejecting Pioneer funds to avoid "partnership" [11] with their source's ideology. A university is ineluctably a partner of its own professors by paying their salary. Thus it is a partner with their ideology in a much stronger sense than that in which Delaware would be partners with the ideology of other Pioneer grantees by accepting Pioneer money for Gottfredson. Nevertheless Delaware cannot dissolve the basic partnership, faculty employment, simply because it dislikes faculty views; that is what academic freedom means. After Aumiller, Delaware realizes this fact. But if Delaware may not deny its partner-professors its own funds to disagree with it, it cannot rationally deny them all other agencies' funds to do so, merely in order to avoid a disagreeable "partner." Again, the Committee position is not even specious; it makes no sense. That is because it results from taking a false assumption — that colleges have a right to disassociate themselves from professors' views by denying them privileges — right up to the extreme, faculty firing, and then stopping. The Committee and Varrin have constructed a <u>reductio</u> of their common premise; but rather than abandon the premise, they are content for Delaware to embrace an irrational position.

At the bottom of all this is a simple-minded error that one might expect from uneducated persons. The Committee protests that it is "by no means an obvious and necessary corollary of academic freedom" that a university must "endorse and support" faculty research [3]. Delaware need not let professors apply for and hold Pioneer grants under university "auspices" [11], for in that case

> the University of Delaware lends its prestige and credibility, and is made to appear to have supported the Pioneer Fund's activities. [10]

Obviously, universities never "endorse" their faculty's research results or declare them "credible," despite buying them with substantial sums of money. If a university by employing a professor endorsed her research, there could be no faculty disagreements; for then the university would endorse a contradiction. The very idea of a university as a forum for intellectual debate implies that faculty disagreement is normal and desirable. If a university agrees with all its professors' research, either it is irrational or they are brain-dead. The Supreme Court, two months ago, said that this point is so simple that even high-school students can grasp it; but not, apparently, Delaware's Research Committee.

If a university does not endorse professors' research by itself paying them to do it, still less does it endorse it by taking money from other people to pay them to do it. And still less, if that is possible, does it endorse the "activities" of a fund only a "substantial" amount of whose money pays people like them to do it. A university warrants the public, at most, that its faculty is of high enough intellectual quality and works hard enough to be employed there. No quality or quantity issues are involved in the Pioneer controversy. Delaware promoted Gottfredson, for work like other Pioneer grantees', on the basis of its excellence. The Pioneer ban rests not on quality or quantity, but on judgments of political purity and policy consistency. As the

"endorsement" remarks show, the Pioneer ban rests on the same error as Trabant's earlier attack on academic freedom, his firing Aumiller for advocating homosexuality. Indeed, Delaware made the same error a third time, in seeking to ban student religious clubs from its facilities before Widmar.[11] Apparently Delaware still has yet to grasp that a university does not "endorse" what its faculty or students say, and so has no right to punish them for saying it. This error should not be beyond the powers of a Research Committee or President to recognize. What requires superhuman powers, on the contrary, is to imagine how accepting Pioneer money, but not promoting Gottfredson, "endorses" race differences in IQ.

B. Affirmative Action as a "Special Commitment." The Committee argues that because "racial and cultural diversity" is a "special commitment" [3/4] of the University, rejecting grants from sources that disagree with this special "mission" [12; press release 4/30/90] creates "no general precedent applicable to other potentially controversial issues" [4].

Surely the Committee is not serious. In the first place, this one "mission," on its own principles, affects countless research topics. All sex-difference research is affected. All other research is affected on any kind of "individual and cultural differences" (a phrase of the Diversity Commission charge, 4) relevant to affirmative action. Vast amounts of work in anthropology, sociology, psychology, political science, and biomedicine concern "individual and cultural differences" relevant to quotas, beginning with all cultural factors influencing academic success. Much law and philosophy debates the ethics of affirmative action; as noted, by the Committee's principles no Delaware professor could draw on a legal research fund that "substantially" funded several Supreme Court Justices. Just with this one "mission" as its censorship tool, the Committee can spend decades purging Delaware of conservative grantors.

In the second place, the only thing the Committee mentions that makes diversity a "special" mission is that the President named a commission on it. But there is also a Commission on the Status of Women, whose charge could justify feminist inquisition into all grantors with "substantial" work threatening women's equality — which includes, for some feminists, all sex-difference research. Further, to use any commission charge as a censorship tool sets a "precedent" for commission-certified ideology. University Presidents can establish commissions at will. On Committee principles, if President Roselle now establishes a commission to honor free enterprise — our state's nationally famous specialty — Delaware will return to the 1950's, unmasking grantors as Communist fronts and faculty as red or pink. One of the first victims of this neo-McCarthyism will be William Frawley, who began the Pioneer controversy with a letter citing assorted Marxist publications. It cannot be seriously thought that the President of a public university, by naming commissions, may unilaterally control the ideology of all university-processed grants.

All censors claim the ideas they suppress are "special." Everyone endorses free speech, they explain, but some ideas are uniquely harmful — because they will destroy America's economic system, or her constitution, or her war morale, or corrupt the morals of youth, or threaten the monarchy, or send innocent souls to hell, or discredit the Diversity Commission. In fact, nothing is "special" in Delaware's affirmative-action policy. Compared to other classic excuses, such as the need to save the nation or keep children out of eternal hellfire, censorship to protect affirmative action is one of the weakest reasons in censorship history. Delaware's affirmative-action policy is no longer even a legally required policy, since the Faculty Senate voted in May 1990 for a fully

voluntary commitment to affirmative action beyond any "legal minimum." Outside academe, opposition to quotas is the typical American view, which is one reason Delaware's favored party loses Presidential elections by landslides. In claiming affirmative action "special," the Committee stands squarely in the grand tradition of censors everywhere, who create special immunities to shield personal theories from debate.

C. Procedural complaints. The Committee makes assorted procedural criticisms [8-10], which it concedes [8] are tangential to the main argument. Indeed, they seem to be post-hoc carping, added to lend verisimilitude to an otherwise bald and unconvincing argument. They succeed in drawing no relevant distinction between Pioneer and other grantors.

To take first complaints of detail, there is no intellectual reason why a small fund must have an application form [9]. If applications are reviewed by previous grantees [9], who are often leaders in their fields, as Delaware conceded by promoting Gottfredson, why is that not "peer review and outside expert evaluation"? Many other grantors, including NEH, NIH, and NSF, use past and current grantees as referees.

As for requiring no interim or final reports [9], that may increase intellectual independence. Once Pioneer money is awarded, grantees can use it as they see fit without reporting results. Pioneer offers just this justification, that

> its unusually unstructured procedures are designed to maintain distance between the Fund and its grantees so as "to insure the impartiality of the research." [9]

The Committee finds this idea "at variance with" a rate of published acknowledgment of only 10-20% of Pioneer grantees. Why? If an author does not name his funding agency, it has that much less cause for complaint if it disagrees with his research results, increasing "impartiality." The Committee forgets its own principle that to be seen to pay for research implies "endorsement" of it. No evidence is cited that a 10-20% rate is unusual, much less "a clear deviation from normal academic expectations and practice" [9]. And there might be good reasons for a deviation, such as that Pioneer values impartiality more, or self-promotion less, than, say, NEH. Perhaps the Committee is hinting that Pioneer is embarrassed at its work; elsewhere, however, it is shocked at its brazen defense of it. [8]

The Committee ends its litany of specific complaints with a strange one, that nonacknowledgment in Pioneer-funded materials means that Delaware looks like the sole support of Pioneer work, since "the materials bear the University's coat of arms but make no mention of the Pioneer fund" [10]. What bears the university's coat of arms is a letterhead. No one, unless inordinately vain, "acknowledges" a funding agency in letters. On the other hand, research papers are not published on Delaware stationery. On no item do both a Delaware letterhead and acknowledgment of a grantor conventionally appear. Here the Committee is not making much sense. Nor is it objectionable or unusual that Pioneer makes grants to single professors [10] — most humanities grants have a single investigator — and no university requires single professors, not only to acknowledge their funding source in letters, but also to state that they work alone [10]! To damn Pioneer, the Committee pulls rules out of the air that it would never apply to other grantors.

What matters, surely, is the quality of Pioneer work, not any specific procedures for awarding funds. The Committee does not, however, try to show that Pioneer-funded work is of poor quality, but only that it tends to discredit a university policy. It expresses generalized fears, such as that Pioneer's procedures offer no "assurances" that money is awarded by "academic merit." But there are no assurances in any procedure, and everyone will allow that NSF, NEH, and NIH let a good deal of bad work through. Though the Committee fears that Pioneer's informal procedures have bad results, it offers no evidence that they do. In fact, several Pioneer grantees, like Eysenck and Jensen, are world-renowned and distinguished by any standard. A recent publisher's series on five great psychologists consisted of Chomsky, Skinner, Kohlberg, Eysenck, and Jensen.

The Committee also fears that Pioneer procedures give no "assurances" that funds are awarded "without prejudice" [8,9]. Here the charge is not only speculative but also unclear. What kind of prejudice? If race prejudice is meant, Pioneer is being accused, without evidence, of illegal acts. If the Committee means intellectual prejudice, it raises hypocrisy to new heights. Its own view is that no agency should fund even a "substantial" amount of work on certain theories, such as genetic race differences. To charge intellectual "prejudice" in a fund while banning it for contradicting local or Democratic ideology is amazing. The Committee report is itself an exercise in the enforcement of intellectual prejudice.

In short, the Committee shows no defect in Pioneer procedures affecting the quality of its grantees' work. Although the Committee finds some procedures unusual, it offers no proof that they are, such as comparative data on other Delaware grantors. Without such evidence, all its charges are innuendo and speculation, and some are incoherent.

D. Indirect Costs and Research Centers. Of the only two Committee arguments of any merit, one is in the "Procedures" section. Pioneer, unlike many other grantors, is said to refuse to pay the Delaware charge of 30% "indirect costs" above salary. These costs are "real," and the university cannot be forced to assume them.

> The University can and sometimes does waive the payment of such indirect costs. Surely, however, no one can maintain that the University must assume any or all of the indirect costs of any grant for which a faculty member wishes to apply, and is prohibited by the doctrine of academic freedom from deciding that it wishes to allocate its limited resources in a different way. [10]

But no one claims that Delaware must pay indirect costs of "any grant for which a faculty member wishes to apply" [10]. What is true is that the decision to pay them must not rest on ideological grounds. The Committee supposes, again, that it is wholly up to Delaware how to "allocate its limited resources" [10]. But there is a middle ground between saying that Delaware must pay indirect costs on every grant, and saying it has absolute discretion. The middle ground, which is the law of our land, is that a public university may not "allocate" faculty privileges -- such as salary, leave, benefits, grant applications, or indirect costs -- on political or ideological criteria unrelated to intellectual quality. Academic freedom can be abridged by politically motivated refusals of indirect costs, just as it can by politically motivated refusals of any other major faculty benefit. A public university may not have a policy that it will pay indirect costs for all Republicans, but no Democrats; or for all faculty whose research conforms to the Catholic catechism, or is anti-Marxist, and so on. That is, a public

university may not use indirect costs as a device to control the ideology of faculty research. That is what the Committee openly suggests Delaware should do.

Finally, the indirect-cost argument can establish at most that Delaware may refuse Pioneer money as long as Pioneer refuses indirect costs. If Pioneer changes its mind, the whole objection lapses.

Similar remarks apply to the specter of universities forced to accept "research centers" [3], with qualifications. Research centers have effects on colleges far beyond the ordinary, ongoing publication program of one professor. A research center takes up campus space, with a new building or modifications of an old building that endure long after a grant runs out or a professor leaves. Thus I do not claim that Delaware must build a Pioneer Hall if it is offered money to do so. But that is partly because no such hall is required for the work of present faculty. If Delaware already had many professors supported by the Pioneer Fund, for a joint project requiring extra space beyond their offices, then it would violate academic freedom to deny space on political grounds. Suppose, say, twenty faculty have Pioneer money to run an Institute on Race and Intelligence that pays their salaries and indirect costs. Suppose that space is available that will either be vacant or go to a smaller, academically weaker group of faculty. Then Delaware may not refuse the institute merely because administrators, faculty, or students dislike its topic. Political tests may not be used to "allocate university resources," whether money or space. Just as Delaware may not have a policy of accepting only research centers approved by the Republican National Committee, so it may not refuse race-and-intelligence, or sex-and-aggression, or age-and-memory, or culture-and-health centers just because their research may discredit local policies.' One would expect a rational university to tailor its policy to its science, not, as Stalin did with Lysenko, its science to its policy.

E. <u>Diversity, Racism, and Free Speech</u>. Most obscure are the Committee's remarks on diversity and free inquiry, by which it seeks to answer the charge of deserting academic freedom. The Committee was told by several faculty that a university's first "mission" is to be a university, and therefore academic freedom is

> a higher value to which the commitment to diversity must yield in the event of conflict. This contention fails for two reasons. First ..., the refusal by the University to seek financial support from a particular source does not in and of itself deny free and open inquiry. Second, this contention fails to recognize that the University's commitment to racial and cultural diversity is intended precisely to allow access to free and open inquiry for all persons of whatever racial or cultural background. If the University agrees to act in partnership with any organization committed to the proposition that people of different racial and cultural backgrounds are inherently unequal, then that partnership restricts the ability of individuals from all backgrounds to be treated as fully equal participants in the University community. [4]

We have already discussed the Committee's first reply. Its second and new thesis is that diversity is not opposed to "free and open inquiry," but part of it. In other words, indirect censorship is actually needed for academic freedom, via an intermediate goal of group diversity and equity. What is the argument for this startling idea that freedom requires censorship?

A little analysis is necessary to see what the Committee must be saying. To begin

with, it is, of course, true that if a professor says that "people of different racial and cultural backgrounds are inherently unequal," then someone on campus is not treating one group as "fully equal" to another. That is a tautology. But we have already noted the ambiguity of "equal." First, equality is not identity. To state trait differences, as Pioneer grantees do, is not to deny group equality in any sense in which equality could be a moral ideal; there can be no "policy" about facts. On the other hand, few, if any, Pioneer grantees make global inferiority claims. Least of all do they say anyone deserves "unequal" treatment based on group membership rather than individual ability. Group statistics say nothing about individuals. It is precisely conservatives who hold the view of Martin Luther King, Jr., and the early civil-rights movement: individuals should be treated as individuals, by merit tests, not as group members with entitlements by race or sex. So it is absurd to say that claims of group difference "restrict the ability of individuals from all backgrounds to be treated as fully equal participants in the University community" [4]. It is conservatives who insist on treating individuals as individuals; it is liberals who refuse to do so and instead establish group entitlements, such as race quotas. Here again the Committee is badly confused about individuals and groups.

Still, if a professor (unlike Pioneer grantees) calls one group globally inferior, then at least one member of the university community has said groups are not "fully equal," denying the Diversity Commission charge. If a university then punishes the professor by firing him or denying him external grants, academic freedom is violated. But the Committee claims that there is no such conflict between freedom and diversity, because diversity is "part of" academic freedom. How can this be?

The link the Committee sees between "equality" (or "equity") and "free inquiry" must be this premise: to deny someone's equality limits his free inquiry. Ignore, for a moment, all distinctions between individuals and groups, between traits and global status, between facts and values, and simply ask: is this premise true? To make it so, a second hidden premise is needed, since it is not obvious that talking about a person does anything to him, much less blocks his own research. Presumably the Committee's further premise is that campus racism psychologically limits "inquiry" by creating bad feeling in members of an insulted race. Presumably the same holds for sexism, or Xism in general -- for any kind of group libel. By what mechanism? It may be thought that blacks, women, gays, etc., will refuse to attend any campus where professors publish views insulting their group, so that the campus loses their "inquiry." Or perhaps blacks, women, or gays will stay on campus but be too upset to do their work effectively.

These, however, are debatable empirical assumptions. How do we know blacks, women, or gays feel easier on a campus with official ideology than a campus with insulting professors? That is, how do we know that blacks, women, or gays view avoiding group libel as more important than free speech? How many black or female faculty will be happy at a university with a category of "politically unfundable professor"? The Committee can only be making an assumption. Indeed, it sounds racist to assume that whites can appreciate free speech, but blacks can't. It sounds sexist to say that men can appreciate free speech, but women can't. And on the Committee's own principles it is racist or sexist, since the Committee treats any group insult as prejudice. In reality, many blacks, women, and gays value free speech, joining organizations such as the AAUP and ACLU, writing articles on academic or First Amendment values, and so on. So it is here the Committee, not the Pioneer Fund, that libels blacks or women as inferior in at least one major respect: their grasp of civil liberties, or aptitude for liberal democracy.

At any rate, we have shown that the Committee notion that indirect censorship is "part of" academic freedom is a version of the idea that equality requires colleges to ban group libel. The Committee wants to censor it in the interests of free speech. Recently, various colleges have banned group libel as harassment, claiming that group insults create the "hostile or intimidating environment" of state or Federal harassment law. But it now seems clear that for a public university to ban group libel violates First Amendment freedom of speech. Although a McCarthy-era Supreme Court, in Beauharnais (1952),[12] once let a state criminalize group libel, the group-libel exception is now dead in constitutional law. The Skokie (1977-8) and Hudnut (1986) cases,[13] involving neo-Nazi marches and pornography, bring general insults to a race, sex, religion, or other group under the umbrella of the First Amendment. Group libel is constitutionally protected speech.

To its credit, Delaware's Faculty Senate foresaw the threat sexual-harassment policy could pose to free speech, and therefore wrote a preamble into its policy exempting abstract statements about the sexes. But other universities wrote unconstitutional policies. In 1989, a Federal court[14] struck down the verbal portion of the University of Michigan's harassment policy because of its effects on academic speech. In one of several cases, a Michigan graduate student had been forced to a formal hearing for saying in class that homosexuality is a curable disease — the consensus of psychiatry until 1973. The Court said:

> What the University could not do ... was establish an anti-discrimination policy which had the effect of prohibiting certain speech because it disagreed with ideas or messages sought to be conveyed. ... Nor could the University proscribe speech simply because it was found to be offensive, even gravely so, by large numbers of people. [Typescript at 23]

These two motives, which violated the First Amendment in the Michigan harassment case, are our Committee's reasons for the Pioneer ban.

In support of its view the District Court cited thirteen decisions of the Supreme Court from 1943 to 1989. In particular, it quoted the following:

> If there is any star fixed in our constitutional constellation, it is that no official, high or petty, can prescribe what shall be orthodox in politics, nationalism, religion, or other matters of opinion or force citizens to confess by word or act their faith therein. West Va. Bd. of Education v. Barnette, 319 U.S. 624,642 (1943).

And it cited without quoting Texas v. Johnson (1989), where the Court reiterated:

> If there is a bedrock principle underlying the First Amendment, it is that the Government may not prohibit the expression of an idea simply because society finds the idea itself offensive or disagreeable. 109 S. Ct. 2533, 2544.

Michigan's goals, of course, were the same as Delaware's: to promote group "equality," "diversity," and so on. But such goals could not take precedence over First Amendment free speech. As the Court said:

> While the Court is sympathetic to the University's obligation to ensure equal educational opportunities for all of its students, such efforts must not be

> at the expense of free speech. Unfortunately, this was precisely what the University did. ...[T]here is no evidence in the record that anyone at the University ever seriously attempted to reconcile their efforts to combat discrimination with the requirements of the First Amendment. [34]

These statements describe Delaware's Committee and ex-President. The Committee, though it mentions free-speech concerns, answers them only by implying that external grants can never be a free-speech matter and that censorship is really free speech anyway. Its argument is exactly that Delaware "disagrees with the ideas or messages" of Pioneer grantees, and, in its implicit "diversity" argument, that they are "offensive to large numbers of people, even gravely so." These are just the kinds of reason that violate the First Amendment.

That a university must tolerate group libel, or more specifically racism, sexism, or Xism, is not some awkward First-Amendment technicality. For at least four reasons, basic intellectual principle demands that abstract racism, sexism, and Xism must be protected speech.

(i) Free speech must, as the Supreme Court has held for 35 years, cover any abstract view on topics of public importance. Race and sex are topics of public importance; they touch many national policy issues and dominate news on many college campuses. To let any group fix official doctrine on such topics and censor those with opposing views violates the most basic principles of free expression. The more important an issue such as affirmative action, the more crucial — not the less — is free speech about it.

(ii) People disagree about what counts as racism, sexism, and Xism. In recent years, everything from attacks on reverse discrimination to criticism of Jesse Jackson to failure to increase the minimum wage to disbelief of Tawana Brawley has been called racism. As for sexism, feminists charge that it permeates all of Western culture, including most of the classics taught at American universities. Even if one limits Xism to claims of the "inherent inferiority" of some X's, we have seen that this is obscure, and the Research Committee may be racist by its own definition.

(iii) There is no good way to limit X, the kind of "oppressed" group empowered to censor views it finds false or insulting. Indeed, U.S. discrimination law already treats nationality, ethnicity, and religion as similar to race and sex. To set official limits on what may be said, not only about blacks and women, but also about Jews, Germans, Catholics, homosexuals, or other historically important groups makes intellectual work impossible.

(iv) Non-"oppressed" groups will not long tolerate restrictions on their speech that do not apply to others. At some point, white men will claim equal rights not to be insulted. But many whites find many utterances by black leaders insulting, and most men find most views of radical feminists insulting. Thus a rule designed to protect blacks and women could, if fairly enforced, end up censoring them.

This fourth point shows the irony of universities' efforts to promote "equality" and "diversity" by banning group insult. Advocates for protected groups insult nonmembers relentlessly. For example, feminist writings are chock-full of insults to men. Here are

four examples. The thesis of Brownmiller's 1975 classic Against Our Will is that all men are either rapists or members of a prehistoric rape conspiracy.

> From prehistoric times to the present ... rape has played a critical function. It is nothing more or less than a conscious process of intimidation by which all men keep all women in a state of fear. [5, italics original]

Diana Russell, a leading feminist sociologist, claims in Crimes Against Women that men make war on women by forcing them to give birth, and thereby kill women faster than any world war. In Feminism Unmodified Catherine Mackinnon, prime architect of harassment law, says that liberal men care about First Amendment values only because they spent years masturbating over copies of Playboy with free-speech essays on facing pages. Andrea Dworkin, Mackinnon's fellow anti-smut crusader, begins a paragraph in Take Back the Night with "Men love death," then goes on to claim that men can only get erections through fantasies of butchering their sex partners.

Texts with anti-male insults like these are taught in Women's Studies courses in most colleges, including Delaware. Indeed a large minority of our Faculty Senate voted to require all men to take Women's Studies. It requires a heroic level of confusion, inconsistency, or malice to wish simultaneously to ban all university support to scholarly-journal articles asserting an 18-point mean intelligence deficit in a minority group, and to require all men students to take classes whose textbooks call them all rapists, sadists, and murderers by nature. Some feminist insults, of course, escape a narrow definition of "sexism" as claims about the "inherent inferiority" of one sex. But as we have seen, what counts as inherent inferiority is obscure. Anyway, many feminists do call men inherently inferior to women, because of testosterone and aggression. And some black faculty, such as Jeffries, may well believe ice people inherently inferior to sun people. On a broader definition of racial insult, Black Studies is full of insults to whites, if only in the form of false charges of racism, the deadliest insult in American politics. Arguably Black and Women's Studies, as disciplines, consist "substantially" of insults to white men, in which case Delaware must ban these disciplines from campus.

On Committee principles fairly applied, then, any "substantial" source of feminist or Black-Studies grants could be banned from Delaware. Of course, Delaware would not dream of applying ideological censorship in a race- or sex-neutral way. It seeks to guard blacks against insult by whites, not whites against blacks; women against men, not men against women. But first, this violates race or sex "equality"; to give one group unique censorship rights over another, whatever it may be, is not "equality." In the second place, such race or sex favoritism in freedom of expression is probably illegal. The Supreme Court rejects the idea that constitutional and statutory rules against discrimination protect only minorities and women, not white men. So even if Delaware could reconcile its indirect censorship with the First Amendment, that would only leave it with a new choice of two bad alternatives: liability for race or sex discrimination against white men, or ending feminist and Black-Studies research at the university.

III. WHY THE PIONEER BAN IS UNCONSTITUTIONAL[15]

The constitutional principles the Pioneer ban violates are stated by Judge Harvey

in Ollman v. Toll, 518 F.Supp. 1196 (D.Md.1981), aff'd, 704 F.2d 139 (4th Cir.1983). In this case, Marxist political science professor Bertell Ollman sued the University of Maryland for rejecting him as professor and chair of the Politics and Government department. Ollman alleged that his rejection was based on his Marxism; district and appellate courts agreed that if that were true, his rejection was unconstitutional.[16]

> It is well established that a state university may not refuse to employ a prospective member of its faculty if the decision is made by reason of the exercise by the applicant of constitutionally protected First Amendment rights. Cherry v. Burnett, 444 F.Supp. 324 (D.Md.1977); see Perry v. Sindermann. 408 U.S. 593 (1972).... Marxist or Communist beliefs, like other political beliefs, are protected under the First and Fourteenth Amendments, and such beliefs or one's association with others holding them is protected activity for which a state may not impose civil disabilities such as exclusion from employment by a state university. Cooper v. Ross, 472 F.Supp. 802 (E.D.Ark.1979). [1202-3]

After citing Givhan[17] on procedure in proving unconstitutional motivation and noting the duty of due deference to professional judgment, the Court observed that universities have total discretion in hiring.

> No reason at all need be given for the refusal of a state university to hire a member of the faculty, and in fact, the state institution need have no reason at all so long as the decision is not based on a constitutionally impermissible reason. [1202]

But even a discretionary employment decision, denying a privilege to which a person otherwise has no right, is unconstitutional if made for ideological reasons.

> Whether or not plaintiff's Marxist beliefs are popular ones and whether or not they have the approval of other citizens of this country, they are entitled to the full protection of the First Amendment. No more direct assault on academic freedom can be imagined than for school authorities to refuse to hire a teacher because of his or her political, philosophical or ideological beliefs. See Board of Regents v. Roth, 408 U.S. 564,581 (1972) (Mr. Justice Douglas dissenting). Thus, an official of a state university may not restrict speech or association, even by the subtle or indirect coercion of refusal to hire, simply because that official finds the views expressed by any group or individual to be abhorrent. See Healy v. James, 408 U.S. 169,187-88 (1972); Franklin v. Atkins, 409 F.Supp. 438,445 (D.Colo.1976), aff'd 562 F.2d 1188 (10th Cir.1977). [1202-3]

Applied to Delaware's Pioneer ban, these words settle the issue. Opposition to affirmative action is as much a political belief as Marxism; indeed, though this is irrelevant, it is more popular in America and commands a major party's assent. Belief in race differences in IQ or in their genetic basis is a "philosophical or ideological belief" that is "protected" under the First Amendment. Refusal to process a grant application or to pay indirect costs for a current professor is a "civil disability," just like the refusal to hire in the first place. Indeed, current faculty have far more claim to university research support than a candidate has to get a job. Gottfredson's relation to the Pioneer Fund is "association with others." Delaware has committed "subtle or indirect coercion" of Gottfredson, "simply because it finds the views expressed by [the

Pioneer] group abhorrent."

Thus, if the Fourth Circuit was right in 1983, the Pioneer ban is unconstitutional. The Supreme Court has not decided a case of exactly this type, denying a professor an employment privilege for ideological reasons. But it has often endorsed academic freedom as a "special concern" of the First Amendment, saying that the classroom is "peculiarly the marketplace of ideas" over which no law may cast a "pall of orthodoxy."[18] In the 1985 case of a Michigan student expelled for failing a pre-med test, the Court said that courts should defer to a professional academic decision unless it is clear that no "genuinely academic" decision was made.

> When judges are asked to review the substance of a genuinely academic decision, ... they should show great respect for the faculty's professional judgment. Plainly, they may not override it unless it is such a substantial departure from accepted academic norms as to demonstrate that the person or committee reponsible did not actually exercise professional judgment.[19]

The Michigan case was a normal academic judgment based on a test score. Delaware's Pioneer ban is not an academic or professional judgment at all. It is a research ban resting on ideology rather than academic quality, violating the "accepted academic norms" of academic freedom, the freedom of every professor to "follow the argument where it leads."[20]

The Fourth Circuit's position is also derivable from first principles. Classic First-Amendment theory's most basic premise is that government may not suppress, or attempt to suppress, abstract ideas. In regulating speech, it must usually show content-neutrality and always show viewpoint-neutrality. "Above all else, the First Amendment means that government has no power to restrict expression because of its message, its ideas, its subject matter, or its content," Police Dept. of Chicago v. Mosley, 408 U.S. 92,95 (1972). Government or public detestation of an idea is irrelevant. An "instrumentality of the State ... may not restrict speech or association simply because it finds the views expressed by any group to be abhorrent." Healy v. James, 408 U.S. 169 at 187-88 (1972). As the Court said last year in the flag-burning case:

> If there is a bedrock principle underlying the First Amendment, it is that the Government may not prohibit the expression of an idea simply because society finds the idea itself offensive or disagreeable.[21]

Classic free-speech theory uses a two-track framework to test government speech regulation.[22] The first track is for regulation aimed directly at the communicative impact of speech. Unless speech falls in a few narrowly defined categories, such as obscenity, libel, or incitement to crime, any such regulation of it must pass strict scrutiny. No viewpoint discrimination is allowed unless the state can prove it necessary to a compelling state interest. Further, when the harm the state fears from speech can be averted by more speech, censorship is conclusively presumed unjustified. A regulation's focus on communicative impact, which triggers first-track analysis, can be shown in two ways: facially, or by purpose shown by but-for causation. Since Delaware's Pioneer ban is facial viewpoint discrimination, we need not explore second-track analysis. Delaware has explicitly cut off Gottfredson's past funding source for reasons of that source's ideology, based on evidence including her own work.

Delaware offers four excuses for its act of facial viewpoint discrimination, all

repeatedly rejected by the Court in unbroken precedents. The excuses are as follows:

(i) No effect on Gottfredson. Delaware argues that it is only regulating Pioneer, not Gottfredson; that its ban is based on Pioneer ideology, not hers; and that she can use Pioneer funds privately off-campus to continue her work, so the ban is no burden to her. Both college-forum and public-employee cases reject these contentions.

University grant-processing, indirect costs, and facilities are benefits to a researcher. First, many grantors, including Pioneer, make no grants to private individuals, so banning a grantor reduces the pool of available money. Second, university facilities such as telephone, office, and equipment make research easier; that is part of their purpose. In Healy, supra, a state university had to grant SDS both official recognition and use of its buildings, bulletin boards, and newspaper, despite its belief that SDS "philosophy was antithetical to the school's policies" [175]. That SDS could also function without official blessing was irrelevant, since denial of recognition was a burden.

> There can be no doubt that denial of official recognition, without justification, to college organizations burdens or abridges that associational right. The primary impediment to free association flowing from nonrecognition is the denial of use of campus facilities for meetings and other appropriate purposes. [181]

Similarly, in Widmar v. Vincent, 454 U.S. 263 (1981), a state university had to recognize and admit a student group to its facilities for "religious worship or religious teaching," though the group could already meet, if less comfortably, a block and a half away [288].

In public-employee cases, as noted below, denial of any employee privilege for exercise of constitutional rights is forbidden precisely because privilege denials put "coercive pressure" on employee speech. Such denials range from firing to denial of promotion or transfer to refusal to hire in the first place. As the syllabus summarizes the most recent public-employee case:

> Significant penalties are imposed on those employees who exercise their First Amendment rights. Those who do not compromise their beliefs stand to lose the considerable increases in pay and job satisfaction attendant to promotions, the shorter commuting hours and lower maintenance expenses incident to transfers to more convenient work locations, and even the jobs themselves .... There are deprivations less harsh than dismissal that nevertheless press state employees and applicants to conform their beliefs and associations to some state-selected orthodoxy.[23]

These same deprivations Gottfredson suffers from the Pioneer ban. The ban already imposes "significant penalties" even without the Varrin letter; and by that letter, if Gottfredson continues Pioneer research, she must develop another whole line of university-approved research or lose "the job itself."

As for the contention that Delaware is acting on Pioneer ideology, not Gottfredson's, this makes its ban worse rather than better, for it is "guilt by association."

> [T]he Court has consistently disapproved governmental action ... denying

> rights or privileges solely because of a citizen's association with an unpopular organization. [Healy, supra, at 185-6 (four citations omitted)]

(ii) Grant support is discretionary. Delaware argues that its cooperation in faculty research is a privilege, not a right, which it often denies for various reasons. The public-forum and employee cases reject this view. A college may put various conditions on student clubs too, and an employer may hire, promote, and transfer more or less at will. All these privileges are discretionary and no one has a right to them, but to deny them for ideological reasons is still unconstitutional. That is because the state thereby pressures students or employees toward official orthodoxy, accomplishing indirectly what it is forbidden to do directly.

> For at least a quarter-century, this Court has made clear that even though a person has no "right" to a valuable governmental benefit and even though the government may deny him the benefit for any number of reasons, there are some reasons upon which the government may not rely. It may not deny a benefit to a person on a basis that infringes his constitutionally protected interests -- especially, his interest in freedom of speech. For if the government could deny a benefit to a person because of his constitutionally protected speech or associations, his exercise of those freedoms would in effect be penalized and inhibited. This would allow the government to "produce a result which [it] could not command directly." ... Such interference with constitutional rights is impermissible.[24]

(iii) Endorsement. Delaware argues it must ban Pioneer to avoid endorsing its ideology, and thus harming Delaware policies of racial diversity and affirmative action. No one can reasonably suppose Delaware to endorse the ideology of any grantor or faculty member. The forum cases uniformly apply the principle that viewpoint-neutrality disproves endorsement. That is why CCSC had to accept SDS in Healy, supra, and UMKC had to accept on-campus religious worship in Widmar, supra. On the contrary, for colleges or most high schools to reject religious groups outside the curriculum is forbidden viewpoint discrimination. The establishment clause permits state-school religion precisely because permission and nondiscriminatory aid are not endorsement, while ideologically selective exclusion would be ideological hostility. This year, in a high-school religion case, the Court said that this concept is so simple that even high-school students can grasp it (though not Delaware's Research Committee and ex-President).

> The proposition that schools do not endorse everything they fail to censor is not complicated. ... To the extent that a religious club is merely one of many different student-initiated voluntary clubs, students should perceive no message of government endorsement of religion.[25]

Similarly, Gottfredson and Pioneer are merely one of many different grantor-professor pairs in Delaware's overall research program, so no student can reasonably perceive a message of endorsement. The rule of both Westside (1990) and Hazelwood (1988)[26] is that schools endorse their curriculum, nothing else. School recognition and aid do not imply school endorsement. Indeed, in Westside, student speech in school buildings, before school officials, under the school budget, with official school recognition, and with a general school endorsement of extracurricular clubs was still not school-endorsed speech. If this principle is true in high school, it is even truer in college. Otherwise, the establishment clause would force state universities to abolish religion departments and ban any grantor that funds a "significant" amount of religious

work. No state university follows any such policy.

(iv) Strict scrutiny. Finally, Delaware argues in effect that its facial viewpoint discrimination passes strict scrutiny, because the Pioneer ban is necessary to its compelling interest in race diversity and affirmative action. Censoring Pioneer ideology is necessary to keep black students at college, which is necessary to protect their freedom of speech.

This argument fails for two reasons. First, purely racial goals are not compelling enough to override academic freedom, any more than they are compelling enough to override ordinary First Amendment free speech. Goals of racial harmony or integration never justify viewpoint censorship. In public forums, racist or "sexist" speech, formerly bannable as "group libel," is now protected by the First Amendment.[27] But a university, as the Court says, is the preeminent "marketplace of ideas," so the same viewpoint neutrality as in a public forum must apply. A university should be no more able than a state legislature to censor abstract ideas about race, sex, nationality, or sexual preference merely to protect the sensibilities of offended groups. Any such general principle would gut the First Amendment, and its application in a state university was rejected by the District Court in the Michigan harassment case. Thus, even if viewpoint censorship were necessary to racial harmony, that goal would not be compelling enough to justify it.

Nor can censoring Gottfredson or Pioneer be "compelled" by the goal of protecting blacks' own free speech. By this strange theory, the Research Committee must mean one of two things: either that blacks can somehow abridge their own free speech by choosing not to join a forum, which is absurd; or that a forum proprietor abridges speakers' freedom by not giving them unique censorship rights over other speakers, which is also absurd. No case has ever held that the state abridges free speech by not giving some speakers the power to censor others.

Secondly, the Pioneer ban is not necessary for any of these goals or narrowly tailored to them. Delaware gives no evidence that its race goals of harmony and integration require research censorship, except for its racist premise that blacks cannot value free speech or grasp the simple point that noncensorship is not endorsement, as Westside High School students can. Finally, and decisively, Delaware fails to try less restrictive alternatives, such as the simple official disclaimer that, to the whole Court in Westside, suffices to "dissassociate" public high schools from religious services within their walls. Delaware also can, and does, combat Pioneer's alleged ideology with vigorous assertions of its own. Delaware's proper remedy for Pioneer-caused harms — none of which have been shown to exist — would be "more speech," as Tribe's "conclusive presumption" demands.

Not only is research censorship not necessary to the goal of black education, it is inconsistent with it. The goal of racially integrating an institution cannot "compel" abandonment of its defining principles, such as academic freedom. Then one has not integrated but destroyed it, depriving blacks forever of the benefit one sought to provide. Where every protest group can censor professor speech, there is no university. Delaware can offer blacks only a vastly inferior education, if any, from faculty in an intellectual "straitjacket," under a "pall of orthodoxy"[28] stretching beyond the classroom to scholarly research. Instead of banning Pioneer, Delaware should simply have told protesters that it has no power of ideological censorship over anyone, and academic freedom protects everyone equally. Faculty who cannot grasp this point are unfit for a

university; students who have not grasped it need Delaware to teach it to them, for it is the single most important lesson college has to offer.

Since the Pioneer ban is facial viewpoint discrimination and none of Delaware's four defenses succeeds, the Pioneer ban fails classic two-track First Amendment analysis. Recently, the Court has been shifting to a more complex theory with different rules for different government roles. Government in its roles as sovereign or as proprietor of any type of forum, public or nonpublic, must still obey classic principles of viewpoint neutrality.[29] But viewpoint discrimination has been permitted to government in its role as educator or as employer. The rule for education is stated in Hazelwood, supra, and reinforced by Westside, supra. Lower schools may viewpoint-discriminate in their curriculum, to serve their traditional value-inculcative goals. This change, despite its desertion of classic free-speech rules, does no more than recognize the obvious. But everything in a school except the curriculum remains a forum, public, limited public, or nonpublic. Thus Hazelwood does not apply to research, which is not curricular, nor arguably to college teaching either, which is not inculcative, as several justices and a recent commentator have noted.[30] Nothing in Hazelwood or prior school cases[31] offers any basis for viewpoint discrimination in university research.

For government as employer, the free-speech rule is the Pickering balance test.[32] For employee speech on "matters of public concern," a government employer must reasonably "balance" its interest in job efficiency with the employee's interest in free speech. This is a weak and unpredictable rule, often giving public employees little constitutional protection. If one looks at the causes for employer censorship accepted by recent cases, they seem insufficient to decide either way on the value of academic freedom.

However, the Court's early academic-freedom cases have already set the Pickering balance for professors. The line of teacher-loyalty cases leading up to Keyishian originates the unconstitutional-conditions doctrine, which the Pickering test itself presupposes. It would be inconsistent, therefore, to apply the Pickering test to teachers in any way that disturbs the Court's oft-repeated dicta on academic freedom. In particular, professor cases like Sweezy and Keyishian show that teachers cannot be deprived of employment, or by later cases any employment benefit (Perry and Rutan, supra), for being Marxists. The district and appellate courts were right to make this assumption in Ollman. But if professors may not be denied discretionary employment privileges for their Marxism, they certainly cannot be denied them for scientific views about IQ or policy views about affirmative action shared by the Republican party and half the Court. The Fourth Circuit is right: for professors' "political, philosophical, or ideological" views, the Pickering balance is permanently tipped to full academic freedom.

Thus, while this may not be true of every state employee, state colleges may not deny professors any job privilege, including research support, on purely ideological grounds — much less on the "narrowly partisan or political"[33] grounds of the Pioneer ban. The teacher-loyalty cases compel this conclusion, including the Court's explanatory remarks on academic freedom, which read as though directly addressed to the University of Delaware.

> Our Nation is deeply committed to safeguarding academic freedom, which is of transcendent value to all of us and not merely to the teachers concerned. That freedom is therefore a special concern of the First Amendment, which does not tolerate laws that cast a pall of orthodoxy over the classroom. "The vigilant protection of constitutional freedoms is nowhere

more vital than in the community of American schools." The classroom is peculiarly the "marketplace of ideas." The Nation's future depends upon leaders trained through wide exposure to that robust exchange of ideas which discovers truth "out of a multitude of tongues, [rather] than through any kind of authoritative selection." In [Sweezy] we said:

"The essentiality of freedom in the community of American universities is almost self-evident. No one should underestimate the vital role in a democracy that is played by those who guide and train our youth. To impose any strait jacket upon the intellectual leaders in our colleges and universities would imperil the future of our Nation. No field of education is so thoroughly comprehended by man that new discoveries cannot yet be made. Particularly is that true in the social sciences, where few, if any, principles are accepted as absolutes. Scholarship cannot flourish in an atmosphere of suspicion and distrust. Teachers and students must always remain free to inquire, to study and to evaluate, to gain new maturity and understanding; otherwise our civilization will stagnate and die."[34]

IV. CONCLUSION.

In 1976, President Trabant fired Richard Aumiller for advocating homosexuality in a campus newspaper interview. Trabant feared that Aumiller's ideology would cause Delaware to be a "mecca" for homosexuals. A Federal judge fined not only the university, but Trabant personally, for his "pernicious insensitivity" and "wanton disregard" for Aumiller's freedom of speech. In 1990, Trabant cut off Linda Gottfredson's funding source for having an un-Delawarean ideology, based on evidence partly including her own work. Trabant's new fear was that Pioneer ideology would cause Delaware to be unattractive to blacks. The verdict is the same: pernicious insensitivity and wanton disregard for Gottfredson's academic freedom. In 1990 as in 1976, Trabant tried to censor faculty ideology to raise student enrollment in preferred groups: blacks now, heterosexuals then. No state university has any such power. Faculty are entitled to publish their views regardless of their effect on the student population mix. To speculate that professors' opinions will make Delaware a mecca for homosexuals, or a Gehenna for blacks, is idle. The only relevant difference between Trabant's acts in 1976 and 1990 is that in 1990, he took care to censor a less popular view and to secure the prior approval of a Research Committee innocent of any belief in either academic freedom or the Constitution.

The Committee itself is to be commended for eviscerating academic freedom so nakedly. The Committee chooses to stand on the weakest possible ground. It might have pretended that politics is academic quality, claiming Pioneer work incompetent. That claim would have been harder to refute, but was presumably blocked by Gottfredson's promotion. Or the Committee might have argued harassment, claiming with Michigan that all work on race and IQ, by insulting blacks, harms them. Instead, it proposes a remarkable view. Colleges may block external funds at will, for any reason or none; academic freedom has nothing to do with grant applications. But if reason is needed, then Delaware is allowed to purge itself of any research that might discredit its own ideas of which it is "specially" fond. This thesis in itself destroys academic freedom. But what idea does the Committee then pick to ban from university research? Is it Satanism? Maoism? Denial of the Holocaust? No: criticism of affirmative action, one of the three most debated topics in American politics, one which like abortion and tax reform divides our two parties, and one on which our ex-President and half the Supreme

Court hold views that would deny them research grants at Delaware.

In short, the Committee offers the worst possible argument. Its argument is the First-Amendment equivalent of explaining that female professors should not have research grants because grants will distract them from their natural destiny of childbearing. Yet the Board of Trustees does the impossible: it makes this argument still worse. When Pioneer protests that its work has been misrepresented, the Trustees reply that facts do not matter, only appearances.

> No matter whether that [the Research Committee description of Pioneer ideology] is in fact the orientation of Pioneer Fund or not, that is perceived as the orientation of the Fund by at least a material number of our faculty, staff, and students.
>
> Without judging the merits of this perception, the Board's objective of increasing minority presence at the University could in the view of our Executive Committee be hampered if the University chose to seek funds from the Pioneer Fund at this time.[35]

In other words, it doesn't matter whether Pioneer has the ideology it is alleged to, only that black students might think so. Delaware claims that it not only may ideologically censor faculty research, but that it may do so inaccurately. If black students decide NEH is racist too, presumably humanities research will have to cease.

As shown in section III, Delaware's Pioneer ban is that rarity, a state act unconstitutional on every existing First Amendment theory. What Delaware has done is to devise a general recipe by which university presidents can censor all funded research. First, select the view V to be purged from the university. Second, name a Commission whose charge includes not-V. Next, after consulting a Research Committee, decree that no professor may apply for grants through the university from grantors with a "substantial" amount of work asserting V. Next, decree that no research under private grants from such grantors may use university facilities either, or count toward salary. Presto! The number of faculty asserting V falls to near zero. As if by magic, a pall of orthodoxy descends upon the research forum.

Delaware's act, if imitated by other universities, will abolish academic freedom in all funded university research. American faculty, forced to bend with every gust of political doctrine,[36] will have to learn a level of political agility that makes the Vicar of Bray look like Solzhenitsyn. Academic freedom in research will be virtually dead. Unless Delaware reverses its policy, the federal courts should declare the obvious without delay: the Pioneer ban, by almost 40 years of First Amendment jurisprudence, is about as clearly unconstitutional as a university act can be.

1. Letter of April 24, 1990, from President E.A. Trabant to Professor Lawrence Nees, Chair, Research Committee.

2. Philadelphia Inquirer, 10/16/77 . Richard Aumiller, university theater director, lecturer, and faculty adviser to the official campus gay organization, gave a newspaper interview (Wilmington News-Journal, 11/2/75) that Trabant construed as "advocating" homosexuality. Among other things, Trabant objected to Aumiller's estimate of "600 gay people on this campus alone." Because of such statements, alleged homosexual overtones in two theater productions, a series of phone calls supporting Aumiller, and Aumiller's admission of living with two undergraduates, Trabant feared that Aumiller was making the campus "a mecca for homosexuals." As Trabant wrote to the Chairman of the Board of Trustees:

> Becoming an advocate and evangelist for gays, he [Aumiller] will naturally attract others to the campus to be employed, to hang around or to be students. Therefore, I feel that I have no choice but to step in as president and attempt to correct the situation. (News-Journal 9/15/76 at 36, 9/17/76)

Trabant fired Aumiller in full knowledge of his act's illegality: he conceded in the same letter that "the chances of the courts upholding any action that I take are minimal." After trial, Judge Murray Schwartz of the District Court awarded Aumiller a year's back pay, attorney's fees, and $15,000 of compensatory and punitive damages. The Board of Trustees paid Trabant's personal $5,000 fine because he had acted with their "full knowledge and approbation" (News-Journal 10/30/77).

3. "Therefore, by copy of this letter it will be University policy as stated in your report," Trabant letter, supra n. 1.

4. April 19, 1990, "Report of the Faculty Senate Committee on Research on the Issue of the University of Delaware's Relationship with the Pioneer Fund" (pp. 12). Page references to this document (and to other previously named sources) are hereafter made in brackets in the text.

5. The phrases are from Board of Education v. Pico, 457 U.S. 853 (1982) at 870-71 (Brennan, J. for plurality of four), quoted at 907 (Rehnquist, J., with Burger and Powell, dissenting). Seven justices explicitly call such state action unconstitutional; none disagrees. The Rehnquist three find Brennan's hypothetical unreal because no school would ever be motivated by party loyalty. Thus Delaware's ban comes as close to meeting the description as a real-world act possibly could.

6. Three classic decisions protecting teachers' right to criticize school policy are Pickering v. Board of Education, 391 U.S. 563 (1968); Perry v. Sindermann, 408 U.S. 593 (1972); and Givhan v. Western Line Consolidated School District, 439 U.S. 410 (1979).

7. In 1933-34 Martin Heidegger, with the aid of Nazi officials, became Rektor of Freiburg University, proclaimed himself its Fuehrer, made Hitler's views the official ideology, blackballed "un-German" professors, attacked Catholics, and urged Hitler to take total control of all German universities. J. Peter Byrne, "Academic freedom: a 'special concern of the First Amendment'," 99 Yale

Law Journal 251-340 (1989), at 259 n.22.

8. Wilmington News-Journal, 9/12/81 at A3.

9. News-Journal, 8/11/89 at B1.

10. In the Name of Eugenics (Knopf, 1985).

11. Widmar v. Vincent, 454 U.S. 263 (1981) (public college must recognize and aid student-led religious groups on same basis as other student activities).

12. Beauharnais v. Illinois, 343 U.S. 250 (1952).

13. National Socialist Party v. Skokie, 432 U.S. 43 (1977) and Smith v. Collin, cert. den. 439 U.S. 916 (1978); Hudnut v. American Booksellers Ass'n., Inc., 106 S.Ct. 1172 (1986).

14. Doe v. Univ. of Michigan, E.D.Mich.S., 9/22/89 (typescript).

15. This section summarizes a companion document, Why Delaware's Pioneer Ban is Unconstitutional.

16. Ollman lost his case, because the district judge found the evidence insufficient to show Maryland's President rejected Ollman for his Marxism rather than for legitimate academic reasons.

17. Givhan v. Western Line Consolidated School District, 439 U.S. 410,416 (1979).

18. Keyishian v. Board of Regents, 385 U.S. 589,603 (1967), quoted with approval in several later cases including, most recently, Regents of the University of Michigan v. Ewing, 474 U.S. 214,226 n. 12 (1985) and Univ. of Pa. v. EEOC, No. 88-493, decided January 9, 1990 (slip opinion at 14).

19. Regents v. Ewing, supra n. 31 at 225.

20. Sweezy v. New Hampshire, 354 U.S. 234,263 (1957) (Frankfurter, J., concurring and quoting a South African scholar on the ideal of Socrates).

21. Texas v. Johnson, 109 S.Ct. 2533,2544 (1989).

22. Laurence H. Tribe, American Constitutional Law (Mineola, NY: The Foundation Press, 2nd ed. 1988) at 789-94.

23. Rutan v. Republican Party of Illinois, No. 88-1872, decided June 21, 1990 (slip opinion, syllabus)

24. Perry v. Sindermann, 408 U.S. 593,597 (1972) (16 citations omitted). See also Rankin v. McPherson, 107 S.Ct. 2891,2896 (1987) (state employer may not fire even probationary employee for protected speech).

25. Westside Community Bd. of Ed. v. Mergens, No. 88-1597, decided June 4, 1990 (slip opinion at 20,22).

26. Hazelwood School District v. Kuhlmeier, No. 88-836, decided January 13, 1988 (slip opinion).

27. Beauharnais v. Illinois, 343 U.S. 250 (1952), a 5:4 McCarthy-era decision recognizing group libel as a First Amendment exception, is now considered overruled by the Skokie Nazi-march case, Smith v. Collin, cert. den., 439 U.S. 916 (1978), and the feminist pornography case, American Booksellers Assn., Inc. v. Hudnut, 595 F.Supp. 1316 (S.D.Ind. 1984), aff'd, 771 F.2d 323 (7th Cir. 1985), 106 S.Ct. 1172 (1986).

28. Sweezy, supra, 354 U.S. 234,250 (1957); Keyishian, supra, 385 U.S. 589,603 (1967).

29. See Healy, supra; Widmar, supra; and Perry Ed. Assn. v. Perry Local Educators' Assn., 460 U.S. 37 (full public, limited public, and nonpublic forums must all be viewpoint-neutral). The ban on viewpoint discrimination even in nonpublic forums was reaffirmed this year; see U.S. v. Kokinda, No 88-2031, decided June 27, 1990 (regulation of nonpublic forum must be reasonable and "not an effort to suppress expression merely because public officials oppose the speaker's view") (slip opinion, syllabus at II)

30. J. Peter Byrne, "Academic freedom: a 'special concern' of the First Amendment," 99 Yale Law Journal 251-340 (1989), at 288 n. 137: "Universities do not 'inculcate' ideology; their transmission of cultural values is an explicitly intellectual process that permits the student to reach her own conclusions."

31. Especially Bethel School District No. 403 v. Fraser, 478 U.S. 675 (1986) (high-school student may be disciplined for campaign speech based on elaborate and graphic sexual metaphor). An earlier, transitional case on school library-book censorship, Board of Education v. Pico, 457 U.S. 853 (1982), split the Court 4:1:4, with no majority opinion. But seven justices endorsed the view that schools may not "suppress ideas" via "narrowly partisan or political" regulations, id. at 871 (Brennan, J.), at 907 (Rehnquist, J., dissenting). Rehnquist's group thought this principle useless because in the real world, no school would dare to censor ideas on the basis of party loyalty [907]. He may not have anticipated that Delaware would ban the affirmative-action views of the Republican party, half the Court, and Rehnquist himself from all university-processed research. Rehnquist specifically contrasts inculcative lower-school education with the "broad-ranging," "freewheeling inquiry" of colleges, id. at 914,915.

32. Pickering v. Board of Education, 391 U.S. 563 (1968). The leading cases for teachers, besides Pickering itself, are Perry v. Sindermann, 408 U.S. 593 (1972) (decision not to rehire teacher based on his criticism of administrators infringes free speech); Mt. Healthy City Board of Education v. Doyle, 429 U.S. 274 (1977) (teacher's telephone call to radio station on school dress code was protected speech); Givhan v. Western Line Consolidated School District, 439 U.S. 210 (1979) (teacher's private complaints to principal in office about race discrimination is protected speech). Mt. Healthy and Givhan were unanimous except for one concurrence. A more conservative Court split 5:4 on three recent public-employee cases: Connick v. Myers, 461 U.S. 138 (1983) (assistant district attorney's questionnaire on office rules and morale mostly extension of grievance not of public concern, and firing still justified insofar as it was of public concern); Rankin v. McPherson, 107 S.Ct. 2891 (1987) (probationary clerical employee in constable's office protected in remark, after Reagan assassination attempt, "if they go for him again, I hope they get him"); and Rutan v. Republican Party of Illinois, No. 88-1872 (June 21, 1990) (all political patronage practices in employment equally unlawful, including refusal to hire, except where party affiliation "appropriate requirement").

33. <u>Pico</u>, supra n. 31 .

34. <u>Keyishian v. Board of Regents</u>, 385 U.S. 589,603 (1967), quoting, in order, <u>Shelton v. Tucker</u>, 364 U.S. 479,487 (1960); <u>U.S. v. Associated Press</u>, 52 F.Supp. 362,372, 326 U.S. 1 (1945); and <u>Sweezy</u>, 354 U.S. 234,250 (1957). The marketplace image is from <u>Abrams v. U.S.</u>, 250 U.S. 616,630 (1919) (Holmes, J., joined by Brandeis, J., dissenting).

35. Letter of July 2, 1990 from Andrew B. Kirkpatrick, Jr., to Harry F. Weyher, Esq., at 2.

36. Delaware fired Aumiller in 1976 for "advocating" homosexuality. Only 12 years later, in 1988, a Michigan student was accused of "harassment" for calling homosexuality a treatable disease. State-university theology can be hard to keep up with.