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POLITICAL LIBERALISM, STANDARDIZED ABILITY TESTING AND EQUAL PROTECTION ADJUDICATION: THE INADEQUACIES OF THE MANIFEST OR SUBSTANTIAL RELATION STANDARD OF REVIEW*

By DWIGHT L. GREENE

INTRODUCTION

THIS ARTICLE IS a comment on a currently evolving standard of equal protection review involving scrutiny of the means selected by the state to assure that there is a manifest or substantial relation to the State's ends. The specific problem considered is the use of standardized ability tests in the admissions process of the state supported higher education. This is a topic of particularly timely import for minority education in this twentieth anniversary year of *Brown v. Board of Education*.¹

Standardized ability tests play a substantial, and at times determinative, role in selecting which individuals will be granted a share in the fruits of higher education.² Moreover, they are an example of the state's use of a technology with known disproportionate impact upon minority groups in its decision making process. For both of these reasons, the constitutional standard used to review the roles of standardized ability tests warrants careful consideration.

It has been suggested that this evolving standard "provides an adequate basis for challenging some of the standardized ability tests used in determining college entrance requirements as violations of [the] equal protec-

tion [clause]."³ This article takes a contrary view, finding the standard lacking in two significant respects: First, its rationale does not provide sufficient precedential authority to protect minority groups against a fixed majority. Second, it does not provide the necessary protection for the liberty of Black individuals.

To provide a framework for these comments, "it is enough, perhaps, to isolate [a theme] which runs persistently through [liberal political] discussions and which seems peculiarly adaptable to the constitutional context in which courts must operate."⁴ In order

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*The author would like to express his thanks to Professor Michelman and special thanks to Professor Tribe for pointing out some of the strengths and weaknesses in this comment. The weaknesses and errors which remain are entirely the author's; but the credit for its strengths must be shared with others not mentioned in the comment, most especially Assistant Professor Roberto Unger, in whose ambience (I have discovered) much of my thinking has taken place. Finally, the author is sincerely appreciative of the assistance he received from his student colleagues, especially Mr. Robert Cotten.

1. 347 U.S. 483 (1954).

2. WING and WALLACH, *COLLEGE ADMISSIONS AND THE PSYCHOLOGY OF TALENT* (1971).

3. *Constitutional Requirements for Standardized Ability Tests Used in Education*, 26 VAND. L. REV. 789, (1973) [hereinafter cited as VANDERBILT] (bracketed word supplied).

4. *Developments in the Law: Equal Protection*, 82 HARV. L. REV. 1065, 1161 (1968) (Modifications bracketed) [hereinafter cited as DEVELOPMENTS IN THE LAW].

to do this, Part I will be devoted to an elaboration of a classical liberal theme of legislation, considering especially the implications of the fourteenth amendment's equal protection clause. Part II will build upon Part I: it will consider two contemporary conceptions of the court's role as a liberal adjudicator, with particular emphasis on the implications of the fourteenth amendment's equal protection clause.

Part III will be an elaboration and critique of the evolving standard as it applies to standardized tests. The conclusion, Part IV, will set forth the parameters of a more acceptable alternative for judicial review.

PART I: LIBERAL LEGISLATION AND THE FOURTEENTH AMENDMENT

Freedom of Men under Government is, to have a standing Rule to live by, common to every one of that Society, and made by the Legislative Power erected in it; A Liberty to follow my own Will in all things, where the Rule prescribes not; and not to be subject to the inconsistent, uncertain, unknown, Arbitrary Will of another Man.⁵

Exercises of power, by the government, inconsistent with that delegation, are tantamount to slavery: the arbitrary exercise of one man's will over another.⁶

The nature, theory and limitations of our institutions of government can most easily be understood through a development of classical liberal theory. In classic liberal theory, especially that most consistent with the theme developed here, the focus of sovereign power is in the people and the government has only the power delegated to it by the people.

This thematic approach is admittedly un-historical. Yet it does permit one to think systematically about our political institutions. Moreover, classic liberalism is not merely theory; its tenets reflect widely held contemporary attitudes about the state and society. In developing standards against which to test state actions, those of us involved in the legal system may find it illuminating to plan litigation strategies and evaluate the opinions of the courts with a consciousness of a classical liberal theory.

A. Rules Order A Liberal Society

THE CENTRAL organizing concept in liberal political thought is the individual. The individual exists to satisfy his own wants. The unrestrained pursuit of one's wants is called Liberty. The drive for Liberty is insatiable, yet the world is finite and there are other individuals in it who like oneself have insatiable drives for liberty. Hence, for the individual there is a dilemma: either all could struggle to the death to obtain control over a world of scarcity, i.e., engage in perpetual civil war, or all could join together in social order. The classic expression of this element of the liberal conception of society is found in Hobbes' *Leviathan*.⁷ Two features of this conception of society should be noted here. First, the individual is the source of society and it is for individual benefit and satisfaction that society exists. Secondly, the relationship between the individual and the society can be imagined as one in which the individual relinquishes only as much of his liberty as is consistent with his/her existence in society.⁸

These two features in liberal society are inherently in tension with one another. At times, it is in the individual's best interest to join together with other individuals to pursue common goals. Such aggregations are the liberal conception of groups. Groups are the result of the coincidence of individual interests. In the political context, these are usually called coalitions.

Several characteristics and implications of coalitions should be made explicit. The *raison*

5. LOCKE, TWO TREATIES OF GOVERNMENT (1691) at §22.

6. E.g., *Yick Wo v. Hopkins*, 118 U.S. 356 (1886).

7. There is, historically, another strand to liberal thought, i.e., one that conceives of rules and social order as freeing men to be what they naturally are — "good." This concept of rules is heavily predicated on a sense of a common God and shared values. Since, however, whatever is left of this concept of the Good State is now considered to issue from God's (individual) representatives, this view would seem to largely collapse into the "Hobbesian" strand of liberal thought being developed in the text. The only difference being that some men view themselves as acting upon good desires.

8. For the best contemporary statement on the Liberal state see RAWLS, *A Theory of Justice* (1971). See also NEGEL, *Rawls on Justice*, 82 PHILOSOPHICAL REV. 220, 228 (1973). But see, e.g., LOWI, *The End of Liberalism* (1969); WOLFF, *Poverty of Liberalism* (1968).

d'être of a coalition is its goal. Coalitions do not alter the essential antagonistic character of the individuals in them. The statement of the coalition's goal, commonly called a rule, is the result of the compromise of individual interest in a manner acceptable to the constituents. Rules may not be "equally" beneficial to all individuals in the coalition; they represent the balance of interests that is sufficient to gain the necessary support of those in the coalition.

Since in classic liberalism no individual can really trust any other individual, the rule must be put in permanent and objective form, and the force of the group must stand behind the rule as stated. Rules then are general statements and apply, as stated, to all who fall within their parameters.⁹

While a coalition is advantageous for those in it, obviously the coalition is not advantageous for those who do not desire the coalition's rule. The coalition is after all affecting a distribution of a scarce world among individuals, all with insatiable desires. Hence, rules limit the liberty of some individuals and advance the liberty of others. Absent the force of the coalition that wants the rule, why should an individual not in the coalition be constrained by it? Without some further means of ensuring order, this state will become one of civil war. Individuals not in the coalition will not have relinquished any of their liberty.

The liberal solution to this problem is derived from the nature of coalitions. The individuals in a coalition have arbitrary desires. These desires will tend to shift over time. Furthermore, the coincidence of interests that make up a coalition as to one goal need not coincide as to another. Thus, over a range of goals and time, the individuals coalescing to make rules will tend to shift according to their arbitrary desires. The problem of rules therefore reduces to a need for a mechanism that can neutrally register individual desires. This mechanism we shall call the "meta-rule."

The "meta-rule" alleviates the tension created by rules. It takes all individuals' interests into account, neutrally permitting

them to coalesce and make rules. The "meta-rule" operates fairly between all individuals, because it assures to each that even though a particular rule may not inure to his or her benefit, the aggregate of rules over time will. The individuals' interests will be fairly represented in some of the winning coalitions. Thus, it is possible to fairly justify the constraint of individual liberty in particular instances by referring the individuals in the minority of the moment to their equal chance to influence the neutral processes of the "meta-rule."¹⁰

This brings us to the final implications of coalitions in liberal political theory. To assure individual liberty, it is necessary to safeguard individuality in the legislative process. This is necessary because it is possible for a coalition of individuals to set as its goal the domination of other individuals over a wide range of issues. Such a coalition could benefit itself by being able to make an unfair number of rules.

9. On the application of rules, see Part II, especially note 41 and 47.

10. It will be observed that *no* particular rule is inherently of value. The meta-rule is a set of rules designed to insure protection of liberty; but none of these rules are in and of themselves of value. In fact, value in a liberal system derives from the satisfaction of individual wants. As long as the source of the meaning of society is the individual, value can have no greater significance; for we cannot gain from another's wants, except as we can coalesce with them to satisfy our own wants. Hence, even our fundamental rules are without inherent value. As Professor Tribe has pointed out, "starting from the premise that human ends and moral values are wholly subjective and personal and hence not derivable from reality by the 'objective' methods of analytic reason and empirical investigation, these theories purport to reach conclusions (sometimes utilitarian and sometimes contractarian) about how society ought to be organized or how social choices should be made (e.g., so as to maximize the sum of individual satisfactions); but if the starting premise is correct, then conclusions of this normative form can never be more than arbitrary expressions of personal preference, opaque to rational discourse — hardly the status to which they must aspire."

TRIBE, *Policy Science: Analysis or Ideology*, 2 PHILosophy AND PUBLIC AFFAIRS 66, 100 n. 95 (1972).

This kind of coalition is called a faction.¹¹ To prevent factions, the liberal system structures into the "meta-rule" certain safeguards to limit majority action and separate power by placing it in opposition to itself. Without such "checks and balances," factionalism could develop and destroy liberty by imposing, in an ascendant fashion, one arbitrary will over another. Given a liberal conception of society, this would be tyranny. It is against this liberal conceptual framework that rules, which in the political context are called laws, should be viewed.

B. *The History of a Law: the Fourteenth Amendment*

"Oh, the shocking, the intolerable inconsistency!"¹²

SLAVERY AS AN institution was a compromise to the generally liberal ideology of the United States Constitution. The fourteenth amendment can be understood as part of a set of Amendments designed to obliterate that anti-liberal phenomenon. In order for us to understand the role the fourteenth amendment plays in our liberal political theory, a brief review of its history will be necessary.

1. *Ante-Bellum*

By 1776, writers, following the logic of American Revolutionary thought, were attacking the institution of slavery.¹³ Indeed it was very much the fashion of the time to analogize the Colonial condition to that of slavery.¹⁴

To many, the term slavery "applied equally to the Black plantation laborers in the American colonies, for their condition was only a more dramatic, more bizarre variation of the condition of all who had lost the power of self-determination."¹⁵ Afro-American slavery was but another example of wholesale deprivation of human liberty.¹⁶

The adoption of the fourteenth amendment was the result of an extraordinary coalition (the condition necessary to change the

"meta-rule") between those in the abolitionist movement, Northern industrialist, and Western agrarian interests.¹⁷ The origins of the equal protection clause itself can, however, be traced to the abolitionists and natural rights advocates.

Whether radical, evangelical, or transcendental, the religious roots of the anti-slavery movement are well known.¹⁸ To these religiously inspired abolitionists, the liberty of man, Black or white, rested not on notions of utility but, rather, on "conformity to our moral relations" as revealed to them "by the moral faculty."¹⁹ And it is in this spirit that

11. The classic statement on factions is of course Madison's in the *Federalist Papers No. 10*:

"Among the numerous advantages promised by a well-constructed Union, none deserves to be more accurately developed than its tendency to break and control the violence of faction. The friend of popular governments never finds himself so much alarmed for their character and fate as when he contemplated their propensity to this dangerous vice. He will not fail, therefore, to set a due value on any plan which, without violating the principles to which he attached, provided a proper cure for it . . .

There are . . . two methods of removing the causes of faction: the first, the destruction of liberty, would be unwise, and the second, giving every citizen the same opinion, would be impracticable." [Madison goes on to talk of the protection of different and unequal faculties of acquiring property and how the government also exists to protect these interests].

"The inference to which we are brought is that the causes of faction cannot be removed, and that relief is only to be sought in the means of controlling its effects. . . . we well know that neither moral nor religious motives can be relied on as an adequate control. . . .

[He then suggests Republicanism to moderate the influence of direct representation, with nationalism and federalism checking each other, and in general, breaking the majority into smaller units with different interests to prevent the formation of oppressive majorities.]

12. Samuel Hopkins in "A Dialogue Concerning the Slavery of Africans; Showing It To Be the Duty and Interest of the American Colonies to Emancipate All the African Slaves" in BAILYN, *The Ideological Origins of the American Revolution*, 244 (1967) [hereinafter cited as BAILYN].

13. JORDAN, *White Over Black*, 287-304 (1968).

14. BAILYN, *supra* note 12 at 232 *et seq.*

15. *Id.* at 234.

16. Various attempts were made to justify the Peculiar Institution. These attempts ultimately proved inadequate to replace the "inevitable" logic of the American Revolution. As Thomas Hutchinson wrote in 1776:

As long as the institution of slavery lasted, the burden of proof would lie with its advocates to show why the statement "all men are created equal" did not mean precisely what it said: all men, "white or black." Ultimately, the colonists were reduced to the realization that the only claim Americans had over Africans was the claim of "force and power."

DUBOIS, *The Suppression of the African Slave Trade* 42-47 (N.Y. 1896).

17. FRANK and MUNRO, *The Original Understanding of "Equal Protection of the Laws,"* 50 COL. L. REV. 131, 139 (1950) [hereinafter cited as FRANK and MUNRO].

18. See generally BARNES, *The Anti-Slavery Impulse* (1933).

19. RIPLEY, *The Transcendentalist: An Anthology* 65 (Miller ed. 1950) (quoting James MacKintosh: 1833), quoted in NELSON, *The Impact of the Anti-Slavery Movement Upon Styles of Judicial Reasoning in Nineteenth Century America* 87 Harv L. Rev., 513, 527 (1974).

we must appreciate their attachment to the Declaration of Independence's phrase "all men are created equal."

While the inconsistency of Black slavery was perceived fairly early by the natural rights advocates, it was not acted upon with great vigor until the repressive nature of slavery and its threat to all liberty became apparent to them.²⁰ To these human rights advocates, the liberty of the individual derived from the inherent logic of a Republican form of government.

These two strands of anti-slavery thought came together in action as two features of slavery became apparent: First, its reliance on the repression of the liberty of those who disagreed with it, especially with regard to free speech and free religious expression. Secondly, the South's treatment of men as property. (This later was brought to focus in the question of the fugitive slave.)²¹ To the abolitionists, the inconsistency of slavery came to be seen as a threat to the liberty of all men.

The phrase "all men are created equal" underwent much of its transformation from an aphorism to a legal instrument at the hands of Charles Sumner, lawyer in the famous case of *Roberts v. City of Boston*.²² Working with the words of the Massachusetts Constitution that "all men are born free and equal," Sumner attempted to transform these words into law:

Of Equality I shall speak, not as a sentiment, but as a principle . . . Thus it is with all moral and political ideas. First appearing as a sentiment, they awake a noble impulse, filling the soul with generous sympathy, and encouraging one to congenial effort. Slowly recognized, they finally pass into a formula, to be acted upon, to be applied, to be defended in the concerns of life, as principles.

HENCE IN SUMNER'S argument, the phrase passed from "created equal" to equality before the law.

He may be poor, weak, humble, or Black — he may be of Caucasian, Jewish, Indian, or Ethiopian race — he may be French, German, English, or Irish extraction; but before the Constitution of Massachusetts all these distinctions disappear. He is not poor, weak,

humble, or Black; nor is he French, German, English, or Irish; he is a MAN, the equal of his fellow-men.

2. Postbellum

After passage of the Civil Rights Act of 1866, the Joint Committee on Reconstruction presented the fourteenth amendment to Congress. The actual drafting of the first section was done by Representative Bingham of Ohio. For the equality clause he had before him two precedent phrases, his own "equal protection in their rights" and the Wilson-Trumbull Civil Rights language, "equal benefit of all laws." It seems clear that he combined the two phrases and arrived at the formula "equal protection of the laws."²³

The meaning of the phrase was not the same to all, but to Senator Howard, floor leader for the Amendment in the Senate, the meaning was summarized thus:

it abolishes all class legislation in the States and does away with the injustice of subjecting one caste of persons to a code not applicable to another.

Howard finally reduced the clause to the familiar phrase: "it establishes equality before the law. . . ."²⁴

Equality before the law meant various things to various supporters and opponents. The strongest congressional advocates of "equality before the law" during the Reconstruction decade hoped the recently emancipated Black man would join society undistinguished from the white population. Their achievement was less than their hopes.

20. tenBroek, *The Anti-Slavery Origins of the Fourteenth Amendment*, 37 (1951); See Barnes, *supra* note 18.

21. See, e.g., *Scott v. Safford*, 60 U.S. (19 How.) 393 (1857); *Prigg v. Pennsylvania*, 41 U.S. (16 Pet.) 539 (1842).

22. Brief for Plaintiff *Roberts v. City of Boston*, 59 Mass. (5 Cush.) 198 (1849). Excellent accounts of this history can be found in LITWACK, *North of Slavery* 174-148 (1961); FRANK and MUNRO, *supra* note 17, at 136-138.

23. FRANK and MUNRO, *supra* note 17, at 140; The Civil Rts. Act of 1866, Apr. 9, Ch. 31, 14 Stat. 2.

24. *Id.* at 142.

The equal protection clause was, . . . originally understood to mean the following: all men, without regard to race or color, would have the same rights to acquire real and personal property and to enter into business enterprises; criminal and civil law, in procedures or penalties, should make no distinctions whatsoever because of race or color; there should be no segregation of individuals on the basis of race or color as to the right to own or use land; there should be no segregation of individuals on the basis of race or color in the use of utilities, such as transportation or hotels; with reservations, for here there is substantial divergence, there should be no segregation in the schools. . . . The clause was meant to have no bearing on the right to vote; . . . and it was generally understood to have no bearing on segregation of a pure private sort in situations fairly independent of the law, as in churches, cemeteries, or private clubs.²⁵

This last point, the limitation of the fourteenth amendment to the public aspects of race, is analogous to the contemporary state action limitation.

IN THE PERIOD in which the fourteenth amendment was adopted, two kinds of relations were generally assumed to exist among men: those controlled by the law and those controlled by purely personal choice. The former involves civil rights, the latter, social rights. While it was generally agreed that "equality under the law" applied only to civil rights, the line between the two defies precise demarcation.²⁶ This is so in part because the extraordinary coalition responsible for the adoption of the fourteenth amendment held views of the role of the individual in society which were not entirely consistent with one another.²⁷

C. The Fourteenth Amendment as Part of a Constitutional Scheme of Liberal Political Thought

"The rights created by the first section of the Fourteenth Amendment are, by its terms, guaranteed to the individual. The rights established are personal rights."²⁸

THE CIVIL WAR Amendments affected the legal status of Blacks and granted

Congress certain enforcement powers. The thirteenth amendment resolved the question of whether people could be treated as property. The fifteenth amendment secured for Blacks the vote, a major part of the right to participate in the society as political individuals. In a sense these amendments granted rights; they gave legal recognition to the Black individual.

The fourteenth amendment firmly establishes, *inter alia*, criteria for citizenship. It also engrafted the states' due process and equal protection clauses onto the constitution. The fourteenth amendment secures the integrity of the political individual against the power of the state. As we shall see below, the fourteenth amendment takes on attributes similar to the structural checks suggested by Madison to cure the ills of faction.²⁹

The language of the equal protection clause would appear to create a problem for the liberal political theme being discussed here.³⁰ This language might be read to prohibit the state from treating any two persons differently. When conceived of as similar to a "Madisonian" check on factions, however, the problem becomes less salient.

Madisonian checks do not prevent majorities from making allocative decisions that benefit some individuals and not others.

25. *Id. supra* note 17, at 167-168. On the greater question of quasi-public enterprises, Cf. *Railroad Co. v. Brown*, 84 U.S. (17 Wall) 445, 452 (1873). In this statutory case, the Supreme Court upheld the trial court's rejection of the defendant's separate but equal transportation facilities, as "an ingenious attempt to evade a compliance with the obvious meaning of the [Congressional] requirement."

26. A typical example of the use of this conception by a supporter of the Amendment is Greeley's observation: "You can't make all men equal socially. One is stronger, better, braver, than the other. Now what I said is that all men should be equal before the law. I want the black man to have his rights all over the South. The law should know nothing about a man's color."

FRANK and MUNRO, *supra* note 17, at 148. Thus, the original distinction appears to have been that the law should not know distinction of color, but that personal taste should be left to govern itself.

27. Of course, the Court has decided that the circumstances surrounding the adoption of the fourteenth amendment in 1868 are "inconclusive." *Brown v. Bd. of Ed.* 347 U.S. 485 (1954).

28. *Shelley v. Kraemer*, 334 U.S. 1, 22 (1948).

29. See text accompanying note 11, *supra*.

30. "No state shall . . . deny to any person within its jurisdiction the equal protection of the laws." U.S. CONST. amend. XIV, §1.

Instead, they operate as limitations on the formation of majorities. The likelihood of the concentration of power in a single faction is lessened so that the process of shifting coalitions remains unencumbered. Ordinary laws do not undercut the integrity of political individuals; for as long as the "meta-rule" remains sound, their interests are assumed to be fairly (justly) represented in the whole set of legislative outcomes. As we have already seen, factions undercut this assumption, raising the spectre of the ascendancy of arbitrary wills and the latent potential of war of all against all.³¹

Yet factions are, given our assumptions, advantageous to those individuals in them. Hence, if there were some means by which a coalition could systematically deprive other individuals of their (abstract) right to a fair share of rules, it would be natural to do so.

Such a systematic deprivation could be accomplished by adopting laws that classify individuals according to characteristics that would set them apart from other individuals regardless of the issue. In a sense, such classifications depend upon group characteristics and not the aggregation of individual desires.³² Laws that operate because of group characteristics in effect establish the group as the source of law. This is, however, antithetical to individual liberty in that it artificially fixes coalitions across a broad range of issues. Hence, such laws threaten liberty in the same way factionalism does.

PART II. LIBERAL ADJUDICATION AND THE FOURTEENTH AMENDMENT

Legal adjudication in liberal theory is premised upon the notion that by applying rules to which the people have consented the judge does not compromise the liberty of the litigants before the court. The decision which results is not then an exercise of the judge's will; but is an application of the will of the people as expressed in their laws.

The judge's authority to decide cases is derived from the role allocated to him in the

Constitution.³³ The judge should render decisions based on rules,³⁴ which, he is expected to apply in a neutral, principled manner.

A principled decision, in the sense I have in mind, is one that rests on reasons with respect to all the issues in the cases, reasons that in their generality and their neutrality transcend any immediate result that is involved.³⁵

In fact, liberal thought predicates the neutrality of the judicial process upon the neutrality of reason.³⁶

To Professor Wechsler, as to many other adherents of this theme of neutral adjudication, the source of these reasoned principles is to be found in the meaning and logic of language.³⁷ This theme of liberal adjudication is known as formalism and takes on one of two forms: either the meaning of words is revealed to us through a common set of shared

31. See text accompanying notes 10 and 11, *supra*.

32. Ordinary law, of course, also relies on group characteristics: those which are associated with some coalition goal. When, however, the characteristic is like race, alienage, etc., the question must be asked: what coalition goal, other than the impermissible formation of a faction, could be served by such a classification? Normally these characteristics are simply not relevant to other group goals, i.e., they are "arbitrary," e.g., *Oyer v. Boles*, 368 U.S. 448, 456 (1961). Two exceptions do occur: The first is when there is a very clear non-factionalist reason to so characterize individuals, for example, war time national security; the second is when the characteristic is being singled out for compensatory purposes. This would be like the rationale that made the 13th and 15th amendments necessary. It is predicated on the theory that there has been an historical deprivation of individuality. Though this affirmative action is distinguishable in the abstract, the distinction is a difficult one to maintain in practice. The equality promised in a liberal state exists only in the abstract. The equal protection clause can be understood as applying "... the notion of equality . . . to the distribution of benefits and burdens in the public sector of a society which embraces wide degrees of inequalities in the private sector." DEVELOPMENTS IN THE LAW, *supra* note 4 at 1163. Equality in such a society must mean the assurance of a fair chance to participate, but not the guarantee of any particular outcome. Hence, when the government intervenes to determine particular outcomes, the question arises as to how much intervention is justified by past deprivations. As will be seen below, it is not possible to resolve this question without a value judgment on the part of the decision maker.

33. *Marbury v. Madison*, 5 U.S. (1 Cranch) 137, 180 (1805); WECHSLER, *Toward Neutral Principles of Constitutional Law*, 73 HARV. L. REV. 1, 5 (1959) [hereinafter cited as WECHSLER].

34. As pointed out by Professor Wechsler, even the exercise of the court's discretionary jurisdiction is governed, in proper liberal thought, by standards. WECHSLER *supra* note 33, at 9-10.

35. *Id.*, at 15-16, 19.

36. See note 41, *infra*.

37. See, e.g., *Otis v. Parker*, 187 U.S. 606 (1903) (Holmes, J.).

assumptions or community values,³⁸ or, the words themselves positively point to some predetermined object or set of objects in the world. The latter is the form most consistent with the liberal theme being developed here.³⁹

A FORMAL RULE is one that operates mechanically.⁴⁰ There is an exact correspondence between the facts and the rule: If given fact X, then apply rule X and only rule X. Rules can be applied in this manner because this version of adjudication adopts a positivistic theory of language. This view of language is similar to that adopted as early as the linguistic positivism expressed by Augustine in the *Confessions*. St. Augustine's view was that words point to, or exactly correspond with, certain things in the world.

Yet the mechanical application of rules is both literally impossible and absurd. Names do not come inscribed on events, they must be supplied. And it is in the final analysis — the judge, who through the exercise of his cognitive processes, supplies the name. This is a balancing operation in which various contextual features are contrasted with each other to determine what name is appropriate. Furthermore, the judge would be unjustified in applying a rule in situations where it was not intended, by the adopting coalition, to apply. Hence, even if the judge successfully names the events as would the rule-maker, he or she must still decide whether this is an appropriate case to apply the rule. For example, the particular situation before the court could be one which could not have been anticipated. The judge must then decide for himself what the rule-maker would have wanted. These two necessary problems in the formal or mechanical application of rules are solved in liberal adjudication by the judge's deciding the case consistently with the purposes of the rule-makers.⁴¹

This purposeful approach adopts an instrumental view of rules. Rules in this second framework are considered as incorporating the goals the rule-maker desired to reach. The words themselves are not dispositive for the words take on meaning only when considered in the light of the purpose for which they were

chosen. This mode of analysis does not purport to examine the ends themselves, but rather questions whether the rule, as applied in the instant case, is the appropriate means to reach the desired end. This mode of analysis, it is argued, is a neutral process; for through reason one can review action to determine whether or not it is an efficient means to some end.⁴² The substantial relationship standard of

38. *Cf. Adamson v. California*, 382 U.S. 46, 47 (1946) (Frankfurter, J.) ("those canons of decency and fairness which express the notions of justice of English speaking peoples. . .")

39. See note 7 *supra*; see also BLACK, *The Bill of Rights*, 35 N.Y.U.L. REV. 865, 879 (1960). Professor Wechsler's view is consistent with this form.

40. KENNEDY, *Legal Formality*, 2 THE JOURNAL OF LEGAL STUDIES 351, 359 (1973) [hereinafter cited as KENNEDY].

41. *Id.* at 359 n. 14. Professor Kennedy suggests that a rule applier ultimately must balance interests, regardless of the linguistic and cognitive problems, because the world is inherently uncertain. On the other hand, Kennedy points out that balancing cannot take place without some reference to words as things with positive meaning, 357 n. 12. We shall develop this point below. See also note 47-48 *infra*.

42. The central postulate of liberal theory in this modality can be derived from Hume's statement that "reason is, and ought to be the slave of the passions." Hume, *A Treatise of Human Nature*, Bk. II, pt. 3, sec. iii. In liberal thought, passions are the ends. They are subjective and incapable of being reasonable or unreasonable, i.e., they are arbitrary. (see note 10 *supra*). On the other hand, reason is the means. It is objective, i.e., concerned with facts and logic. Reasoning does not depend upon the individual, it has no inherent values; it is neutral.

Yet as Horkheimer has suggested, the condition of reason in liberal thought is not without its difficulties. Reason had been traditionally thought to reveal to man an inherent order in the world, e.g., Plato, Aristotle and the German idealist.

"The term objective reason . . . on the one hand denotes as its essence a structure inherent in reality that by itself calls for a specific mode of behavior in each specific case, . . ."

Horkheimer, *Eclipse of Reason*, 11 (1947).

Hence traditionally, reason could assist in revealing value. Largely due to the influence of Kant in his *Critique of Pure Reason*, however, human knowledge became conceived of as subjective and relative. (Though there was an objective reality to Kant, it could only be known through subjective experience.) "Ultimately subjective reason proves to be the ability to calculate probabilities and thereby to coordinate the right means with a given end." Horkheimer, at 5. (This notion largely corresponds to Freud's conception of the Ego. See, e.g., FREUD, *An Interpretation of Dreams; The Ego and the Id.*)

A problem with this view, however, derives from Hegel's criticism of Kant's critique of human knowledge. Hegel applies Kant's own critique of objective reason to man's ability to "objectively" know himself. He points out that the epistemological problems found with pure reason also apply to reasoning about self. This completes the so-called "hermeneutical circle," wherein man cannot objectively know himself.

Horkheimer develops this critique in the context of classic liberalism to show that the reliance placed on the individual's ability to know his own interests in liberal political theory is unjustified, hence the very premises of democracy are threatened by the "neutrality" of reason. Horkheimer at 26, 28.

review — our particular concern in this comment — is an example of this mode of analysis in the equal protection area.⁴³

Equal protection analysis, when viewed instrumentally, is a review by the court of the constitutionality of the means adopted to reach some permissible state goal. The means adopted by the state involves a classification system. Hence instrumental equal protection review is limited to reviewing the classifications used by the state to reach some legitimate goal. The question of concern to the court is: Is this system of classification reasonably calculated to reach the state's goal?

The equal protection clause is not, however, a general limitation on the state's power to act when the court is convinced that the particular rule is the outcome of a soundly functioning "meta-rule."⁴⁴ If the system of classification can be reasonably calculated to further any conceivable permitted state purpose, then it must be upheld.⁴⁵ This is not the case when the classificatory scheme is predicated upon criteria which might lead to a systematic deprivation of one group of individuals' just share of rules. Here the court, given the purposes of the equal protection clause, must examine the means more closely to see that they are justified as the only way of reaching some state goal. This shift is justified by the risks of a coalition becoming a faction.

IN ORDER TO conduct this instrumentalist review, the court must determine what the rule's purpose is. Normally, this is done by studying the words used by the legislature in as complete a context as possible. There is, however, one central feature to this investigation: the purpose is ultimately dependent upon the particular words chosen. If the court cannot demonstrate that it is attempting to maintain the balance intended by the legislature, which is revealed by the words used, then its decision can ultimately be grounded only in its own will.⁴⁷ This would be the end of neutral adjudication. In the framework of instrumental adjudication, the court must claim that words have some determinable meaning and are not ambiguous.⁴⁸

We have then apparently returned to the point where we began: "The god of process seems Janus faced."⁴⁹ The requirements of either the formal (positivist-mechanistic) or instrumental view of rules necessitates reference to the other view; and yet, the answer cannot be found in that other view. What then is the solution?

43. See text accompanying note 50 *et. seq.*

44. See text accompanying notes 28 to 32.

45. See, e.g., *Kotch v. Bd. of River Port Pilot Comm'rs.*, 330 U.S. 552 (1947).

46. See *U.S. v. Carolene Products*, 304 U.S. 144, 152n. 4 (1938) ("political process" and "insular minorities").

47. Professor Tribe has in the context of a discussion of the ends/means relationship in policy science set forth an analysis which suggests that the problem confronted by the courts is even more difficult than the text indicates. A central assumption of most instrumental thought is that the ends remain stable. Yet ends often turn out not to be ultimate themselves, i.e., they often turn out to be means to some other end. TRIBE, *Policy Science: Analysis or Ideology*, 2 PHILOSOPHY & PUBLIC AFFAIRS 66, 99 and n. 93 (1972). The legislature may not be aware of this itself, hence how could a court "neutrally" choose between the end and the more fundamental end. The problems here are legion.

At a somewhat deeper level, the facts that one counts as leading towards the end may largely depend on the beliefs held by the legislature and subsequently by the court. And when classification schemes are considered as a form of probability statements, it is literally impossible to "neutrally" decide when facts no longer lead to the desired goal.

"There is of course no finite limit to the confidence we may reasonably place in a null-hypothesis, nor can there be therefore any definite lower limit either to the probability of events which we may assume to have occurred on the basis of some null-hypothesis. Hence it is clear that a probability statement cannot be strictly contradicted by any event, however improbable this event may appear in its light. The contradiction must be established by a personal act of appraisal which rejects certain possibilities as being too improbable to be entertained as true." POLANYI, *Personal Knowledge: Toward a Post-Critical Philosophy*, 23-24; see also Chap. 2 and *passim*. (1958).

Hence if the legislature is considered to have defined the ends it desires in terms of the belief that it probably can be reached through that means, the court can only review their decision through its own appraisal of the probability. Such an appraisal is *a priori* not objective, and hence not neutral in Black's or Wechsler's sense.

Moreover, Professor Tribe has pointed out that some of our decisions about means have the effect of reshaping ends. For instance, means which seek to affect the genetic make up of man, to redefine "man." Hence, the means is reshaping the decision maker. The concept of "maintaining" a legislative "balance" in this context becomes a nullity. TRIBE, *Policy Science*, 99-100; TRIBE, *Technology Assessment and the Fourth Discontinuity: The Limits of Instrumental Rationality*, 46 SO. CALIF. L. REV. 617, 642-657 (1973). Given the extent to which standardized ability tests determine opportunity in society, this point is instructive. We are creating a society largely dominated by those who do well on these tests.

48. Indeed, recall that we have reduced the historical ambiguity in the word equality by an act of choice. *Supra* text at note 7. See on the philosophic ambiguity of the word "equal," DEVELOPMENTS IN THE LAW, *supra* note 4 at 1159-1168.

49. ACKERMAN, *Law and the Modern Mind*, 103 DAEDALUS 119, 129 (1974).

No attempt will be made here to solve this apparently intractable problem in liberal adjudication through a thematic exposition. Instead we shall investigate the problem in the context of an evolving standard of equal protection review as it could be applied to the use of standardized ability tests in the admissions process to state supported higher education.

PART III. THE EVOLVING CASE LAW

There is currently evolving a body of case law in which courts have been called upon to review the use of standardized general ability tests by the government.⁵⁰ Cases to date have been decided in the context of lower education and job employment. Our research has revealed no judicial authority reviewing the use of standardized ability test in the context of higher education. Nevertheless, it has been thought by some that the standard of review used by the courts in the areas of lower education and employment should be applied here.⁵¹ This analysis will develop and comment upon the implications of this equal protection standard of review in the context of higher education.

A. *The Tests*

"Why call excellence at these test games intelligence?"⁵²

STANDARDIZED ability tests are the means through which prospective applicants are classified for the purposes of a government action: the admission to institutions of higher learning.⁵³ Since it is essential for equal protection analysis to ascertain the nature of the characteristic being used, we shall first try to establish what it is these tests are testing and then go on to review and evaluate how the courts have responded to minority group challenges to these tests.

Standardized ability tests are supposed to provide a common measuring rod against which other applicant variables can be viewed. These tests have been advanced as measures of the innate ability of the individual to learn.

There are, logically, two sides to this question of ability: one, the ability to learn; and two, the ability to perform.

Though it is not absurd to believe that some component of intelligence is heritable, it is currently, and possibly permanently, impossible to estimate its significance. Standardized tests are subject to uncontrollable, unknown and perhaps unknowable systematic errors of uncertain magnitude.⁵⁴ The extent to which phenotypic traits vary as a result of genetic differences is uncertain; and much of this uncertainty derives from the largely instrumental definitions of aptitude. The largely instrumental definition of intelligence separates this measurement from conventional physical and biological measurements. Most significantly, even the data obtained from phenotypic correlations between separated monozygotic twins are vitiated by systematic errors inherent in IQ tests, by the presence of genotype-environment correlation, and by the lack of detailed understanding of environmental factors relevant to the development of behavioral traits.⁵⁵ The role played by heredity in determining the ability to learn is currently unknowable.

50. In higher education these tests are usually administered by private testing services, e.g., Educational Testing Service. For the purposes of this comment, it will be assumed that their prominent place in state admissions processes will be sufficient to constitute state action. This question and the relevant authority is discussed in a Note. VANDERBILT, *supra* note 3 at 797-801.

51. E.g., *Constitutional Requirements for Standardized Ability Tests Used in Education*, 26 VAND. L. REV. 789 (1973); *See The Legal Implications of Cultural Bias in the Intelligence Testing of Disadvantaged School Children*, 61 GEO. L. J. 1027 (1973); cf. Chief Justice Berger's question to Washington Attorney General Groton on oral argument in *Defunis v. Odegaard*, CCH S. Ct. Bul., p. B2415 (U.S., Apr. 23, 1974), reported in the NEW YORK TIMES MAGAZINE, Apr. 14, 1974, at 43 col. 1 (do grades have "a direct correlation with success and effectiveness in the practice of the law?") BELL, RACE, RACISM, AND AMERICAN LAW, 762, 485 (1973); BELL, *Racism in American Courts*, 61 CALIF. L. REV. 165, 193-203 (1973).

52. McCLELLAND, *Testing for Competence Rather Than for Intelligence* 28 AM. PSYCHOLOGIST 1, 2 (Jan. 1973) [hereinafter cited as McCLELLAND].

53. *See generally*, WING and WALLACH, *supra* note 2; HOFFMAN, *The Tyranny of Testing* (1962) [hereinafter cited as HOFFMAN].

54. For an excellent proof of this proposition, *see* LAYZER, *Heritability Analysis of I.Q. Scored: Science or Numerology?*, 183 SCIENCE 1259 (March 1974) [hereinafter cited as LAYZER].

55. *Id.* at 1265.

The only ability we can apprehend is the ability to perform. The question of ability then reduces to what performance counts as an indication of ability: all we ever test for is the ability to perform. Do standardized ability tests measure any "general" ability to perform?

Researchers have had great difficulty in establishing significant validity co-efficients between grades in school or "aptitude" tests and any other behavior of importance. The public, and even many psychologists, are either ignorant of this lack of validity or refuse to acknowledge it. And educators assume (or do not think about it at all) that those who excel in *their* classes *must* go on and do *well* in life. Unfortunately, it may be in the best interests of educators to systematically ignore any evidence to the contrary. What are the facts?

IT IS CLEAR that credentials are important. That is, college graduates do on the average better than non-college graduates in terms of making money. However, college graduates with better grades do not necessarily "do better" than those with lower grades.⁵⁶ Berg, in *Education and Jobs: The Great Train Robbery* (1970), has reported studies showing that neither the amount of education nor grades are significantly correlated with vocational success as a bank teller, factory worker, or air traffic controller. Taylor, Smith and Ghiselin show in *Scientific Creativity: Its Recognition and Development*, that grades are not related to superior on the job training in even highly "intellectual" jobs.⁵⁷ Except to the extent of a self-fulfilling prophecy, the facts do not support the degree for which we assume these tests correspond with producing valuable and productive citizens.

"[These studies] make it abundantly clear that the testing movement is in grave danger of perpetuating a mythological meritocracy in which none of the measures of merit bears significant demonstrable validity with respect to any measures outside of the charmed circle. Psychologists used to say as a kind of an "in" joke that intelligence is what the intelligence tests measure. That seems to be uncomfortably

ably near the whole truth. . . . (w)hy call excellence at these test games intelligence?"⁵⁸

"Since the development of intelligence tests, psychologists have wondered what they measure. Do the scores really measure the intelligence, or do they simply reflect how well an individual can do on a certain test? The question is peculiar because it suggests that something lies within, not disclosed directly by performance of this or that kind but, it is to be hoped, validly inferable from these performances. Perhaps we could ask instead, do the test scores provide a reliable index to a range of performances?"⁵⁹

The inference that successful performance of the tasks required on intelligence and aptitude tests somehow measures a person's "basic" ability is simply not supported if one correlates scores with job success. In *10,000 Careers* (N.Y. 1959), Thorndike and Hages obtained 12,000 correlations between aptitude test scores and various measures of later occupational success. They concluded that the results did not exceed that expected purely by chance. The investigations of Holland and Richard, in *Academic and Non-Academic Accomplishment: Correlated or Uncorrelated?*; and Elton and Shevel, in *Who is Talented? An Analysis of Achievement* "have shown that no consistent relationships exist between scholastic aptitude scores by college students and their actual accomplishment in social leadership, the arts, science, music, writing, speech and drama."⁶⁰

56. McCLELLAND, *supra* note 52 at 2.

57. Prof. McClelland reports that in the case of the medical "aptitude" test, there is no correlation between the scores and grades in medical school or between either and job performance.

58. McCLELLAND, *supra* note 52 at 2.

59. LOUGH, EXPLANATION AND HUMAN ACTION, 55 (1966).

60. McClelland, *supra* note 52 at 3. The citations for the Holland and Elton studies are respectively: Research Report No. 2, Iowa City, Ia. (1965); Research Report No. 31, Iowa City, Ia. (1969). Contrary, see Ghiselli, *The Validity of Occupational Aptitude Tests* (1966). It is difficult to evaluate Ghiselli's results, for he does not reveal his research techniques. Moreover, the correlations he observed can just as easily be accounted for by looking at the child's social class as a predictor of success. The standardized test may be little more than a social register for middle and upper class whites. What is a "common sense notion" to Arthur Jensen, that I.Q. relates with high status may be *no more than* the common sense that the privileged end up in privileged positions. The test may be without significance. JENSEN, *The Heritability of Intelligence*, 244 SATURDAY EVENING POST, 2, 9, 12, 149.

What is it that we do when we test for intelligence? "The games people are required to play on aptitude tests are similar to the games teachers require in the classroom."⁶¹

Ultimately, much of the justification for the use of standardized tests derives from their ability to correlate with performance in academic environments, most especially on tests. And it is from this characteristic of the test, that some psychologists, and many educators and admission officers, conclude that the test is testing "innate ability" or intelligence. Yet the reliable range of performance measured by these tests is in fact quite narrow.⁶²

This fact in and of itself would not be sufficient to raise a serious constitutional question. But it is also widely known that these tests have a disproportionate effect according to the race of the test taker. And this at least raises a constitutional question, for, as Professor Ely states it:

"Disproportionate racial impact is usually the best evidence that race has been employed as the criteria of selection."⁶³

AS A MODE OF assessing the talents of all individuals, standardized tests systematically under-assess the talents of minority persons. Two sources are generally cited for this under-assessment of minority individuals. First, there are those factors that would effect any individual's taking the test, such as ambiguous wording. Since these have a presumably "random" effect,⁶⁴ we will not give consideration to them at this, the constitutional level of review. Secondly, there is the issue of "validity." It is this second issue that is key to current legal challenges to standardized tests.

"Validity" has to do with what performance is counted as an indication of an individual's ability to learn. Several stages are necessary before a test is considered valid. To begin with, the test must be constructed. Once constructed, the test must be tested for reliability and then standardized. Essentially testing for reliability is a process of checking the test to see that it consistently measures

the same group's (actually this is done through a system of representative control groups) performance on the same test. Standardization begins with a process for assigning numerical equivalents to students' scores. These numbers or "raw" scores are then standardized, which means they are associated with a "normative" mathematical function, usually a bell-shaped curve. This means that the "raw scores" are translated into normative scores, i.e., a comparison with a hypothetical normal population.⁶⁵ Finally, to obtain a validity coefficient, one correlates the tests' scores against the desired performance, usually grades in school.

B. The Case Law

Two issues have emerged as the focus of the legal challenge to standardized tests. First, it is charged that the tests, by virtue of their construction, are not reliable indicators of the intelligence of minority group students. This is the so-called cultural bias or mislabeling thesis.⁶⁶ Secondly, it is charged that the tests are not valid measures of job performance. Though this would not appear to be a charge

61. It is now common knowledge that many of Binet's original tests were taken from exercises that teachers used in French schools. McCLELLAND, *supra* note 52 at 1; See Garcia, *I.Q.: The Conspiracy*, PSYCHOLOGY TODAY, (Sept. 1972).
62. VANDERBILT, *supra* note 3 at 792-796. There is no *a priori* reason why standardized tests could not be designed to test for a wider range of intelligent human performances. The failure to do so is probably largely the result of the economic relationship between the testing services and their chief client: the schools. Educational institutions are almost the sole users of tests like the SAT and LSAT and hence it is not surprising to find that the chief measure of reliability for these tests is the rather narrow one of school performances. McClelland suggests that testing for motivation might be better. It would also seem that competencies other than school performance might be imported into the testing instrument. See text accompanying notes 167-169 *infra*.
63. ELY, *Legislative and Administrative Motivations in Constitutional Law*, 79 YALE L. J. 1205, 1259 (1970).
64. Actually, of course, there is some question as to whether ambiguous questions do not in fact hurt brighter students more than those of more moderate intelligence. HOFFMAN, *supra* note 53 at 21-22.
65. CRONBACH, *ESSENTIALS OF PSYCHOLOGICAL TESTING* (N.Y. 1970).
66. "This mislabeling thesis attacks an educational, not necessarily a discriminatory, intent, and is premised not upon contrived classifications which are racially or socio-economically discriminatory but upon an inherent cultural bias in testing which in reality groups by status rather than ability." 61 GEO. L. J. 1027, 1038.

properly directed at schools, it is contended in this argument that jobs, and not school-performance, is the relevant standard for performance in examining any test. In considering the case law below, we shall take these two challenges in the order presented above.

In *Hobson v. Hansen*,⁶⁷ Judge J. Skelly Wright found that the use of intelligence testing to impose a "tracking" system was an unconstitutional denial of "equal educational opportunity." This state action violated the principles of *Brown v. Bd. of Ed.* as reflected through the fifth amendment.⁶⁸ These standardized tests were used both originally to track students and to "re-evaluate" them on a yearly basis to determine if they still were properly tracked. This procedure had the effect both of separating students according to racial and socio-economic status, and of placing lower income Blacks into the lower tracks. With these effects empirically demonstrated, the court turned to an examination of the tests themselves and their effect upon the students.

The court's opinion relied in part on expert testimony, the content of which tended to show that these tests were not measuring innate ability but students' past experiences. In the first instance, the court concluded the test was not a fair measure to use in determining educational opportunity. Those students with equal innate ability but without the middle to upper class white cultural experience could not do as well on the test.⁶⁹ Moreover, since the procedure used to standardize (normalize) the test was also subject to the same socio-ethnocentricity, a fact which was borne out by the empirical evidence establishing a direct correlation between the test score and membership in white middle to upper-middle class society,⁷⁰ poor Black students were under a double disability in taking these culturally biased tests.

THE COURT THEN considered the damage caused Black students through the use of these tests. It found the damage to be serious, affecting the students' self-image, the image of the student conveyed to those seeing the

tests' results, and those who knew what track the child was in.⁷¹ These tests affected teacher expectations, and hence served as a self fulfilling prophecy.

It is not entirely clear what standard of review was used by Judge Wright in *Hobson*.

At the outset it should be made clear that what is at issue here is not whether defendants are entitled to provide different kinds of students with different kinds of education. Although the equal protection clause, is of course, concerned with classifications which result in disparity of treatment, not all classifications resulting in disparity are unconstitutional. If classification is reasonably related to the purposes of the governmental activity involved and is rationally carried out, the fact that persons are thereby treated differently does not necessarily offend.⁷²

But this was not such a case.

"[g]iven the nature of the right involved here and the class of persons affected, plaintiffs are entitled to careful judicial scrutiny of defendants professions that classifications are *in fact* based on ability to learn."⁷³

And though it has seemed to some that the judge applied a compelling state interest test,⁷⁴ it is more consistent with the language of the case to conclude that he balanced interests with something less than a strict scrutiny of the state's actions.

FIVE OTHER CASES involving the constitutional review of culturally biased standardized tests in lower education should be considered. Four of these involved the assignment of minority students to educable mentally retarded ("EMR") classes and the fifth involved assignment to the lower tracks in a tracking system.

67. 269 F. Supp. 401, (D.D.C. 1967), *aff'd sub nom. Smack v. Hobson* 408 F. 2d 175 (D.C. Cir. 1969) (en banc).

68. See *Bolling v. Sharp*, 347 U.S. 497 (1954).

69. *Hobson supra* note 68 at 478.

70. *Id.* at 483.

71. *Id.* at 491 n. 144.

72. *Id.* at 511 (footnote omitted).

73. *Id.* at 513 (emphasis supplied).

74. See 81 HARV. L. REV. 1511, 1519 (1968). See text accompanying notes *infra*, on the compelling state interest test.

The first three EMR class actions cases, *Diana v. State Bd. of Ed.*, *Covarrubias v. San Diego Unified School Dist.* and *Guadalupe Organizations Inc. v. Tempe School Dist.*,⁷⁵ were settled by the parties prior to trial. While all of these cases claim that cultural bias in the test renders their use in student assignments to EMR classes violative of their constitutional right to equal educational opportunity, *Diana* and *Guadalupe* are more closely linked to the claims of bilingual students, while *Covarrubias* is of a more general scope. In these cases, the evidence showed that the tests were culturally biased and that students in the plaintiff class were disproportionately concentrated in EMR classes. The remedies in the cases varied; but were largely influenced in *Covarrubias* by the statutory provisions passed by the California legislature after *Diana*. A feature common to all of these cases, but particularly prominent in *Guadalupe*, warrants special mention.

The agreement order in that case ordered that all students currently assigned to EMR classes had to be retested and that future testing would have to be conducted in the bilingual child's primary language. Along with this double testing, there had to be an examination of the child's personal history and environment by a professional advisor. While the double testing is an extension of *Hobson* in some ways, it is by no means startling. The feature of the agreement order that is, however, somewhat startling is the required individualized evaluation of students. It would seem that while this approach may benefit some students, there will be no effective way to review these individualized determinations to assure that individual students have been fairly treated. The fourth case, *Moses v. Washington Parish School Bd.*,⁷⁶ does not reveal this tendency towards individualized government action to as great an extent.

In *Moses*, the court, implementing a Supreme Court desegregation order,⁷⁷ prohibited the use of two standardized tests (one for "I.Q." and one for reading) in assigning students to different levels of instruction. Injunctive relief was sought under a

theory of a denial of equal educational opportunity on two grounds. The first was the inherently harmful effects of tracking upon slower learners. And the second was the disproportionate concentration of Blacks in the lower tracks. In its opinion, the court stated that an essential feature of ability grouping was a remedial program enabling those in the slower classes to catch-up. Though this case could be considered as a step beyond *Hobson*, its precedential value may be extremely limited by the fact that there was a prior finding of *de jure* segregation here; the court was really supervising a desegregation order.⁷⁹ The crucial test in this situation could come after desegregation is "complete" and the school board desires to start testing again.

The final cultural bias case to be considered, an EMR class action brought by Black plaintiffs, is terribly significant in two respects. In *P. v. Riles*,⁸⁰ the court concluded first that the I.Q. tests, used to determine whether or not Black students would be placed in EMR classes, were biased against Black culture and experience.⁸¹ Secondly, the court concluded that the appropriate standard of review was the equal protection version of the "Griggs" standard.

75. Civil No. C-70 37 RFR (N.D. Cal., Jan. 1970).
Civil No. 70-394-S (S.D. Cal., Aug. 21, 1972).
Civil No. 71-435 (D. Ariz., May 9, 1972).

As reported in 61 GEO L. J. 1027, 1040 n. 87, these cases have been summarized in WEINTRAUB, *Influences of Law Regarding the Identification and Educational Placement of Children*, FOCUS ON EXCEPTIONAL CHILDREN, 4 (April 1972).

76. 330 F. Supp. 1340 (E.D. La. 1971) *aff'd*, 456 F. 2d 1285 (5th Cir.) (per curiam), *cert. denied*, 409 U.S. 1013 (Nov. 13, 1972).

77. *Green v. County School Bd. of New Kent*, 391 U.S. 430 (1968).

78. 330 F. Supp. at 1345. But compare, *Lau v. Nichols* 483 F. 2d 791 (9th Cir. 1973), reversed on statutory grounds, ___U.S.___ 42 U.S.L.W. 4165 (1974). In *Lau*, the Court of Appeals denied the equal protection claims of non-English Chinese students who claimed that the school system had to provide them with bilingual compensatory education. There had not been a prior finding of *de jure* segregation in the *Lau* case. The Supreme Court did not reach the constitutional question. It reversed on the authority of 601 of the Civil Rights Act of 1964, 42 U.S.C. 2000(d).

79. See *Keyes v. School Dist.*, 413 U.S. 189 (1973); *North Carolina State Bd. of Ed. v. Swann*, 402 U.S. 45 (1971).

80. 343 F. Supp. 1306 (N.D. Cal., 1972).

81. 343 F. Supp. at 1313.

THE COURT'S FINDING of cultural bias was based, in part, on the evidence submitted by the plaintiff class showing that when the representative class students were re-tested with a reconstructed test, they did not show a retarded ability to learn. The reconstructed test was administered after having established a rapport between the examiner and the student, so as to counteract feelings of self-defeatism when students were confronted with the test itself. The test had been reconstructed to reword the questions with terms more consistent with the students' background. Furthermore, examiners employed techniques for detecting non-standard responses that were nevertheless intelligent. The whole approach countenanced by the court tends towards individualized evaluations.

The *Riles* mode of legal analysis is also of great interest; for it adopts the equal protection standard advocated by the commentators as an adequate one for judicial review of standardized tests in higher education.⁸² Judge Peckham considered this use of analogies to those used in employment, jury selection, and school desegregation cases.⁸³ Once the plaintiff in *Riles* made a prima facie showing of a statistically disproportionate racial impact, the burden shifted to the state to show how the use of these tests was validly related to its purpose. On its face, it appears that the court did not review the state's purpose but rather its chosen means of reaching that purpose. The judicial review was more rigorous than that usually observed in equal protection analysis, importing the standard applied in *Griggs v. Duke Power Co.*⁸⁴ into the equal protection area.

In *Griggs*, the Supreme Court decided a case involving job qualifications and testing, pursuant to Title VII. The defendant company in this case had a history, prior to the effective date of Title VII, of discriminatory employment practices. The district court found that since the effective date of Title VII, the defendant had ceased its policy of overt racial discrimination. Defendant company had, however, instituted a policy of conditioning employment in its three previously

all white departments on graduation from high school and satisfactory performance on a standardized general aptitude test. Both of these conditions discriminated against Blacks; but the tests were by far the more stringent of the two as found by the Equal Employment Opportunity Commission (EEOC) in 1966.

Chief Justice Burger delivered the opinion of the Court. In that opinion he declared that it was the objective of Congress:

to achieve equality of employment opportunities and remove barriers that have operated in the past to favor an identifiable group of white employees . . . Under the Act, practices, procedures, or tests neutral on their face, and even neutral in terms of intent, cannot be maintained to "freeze" the status quo of prior discriminatory employment practices.⁸⁵

Noting agreement in the fact that "whites fare far better on the Company's alternative requirements" than Blacks, the Chief Justice, concluded that:

[t]his consequence [appeared] to be directly traceable to race. Basic intelligence must have the means of articulation to manifest itself fairly in a testing process. Because they are Negroes, petitioners have long received inferior education in segregated schools and this Court expressly recognized these differences in *Gaston County v. U.S.*⁸⁶

Congress did not, the Chief Justice continued, intend to guarantee a minority individual a job without regard to his qualification.

Discriminatory preference for any group, minority or majority, is precisely and only what Congress has proscribed . . . The Act proscribes not only overt discrimination but also practices that are fair in form, but discriminatory in operation.⁸⁷

82. See text accompanying note 5, *supra*.

83. See, e.g., respectively, *Griggs v. Duke Power Co.*, 401 U.S. 429 (1971) (Title VII), *Chance v. Bd. of Examiners*, 458 F.2d 1167 (2d Cir. 1971); *Baker v. Col.* 462 F.2d 1112 (5th Cir. 1972).

84. 401 U.S. 424 (1971), [hereinafter cited as *Griggs*].

85. *Id.* at 429.

86. *Id.* at 430.

87. *Id.* at 431.

ACCORDING TO the Chief Justice, the question was one of "business necessity" ("a genuine business need"), and since neither of the qualifications, high school completion or the general intelligence test, were shown to have a demonstrable relationship to successful performance of the jobs, the company would have to discontinue their use. It was not sufficient that they were believed to generally improve the overall quality of the work force. The consequence of the requirement on employment patterns and intent was dispositive. The Chief Justice concluded that for the tests to be given controlling force, they had to be job related (a valid measure of job performance).

The Chief Justice's language in *Griggs* has obvious appeal if one wishes to apply it to the use of standardized tests in higher education. State higher education has a discriminatory history.⁸⁸ In addition, the institution of massive testing post-dates, we may assume *arguendo*, the abandonment of overt discriminatory policies.⁸⁹ And it is certainly consistent with the liberal ideology of the fourteenth amendment to remove barriers to individual opportunity that operate on the basis of presumably arbitrary criteria like race.⁹⁰

The Court's opinion reflects its presumption that, until demonstrated to be otherwise by a test capable of fairly measuring basic intelligence, differential results in test scores will not be considered as reflecting innate differences in ability; but rather histories of inferior education. Hence, though fair in form, a test that in effect takes advantage of this history of race prejudice will not be considered neutral. This does not ban the use of tests per se, but only biased tests which do not reflect an individual minority member's true ability. The legal standard, which the Court adopted was that the test, to be neutral, must be "job-related." The test must bear a manifest relationship to the task in question.

AS AN EQUAL protection standard, this "manifest relationship" has been translated into a new rational relationship test

with more "bite" than the traditional "minimal scrutiny" or "restrained" standard of review.⁹¹ It has been suggested,⁹² that this standard parallels the one suggested by Professor Gunther.⁹³ This however, would not seem to be the case; the manifest relationship standard applied in testing cases would appear to be quite different.

A threshold consideration with regard to the applicability of Professor Gunther's model provides the proper occasion for a brief general review of the more traditional standards of equal protection review. Professor Gunther makes it clear that the purpose of his speculations is not to upset the traditional standards of review applied to a "suspect classification" like race.⁹⁴ Thus we must first consider whether these tests create a "suspect classification" of race.

Suspect classifications like race are subjected "to the most rigid scrutiny,"⁹⁵ and are upheld only if shown to be necessary to the accomplishment of some overriding state purpose.⁹⁶ The classification must therefore bear a tight fit to some compelling state interest.⁹⁷

The state's racial classification need not be explicit in order for the law to be invalidated as an enactment with a discriminatory pur-

88. See, e.g., *McLaurin v. Oklahoma State Regents*, 339 U.S. 637 (1950); *Sweatt v. Painter*, 339 U.S. 629 (1950); *Missouri ex. rel. Gaines v. Canada*, 305 U.S. 337 (1938).

89. If this assumption does not hold true, the argument is presumably stronger for imputing more than a coincidental discriminatory impact.

90. See accompanying note, *supra*.

91. DEVELOPMENTS IN THE LAW, *supra* at 1077-1087. For cases in the testing area applying this apparently "new" standard of equal protection review, see, e.g., *P v. Riles*, *supra* at note 80; *Chance v. Bd. of Examiners*, 458 F.2d 1167 (2d Cir. 1972).

92. VANDERBILT, *supra* at 805 n. 71.

93. *The Supreme Court*, 1971 Term, *Foreword: In Search of Evolving Doctrine on a Changing Court: A Model for a Newer Equal Protection*. 86 HARV. L. REV. 1 (1972) [hereinafter cited as GUNTHER].

94. *Id.* at 24.

95. See, e.g., *Korematsu v. U.S.*, 323 U.S. 214, 216 (1944).

96. See, e.g., *Loving v. Virginia* 388 U.S. 1, 11 (1967); *McLaughlin v. Florida*, 379 U.S. 184, 194 (1964).

97. Separation on the basis of learning ability would appear to be a legitimate state purpose. See *Shuttlesworth v. Birmingham Bd. of Ed.* 162 F. Supp. 372 (N.D. Ala. 1957) (dictum), *aff'd* 358 U.S. 101 (1958). Such separation would not however appear to be a sufficiently compelling state purpose, nor does the fit appear to be tight enough. See text immediately below.

pose.⁹⁸ In order to reach such a conclusion, however, the "fit" between the classification and race must be tight enough to warrant the conclusion that a racial discrimination was its purpose.⁹⁹ It has been argued that courts may be more willing to look behind apparently neutral administrative action to find impermissible racial motives,¹⁰⁰ but it will be assumed here that no proof of racially discriminatory motive or a deliberate attempt to discriminate is available in the case of the state's use of standardized tests.¹⁰¹ Though the mere fact of an apparently neutral classificatory criterion is not dispositive,¹⁰² the "fit" between the effect and a plausible racial discriminatory effect must usually be a close one. This is obviously, however, a question of degree; and hence, it is possible that a court may find the discriminatory impact of these standardized tests sufficient to trigger the suspect classification analysis. Judge J. Skelly Wright is considered to have done so in *Hobson*. Yet this conclusion is not easily sustained after close examination of the language of the case. As suggested above, it would appear that Judge Wright required some less demanding showing from both the state and the plaintiff. The tests did not have an exclusionary, but rather a disproportionate effect on minority groups. Yet the plaintiff class was able to shift the burden of proof to the defendant. On the other hand, the state's use of the test was not tantamount to an explicit racial classification. Hence a less than compelling justification would have sufficed.

TRADITIONALLY, the only alternative to "strict scrutiny" has been a "restrained" or "permissive" view of state classifications.¹⁰⁴ This lower standard of judicial review (restrained review)¹⁰⁵ has rarely been used to find a violation of the equal protection clause. The case of standardized testing would seem to fall between these two tiers. At first glance, Professor Gunther's model viewing "equal protection as a means focused, relatively narrow, preferred ground of decision in a broad range of cases,"¹⁰⁶ would seem an attractive source for elaborating a middle ground.

Professor Gunther, noting "a growing malaise about" and a "mounting discontent" with two-tier formulation of equal protection review,¹⁰⁷ speculates on the doctrinal material out of which an adequately reasoned basis of constitutional evolution can be fashioned.¹⁰⁸ He points particularly to the language of Justice Marshall, as exemplified in *Chicago Police Department v. Mosely*,¹⁰⁹ where Justice Marshall attempted to formulate an "overarching" question appropriate to "all equal protection cases": Is there "an appropriate governmental interest suitably furthered by the different treatment?"¹¹⁰ To Professor Gunther, this language points to a new judicial "mood." Professor Gunther suggested his model as a means through which this new "mood" could be reflected in reasoned doctrinal evolution consistent with the Court's acknowledged modern role: "Safeguarding the structure of the political process. . . ."¹¹¹

The Guntherian model seeks to limit the legislature by having the court assess the means used to effect legislative purposes, as

98. *Yick Wo v. Hopkins*, *supra* at note 6; *cf.*, *Gomillion v. Lightfoot*, 364 U.S. 339 (1960).

99. *See Palmer v. Thompson*, 403 U.S. 217 (1971).

100. DEVELOPMENTS IN THE LAW, *supra* note 4 at 1097.

101. If this were so, this would be a fairly easy case. *See Swain v. Alabama*, 368 U.S. 448 (1962).

102. *Meredith v. Fair*, 298 F.2d 718 (4th Cir. 1966); *Franklin v. Parker*, 223 F. Supp. 724 (M.D. Ala.); *aff'd* 331 F.2d 841 (5th Cir. 1964); *See Hawkins v. North Carolina Dental Soc.*, 355 F.2d 718 (4th Cir. 1966).

103. *See text* accompanying note 75.

104. *See generally* DEVELOPMENTS IN THE LAW, *supra* note 4 at 1077-1086.

105. E. g., *McDonald v. Bd. of Election Comm'rs*, 394 U.S. 802, 809 (1969); *McGowan v. Maryland*, 366 U.S. 420, 425 (1961). *Contra, e.g., Dept. of Agriculture v. Moreno*, 413 U.S. 508 (1973).

106. GUNTHER, *supra* note 93 at 20.

107. *Id.*, at 17-18.

108. *Id.*, at 1, 12.

109. *Chicago Police Dept. v. Mosley*, 408 U.S. 92, 95 (1972).

110. *See also, e.g., Weber v. Aetna Cas. & Sur. Co.*, 406 U.S. 164 (1972) (Powell, J.); *Dandridge v. Williams*, 397 U.S. 471, 519, 520 (1970) (Marshall, J., dissenting) (uses a "sliding scale analysis").

111. GUNTHER, *supra* note 93 at 44.

"It does indeed follow from the political process theme that legislative value choices warrant judicial deference so long as the people can have their say in the public forum and at the ballot box. . . . Examination of means in light of asserted state purposes would directly promote public consideration of the benefits assertedly sought by the proposed legislation; indirectly it would stimulate fuller political examination, in relation to those benefits, of the costs that would be incurred if the proposed means were adopted."

articulated by the state in its case before the court. The court's decision would then have "substantial basis in actuality, not merely conjecture."¹¹² The focus of the court's review would be to gauge the reasonableness of the means to the purpose articulated by the state in order to avoid "prefunctory judicial hypothesizing." This standard is similar to a due process inquiry to determine whether "the means selected have a real and substantial relation to the object sought to be attained."¹¹³ Recent cases in the equal protection area appear to adopt language consistent with this suggested approach.¹¹⁴

The Guntherian model is clearly an attempt to articulate a meaningful "neutral principle" of instrumental adjudication.¹¹⁵ Unfortunately as Professor Laurence Tribe has so tersely put the point, the Gunther model "evaporates in a verbal mist while inviting manipulation that cancels the substantive judgments underlying judicial choice."¹¹⁶

AS PROFESSOR TRIBE points out, it seems doubtful that any mode of judicial review which scrutinized only the rationality of the means to some articulated ends could avoid making significant value judgments. Since it is always possible to articulate the means-end relationship, such that the means is a perfect "fit" to the articulated end, there need never be an under-inclusive or over-inclusive classificatory scheme.

If this universally available guarantee of a perfect means-end "fit" terminates judicial review, *no law could ever be deemed invalid*; if it does not, the law's constitutional validity must turn on an assessment of the end itself, judging its acceptability either as a general matter or in the context of the particular kind of legislation involved.¹¹⁷

Within Gunther's model, the claim that the court is no longer supplying the articulation of the state's purposes through "mere conjecture" and "prefunctory judicial hypothesizing," is almost meaningless since this "conjecture" is shifted to the executive. This preservation of judicial neutrality is but a farce, a trap for a state's attorney general.

A mismatch between means and ends, when

the only ends examined are those argued in a law's defense by an executive officer, may indicate no more than that the officer did not advance the right ends in the law's defense. That his oversight or deliberate choice should be allowed thereby to frustrate the past efforts of his jurisdiction's legislature seems strange. Nor can I imagine any satisfactory way of forcing the executive to defend a law in terms of the legislature's own, often conflicting, goals, whether hidden or publicly expressed.¹¹⁸

Moreover, since it is in the nature of legislative enactments that subsequent legislation adopted by a more contemporary coalition, can always supersede earlier legislation,¹¹⁹ the legislature could reenact the same body of rules for diametrically opposite reasons. It therefore follows that they could maintain the same body of rules for reasons different from and indeed opposite to those of an earlier legislature. Professor Gunther's justification, that of causing "public debate," though not in some circumstances *de minimis*, is in general a marginal justification for wasting valuable legislative time. Finally, it might even be queried as to why the stated end is dispositive if the actual end served is a permissible one.¹²⁰

If the articulated purpose of using standardized tests is to select those students currently best prepared to advance Euro-American culture in an academic environment, would not the fit between the "articulated" means and the ends be "tight" enough to satisfy the

112. *Id.*, at 21, 47.

113. *Nebbia v. New York*, 291 U.S. 502, 525 (1934) cited by GUNTHER at 42.

114. *San Antonio Independent School Dist. v. Rodriguez*, 411 U.S. 1 (1973) (does the scheme rationally further some legitimate, articulated state purpose); *McGinnis v. Royster*, 410 U.S. 263, 270 (1973) (does the "classification . . . rationally further some legitimate articulated state purpose . . . which is legitimate and nonillusory . . . We have supplied no imaginary basis or purpose for this statutory scheme, but we likewise refuse to discard a clear and legitimate purpose because the court below perceived another to be primary.').

115. Note especially its reliance on reason and its claimed value neutrality in note 114 *supra*.

116. TRIBE, *The Supreme Court*, 1972 Term, *Foreward: Toward a Model of Rules in the Due Process of Life and Law*, 87 HARV. L. REV. 1, 6 (1973) [hereinafter cited as TRIBE].

117. *Id.* at 6 (emphasis supplied).

118. *Id.* at 6 n. 28.

119. *But see Hunter v. Erickson*, 393 U.S. 385 (1969).

120. TRIBE, *supra* note 116 at 6.

Gunther model? Should judicial inquiry terminate once the state advances this rationale? Whether it should or not, the evolving case law does not adopt Gunther's approach. Our examination of Professor Gunther's model has not however been for naught; it will assist us in gaining a full apprehension of the nature, limits, and possible improved rationale for judicial intervention with a new equal protection standard.

In *Riles*, Judge Peckham, facing the question of cultural bias, affected two traditional elements in traditional equal protection analysis: First, no discriminatory intent or precise racial "fit" was required to shift the burden to the state. Second, the state was not required to demonstrate that there was a compelling state interest for segregating students according to their ability to learn, in spite of the tests' disproportionate racial impact. Judge Peckham held the state to what appears to be a new equal protection standard — a rational relation test with "bite." He cited *Griggs, supra*, as support for his analysis, and in addition cited several equal protection job-related test cases discussed *infra*.

Riles can be understood as limiting state action through the use of a model similar to that suggested by Professor Gunther; for the defendants admitted that the test was a culturally biased means to group by ability, and was not a true assessment of a student's abilities. This is implicitly an acknowledgment by the state's advocates that their purpose was not being achieved by their means. If the Gunther model is the applicable one, this case was lost because of an incompetent state's attorney. To be successful, all the state's attorney needed to argue was that the test was given to select those children with the greatest ability to learn Euro-American culture. In that context, the test would have been rationally related to that end. There is, however, another interpretation that can be given to this case.

The judge could have been saying that the state's interest in pursuing its goal was simply not substantial enough to impose this racially delineated burden. The court defined (or at

least accepted as its definition) the purpose of standardized testing as affecting a classification based on distinctions in "basic intelligence." As measured against this purpose, the court found the standardized tests then being used to be systematically biased. But the problem here may not be in the classification but rather in the court definition of the purpose of the test. "It is always possible to define the legislative purpose of a statute in such a way that the statutory classification is rationally related to it."¹²¹ Specifically, a more precise statement of the purpose of standardized testing would follow the Euro-American cultural approach suggested above. Given a critique similar to that elaborated for the Gunther model above, the court must be either unaware of its own act of definition, or it is striking down this classificatory scheme in a covert balancing of the litigants' interests.

IT WAS MENTIONED above that the end of separating students according to ability would seem to be permissible.¹²² Yet *Riles*, while not by any means standing for the proposition that this end was per se unconstitutional, did enjoin the state from using the standardized test in grouping those in the plaintiff class.¹²³ This case would then be considered as an example of a court balancing interests; yet it would have done so without either a "suspect classification," or, on the state's side, a compelling state interest being present. The policy here would be "the strong judicial and constitutional policy against racial discrimination" and "the general distrust of classifications which harm [B]lacks as an identifiable group."¹²⁴

Griggs, the progenitor of the "validity" challenge to standardized tests, can also be viewed as an example of this less rigorous

121. NOTE, *Legislative Purpose, Rationality and Equal Protection*, 82 YALE L. J. 123, 128 (1972) [hereinafter cited as LEGISLATIVE PURPOSE].

122. *Supra* note 97.

123. DEVELOPMENT IN THE LAW, *supra* note 4.

124. *P. v. Riles, supra* note 80, at 1309 (emphasis supplied). All of the other cultural bias cases can be similarly understood.

balancing technique. Ostensibly, *Griggs'* "validity analysis" only reviews the fitness of the means selected to the end desired. It should now, however, be clear that this mode of analysis is far from "neutral," for it is the court that decides what is the end being pursued. The determination of the goals of a statute is not itself a neutral process.¹²⁵ In *Griggs'* "validity analysis," the body is hidden" in the court's selection of the definition of what the job is.

Determining what constitutes "the job" in any particular case is simply not susceptible to a positivist approach.¹²⁶ Labor negotiations or even the articulation of a job description highlight difficulties inherent in defining what is job related. It is not a given fact to which the court can look and then neutrally reason therefrom. Ordinarily, any definition evolves from the interests of the parties. This suggests the use of Gunther's neutral approach of testing the classification against the employer's articulated goals (The hope being that required disclosure will provide a political check).

The *Griggs'* "validity analysis" clearly rejects this approach. In *Griggs*, the defendant attempted to articulate a goal consistent with utilizing the tests. The company argued that the tests were not only designed to test for the ability to perform some specified job, but also to upgrade the "overall" intelligence of the work force. Certainly, there can be imagined a host of legitimate reasons why an employer might include measures of general intelligence in a job description. Hence, if the employer's purpose is understood as a combination of sub-purposes, the means selected to effect them "fit." Nevertheless, the Supreme Court did not measure the means chosen against these well articulated ends.

Instead, the Court adopted its own rather unspecified definition of the job, and then concluded that the tests did not validly measure them. This act of redefinition obfuscates the fact that the Court rejected legitimate articulated purposes. If we first disregard this act of definition, and then articulate the purposes of the employer on their own quite

legitimate terms, the Court's adjudication can be seen as simply balancing other ends against them. All of the job related ("validity") equal protection challenges to standardized testing are susceptible to the above critique of the *Griggs* "validity analysis."

PERHAPS THE BEST case to illustrate this point is *Armstead v. Starkville Municipal Separate School District*.¹²⁷ The majority opinion of Judge Dyer is typical of the state of the law in this area. The partial dissent of Judge Rives contains seminal ingredients which may grow into an application of the validity analysis to standardized testing in higher education.

Armstead, involved a school board which had adopted certain requirements to be fulfilled by those seeking a teaching position. The two requirements of central significance here were a minimum score on the Graduate Record Examination (GRE), or in the alternative, either a Master's Degree in any field or an AA Teaching Certificate.¹²⁸ The school board had previously ascertained that the GRE was required for both regular and provisional admissions to the state university's graduate school. The expert evidence at the trial level was sufficient to show that the GRE was reliable or valid for selecting public school teachers. The defendant's superintendent of schools admitted knowing that the GRE had nothing to do with determining teacher competency.

In the light of this failure to show the GRE to be a reliable and valid measure for testing teacher competency, and given its disproportionate racial impact in a context of pressure on the school board to desegregate, the use of this standardized test was enjoined as a denial of the equal protection of the law. The court

125. See text and notes accompanying notes 41 to 48, *supra*.

126. See text and notes accompanying notes 39 to 41, *supra*.

127. 461 F.2d 276 (5th Cir. 1972).

128. The school board in this case had a *de jure* segregation history. In these job-related testing cases, this would not appear to be a necessary or even terribly significant distinction. See, e.g., *Chance v. Bd. of Examiners*, *supra* note 92; *Bridgeport Guardians, Inc. v. Civil Serv. Comm'n*, 482 F.2d 1333 (1973).

relied in part on the authority of *Reed v. Reed*,¹²⁹ and *Eisenstadt v. Baird*¹³⁰ and the equal protection test they espoused.¹³¹ The test in *Armstead* was not designed and was not shown to be related to the selection of competent teachers. The school board was not, however, given an opportunity to justify the validity of the credential requirement by the district court. The district court's injunction against the use of these requirements was dissolved. Finally, Judge Dyer's opinion concluded that the imposition of a quota, waiveable upon a showing by the board of an inability to comply, was a permissible remedy to attempt to maintain the status quo (a 30 percent Black, 70 percent white teacher ratio).

Judge Rives dissented from the partial reversal. Referring to *Grigg's* manifest relationship test, he concluded that the credential requirement, predicated as it was on the same arbitrary test, should be eliminated. If, however, the defendant could show that there was an alternative method to qualify for the required credential, then the burden would shift back to the plaintiff to demonstrate that requiring a degree or certificate served to disqualify a "disproportionate" number of Blacks. In the event such a showing was made, the defendant would then have to demonstrate that the credentials were "properly related" to "job performance."¹³² In this case, however, the evidence tended to show that the alternative requirements were predicated upon the same arbitrary tests.

THE MAJORITY OPINION explicitly did not adopt a balancing approach.¹³³ Instead, it purported to examine only the means-end fit. After finding the fit to be underinclusive, the circuit court concluded that the use of the GRE was arbitrary.¹³⁴ But unless this entire case can be made to turn on the superintendent's admission, then the court is in fact doing precisely what it says it is not doing. There is no reason why a school board's desire to improve its faculty could not rely in part on the kind of skills demonstrated through the GRE. Certainly there are conceivable legitimate reasons for including this among the requirements for the teaching

credential.¹³⁵ The fact that the test was not designed for testing teachers does not mean that it is arbitrary to include the skills the GRE measures among those desired as part of Starkville's teacher job description. The court tacitly acknowledges this by permitting the credentials requirements to stand. At the very least, this must mean that the skills demonstrated on the GRE are helpful in learning how to become a qualified teacher. Does it not follow that they can be considered relevant for people who are going to teach without having had additional graduate level training? The conclusion cannot be avoided that by rejecting a legitimate sub-purpose represented by the test, and then concluding that the test was not reasonably related to his own definition of the test's purpose, the court in effect over-rode the state's interests by one it considered more important. Judge Rives' approach, while more extreme, is essentially the same.

Judge Rives' approach contains an impulse that moves in the direction of undercutting the entire use of standardized tests in higher education. Since most credentials are predicated upon successful performance on standardized tests,¹³⁶ very few public jobs or professional screening devices could be sustained once a disproportionate racial impact were shown in the basic testing device. From here it would be an easy step to hold unconstitutional state supported professional school admissions examinations. Though somewhat more difficult to plausibly limit by judicial definition, the purposes of a liberal arts education, the inability of educators to

129. 404 U.S. 71, 75 (1971).

130. 405 U.S. 438 (1972).

131. These cases are discussed by GUNTHER, *supra* note 93 at 29-36. The standard of equal protection review utilized in these cases is most forcefully shown to conceal the Court's own interest balancing in, *Legislative Purpose*, 82 YALE L. J. 123 (1972).

132. 461 F.2d at 282.

133. *Id.* at 279.

134. *Id.* at 280.

135. See *Kotch v. Bd. of River Port Pilot Comm'rs*, *supra* note 45.

136. See COLLEGE ADMISSIONS AND THE PSYCHOLOGY OF TALENT, *supra* note 2; THE TYRANNY OF TESTING, *supra* note 53.

show these tests or college grades as rationally related to any successful performance in life, might well be sufficient to enjoin their use.¹³⁷ While these outcomes may be desirable, there are two serious inconsistencies with our liberal theme raised in the manifest or substantial, relation approach that ought to be of concern.

The first inconsistency with our liberal theme is that this standard, by concealing the value choices being made by the judges involved, undercuts the possibility of establishing firm precedent in this area. It creates the potential for individual judges to exercise their power in a manner inconsistent with the equal protection clause. Normally, the exercise of judicial power is limited by precedent. The strength of precedent as a constraint on individual judges is, in part, determined by the degree to which the reasoning adopted and value choices made by preceding authority clearly covers the case currently before the court. The rational relation standard is, however, ineffective as precedent precisely because it does not purport to decide anything generally about the use of standardized tests; but only whether those tests are "rationally related" (fit) the state's purpose. Since it is difficult, if not impossible, to fix a definition of the purpose of testing that cannot be easily redefined by the next judge to suit his own value choices, there is little chance of controlling judges through precedent. Thus, the judge may exercise his power in an arbitrary manner.

EVEN A DECISION by the Supreme Court could not settle the question of what any state university's purpose was in using the standardized admission tests. Lower courts could be reversed when appellate courts concluded that the lower courts' perception of the state's "real" purpose was incorrect; but presumably the state itself could "readopt" exactly the same admissions tests for the purpose articulated by the lower court and force the appellate court to accept its new legislation as satisfactory. A district court case, *U.S. v. Nansemond County School Board*,¹³⁸ illustrates this point.

In *Nansemond*, Chief Judge Hoffman held that the use of the National Teachers Exam (NTE) was rationally related to the school board's purpose of remedying a situation in which its teachers were found lacking the ability to communicate to students, and/or were drastically outdated in their teaching techniques. The decision to adopt the NTE was not made hastily but in the light of experience with the tests by other neighboring school systems. The school board also considered the fact that some of the area's colleges have open admission requirements. In addition, there was no dearth of qualified applicants from which the school board could choose.

The examination itself offered a general appraisal of a prospective teacher's basic professional preparation and general academic attainment. It also provided a common basis against which to interpret the transcripts from colleges of varying academic reputation.

Even though the Judge was willing to assume, *arguendo*, that an inference of a disproportionate racial impact could be drawn from the statistics,¹³⁹ it was overcome by valid reasons for the state's actions. And in the absence of a showing of an intentionally discriminatory purpose, the state's action was to be sustained. What were the valid reasons for the state's action and how did they comport with the equal protection clause?

Chief Justice Hoffman, recognizing that *Griggs'* "validity analysis" was "no stranger to equal protection analysis," referred to *Reed* and *Eisenstadt* as the relevant authority.¹⁴⁰ According to the court, the reasonable relationship standard of these cases had been construed, in the area of standardized tests, to mean "reasonably necessary connection between the qualities tested . . . and the actual requirements of the job to be performed."¹⁴¹ The judge went on to fully ad-

137. See accompanying notes 52 to 65 *supra*.

138. 351 F. Supp. 196 (E.D. Va. 1972).

139. *Id.* at 202.

140. *Id.* at 203.

141. *Id.* at 203.

mit that the NTE had only content validity, that is, the abilities tested were conceivably those utilized in the job. There was no demonstrated predictive validity: 'nothing measured by the test correlated with actual performance on the job. More importantly, admitted that *he* was deciding that content validity was acceptable in his court.¹⁴² This measure of validity is not patently absurd; but its relationship to teaching quality is barely conceivable.

This court elaborated the technique for voiding whatever protection for minority groups the "Griggs" standard of equal protection review offered. By defining the state's purpose, a judge can covertly balance the interests of the litigants according to his/her own values.¹⁴³ Even if the judge were reversed by an appellate court on the theory that the purpose assumed by the court below was not the state's real purpose, all the state would then have to do is to say that the lower court's statements of its purpose was accurate and the state could thereby overrule the appellate court's constitutional adjudication without invoking the amendment process. This is hardly a satisfactory solution to the problem of neutral decision making in liberal adjudication.¹⁴⁴

THE SECOND inconsistency with our liberal theme in the judicial context, concerns the equal protection clause as a guarantor of the liberty of Black people as individuals. This problem arises after a court has found that the state's means are not rationally related to its goal. At this point, the question becomes one of how to make the "fit" closer since presumably the goal is permissible. The remedy implied is an adjustment of the means used to select applicants from the plaintiff class to increase the "fit." The closest "fit" is obtained when each individual's merits are considered in the light of their own special circumstances. The remedy implied by the tendency in the manifest relation test is the individualized determination of government acts. The result of this, however, is that no individual can be sure that he or she

will be treated fairly, nor can any court effectively review the government's action as it pertains to any individual in order to ascertain that the individual was not treated in an arbitrary manner.

The requirement of a close fit vitiates the protection of individual liberty offered by general criteria for government action, by moving the government closer to a system of making categorizations on the basis of individual evaluations. As Chief Justice Burger pointed out in *Vlandis v. Kline*,¹⁴⁵ "... all legislative classifications are, and might be improved on by individualized determinations. . . ."¹⁴⁶ Despite the rhetoric of individualized attention, this approach is not entirely consistent with notions of individual liberty.

Hundreds of years ago in England, before Parliament came to be thought of as a body having general lawmaking power, controversies were determined on an individualized basis without benefit of any general law. Most students of government consider the shift from this sort of determination, made on an *ad hoc* basis by the king's representation, to a relatively uniform body of rules enacted by a body exercising legislative authority, to have been a significant step forward in the achievement of a *civilized* political society. *Cleveland Bd. of Educ. v. La Fleur*.¹⁴⁷

If the word liberal is substituted for "civilized" in Justice Rehnquist's dissent, the point and its premises become clearer.

LaFleur was a case in which the Supreme Court struck down, under the due process clause, a *per se* rule adopted by a school system. This rule required all teachers to take an unpaid maternity leave five months before an expected childbirth and not return until the beginning of the next regular semester after the child was three months old. Justice

142. *Id.* at 203.

143. See text accompanying notes 48-52; 119-121; 125-130 *supra*.

144. See text accompanying note 51 *supra*.

145. *Vlandis v. Kline*, 412 U.S. 441 (1973).

146. *Id.* at 462.

147. *Cleveland Bd. of Educ. v. LaFleur*, ___U.S. ___, 42 USLW 4186 (Jan. 1974) (Rehnquist, J., dissenting) (emphasis supplied).

Rehnquist, in his dissent, points out that while the generality of the rule imposed burdens on some individuals in excess of those imposed on others, it also protected each teacher, for it established an objective criterion against which the administrator's determination could be judged for fairness. Justice Rehnquist indicates that, with individualized determinations, it will be substantially impossible to review the determination of an administrator to assure that two individuals, similarly situated, were treated alike. While Justice Rehnquist's dissent in *LaFleur* somewhat overstates the position adopted in the majority opinion, a problem similar to the one he discussed is raised in the testing area as between any two Black applicants.

WITHOUT THE "benefit" of generality, there is no effective check on the likes and dislikes of the immediate decisionmaker as the individual stands before him or her. To illustrate this point further, let us take the case of two Black applicants to law school. There is no *reason* why a Black law school applicant with excellent scores on the LSAT, who is a Phi Beta Kappa graduate from a school known for its rigorous standards, and who has received enthusiastic recommendations, should be preferred to another student without such credentials, but who has been judged by the school admissions officer to have "greater ability" — all things considered. Yet, at the same time, there is also no *reason* why the second student could claim he or she was objectively entitled to be preferred to the first. Neither student could consider himself fairly admitted or rejected. The decision criteria are, practically speaking, whatever the administration wants them to be, and the individual is effectively subject to the arbitrary will of another.¹⁴⁸ This result is an unacceptable solution to the problem of adjudication in a liberal system. The courts should not, even in the name of equal protection, expose individuals to the arbitrary will of a government official. Yet that is the direction in which the courts may be unfortunately heading.

This completes our elaboration and critique of the evolving standard of equal protection review, Part III, and now we turn to the conclusion of this comment, Part IV, a sketch of an alternative.

PART IV. LIBERAL ADJUDICATION AS PROCESS

Athena: It is my task to render final judgment here . . .

Orestes: This is the end for me, The noose, or else the light.

Chorus: Here our destruction, or our high duties confirmed.

Athena: The ballots are in equal number for each side.¹⁴⁹

THE SENSE OF equal protection adjudication is misperceived by those who would expurgate value judgments from judicial decision making. The most accurate description of equal protection adjudication is as a process identical to that in Aeschylus' trilogy, *The Orestia*. This trilogy, in classic dramatic form, illustrates a case in which society places in tension, one with another, those purposes and values it currently finds basic. As Dahrendorf has observed, this tension arises by virtue of the assumption "that all men are equal in some respects and unequal in others."¹⁵⁰ Properly perceived, a challenge to the use of standardized tests in higher education would put in tension our fundamental notions of the liberty of the private maximizer of goods and services, and the legal equality of human beings. It is our task here to illuminate for those responsible for creating the shape of this equal protection adjudication, possibilities latent in this tension.

148. Reconsider the remedies in the cultural bias cases, *supra* at notes 66 to 82, in the light of this critique. See also *Gay v. Wheeler*, 363 F. Supp. 764 (S.D. Tex. 1973) and *cf. U.S. v. Nansemond*, *supra* note 142, for possible instances of this problem in the job testing area.

149. AESCHYLUS I, *ORESTES*, 161-162 (Lattimore translation 1953).

150. DAHRENDORF, *Liberty and Equality*, ESSAYS IN THE THEORY OF SOCIETY, 192 (1968).

We have examined the central role of the neutrality of reason in classic liberal theory. At the legislative level, we have suggested that the contemporary state of reason has rendered our most esteemed rules, constitutional and otherwise, of no inherent value;¹⁵¹ and indeed, the subjectification of reason may have undermined the intellectual premises of democracy itself.¹⁵² And of more immediate concern to us here, the contemporary state of reason has been shown to be incapable of resolving an equal protection challenge to the use of a standardized test through a neutral, i.e., value-free, adjudicatory process.¹⁵³ As Wittgenstein has formulated the problem,

we have got onto slippery ice where there is no friction and so in a certain sense the conditions are ideal, but also just because of that, we are unable to walk. We want to walk: so we need friction. Back to the rough ground.¹⁵⁴

Where shall this "rough ground" be found?

The suggestion could be made that the ground might be found in human language. Human language is itself a fact. Moreover, it is a fact common to us all. Hence, it could be suggested that through holistic,¹⁵⁵ structural,¹⁵⁶ and/or philosophic,¹⁵⁷ contemplation, study, and/or investigation a handle on our commonality might be obtained from which an adjudication could be fashioned. No attempt will be made here to set forth these approaches in the search for "rough ground." It is sufficient for our purposes that we recognize these approaches as sources of possibilities for action.¹⁵⁸ Yet to look to language alone as a ready made source of shared values from which to decide cases,¹⁵⁹ would seem to presume that the liberal theme of antagonistic individuals can be diffused of its great explanatory power merely through a cognitive fiat. We will not entirely learn how to walk here, let us turn instead from the general to the specific: Perhaps the sense of value judgments is incomplete when in the form of general statements and becomes complete only in the particular case.

THE IMPACT OF the standardized ability testing falls disproportionately upon identifiable minority groups. The degree to

which this is due to "innate" ability is indeterminate, and perhaps indeterminable. Yet it is clear, that those who generally perform well on these tests are youngsters from socially advantaged white backgrounds. These tests do not significantly predict successful life performances; but rather successful performance in educational institutions controlled largely by the parents of the youngsters who perform well on these tests. Successful performance in educational institutions grants the students the privileges and opportunities of credentials, which are substantial. This factual configuration bears all the marks of a pernicious racial faction, save one thing: the differential impact is disproportionate and not exclusively visited upon an identifiable group. The "fit" of this classificatory scheme is imperfectly racial.

This imperfect racial "fit" is not dispositive. Unconstitutional state racism can take on a more subtle garb than that of the Ku Klux Klan's sheets.¹⁶⁰ We know that historically through the state's action non-white minority groups have been systematically deprived of an equal educational opportunity.¹⁶¹ Moreover, the "meta-rule" does not operate to effectively distribute the benefits of the state to minority groups in a just manner. For example, problems of minority group representation remain significant. While the evidence on which a court will rely is not the clearest case of a racial violation of the fourteenth amendment, Shakespeare's *Hamlet* dramatically illustrated the tragic

151. See note 10 *supra*.

152. See note 42 *supra*.

153. See Part II and Part III.

154. WITTGENSTEIN, *PHILOSOPHICAL INVESTIGATIONS*, par. 107 (Anscombe ed. 1958).

155. E.g., MERLEAU-PONTY, *PHENOMENOLOGY OF PERCEPTION*, 174-201 (Routledge & Kegan Paul Ltd. trans. 1962).

156. E.g., CHOMSKY, *LANGUAGE AND MIND* (1968).

157. E.g., WITTGENSTEIN, *supra* note 154.

158. An interesting attempt at using ordinary language to reveal possibilities for action is *The Speech and Press Clauses of the First Amendment Ordinary Language*, 87 HARV. L. REV. 374 (1973).

159. See, e.g., Justice Frankfurter's opinion in *Adamson v. Calif.* *supra* note 37.

160. See, e.g., *Green v. County School Board*, 391 U.S. 430 (1968); *Griffin v. Prince Edward School Bd.*, 377 U.S. 218 (1964).

161. See, e.g., *Brown v. Bd. of Ed.*, *supra* at note 1.

consequences which can ensue when those responsible in government for taking action procrastinate because the evidence is yet too "spectral." The racially explosive tone to the issue of standardized testing is undeniable. And it is the very sense of equal protection adjudication to deal with such problems wherever possible.

The equal protection clause is not merely a legal rule. As Professor Freund has pointed out, "it is a moral standard wrapped in [a] legal command. . . ."¹⁶² Whether the courts view their role as merely reminding the people of the dangers to the liberty of all inherent in racial factions,¹⁶³ or as contributing "to our more general thinking about social justice and ethical conduct,"¹⁶⁴ they will be walking on ground where it is literally impossible to avoid morality. The ground itself is a moral one.

In fashioning its adjudication, the court must be more effective in dealing with problems like the two inconsistencies with liberalism discussed in the later pages of Part III. For the reasons stated there, the substantial or manifest relations standard will not suffice. What is needed is a mode of intervention that will adequately safeguard against racial factionalism while not sacrificing the protection offered to the individual by general criteria. Because of the view of the adjudicatory process adopted here, no specific standard will be suggested, for its form must develop out of the process. More can, however, be said about the parameters to which this standard must conform.

The standard must make it clear that it is the disproportionate deprivation of an historically disadvantaged and oppressed group that is at issue here, and not whether the state's means is related to its ends. Whenever the state's use of technology disproportionately burdens minority groups, the courts should limit the effect of that technological impact. The courts must seek to do so, however, in a manner that does not compromise individual liberty.

is the imposition of a quota while continuing the use of the same tests.¹⁶⁵ This approach would protect minority interests, maintain general selection criteria, and still permit the majority to "bias" its educational institutions towards the pursuit of Western culture. While this approach would conform to the necessary parameters, difficulties with the "reverse discrimination" implied in this approach may militate against advocating its adoption.¹⁶⁶ The "quota" approach does not, however, exhaust the available possibilities.

Possibilities exist also in the more subtle and complex alternatives available in changing the technology itself. One prospect in this range of alternatives would be to introduce questions which are biased towards various minority cultural experiences. This is the solution Judge Peckham seems to envision in *Riles*. A second possibility is to test for motivation patterns that correlate with desirable patterns of life performances.¹⁶⁷ Another possibility would be to test for some more narrowly defined competencies.¹⁶⁸ And finally, it should be possible to test for sensitivities, associated with the qualities of balance, harmony and concern for the welfare of groups. These are arguably qualities one should expect to be more prevalent among minority group members,¹⁶⁹ and yet they are qualities that are of increasing importance to the larger society. This possibility is the most attractive "rough ground" of all, but it may not grow out of the adjudicatory process.

162. FREUND, *Constitutional Dilemmas*, 45 B.U.L. REV. 13, (1965).

163. See text accompanying notes 18-24 *supra*.

164. FREUND, *supra* note 162.

165. See generally *Race Quotas*, 8 HARV. CIV. RIGHTS CIV. LIB. L. REV. 128 (1973).

166. The point here is that whatever approach strategists adopt should not depend upon a favorable outcome in *Defunis* like cases.

167. See McCLELLAND, *supra* note 52 at 7-13.

168. See LAYZER, *supra* note 54.

169. At this point, the author reflects upon the claims of poets like LANGSTON HUGHES in RIVERS; SENGHOR, PROSE AND POETRY, 96 (Oxford 1965) ("a sense of commune or brotherhood among men" — human warmth in "the civilization of the universal"). And of the African claim of being spiritually in harmony with and linked to the world. See, e.g., ABRAHAM, THE MIND OF AFRICA, especially Chap. 2 (1962).

A RANGE OF possibilities present themselves. The most obvious of which

The standard which evolves out of the court challenges to standardized ability tests will be a moral one, but it will not refer in an absolutist sense to any particular values. Rather, it will develop as a result of the self-conscious response by the courts to the societal conflicts represented in the cases before them. The standard must be a creation dependent upon both argument and judgment purposefully designed to alleviate the need for confronta-

tion between mutually exclusive "rights" in society. The courts in equal protection adjudication serve much the same function as did Athena in the last scene of the *Eumendes*. The courts provide a forum for conflicting values to meet in a dialectic, the parameters of which are largely, but not exclusively, set by reason. This dialectic changes the relative importance of the values in tension, in an endless, but orderly process.



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