EFFICIENCY, EQUALITY AND JUSTICE IN ADMISSIONS PROCEDURES TO HIGHER EDUCATION:

A Constitutional Model for Resolving Conflicting Goals and Competing Claims

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I

ON MAY 17, 1954, the Warren Court officially opened the door to a new era in constitutional adjudication. With its rejection of the established doctrine of "separate but equal," *Brown v. Board of Education*[1] became the legal synonym for racial equality and justice throughout society. In a moral sense, the decision was long overdue; but in an historical sense, the decision was timely — it "gave impetus to the civil rights movement"[2] and promised continued support for a race disillusioned and angry with the wrongs of discrimination. The *Brown* holding became the precedent for outlawing enforced racial segregation in virtually all aspects of American life.

This article, though logically and morally annexed to the underlying sentiments of *Brown* and its progeny, is a search for a different set of conceptual rules to enforce the legitimate demands of racial justice. The precise question on which this article focuses can be stated in deceivingly simple fashion:

> IN THE ABSENCE OF A DISCRIMINATORY MOTIVE OR PREVIOUS HISTORY OF DE JURE SEGREGATION, CAN THE STATE THROUGH THE USE OF STANDARDIZED TESTS AND OTHER ADMISSIONS PROCEDURES NEUTRAL ON THEIR FACE, SELECT APPLICANTS FOR COLLEGE OR GRADUATE STUDY IN A MANNER WHICH HAS A DISCRIMINATORY IMPACT UPON A SUSPECT CLASSIFICATION?

Framed as such, this question has never been presented to a court, nor significantly discussed in the legal literature. Yet what is certainly involved in this issue is the very meaning of equal educational opportunity, as well as the relevance or irrelevance of the *Brown* mandate to desegregate in higher education. No less involved, are fundamental questions of distributive justice — concerning the manner in which a state ought to distribute certain kinds of goods and benefits, ideally and realistically, in a racially disparate society. These questions can be reduced to certain themes which will be considered throughout. They include: 1) the complex nature of education as a social good; 2) the tension between the maximization of certain goals and the ethical desire for equality; and,

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1. 347 U.S. 483 (1954).
2. COX, THE WARREN COURT at 5 (1968).

3) the responsible role which the state ought to assume vis-a-vis its citizens in a free enterprise system. The attempt will be to articulate and explore these themes in sections II through VI, and in section VII to synthesize them into a conceptual model for the proper analysis and resolution of this question.[3]

II

ANY MEANINGFUL discussion of the proper distribution of education must begin with the consideration of its special nature and quality; for public education, unlike a variety of other commodities provided by the state, is an inherently complex social good. It is a good which in composite form is both a means and an end, an item of public and private investment and consumption, and perhaps most importantly, the theoretical gateway between classes in a "classless" society. In a free enterprise system, education stands virtually alone in complexity and importance.

The range of social goods which comprise education can be broadly divided into investment and consumptive goods, or more generally, intermediate goods and final goods. An intermediate perspective insists that the overall function of public education and its motivating rationale consists of its ability to further economic growth and individual participation in a shared democratic ideal. The view of education as a final good, on the other hand, stresses the notion that education is a good in and of itself; and that its existence need not be justified in terms of its contribution to the GNP or to any set of economic or political values. Thus in one sense, education is a commodity, which can be purchased by or distributed to individuals for the sole purpose of consumption. And in another, and perhaps deeper sense, education and the procurement of knowledge, are values which an enlightened society will pursue, simply because the alternative is ignorance.

As an historical matter, the judiciary has always taken an intermediate view of education, especially when justifying the necessity of overruling clear precedents or fashioning extraordinary relief. Of particular concern has been the role which education serves in enhancing the virtues of a democratic society. Thus, in *McCollum v. Board of Education*,[4] a case involving time relinquished for religious purposes, Justice Frankfurter viewed the public school as "the most powerful agency for promoting cohesion among heterogeneous democratic people . . . at once the symbol of our democracy and the most persuasive means for promoting our common destiny." In the famous Bible reading case, *Abington School District v. Schempp*,[6] Justice Brennan wrote, "Americans regard the public schools as a most vital civic institution for the preservation of a democratic system of government."[7] And of course in *Brown*, Justice Warren's frequently quoted opinion, acknowledged the importance of education to a democratic society, its requirement for the performance of basic public responsibilities, and its necessity as the foundation of good citizenship.[8]

IN A MORE profoundly economic context, education services as an intermediate good by providing input into the productive sector and by serving as a major determinant of economic growth. From this perspective, a state school of either higher or lower education may be analogized to a firm that specializes in the production of schooling, or more specifically, the development of human capital.[9] The state educational establishment, which includes all schools, would be analogized to an industry. Cost-benefit analyses then become appropriate for assessing the value of education to the nation and for suggesting more cost-effective ways to produce a given level of educational output.

3. Throughout this presentation, various uses of economic terms have been employed with the hope of adding clarity to the work. They do not, however, reflect an economic analysis, but simply provide conceptual tools for informing the discussion.
4. Ill. *ex. rel.* McCollum v. Bd. of Educ., 333 U.S. 203 (1948).
5. *Id.* at 216, 230.
6. School Dist. v. Schempp, 374 U.S. 203 (1963).
7. *Id.* at 230.
8. *Id.* at 493.
9. SCHULTZ, THE ECONOMIC VALUE OF EDUCATION, 4 (1963).

During recent years, the value of education has received the attention of many economists. Studies suggest that the rapid rise in schooling in the American labor force "accounts for about a fifth of the measured growth between 1929 and 1957."[10] And, for the last three decades, that same rise in schooling has represented a larger source of growth than comparable investments in physical capital.[11]

From a private vantage point, returns on investments in education appear equally rewarding. A number of studies suggest that private rates of return on total resource investment run as high as 12.1% through college.[12]

The importance of the economic perspective, *i.e.* viewing education as an investment good, must be underscored. Although cost-benefit models have not been overtly relied upon in judicial opinions, they represent empirical articulations, of intuitive assumptions certainly made by the legislature, and perhaps shared by the courts. As will be discussed in section VII, the notion of allocating education in order to maximize potential contribution to the social welfare, is not merely utilitarian idealism, it is in fact one of the underlying rationales of admissions procedures in higher education.

Although the view of education as an intermediate good receives the most considered attention in academic literature, there is always the accompanying realization that education is in part, a final good. The classic case in which education is simply a commodity is in "adult education centers." There are generally no prerequisites to enrollment in their so-called "enrichment courses," except payment of the basic fee and the present availability of space. The purpose for which the courses are offered is not to enable the participants to become more productive members of society, but simply to enhance their enjoyment of leisure time. Education, in this context is a good one purchases for the simple purpose of consumption. It is, in that sense, similar to the purchase of a television set, a pool table or other non-inventory commodities.

ECONOMISTS HAVE suggested another way in which education, particularly elementary and secondary education, is purchased. For example, Robert Tiebout has theorized that the consumer, in the act of purchasing or remaining in particular housing, in effect chooses that mix of governmental services which best satisfies his demand.[13] One of the services considered most important, is the quality of the local school system. Studies have shown that the price of housing varies proportionally with the quality of the relevant school system.[14] Obviously this factor is crucial when considering the income redistributive effects of such controversial plans as inter-district school busing.

Even if we accept public education as intermediate, there is still a certain increment which is presently consumed by the student or pupil. Termed the "consumer good" aspect of education, this increment simply represents the present satisfaction to the persons involved in the process. Not even the most rational economic man can postpone all gratification for 15 or 20 years by investing in education with the hopes of higher future returns.

Closely aligned with this element of consumer good, is the idea that education is also in part a consumer durable; that is, to the extent that one is involved in the process of education, the satisfactions to be derived from it are not immediately consumed in entirety, but carry over into future time periods. What is learned in elementary education, for example, improves one's capacity for enjoying leisure time and may be fundamental for the future exercise of one's constitutional rights.

However, education as a final good is perhaps most deeply rooted in ethical notions,

10. *Id.* at 44.
11. *Id.* at 44.
12. Hansen, *Total and Private Rates of Return to Investment in Schooling*, 71 J. Of Pol. Econ. 128-40 (1963).
13. Tiebout, *A Pure Theory of Local Expenditure*, 64 J. OF POL. ECON. 416 (1956).
14. Oates, *The Effects of Property Taxes and Local Public Spending on Property Values*, 77 J. OF POL. ECON. 129 (Nov.-Dec. 1968).

particularly with respect to higher education. As part of tradition which derives in part from the Greeks, education, the pursuit of excellence, scholarship, and knowledge have frequently been the theme of many a professor's opening remarks, and many a university president's convocation address. This concept of education as a value in itself, will be explored in much greater detail when an attempt will be made to identify the state's purposes for providing higher education.

III

FROM THE viewpoint of pragmatic policy choice, the distinction between higher education as an intermediate and a final good also serves to delineate the conceptual framework for its distribution. To the extent that higher education is seen as an intermediate good it will be *allocated* in a manner which maximizes a particular goal. When higher education is viewed as a final good, on the other hand, it will be *distributed* with reference to the principles of distributive justice.

As a general rule, the allocation of intermediate goods is a teleological proposition: the ultimate values or goals are first defined by an independent policy-making body; then, the proper or "efficient" allocation is defined as that particular configuration which maximizes the stated goals.[15] Modes of allocation thus differ only with respect to the differences in values posited.[16] Once the values and goals are stated, the analytical processes of goal-maximization are the same.

One important principle which is used to evaluate particular allocations holds that a particular allocation of intermediate goods is efficient whenever it is impossible to reallocate those goods so as to produce greater benefits as defined by the original goals. In economics, this principle corresponds to Pareto efficiency, where a particular distribution of goods to consumers is optimal if no alternative distribution can make some individual better off without simultaneously making another worse off. Or, given a goal of maximizing total output with fixed quantity of resources, a particular allocation is efficient if there is no way to alter it so as to produce more of one commodity without producing less of another.

In philosophy, this notion has been embodied in the Rawlsian "principle of efficiency," where for example, a governmental arrangement is efficient if it is impossible to "redefine the scheme of rights and duties, so as to raise the expectations of any representative man . . . without at the same time lowering the expectations of some other representative man."[17]

In allocating higher education, if it is assumed that one of the goals of a university is to maximize educational achievement, with the larger hope of producing individuals who will greatly add to the Gross National Product (GNP), the budgetary decision-maker would spend each dollar so that it buys the most in educational achievement. This may require spending money on a number of different programs, such as recruitment, scholarship, library books, etc. The principle of efficiency would, however, require that the marginal returns from each activity be the same, and that where the returns per dollar are less in one program than another, resources should be transferred to those programs yielding the higher returns.[18]

The efficiency maximization solution is demonstrable in a slightly different situation. If we assume the same institution wishing to maximize the same values as in the previous example, a pure efficiency solution would also say something about the kind of students which would be selected to attend. Thus, theoretically, the state would be perfectly

15. RAWLS, A THEORY OF JUSTICE 24 (1971). [Hereinafter cited as RAWLS].
16. If the value posited is the realization of human excellence in art or culture, the teleological theory is termed perfectionism. If the value is defined as pleasure it is hedonism; if it is happiness, eudaemonism, etc.
17. RAWLS, *supra* note 15 at 70.
18. Schoettle, *The Equal Protection Clause in Public Education*, 71 COLUM. L. REV. 1355, 1390 (1971).

justified in allocating higher education only to those potential students which it felt could produce the highest level of educational achievement at a given cost. If the predicted ability to contribute to the GNP, of poor students or geographically isolated students was lower than middle class or local students; or the cost of educating certain students, (*e.g.*, blind students), was greater than the cost for other students, the state would be justified in allocating all of its educational resources in the direction of the least-cost producer. The striking and troublesome quality of all efficiency solutions is their ability to subordinate all things, including human beings, to the maximization of the purported goal.

IV

IN CONTRAST to efficiency notions are the principles of distributive justice, when the focus shifts from intermediate to final goods.[19] As a general proposition, theories of distributive justice arise as standards for resolving competing claims to the distribution of scarce goods.[20] In the context of higher education, these claims may be based upon need, merit, or some notion of equal rights or privileges.[21] The problem, at least in the first instance, is deciding how to distribute education in a just manner in light of these conflicting, and at times equally valid, claims.

As a general rule, equality principles serve as the cornerstone to the just distribution of final goods. However, ethical conceptions of justice as equality are multifarious. Thus, equality is one of Aristotle's meanings of justice,[22] the basis of Kant's categorical imperative,[23] the heart of Professor Flatham's generalization principle,[24] and more recently the focus of Professor Rawls' elaborate theory of justice.[25]

Outside of philosophical and political circles, the term equality has a readily discernible meaning; it is used "to compare things of a recognized quality or attribute which they have in common, best illustrated, perhaps, in its application to metrical concepts."[26] Thus we speak freely of equal lengths and equal widths. But when applied to the phrases, "equal educational opportunity," "all men are created equal," or any one of a number of political conceptions, extrapolations from its common usage are only arguably helpful. Still, however, generalizations about the principles of equality solutions are possible. At one level, equality solutions represent a demand for rationality. Termed formal equality, this "requires merely that similar cases be treated similarly,"[27] "according to one and the same rule."[28] It is precisely because there is agreement as to this ethical standard, that the focus of debate centers on arguments over criteria for ascertaining whether in fact certain cases are similar.[29]

The *Brown* decision is an example of a formal equality solution. By holding that race cannot constitutionally be a relevant factor to distinguish otherwise similar cases, the decision struck down as a denial of equal protection Kansas' mode of distributing lower education.

Compromises between equality and efficiency solutions are often a matter of social necessity, for even the most egalitarian-minded are not indifferent to differentials in efficiency. Thus, even if equality were accorded absolute priority in a scheme of values, as between exactly equal solutions the more efficient would always be the more preferable. For example, *pure* equality theory would be

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19. *See generally*, RESCHER, *Distributive Justice* (1966). [Hereinafter cited as RESCHER].
20. *Id.* at 7.
21. Note, *Developments in the Law Equal Protection*, 82 L. REV. 1065, 1167-9 (1969) [hereinafter cited as DEVELOPMENTS].
22. ARISTOTLE, NICOMACHEAN ETHICS bk. v. 1121a1-1138b15.
23. *See generally*, KANT, FOUNDATIONS OF THE METAPHYSICS OF MORALS (Bech trans. 1959). Kant's directive required that rules be generalizable so that they apply to all things similarly situated with respect to the rule.
24. ELATHAM, EQUALITY AND GENERALIZATION, A FORMAL ANALYSIS, IN EQUALITY, 38 (Pennock & Chapman eds. 1967). The Generalization Principle is expressed principally by the notion that similar cases be treated "according to one and the same rule" (p. 49). Professor Flatham argues that equality as a normative concept may simply be a part of a moral obligation to consider all consequences of a particular decision.
25. RAWLS, *supra* note 15.
26. DEVELOPMENTS, *supra* note 21 at 1160.
27. FLATHAM, *supra* note 24 at 49.
28. RAWLS, *supra* note 15 at 237.
29. DEVELOPMENTS, *supra* note 21 at 1165.

indifferent between all receiving an equal education and all receiving none. It would be indifferent as between a per student allotment of $100 for books which produced one level of academic learning, and an equal allotment for different books which would produce a much higher level of learning. Few would insist that equality need be indifferent to levels of efficiency. It is less clear however, whether the converse is true: *i.e.*, whether a pure efficiency advocate would prefer that alternative which is more equal, as between alternative efficient solutions.

Equality has always been an important theme in this country. It was the dominant concern of the founding-fathers in structuring the principles of American liberal democracy, and it is the dominant theme of the civil rights movement, most recently vocalized by women. Indeed, as Professor Weinreb notes:

> The interest in equality is not confined to intellectuals. Equality is what the restless, dissatisfied, unrepresented seek from the community. It is the label they give to their most pressing concerns, and a goal that the community dare not deny, whether or not it promises to stride toward it soon.[30]

It is no coincidence that what is fundamentally involved in the question of the just distribution of higher education is the ethical notion of equality — social, political and economic.

V

THUS FAR A distinction has been made between the intermediate and final good aspects of higher education. The suggestion has been that the distinction serves to delineate the different sets of ethical assumptions which dictate the manner in which higher education is ultimately distributed. As formulated, however, there are two fundamental tensions which exist between the approaches which are crucial to this analysis.

First, inasmuch as higher education is viewed as an intermediate good to be allocated efficiently, it will conflict with the ethical goal of equality in its distribution as a final good. For example, if we accept as one of the university's goals the maximization of educational achievement, the conclusion must follow that some can better maximize the use of education so long as we are willing to acknowledge different abilities and/or levels of preparedness. The resulting allocation, as was discussed earlier, would favor the least-cost producers. The distribution of education as a final good, on the other hand, would not emphasize the ability to maximize achievement, but would rely on some principle of equality which may be indifferent as to relative abilities and levels of preparedness. The problem is that equality in the distribution of education as a final good is, at the same time, an equal allocation of education as an intermediate good, which, when given differing abilities, produces inefficiency.

Secondly, and more importantly, if we assume a mixed social welfare function[31] in which one of the goals of allocating education is to promote equality in this society, as well as maximize the GNP, there will be a sharp conflict in the manner in which education as an intermediate good will be allocated. In that context, equality will necessarily serve as a *constraint* upon the maximization of the GNP, or vice-versa.[32] In this sense, allocations simply for maximizing the GNP (efficiency solutions) or only for maximizing equality (equality solutions) represent two polar positions to the proper allocation of a scarce resource. There is, of course, a vast middle ground which consists of trade-offs or compromises between the two poles.

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30. Weinreb, *Equality* 1, (1974) [Unpublished manuscript in Harvard Law School Library].
31. The social welfare function is a welfare economic term, which represents the total aggregation of values and goals deemed important by society for the maximization of its collective well-being. In a strict sense, the function may only be determined by one who possesses perfect knowledge of each individual's goal-preferences in the society, hence Professor Samuleson's "omniscient observer." In the real world the values which this society may work to maximize are defined by the legislature. The mixed social welfare function simply represents those qualitative (equality) as well as, quantitative (GNP) values which a society may want to maximize.
32. Actually, the insistence on complete equality will serve as a constraint upon the maximization of virtually any other societal goal. The tension formulated here between equality and maximizing the GNP is but an example of the larger tensions which would exist in a mixed social welfare function with equality as one of the goals.

VI

The resolution of the foregoing tensions between equality and efficiency solutions is at the heart of the legislative process. It is the legislature that chooses when and which ethical values are to have absolute priority, and when and where compromises and trade-offs between those values will take place.

Within this context, the equal protection clause serves in part as a judicial mandate for policing the resolution of the foregoing tensions. Although the fourteenth amendment can be understood simply as a constraint upon the legislature not to use race, lineage, and certain other factors as relevant criteria for the distribution of burdens or the nondistribution of goods, courts to some extent monitor the maximization of certain goals, when the resulting inequalities affect suspect classifications or fundamental interests. In such cases, the court may substitute its own ethical judgments as to the importance of certain values, for that of the legislature. Thus, in *Kotch v. Board of River Pilot Commissioners,*[33] although a majority of the court upheld a Louisiana statute which, in effect, allowed state licensed river pilots to be selected partly on the basis of lineage, Justice Rutledge, writing for the dissent, focused on the efficiency-equality tension. After conceding that the state's method of selection may indeed have been efficient, he urged that

> . . . it is precisely because the Amendment forbids enclosing areas by legislative lines drawn on the basis of race, color, creed and the like, that, in cases like this, the possibly most efficient method of securing the highest development of skills cannot be established by law.[34]

BUT ACCORDING TO a pure efficiency solution, correlations of race or lineage and performance may well be relevant in making cost-benefit judgments.[35] The statement that in making efficiency judgments certain criteria are constitutionally irrelevant, is really a disguised shift in priority between two ethical values.

Courts have historically been called on to review efficiency-equality resolutions by the legislature in a number of contexts. In considering the constitutionality of state school financing courts were forced to review the legislature's goals of subsidiary in view of accompanying inequalities.[36] And in *Hobson v. Hansen,*[37] tracking systems, which in theory maximize educational achievement by tailoring classwork to talent, were held to violate equal protection when they served to further racial inequalities in the dual school system.[38]

In short, one of the paramount purposes served by the equal protection clause has been to review the "fairness" of particular state allocations.[39] In the process of this review, the court either affirms the legislature's judgment or substitutes its own as to the efficacy of certain values, by balancing equality notions against efficiency notions, siding with one, the other, or both.

It is with this background that we turn, finally, to the constitutionality of state procedures in higher education. As has been suggested in previous sections, this question is fundamentally a question of how a state ought to allocate or distribute a scarce good. It is more specifically, the question of what kind of trade-offs or compromises between ethical values ought to be tolerated in the context of judicial review.

VII

Any model for constitutional adjudication under the equal protection clause must take account of the differing goals for which the

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33. 330 U.S. 552 (1947).
34. *Id.* at 566.
35. The argument here does not turn on immutable characteristics. It may well be efficient, for example, for a society made up of three different ethnic groups to allocate resourses with reference to the different cultures, simply because particular elements of a culture may provide a ready expertise for producing a given product. The tendency towards cultural assimilation makes this efficiency argument short-run.
36. San Antonio School Dist. v. Rodriguez, 411 U.S. 1 (1972); *see also,* Serrano v. Priest, 5 Cal. 3d 584, 487 P2d 1241 (1971).
37. 269 F. Supp. 401 (D.D.C. 1967), *aff'd sub nom.*, Smuck v. Hobson, 408 F. 2d 175 (D.C. Cir. 1969).
38. In a strict sense, this holding turned on the finding of cultural bias in the standardized test that was used. *Id.* at 514.
39. "Fairness" is not used here as a term of art, as in "Justice as Fairness" by Professor Rawls.

state classifications were created. In identifying those goals, the earlier discussion of education as a complex good is relevant, for it is submitted, that the range of state goals and subgoals for which higher education is provided can be reduced into the following categories:

1. The allocation of education so as to maximize individuals' contribution to the GNP;
2. The distribution of education as a reward for the meritorious.

In the model which ensues, the implications of equal protection for higher education will be considered in light of these two purposes.

PART A — *EDUCATION AS AN INTERMEDIATE GOOD:* A CLOSER LOOK AT THE STATE'S GOAL

> Whether we like it or not, university education is now predominantly vocational. Students go to universities in the expectation or hope of higher incomes in the future. Outlays by them or on their behalf improve their productivity and are exactly analogous to outlays on physical capital.[40]
>
> —John Vaizey

THIS STATE GOAL approaches education as an intermediate good to be allocated to individuals for their use and ultimate contribution to the GNP. Such an approach analogizes education to other productive inputs, including, capital and labor. It sees the problem of allocating education as requiring the selection of individuals who as a predictive matter will maximize its use. In the face of rising student demand for higher education, competitive exams and other procedures are used for selecting from among applicants. Those tests however, are not simply indices of potential school performance; on the contrary, there is an assumed correlation between outcome on college exams and one's potential contribution to the larger community.

It is easy to imagine alternative modes of allocating the educational resource. It would be possible to rely on the time-honored market mechanism, or to choose applicants above a particular level on a first come first serve basis, or to resort to a lottery. But the striking sentiment which underlies one's intuitive rejection of these and similar approaches is the suspicion that none will insure either successful academic performance or ability to contribute to the GNP. To allocate education according to the laws of supply and demand, for example, may so restrict the pool of available talent, that gross inefficiencies are a likely result. But there is a further point: it is a matter of common knowledge, that one of the "incidental" effects of higher education is that it acts as a sorter, *i.e.* as a means to select people for positions of power and responsibility in society. To the extent that access to the sorter is made solely on the basis of wealth or chance, it would certainly be an admission that free enterprise had sold its birthright.

There is, in short, a significant efficiency justification for the manner in which candidates for admission to higher education are presently selected. While this may seem more true in the case of professional schools, a significant efficiency element is present in undergraduate admissions policies as well. The proposition which follows acknowledges the efficiency goal of selections in higher education, and attempts to suggest a model for its constitutional evaluation.

PROPOSITION I — EDUCATION AS AN INTERMEDIATE GOOD

AS BETWEEN TWO EQUALLY EFFICIENT ALLOCATIONS OF INTERMEDIATE GOODS, THE STATE HAS THE DUTY OF CHOOSING THAT ALLOCATION WHICH PROMOTES THE GREATER EQUALITY.

In light of the state's purpose, PROPOSITION I accords absolute priority to an efficiency solution. As formulated, no

40. VAIZEY, THE ECONOMICS OF EDUCATION 27 (1972).

compromises or trade-offs are offered between efficiency and equality, but even gross inequalities in proportional allocations between the races are allowed to the extent such inequalities are correspondingly justified by greater provable efficiency. It is thus perfectly consistent with the state's purported goal of maximizing the GNP. As between alternative allocations which produce the *same level* of efficiency, however, the *equality* of the alternatives becomes dispositive.

Before proceeding it is necessary to elaborate upon the definition of equality as used in PROPOSITION I. At least in an initial sense, "that allocation which promotes the greater equality" takes its cue from the judicial standard of a "discriminatory impact upon a suspect classification." In the cases to be discussed shortly, courts have used such indices as differential rates of passing standardized tests which result in disproportionate minority hiring, to make a prima facie showing of inequality.

In perhaps a deeper sense, equality as used in PROPOSITION I is an implicit statement about the performance of governmental responsibilities. To the extent that unequal proportional distributions between the majority and minority cannot be justified as somehow enhancing some identifiable measure of social welfare (as measured by the GNP), the discrimination, whether intended or not, is arbitrary and harmful, and ought to be held violative of equal protection. This notion will be refined as we examine the employment testing cases.

1. *Conceptual Analogy Between Higher Education and Labor*

One of the consequences of a state's goal of allocating education as an intermediate good, is that it gives rise to a conceptual analogy to the allocation of labor. To the extent that both higher education and labor are considered inputs into the productive sector, and lifetime options which may be afforded an individual properly qualified, they stand on similar social and economic grounds. The analogy, however, goes much further. Both are means of acquiring status and mobility. And in terms of the employment for which education (particularly professional schools) prepares one, both have very significant consumptive dimensions as well.

One of the purposes for attending college or graduate school is to improve the individual's chance to enjoy his or her work, as well as to anticipate a higher income. The cry in the late sixties, for example, that work be in part fulfilling and in some measure enjoyable was more than the white-collar response to Marx's theory of worker alienation; it was in part a rejection of the economic axiom that pleasure and work must be antithetical. As to this consumer good aspect of both education and employment, there can be no reason to assume that the amount of satisfaction presently consumed in the process of education is significantly greater than the amount consumed while employed. Corollary to the amount of satisfaction which a student enjoys in the process of learning, is the amount of satisfaction a teacher receives from teaching, a lawyer from winning a case, or a doctor from saving lives. And as to the consumer durable aspects of both education and employment, what one learns in school and what one learns on the job may equally contribute future benefits, including the greater enjoyment of one's leisure time.

Of greater concern here, is the identity of allocational decisions between hiring processes and admissions procedures for colleges and graduate schools. As a general matter employment testing and other formal and informal procedures are used to make hiring decisions, when the demand for particular job openings exceeds supply. The employer, in selecting from the available applicant pool, attempts to choose those applicants who will maximize the overall productivity of his labor force. This manner of hiring is essentially identical to educational selection procedures, which as posited, attempt to choose those who will maximize the social return from the educational resource.

2. *The Employment Testing Cases*

The analogy of admission procedures in higher education to hiring procedures is important in bringing into focus the relevance of the employment testing cases. These cases represent a sizeable and developing body of law, challenging on equal protection grounds, the validity of standardized testing and other hiring procedures. In the usual case, the plaintiff makes a prima facie showing that the examination (or other procedure employed) has a discriminatory impact upon a racial classification; the burden of proof then shifts to the employer to establish that the test is rationally related to job performance. If the defendant cannot establish the relationship, the use of the test or procedure, regardless of a lack of discriminatory intent, will be held to violate the plaintiff's right to equal protection. It is submitted that these cases support PROPOSITION I.

One of the leading cases in the employment testing area, is *Chance v. Board of Examiners*.[41] In that case, the plaintiffs, Chance and Mercado, who were respectively Black and Puerto Rican, sued the New York City Board of Examiners, claiming that competitive examinations required for appointment to supervisory positions in the City's schools, discriminated against them on the basis of race, in violation of their equal protection rights.[42] To obtain a permanent supervisory position in New York City, an applicant had to meet, not only the State requirements for certification, but obtain a City license as well.[43] The plaintiffs had obtained the necessary State certification, and had met the educational and experience requirements established by the City Board of Education. At the time of the action they were and had been serving satisfactorily as acting principals of New York elementary schools.[44] Both plaintiffs, however, failed to pass the Board's examination for the city license, and were thus foreclosed from permanent appointments.

In challenging the constitutionality of the exam, the plaintiffs developed "a survey procedure to determine the comparative pass rates of the different ethnic groups" which had taken the exam in recent years.[45] The plaintiffs were able to establish that the "examinations prepared and administered by the Board of Examiners for the licensing of supervisory personnel . . . [had] the *de facto* effect of discriminating significantly and substantially against Black and Puerto Rican applicants."[46] The Court of Appeals, in affirming the District Court, held that the demonstrated disparity in the rates of passing, was sufficient to establish a "prima facie case of invidious de facto discrimination," justifying a shift to the Board of a heavy burden to show that its contested examinations were at least job-related.[47] In holding a failure to meet that burden, the Court noted that since the exams were not found in fact to be job related, they were "wholly irrelevant to the achievement of a valid state objective."[48] The Appellate Court went on to uphold the injunction against the further use of the examinations to select supervisors to permanent positions in the City's schools.

Bridgeport Guardians, Inc. v. Members of the Bridgeport Civil Service Commission,[49] presented the same equal protection challenge, but in a slightly different context. In that case, the plaintiff, a non-profit corporation whose members included nearly all of Bridgeport's Black policemen and individual Black and Puerto Rican residents who had failed patrolmen's examinations, sued the local Civil Service Commission alleging that the competitive examinations for initial appointment discriminated against Black and Spanish residents on the basis of race.[50] The Civil Service Exam in question, was similar to those used in most cities; it was general, and its passage was prerequisite to consideration for any city employment.

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41. Chance v. Bd. of Examiners, 458 F. 2d 1167 (2nd Cir. 1962).
42. *Id.* at 1169.
43. *Id.* at 1170.
44. *Id.* at 1170.
45. *Id.* at 1170.
46. *Id.* at 1170.
47. *Id.* at 1176.
48. *Id.* at 1177.
49. 482 F. 2d 1333 (1st Cir. 1973).
50. *Id.* at 1334.

The plaintiffs made a prima facie showing of discriminatory impact, by establishing that the passing rate for Whites was 3.5 times better than for Blacks and Puerto Ricans.[51] The defendants then had the burden of showing that the tests bore "a demonstrable relationship to successful performance of the patrolman's job."[52] In upholding the lower court's finding that the written examinations were not job-related, the court also relied on the fact that the test might have been culturally biased.

Griggs v. Duke Power Company[53] was the first and most important Supreme Court decision in the employment testing area. The case arose, however, pursuant to Title VII of the Civil Rights Act of 1964,[54] and as such did not raise equal protection issues. *Griggs* is nonetheless relevant for two reasons. First, the identity of the issues involved and the manner of their resolution, suggests that no logical distinction between Title VII actions and equal protection actions exists. Secondly, the Supreme Court in employing the "job-related standard" in a more recent case, *McDonnell Douglas Corp. v. Green,*[55] not only relied on its former *Griggs* holding, but cited both *Chance v. Board of Examiners,*[56] and *Castro v. Beecher*[57] (another equal protection case), as support — despite the fact that *McDonnell* was a Title VII case. The holdings in *Griggs,* likewise, has been cited and relied upon in numerous equal protection cases as well.[58] The distinction between the two kinds of actions originates from an historical quirk. Until the 1972 Amendment to Title VII, states and political subdivisions were exempted from the Act. Title VII reached only private discrimination; the equal protection clause was used to challenge public discrimination. Since the amendment, the actions are essentially identical.

In *Griggs,* Black employees of Duke Power Company brought an action under Title VII challenging the requirement of a high school diploma or passage of intelligence tests as conditions of either employment or promotion at the plant. Blacks traditionally had been employed in the lowest paying jobs, and because of the added requirements were generally frozen in place.[59] Although the defendant had had a previous history of discriminatory hiring, both lower courts found that at the time of the suit, such discrimination had ceased.

The company instituted its policy of requiring a high school education or its equivalent for the purposes of hiring and transferring, in 1955. The use of the tests were instituted on the company's judgment that they would improve the general quality of the work force.[60] The use of the tests, therefore, was neither directed nor "intended to measure the ability to learn to perform a particular job or category of jobs."[61] The question presented to the Court was whether criteria neutral on their face, and employed without intention to discriminate, were valid in light of a discriminatory impact upon Blacks. The Court, in reversing, held that if an employment practice that operates to exclude Blacks cannot be shown to be related to actual job-performance, it is prohibited notwithstanding the employer's lack of discriminatory intent.[62] The *Griggs* case, as the equal protection cases, can be understood as an attempt to resolve the situation where Blacks cannot meet educational requirements or score well on standardized tests, but are in fact able to perform the jobs in question.[63]

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51. *Id.* at 1335.
52. *Id.* at 1337.
53. 401 U.S. 424 (1971).
54. 42 U.S.C. 2000e (a)-(b) *see also,* Equal Employment Opportunity Act of 1972, Publ. L. No. 92-261, 2(1)-(2), 86 Stat. 103 (March 24, 1972).
55. 411 U.S. 792, 802 (1973).
56. *Chance v. Bd. of Examiners, supra* note 41.
57. 459 F. 2d 725 (1st Cir. 1972).
58. *See Chance v. Bd. of Examiners, supra* note 41 at 1176; *Bridgeport, supra* note 49 at 1337.
59. *Griggs v. Duke Power Co., supra* note 53 at 427.
60. *Id.* at 431.
61. *Id.* at 428.
62. *Id.* at 436.
63. Comment, *Pre-employment Testing Requirements Unrelated to Job Function Held Unlawful,* 18 N.Y.L.F. 264 (Summer 1972).

a. A Closer Look at the Employment Testing Cases

As the above cases illustrate, there are three crucial elements to the judicial analysis of an employment testing case: the prima facie showing of a discriminatory impact, the shift of the burden of proof to the employer, and the evaluation of job-relatedness.

As a general rule, all that is required to establish a prima facie showing of discriminatory impact is that the testing procedures produce significant disparities in rates of passing between White and Black applicants. In *Chance* the disparity was 1.5 to 1. In *Pennsylvania v. O'Neill,*[64] the disparity was 1.82 to 1. It is, of course, impossible to define "significant disparity" with any measure of empirical accuracy. Two factors, however, are worth noting. In most of these cases, the making of a prima facie case of de facto discrimination is achieved through the use of elaborate statistical methods. Arguments frequently concern the validity or reliability of various statistical probabilities and comparisons, and in many cases, the Court is forced to rely on well-intentioned but not-so-expert experts.[65] The upshot, is that the appellate courts rarely reverse a lower court determination, except for abuse of discretion.[66] After the trial judge has resolved the issues, which inevitably involve "technical statistical jargon like 'one tail' or 'two tail' tests and 'Chi-Square Test (Yates-corrected)' as well as less esoteric numbers and percentages . . .,"[67] it is understandable that the appellate courts are hesitant to overrule.

The burden of proof standard which has been applied to many of the cases has varied tremendously — at least in terms of formulation. Those cases which have found a discriminatory intent in the use of the testing procedure have generally required a compelling state interest for their use.[68] Where no evidence of discriminatory intent is offered, the formulations have varied, from the requirement that the test be "sufficiently job related to justify its use in the circumstances of the case,"[69] to the requirement that there be "a reasonable relationship between the aptitudes tested and the demands of the work to be performed."[70] Other cases term the burden "weighty,"[71] or heavy[72] while requiring the test to bear a "manifest relationship,"[73] substantial relationship[74] or simply that it be "relevant, reliable, and free of discrimination."[75]

One thing is clear from the range of formulations quoted above. The courts are apparently using a more rigorous version of the rational relationship test, patterened ostensibly after the unanimous Supreme Court decision in *Reed v. Reed.*[76] Thus, for example, the lower court in *Bridgeport* found against the defendants on the issue of job-relatedness, notwithstanding its conclusion that the tests were in fact "rationally related."[77] The court held that the appropriate test was greater than the mere rational relationship test but somewhat less demanding than the strict scrutiny or compelling necessity criteria the courts have generally employed in equal protection cases.[78]

In assessing the job-relatedness of certain hiring procedures and examinations, courts initially require that the test be used for the purposes for which it was created. Thus, in *Armstead v. Starkville Municipal Separate School District*[79] the court struck down the use of the Graduate Record Examination where it was used as an indicator of present

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64. 348 F. Supp. 1084, 1089 (E.D.Pa 1972), *mod.* 473 F. 2d 1029 (3d Cir. 1973) (*en banc*).
65. *Id,* generally.
66. *Chance v. Bd. of Examiners, supra* note 41, at 1173.
67. *Id.*
68. Baker v. Columbus Mun. Separate School Dist., 462 F.2d 1112 (5th Cir. 1972).
69. 354 F. Supp. 776, 792 (E.D. Pa 1972).
70. Western Addition Community Organization v. Alioto, 330 F. Supp. 536, 539 (N.D. Cal. 1971).
71. Hobson v. Hansen, *supra* note 37 at 513.
72. *Chance v. Bd. of Examiners, supra* note 41 at 1176.
73. *Griggs v. Duke Power Co., supra* note 53 at 432.
74. *Castro, supra* note 57 at 732.
75. *Copeland v. School Bd.,* 464 F.2d 932 (4th Cir. 1972).
76. 404 U.S. 71, 76 (1971).
77. *Bridgeport Guardians v. Bridgeport Civil Service Comm., supra* note 69 at 791.
78. *Id.* at 788; *see also* Armstead v. Starkville Mun. Separate School Dist., 461 F.2d 276, (5th Cir. 1972).
79. *Armstead v. Starkville Mun. Separate School Dist., supra* note 78 at 279.

teacher competency or future teacher effectiveness in elementary schools, partly because it was not designed for that purpose. Beyond this initial requirement, courts have looked to traditional validation techniques in measuring job-relatedness. Those techniques most often used are predictive validity, both full and concurrent, in which performance on the relevant exam is correlated to actual job performance; and content validity (when predictive validity is unfeasible[80]) which actually measures necessary job skills. In addition, courts have been sensitive to questions of testing bias[81] and test administration.[82]

The theme which emerges from these employment testing cases, is one of increased intervention into what was formerly an area of legislative discretion to employ any rational means which furthered a permissible state goal. This emerging doctrine of constitutional adjudication has begun to take on widespread application, and has not simply been limited to the employment testing area. In this respect, Professor Gunther's model[83] for analyzing this emerging equal protection doctrine is particularly apt. Professor Gunther's model views "equal protection as a means-focused, relatively narrow, preferred ground of decision in a broad range of cases."[84] He rejects the rather weak judicial review which imagined a state of facts which could reasonably justify state action.[85] Instead, the courts, strengthened with a doctrine of scrutinizing the rationality of legislative actions, would assess the means by reference to actual and substantial legislative purposes.[86] In doing so, the court may necessarily confront technical and complex legislative decisions, but with the touchstone of review being judicial competence, it is hoped that the courts will "do more than they have done for the last generation to assure rationality of means, without unduly impinging on legislative prerogatives regarding ends."[87] It should be noted, however, that Professor Gunther's model would still maintain the compelling interest test or require a "least restrictive alternative" in the context of fundamental interests or suspect classifications.[88]

As equal protection challenges, the employment cases are *sui generis*. The discrimination that may result is not due to a state's classification, but rather the consequence of an intermediate standardized test. It is submitted, that the manner in which courts have analyzed this question has been to employ the "rigorous rational relationship" standard employed by the Supreme Court in *Reed* and in *Eisenstadt v. Baird*,[89] as explicated by Professor Gunther.

b. The Employment Testing Cases and the Principle of Absolute Priority

The court holdings in the employment testing cases, accord absolute priority to the maximization of the GNP or any other permissible state goal. If an employer can show a rational relationship between the test and required job performance, he will win, regardless of its discriminatory impact. Hypothetically, therefore, any such court holding, involves a situation of zero net gain or loss to society. But to the extent that the state cannot justify the procedure as efficient, that procedure will not be allowed to have a discriminatory impact on minorities.

There is another way in which these cases can be analyzed. Using a classic equal protection analysis, a test that does not bear a rational relationship to the relevant job, necessarily under-includes or perhaps over-includes individuals similarly situated with respect to the distribution of the benefit. The particular scheme, therefore, would violate

80. United States v. Nansemond County School Bd., 351 F. Supp. at 203 (E.D. Va. 1972); Davis v. Washington, 348 F. Supp. at 17 (D.D.C., 1972), *But cf.* Western Addition Community Organization v. Alioto, *supra* note 70 at 1354; Fowler v. Schwarzwalder 351 F. Supp. at 724 (D. Minn. 1972).
81. *Bridgeport Guardian v. Bridgeport Civil Service Comm., supra* note 69.
82. *Baker v. Columbus Mun. Separate School Dist., supra* note 68 at 1113.
83. Gunther, *Forword: 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].
84. *Id.* at 20.
85. *Id.* at 20.
86. *Id.* at 21.
87. *Id.* at 23.
88. *Id.* at 24.
89. 405 U.S. 438 (1972).

the first concern of equal protection, the concern for formal equality.[90] The argument, however, proves too much. For if that were the case, the courts would not insist on the showing of a discriminatory impact. All those who failed a particular exam, whether Black or White would be equal victims of arbitrary government action.

Few employment testing cases have gone that far. One such case, however, is *Armstead.* There, the Court held that it was unnecessary to review the district court's finding that the test created a racial classification because the "GRE score [did] not measure up to the equal protection requirements under the Fourteenth Amendment."[91] Citing both *Reed* and *Baird,* the classification created was found lacking in reasonable basis and arbitrary.[92] But *Armstead* is atypical. Not only was the procedure irrational, but the surrounding circumstances suggested a discriminatory intent. The *Bridgeport* case may be more to the point. For in most cases, the state procedure is "rational," at least under the accommodating standards of *McGowan v. Maryland*[93] and *McDonald v. Board of Election Commissioners.*[94] The ethical judgment which the courts are making under the rigorous rational relationship test, is that mere rationality (which is tantamount to a low showing of goal-maximization) will not suffice to justify racially discriminatory impacts.

To the extent that one views the mere rationality test of *McDonald* and the compelling state interest test as polar points on a continuum, with the rigorous rational relationship test as lying somewhere between those points, one further conceptualization is possible: lying parallel to the rational relationship-compelling interest continuum is the efficiency-equality continuum of solutions to the allocation of intermediate goods in a mixed social welfare function. To the extent that the court, in ascribing meaning to its rigorous rational relationship test, sets the burden closer to the compelling interest end of the spectrum, it strengthens equality as the secondary value. Conversely, if the judicial test comes to rest closer to the mere rational relationship pole, a much lower showing of efficiency will be required to offset accompanying inequalities. This latter position seems only justified on some principle of judicial deference to the legislature, since allocations which could only survive the mere rationality test, will insure neither efficiency nor equality. The courts, however, seem bent on the former.

c. PROPOSITION I and the Employment Testing Cases

As presently formulated, the employment testing cases fall short of PROPOSITION I. For if the employer is able to satisfy the required threshold level of efficiency or job-relatedness, he may employ the procedure despite its discriminatory impact. PROPOSITION I, on the other hand, goes one step further: even if a threshold level of efficiency is established, the state would still have the duty of choosing that solution which is more racially equal. Given the ethical command of the concern over racial inequalities discussed above, however, one wonders whether the courts are really indifferent as between equally efficient solutions. The suspicion is that they are not; they may, in part, be enforcing PROPOSITION I by manipulation of the threshold level which must be satisfied.

As a formal matter, the case involving PROPOSITION I has yet to be litigated. The issue has however, been briefly mentioned in *Chance* where the court recognized, but did not reach the more difficult question of whether upon a finding that the examinations were job-related "the Board would still be required to demonstrate that no less discriminatory means of obtaining its supervisory personnel were available."[95] It is submitted, that although the showing of a least restrictive alternative usually accompanies the bite of the compelling interest test,[96] its use in

90. DEVELOPMENTS, *supra* note 21 at 1163.
91. *Id.* at 279.
92. *Id.* at 280.
93. 366 U.S. 420, 425 (1961).
94. 394 U.S. 802 (1969).
95. *Chance v. Bd. of Examiners, supra* note 41 at 1177.
96. Loving v. Virginia, 338 U.S. 1 (1966); McLaughlin v. Florida, 379 U.S. 184 (1964).

these kinds of cases would not be inconsistent with the Guntherian model.[97]

In its truest sense, PROPOSITION I embodies both the threshold approach of the employment cases and the least restrictive alternative requirement mentioned in *Chance*. If the state cannot make the threshold showing of efficiency, the test ought to be struck down; only if it succeeds in meeting the threshold requirement, must it then show that no solution just as efficient is possible which would also be more equal.[98]

3. *Applying the Employment Testing Cases to Higher Education*

In this section, the focus shall be on professional schools, for they raise the issues which concern us here in their clearest form. In the employment testing cases, the testing procedures have been correlated with actual performance on the job. But in higher education, and specifically in professional schools, the question becomes whether the admissions procedures must be correlated with performance in school or with the ultimate performance for which the university is only an instrument. The answer, it is submitted, must be the latter.

To the extent that professional education is viewed as an intermediate good, what society is really concerned about is the quantity and quality of the doctors, lawyers, etc. who matriculate. That concern is manifested in the market place where, to many an intellectual's chagrin, arid scholarship brings a very low bid price. Academic achievement for achievement's sake is not at all the concern under an intermediate conception of education. The concern is solely with the output of human capital.

The above argument — that admissions procedures must correlate to the ultimate maximization of the GNP — may seem counter-intuitive if one assumes either: 1) that there is an implied correlation between academic performance and future productivity in society, or 2) that it is impossible to measure with any meaningful accuracy those qualities which make for greatness beyond the four walls of the university.

The first assumption is evident principally in the business practice of centering hiring techniques around grade performance. There is widespread belief that those who do better in school are more likely to do better on the job. Thus, by choosing those who the university feels will attain the highest level of academic achievement, the university is in fact choosing those who will maximize the GNP. This argument cannot be persuasive in light of the employment testing cases: for those cases stand exactly for the proposition that assumed correlations of this type are impermissible in the context of a discriminatory impact upon minorities. In *Griggs*, for example, the Duke Power Company made the assumption that there was a correlation between a high school diploma or its equivalent and heightened job performance. The Court, however, found a

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97. *See generally, Griggs v. Duke Power Co., supra* note 53.
98. Since the least restrictive alternative component of PROPOSITION I has not been litigated, certain policy issues must be anticipated. To the extent that potential plaintiffs are allowed to challenge hiring and testing, an expensive burden is placed on the employer since he is required to make a showing not only of job relatedness but also that the procedure is the least restrictive. Research and experimentation that may be necessary to justify a particular exam as the most efficient or the least restrictive, could greatly snarl the state bureaucracy.

Further, one might argue, an employer ought only to be responsible to pursue business activity in a reasonably efficient manner; without the added requirement of fairness.

There are two responses to the above position. To begin with, it is not at all clear that the confusion caused by forcing an employer to find an exam that is least restrictive is any greater than the confusion now caused when a test is declared not rationally related. The impersonal bureaucratic machine seems adept at adapting to the requirements of finding alternative procedures, when pushed. And although for private employers, there may not be a requirement beyond job-relatedness, when state action is involved, and a state procedure has a discriminatory impact, it is not unreasonable to demand something beyond job-relatedness.

There are two ameliorative procedures which might be used to lessen the bite of the least restrictive alternatives approach, in the event the court was unwilling to impose the added burden. The court could for example, require the plaintiffs and defendants to submit a joint feasibility study for an alternative selection process, once a discriminatory impact was shown and the defendant satisfied the job-relatedness test. The court would not enjoin the present use of the test shown to be rational, but would make its future applicability subject to the findings based on the feasibility study.

Another approach, which would be more harsh on the plaintiffs, would require the burden to shift back to the plaintiff to suggest the least restrictive alternative, once the defendant establishes that the procedure is job related. Although the practicality of this approach, is questionable it would be more desirable than nothing, and consistent with PROPOSITION I.

violation of Title VII in light of its discriminatory impact on Blacks. The employment testing cases forbid mere arm-chair speculation as to correlations between the hiring procedures and the actual job to be performed. The fact that society at large, and more specifically the business community, share this presumptive correlation, is irrelevant in the face of a discriminatory impact upon a racial minority.

The second argument raises a different kind of problem. The thrust of the argument is that to force an admissions committee to make selections to professional schools with an eye towards maximizing the GNP is unreasonable because of the complex of factors which must be considered. The argument concedes that there are equally important qualities of the good lawyer or doctor which professional schools do not teach, nor entrance examinations test nor academic grades measure, thus, professional schools ought not be required to make selections with an eye other than to school performance.

It should be noted however, that at least as far as entrance examinations are concerned, no serious attempts have been made to devise a test which measures potential for out-of-school performance. Only recently have testing authorities begun to focus even limited attention towards this larger question.[99] Moreover, it is apparent that many admissions committees do take into account the complex of factors which they deem relevant in assessing an individual's future contribution to society.[100] In *DeFunis v. Odegaard,* for example, the University of Washington argued that its criterion for selecting law students, which in part favorably considered the race of Black applicants, correlated to its goal of producing students with "the ability to make significant contributions . . . to the community at large" above and beyond "potential for outstanding performance in law school" and the capacity to make "contributions to law school classes."[101] The attempt to justify admissions procedures as correlative to activity beyond the four walls of the professional school was the dominant theme of the University of Washington's argument and the supporting briefs.[102]

The difficulty of measuring future legal or medical talent in admissions to professional schools seems no more difficult than doing so for policemen or teachers. But in deciding, for example, whether a policeman would be admitted to training school, the court in *Pennsylvania v. O'Neill,* supra, held that the test cannot be validated simply by showing that it correlates to a different test given at the end of training unless the latter has been shown to be an effective predictor of job performance.[103] As applied to higher education, this holding would allow entrance examinations to be validated by reference to academic grades only to the extent those grades were in turn validated as predictors of success in the practice of law, medicine, etc. In short, the difficulty of measuring the wide range of relevant talents and strengths needed for practice in a given profession, seem no more insurmountable than in the case of entrance exams for policemen, who must exercise a similarly wide range of responsibilities and judgments.

The requirement that admissions procedures be correlated to an individual's potential contribution to the GNP may perhaps be better understood if put in the following context: with rare exception, admission to the professional school is the first step toward admission to the profession itself. One simply cannot become a lawyer, doctor, or an

99. *See* Carlson, Werts, Proposal: Relationship Among Law School Predictors, Law School Performance, and Bar Examination Results, Educational Testing Service (February 1973). Other studies, yet to be completed have been undertaken by the National Conference of Bar Examiners, the American Bar Foundation, and the Association of American Law Schools.

100. *See, e.g.,* Brief for the Board of Governors of Rutgers as *amicus curiae, Defunis v. Odegaard,* 82 Wash. 2d 11, 507 P. 2d 1169 (1973), *Cert. granted* no. 73-235 (1973), *Vacated as moot,* 42 U.S.L.W. 4578 (U.S. Apr. 23, 1974).

101. Brief for Law School Council as *amicus curiae* at 10, *Defunis v. Odegaard,* 42 U.S.L.W. 4578 (U.S. Apr. 23, 1974).

102. *See* Brief for Rutgers and Brief for Law School Council as *Amicus curiae, Defunis v. Odegaard.* 42 U.S.L.W. 4578 (U.S. Apr. 23, 1974).

103. *Pennsylvania v. O'Neill,* 348 F. Supp. 1084, 1090 (E.D. Pa. 1972).

economist without first attending an accredited graduate school. Moreover, in view of the widening reliance by schools on standardized test scores for admission, those standardized tests to some extent constitute a prerequisite to employment in the respective profession. Thus, the applicability of the logic of the employment testing cases is underscored.

Assuming an approach that would correlate the admissions procedures with professional performance, the rigorous rational relationship test would apply. Upon the showing of a discriminatory impact upon a racial category, the burden would then shift to the university or college to justify the procedure as being substantially related to "job" performance. Whether or not the admissions procedure would be upheld, would depend upon the particular factual circumstances, the level of statistical significance to which the court will hold the testing procedures used, and the level at which the judge sets the threshold of sufficient efficiency justification.

This last factor, the level at which the judge sets the necessary threshold level for a showing of GNP maximization, is of crucial significance. When distinctions between students are made on the flimsiest of differences, partly because of the tremendous student demand, and partly because of the subjective nature of the process, resulting decisions are often not at all justified in terms of ability to succeed or to do well, either in school or out of school. When the function of the process is no longer geared towards making more efficient selections, but becomes a process of elimination, one may well inquire whether a racially discriminatory impact is justifiable. PROPOSITION I answers that question in the negative.

The factual circumstance which underlies this last point is based on a notion of Pareto optimality. To the extent that an institution cannot distinguish one applicant from another using a standard of efficient choice, and to the extent that there is an excess of applicants with respect to the available space, it is clear that the function of the admission process is one of *elimination* rather than *efficiency*. In that case, PROPOSITION I would require that the state pick that solution which does not have a discriminatory impact upon a racial category. Since the situation posited would not involve any compromise to GNP maximization, there really is no justification for continued and gross inequality. Although no attempt will be made in this article to examine in detail whether particular admissions examinations would satisfy the rigorous rational relationship test of *Griggs* and *Chance*, two points are worth noting, at least in the context of legal education. To begin with, the LSAT examination has not been validated as a predictor of legal job performance, but simply as it correlates to predicted first year averages of incoming students.[104] The first year averages of the students, however, have not themselves been validated as predictors of legal performance. In fact, no standards for success in the legal profession have as yet been delineated, much less tested. As we have seen previously, validation of an examination is crucial if it is to justify a discriminatory impact upon a racial classification.

Further, a 1968 study by Richard Watkins, has found that the correlation between the LSAT score and performance by law students who took the California bar exam was only .19, meaning that only nineteen times out of 100 was the LSAT an accurate predictor of bar examination performance.[105] As a statistical matter, the correlation is meaningless. To the extent that the bar examination is itself a valid indicator of the legal knowledge and ability requisite to the capable practice of law, the LSAT exam may well fall

104. *See* Law School Council Brief as *amicus curiae* at 16, *Defunis v. Odegaard*, 42 U.S.L.W. 4578 (U.S. Apr. 23, 1974).

105. Atkins, *The Comparability of Grades on the California State Bar Obtained at Different Admissions*, Educational Testing Service (Bull.), SR 68-1-WO (March 1968). Note also in this context, that the correlation coefficient even between LSAT scores and the predicted first year average is only .39-.42.

short of the standards imposed by *Griggs* and *Chance*.

Although the employment testing case analogy to higher education may not solve all the problems of discriminatory impacts, it does provide conceptual and legal tools for analyzing a number of situations. In the discussion that follows, I shall consider one such situation, attempting to highlight some of the important conceptual issues which are involved.

4. *Standardized Test Scores As Cut-Offs to Admission*

From 1967 to 1971, there was a tremendous increase in the number of applicants to professional schools in this country. In the legal sphere alone, for example, the number of persons taking the LSAT increased from 47,458 to 107,147.[106] As a result of this tremendous increase in demand, greater and greater reliance has been placed on standardized tests to narrow the relevant applicant pool. Consequently, many state colleges and universities have adopted or are considering minimum test scores as a prerequsite for admission.[107]

The permissible theory which must be advanced to back the use of a cut-off score is that allocating education to those that score below the particular minimum would result, in a wasting of educational resources. In order to fully justify the use of a particular score as an absolute cut-off, it would be necessary for the state to show either: 1) that those with or below that score could not as a predictive matter graduate from the university, or 2) that as between that score (or score range) and the next higher score, there would be measureable difference in terms of output in the larger society.

The first point would require a showing by the state that the relevant test score measured, at the very least, the minimum intellectual ability necessary to successfully complete the relevant courses of study. The accuracy of the entrance examination as a predictor of that fact is all important. For the basic teaching of *Griggs* and *Chance* is that standardized tests cannot be used to exclude applicants if otherwise fully qualified.

The second point demands even more. Where the state attempts to justify the use of a cut-off score on the theory that there are more than enough applicants above that score who, *ceterus paribus*, would deserve admissions, it must show that the admissions test not only correlates with first year average or a minimum ability to succeed, but that the difference between a score of 550 and a score of 600 on an LSAT corresponds to an actual predicted increase in potential achievement and contribution.

To the extent that the cut-off serves more to eliminate rather than avoid misallocation, its use should not be allowed to stand in the face of a showing of discriminatory impact on minorities. The test will necessarily have the effect of eliminating a number of good students who may have a wide range of talent which ought to be considered in the admissions process. If it is used to eliminate and not maximize, its use may well be enjoined for arbitrariness or gross imprecision in the lines it draws between those qualified and those not qualified.[108]

PART B — *EDUCATION AS A FINAL GOOD:* A CLOSER LOOK AT THE STATE'S GOAL

> The trouble with the popular notion of utility is that it confuses immediate and final ends. Material prosperity and adjustment to the environment are good more or less, but they are not good in themselves and there are other goods beyond them. The intellectual virtues, however, are good in themselves and good as means to happiness.[109]
>
> Robert M. Hutchins

106. Brief for Law School Admission Council as *amicus curiae* at 8, *Defunis v. Odegaard*, 42 U.S.L.W. 4578 (U.S. Apr. 23, 1974).
107. A number of New York colleges and universities use this technique.
108. *See* Beckwith, *Constitutional Requirements for Standardized Ability Test Used in Education*, 26 Vand. L. Rev. 789 (1973).
109. Hutchins, *The Higher Learning In America*, 62-63 (1963). Professor Hutchins was the President of the University of Chicago when this speech was given.

Thus far the discussion has focused exclusively on the allocation of higher education as an intermediate good. Part A of this model has suggested an analytical approach to the problem, offering PROPOSITION I as a means of resolving conflicting goals. In this section, we approach education as a final good, shifting from the tensions implicit in a social welfare function to the multivaried principles of distributive justice. This analytical shift will be accompanied by a change in schools of thought — from economics, to philosophy and politics.

As a preliminary matter, it is important to distinguish between two separate aspects of higher education as a final good. The first sense derives from the resemblance of higher education to other commodities, principally in its consumer good and consumer durable aspects, previously discussed in section II. In the second sense, higher education is linked to an ethical value system, typified by the view that "education," "knowledge" and the "perpetuation of culture" have worth in and of themselves.

When higher education is viewed solely as a final good, the commodity element of higher education becomes the sole incentive for student participation in the educational process. The distributional issue then becomes who will receive the enrichment and enjoyment of the educational process, (not who will best maximize the GNP). For purposes here, I will treat the commodity element of education as a final good as merged in the larger perspective of higher education as an ultimate value. This is because the value perspective more properly corresponds to the state's goal for providing higher education. The commodity element, while important, better represents the individual's incentive.

In the value-sense that education as a final good is used here, it corresponds to Professor Fuller's morality of aspiration, which in his terms, represents the morality of the "Good Life, of excellence, of the fullest realization of human power."[110] As an ethical concept it is most clearly exemplified in Greek Philosophy, and is manifested principally in the concern that man engage in activity worthy of his capacity.[111] The morality of aspiration approaches human achievement from the top.[112] The concern is not what minimum conduct and responsibility individuals must shoulder in an organized society; the morality of aspiration begins where duty leaves off, and "extends upward to the highest reaches of human aspiration."[114] As applied to higher education, the Fullerian perspective would see the university as an institution intended to make men see and understand the "good life," dedicated to the preservation and enrichment of man's social inheritance.[115] This ethical view, however, says nothing at all about the manner in which education ought to be distributed. And as we shall see, it says even less about the manner in which a court ought to review the distribution of education.

1. *Higher Education and Distributive Justice*

As a general rule, states use some kind of equality solution of justice when scarce final goods must be distributed. Although the complex area of equality solutions was passed over in PROPOSITION I, it becomes particularly relevant here; a brief outline of some of the relevant and classic equality solutions is therefore included.

As a general matter, all equality solutions must conform to the principles of formal equality.[116] Formal equality, as has been previously suggested, simply requires that similar cases be treated similarly.[117] It is at the heart of the court's enforcement of the equal protection clause, and serves as a con-

110. FULLER, THE MORALITY OF LAW 5 (1964) [Hereinafter cited as Fuller].
111. *Id.* at 8.
112. *Id.* at 9.
113. *Id.* for a discussion of the morality of duty.
114. *Id.* at 9-10.
115. *Id.* at 6 and 13.
116. *See* text discussion *supra* at notes 26 to 29.
117. *See* RAWLS, *supra* note 15 at 237.

straint upon arbitrary, government action.[118] When a state distributes a benefit or burden differently to persons similarly situated with respect to the good being distributed, it is open not to the charge that it necessarily has acted badly or immorally, but simply that it has acted irrationally.[119] And irrational governmental action is the vice at which the equal protection clause is in part aimed.[120]

But the formal principles espoused above cannot be implemented without appeal to principles outside mere formal equality.[121] For they do not identify any of the factors relevant in distinguishing apparently similar cases. Towards this end, the principles of normative equality, which are in turn subdivided into numerical and proportional equality, provide the key.[122]

Numerical equality concedes the range of diversity among human beings, but nonetheless concludes that all such differences are irrelevant as criteria for distributing benefits and burdens.[123] Among its attributes are ease of administration and a ready justification for insensitive individual treatment.[124] The principle of numerical equality, however, is inept in the distribution of scarce goods, where this simplest adherance to formal equality is by definition impossible.

Proportional equality, on the other hand, is Orwellian. It attempts to justify disproportionate distributions by identifying the inequalities among individuals. From the point of view of government action, the two most important inequalities are those of need and those of merit.[125] In distributing higher education according to merit, for example, the state would "purport to measure and reward and discourage accordingly the individual's perceived value to society."[126] By using such indices as achievement or performance, past or anticipated, social worth is determined, and in higher education, encouraged and rewarded, by admission. A distribution according to need, unlike merit, would deny the direct relevance of previous achievement and performance, stressing instead the effectiveness with which it fulfilled what are considered the relevant needs of the recipients.[127]

It is submitted, that once higher education is conceived of solely as a consumptive good, the distribution of education to some and not others is justified principally as a reward for the meritorious rather than the needy — a reward for those who have achieved certain levels of past excellence, and whose anticipated performance suggests their favoritism as a matter of "just desert."[128]

2. *A Closer Look At Equality of Merit*

The notion that a system of justice rewards individuals according to their abilities and achievements is traceable to Aristotle and emerges most clearly in the American tradition in the works of the Jeffersonian theorists.[129] But what constitutes merit is seldom defined, and in practice covers a wide

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118. *See e.g.* Ry. Express Agency v. New York, 336 U.S. 106, 111 (1949). Justice Jackson stated in concurrence:
Invocation of the equal protection clause on the other hand, does not disable any governmental body from dealing with the subject at hand. It merely means that the prohibition or regulation must have a broader impact. I regard it as a salutary doctrine that cities, states and the Federal Government must exercise their powers so as not to discriminate between their inhabitants except upon some reasonable differentiation fairly related to the object of regulation. *This equality is not merely abstract justice. The framers of the Constitution knew, and we should not forget today, that there is no more effective practical guaranty against arbitrary and unreasonable government than to require that the principles of law which officials would impose upon a minority must be imposed generally.* Conversely, nothing opens the door to arbitrary action so effectively as to allow those officials to pick and choose only a few to whom they will apply legislation and thus to escape the political retribution that might be visited upon them if larger numbers were affected. Courts can take no better measure to assure that laws will be just than to require that laws be equal in operation. [Emphasis added].
119. Weinreb, *supra* note 30 at 3.
120. *Ry. Express Agency v. New York, supra* note 118.
121. DEVELOPMENTS, *supra*, note 21 at 1164.
122. *Id.* at 1164.
123. *Id.* at 1165.
124. *Id* at 1165.
125. *Id.* at 1166.
126. *Id.* at 1166.
127. *Id.* at 1168.
Needless to say, as there are debates as to the criteria of relevance when judging distribution according to merit, there is similarly a raging debate surrounding the definition of needs, especially given their subjective and relative nature. This realization has led to such formulations as Professor Michelman's "minimum guarantees," and Professor Rescher's minimum utility floor. *See* Michelman, *Foreword: On Protecting the Poor Through The Fourteenth Amendment*, 83 Harv. L. Rev. 7 (1969); RESCHER, *supra* note 19 at 28-30.
128. *See generally* RESCHER, *supra note 19 at 53-65.*
129. *Id.*

range of value judgments. As it will be used here, however, merit corresponds to the morality of aspiration. As such, it attempts to measure human action as it strives towards some conception of the highest good. But even here there are problems. First, it is impossible to establish clear standards for defining or measuring the attainment of some policy-maker's preconceived notion of "excellence" or of the highest good. Secondly, and as a corollary to the first, decision-making procedures are necessarily informal. Decisions as to merit thus stand in marked contrast to decisions which a government ordinarily makes. For government arises principally as a means of enforcing the basic rules of social living; it is thus concerned with minimums, usually formal and very well defined.[130]

The distinction drawn in the world of government action, between rewards based on a criterion of subjective merit and sanctions based on a failure to observe the minimum requirements of social living, is demonstrable in a wide range of contexts. For example, athletic competition depends on referees to enforce the basic or minimum rules of organized sports, but there are no referees or umpires to rule on the grace of a particular home-run swing, or the style of a particular slide into second base. For the evaluation of "excellence" on the playing field, we must rely on the informal judgments of the spectators and sports writers. Likewise, while society relies on relatively informal procedures to make awards for good citizenship, or awards for bravery in battle (i.e. the Congressional Medal of Honor), it relies on strict procedures to enforce sanctions against inividuals for committing crimes. In short, most decisions concerning merit are essentially subjective and perhaps intuitive, partly because of the diversity of value judgments which underlie them, but more generally, because it is impossible to measure with anything like precision, the 'Truly Great' or the 'Truly Beautiful.'[131]

Nowhere is this subjectivity and imprecision more blatant than in admissions to higher education. And it is with this realization that admissions procedures remain basically informal and non-reviewable, while expulsion (for lack of observing some well-defined minimum standard) are generally formal and reviewable. Although all may have a defensible conception about the minimums for admission or for passing a course, we must accept as a recognition of human frailty, the biases and value-judgments which necessarily enter into the evaluation of merit. The process is essentially one of ethical and aesthetic judgments, made by those in positions of power and responsibility.[132]

The distribution of education according to merit thus raises two problems in the context of a discriminatory impact upon minorities. By allowing institutions to justify selections with reference to subjective criteria, it may in fact shield purposeful discrimination.[133] The problem is that without the requirement that selections be justified with reference to objective criteria (i.e. the ability to succeed or to maximize the GNP), there simply is no way to evaluate the propriety of choices. It thus leaves virtually unchallengeable what may in fact be *de jure* discrimination. In addition, where subjective merit is the criterion for the distribution of higher education, we may be confronted with majority tyranny in its most subtle and pernicious form. When selections

130. The dichotomy here corresponds to Professor Fuller's Moral scale represented on the two poles by the morality of aspiration and the morality of duty.
131. FULLER, *supra* note 110 at 30-32.
132. Note an implicit distinction has been made here between what I call objective v. subjective merit. Objective merit consists in identifying that achievement and performance which contributes to the GNP as the basis upon which distributions ought to be made. It is thus susceptible of means-goal scrutiny, and is represented principally by the analysis of education as an intermediate good suggested in Proposition I. Subjective merit on the other hand, is neither defined nor matched against any empirical outcome. It is nonrational, and it is defined soley with reference to subjective, value-laden criteria, principally in the minds of the decision makers, but presumably reflective of majoritarian values as well. Subjective merit is what is concerned in the distribution of education as a final good.
133. For example, the state institution would have total freedom to use a criterion for assessing merit which would prefer a student that studied abroad in Paris for a summer as opposed to a student who studied in Tanzania; that preferred the applicant to law school which had majored in Italian Renaissance Literature as opposed to African history or Black studies; or that preferred the applicant who worked in his father's bank as opposed to Model Cities or the Urban League.

of beneficiaries for government goods are made by appeal to an array of ethical values, perhaps shared by the majority, but not to any significant degree shared by the minority, the mechanical logic of utilitarianism and the promise of democracy serve only to disguise discrimination and cultural subjugation.

The underlying theory which permits government discretion in using value judgments as a basis of distribution was expressed by Madison, when he postulated that shifting coalitions will allow all at some point to have their particular ethical values become the object of the law.[134] Majority tyranny, Madison theorized, would not develop because of the diversity and conflicts between men and factions, producing constant shifts of power, as former coalitions crumble and new and different ones emerge.[135] It is important to note, however, that Madison was concerned principally with factions which grow out of "the various and unequal distributions of property."[136]The fear of a possible "majority united by a common interest" was really the fear that the masses of landless proletariat fused in interest would become an overbearing majority,[137] rendering the "rights of the minority . . . insecure."[138] The first objective of the constitutional theory was thus to prevent contending forces from fusing into a permanent majority. The constitution and the separation of powers doctrine reflect this central concern.[139]

But Madison wrote during slavery. Thus, although the possibility of economic majority tyranny was well provided for in the original construction of the liberal theory of democracy, tyranny of a racial majority over a permanent and insular minority was totally ignored. With respect to race, then, the liberal principles merely articulated rights, but provided no remedy. It is submitted, that it was the fourteenth amendment that brought that remedy. The equal protection clause arises primarily as a means of protecting racially insular minorities from becoming the victims of majority tyranny. It thus represents the realization that the implied promise of democracy — that all will have their chance to have their ethical values enshrined in law — is inept in the context of an insular minority, who at least as to some issues (most particularly their ethical and cultural values) will always remain outside of the law.

According to Madison and Hamilton, it was the judiciary which was to serve as the "crowning counterweight to 'an interested and overbearing majority.' "[140] The liberal principles of democracy were "secured in the peculiar position assigned to the judiciary, and [in its] use of the sanctity and mystery of the law as a foil to democratic attacks."[141] The mandate of the equal protection clause, then was a formal extension of the judiciary's historic role as protector of "minorities." The special judicial treatment accorded to "suspect classifications" is a manifestation of that protection.

It may seem peculiar, in a sense, that the state should be forbidden to reward certain kinds of behavior deemed desirable unless minorities share proportionally in the reward. There are, to be sure, certain rights which inure to the benefit of the majority by virtue of their majority status. But it not the position here, that the state can never reward the meritorious. The true issue involves a line-drawing problem as to the kind and degree of awards which can be given. It is submitted that PROPOSITION II is an appropriate guide for drawing that line.

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134. Hamilton, Madison, Jay, *The Federalist Papers*, Madison #10.
135. *Id.*
136. *Id.*
137. Farrand, 2 Records 203.
138. *The Federalist 51.*
139. *See The Federalist* #60 for a further elaboration of this theme. At one point, Madison writes:

> "The House of Representatives being to be elected immediately by the people, the Senate by the State legislatures, the President by electors chosen for the purpose by the people, there would be little probability of a common interest to cement these different branches in a predilection for any particular class of electors."
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> For a more extensive comment on this theme see C. Beard, AN ECONOMIC INTERPRETATION OF THE CONSTITUTION OF THE UNITED STATES 160-64 (1935). [Hereinafter cited as BEARD).

140. BEARD, *supra* note 139 at 161.
141. *Id.* at 161, see also Hamilton *The Federalist 78.*

3. PROPOSITION II — EDUCATION AS A REWARD FOR THE MERITORIOUS

THE STATE MAY NOT USE FACTOR ENDOWMENTS IN REWARDING NON-EFFICIENCY GOALS, IF THE NATURAL EFFECT OF THEIR USAGE IS TO FURTHER WIDEN THE INTER-GENERATIONAL DISPARITY BETWEEN THE RACES IN THE PROPORTIONAL DISTRIBUTION OF INCOME.

PROPOSITION II admits that a state may distribute goods according to a criterion of subjective merit. It allows the legislature, for example, to give an award for the best art, the most exemplary scholarship or the best literary effort, using criteria of subjective merit and in the face of a discriminatory impact upon minorities.[142] The problem lies not in whether such awards can be made, but whether particular kinds of state distributions can serve as the basis of the reward. The principle of PROPOSITION II is that the state may not use factor endowments as the reward.

a. Defining Factor Endowments

The term factor endowment as used in PROPOSITION II derives, in part, from the notion of initial endowment in game theory. Typically, as in the Edgeworth-Bowley box, game theory is concerned with structuring theoretical rules for bargaining between individuals in situations of potential bilateral or multilateral exchange. For example, in a zero-sum two-person game, (where "two-person" means there are two economic actors with conflicting interests, and "zero-sum" means that whatever is gained by one actor in a trade must be at the expense of the other), each actor is given an "initial endowment" of goods to be taken to the market and traded in a particular time period. The market is closed, in that there are no other goods to be traded other than what the actors have between them, and there are no other traders beside themselves. Each player is thus confronted with a finite number of strategies which he can use to maximize his preferences. "Each player must choose his strategy without knowledge of what his opponent has done or is planning to do,"[143] and decisions are irrevocable.

An Edgeworthian analysis of this situation would allow an economist or mathematician to theorize as to the particular bargain set and ultimate contract point at which the parties acting to maximize their utility will arrive. As the games become more complex, both in the number of economic participants and in the range of goods which are offered for trade, the conclusions of economic game theory serve as part of the general theory of bargain-exchange in this competitive economy.

In the real world, the initial endowments of which economics and game theory speak, simply represent those real goods and services which are traded in the market place at a given point in time. They may include a farmer's crop, a businessman's acumen, an entertainer's talent or a doctor's medical services. Exchanges may take place initially for money, but ultimately and essentially that money is transferred into other goods and services by the recipient. Game theory is, however, silent as to where the initial endowments come from. The assumption in a competitive economy, is that endowments are produced in the private sphere by investment in capital. It is the capital which an individual owns which produces the goods which are then traded in a particular time period. The capital of the farmer, (land, machinery, etc.) produce the goods, (potatoes, corn, etc.) which are then traded on the market, ultimately for other goods and services.

The distinction drawn above, between capital and the commodities which that capital produces, is the precise distinction on which PROPOSITION II turns. Factor endowments, as used in PROPOSITION II, are

142. If majoritarian values prefer the New York City Ballet over the Alvin Ailey Dance Troupe, or the Philadelphia Philharmonic over Hubert Laws or Quincy Jones, the legislature may with impunity make rewards using a criterion of subjective merit notwithstanding a discriminatory impact.

143. FREUND AND WILLIAMS, ELEMENTARY BUSINESS STATISTICS 153 (2nd ed. 1972).

distributions by the state of capital; they represent distributions of a 'means of production,' enabling the individual to produce commodities time after time and to claim benefits which trading those commodities will bring.[144]

It is within this context, that state provided higher education must be understood as a factor endowment, as opposed to a commodity endowment, for those students who are admitted and who matriculate.

b. State Provided Higher Education as a Factor Endowment

The notion of higher education as a factor endowment derives from the theory of human capital and the important distinction between "stock" and "flows." For the purposes here, stocks shall refer to capital, whether human or physical, which has the ability to produce goods or services. Flows shall be the goods or services produced by human or physical capital. Thus, for example, in the case of the doctor, the stock is his own human capital, for what he has in his body and his mind produces the services (or flows) which others may purchase or trade.

Higher education is essentially an addition to human capital or stock. Its purpose is to enhance or increase one's ability to produce certain kinds of flows. The distribution of education in this sense is not the distribution of a commodity endowment like free legal services or medical clinics; it is a factor endowment, more properly analogized to a machine which enables the individual to produce legal services or medical services time after time and to enter the market and trade.

It is because higher education enables individuals to produce a more demanded output, that the student can ultimately expect more goods or greater benefits in the market place than he or she would otherwise have been entitled to without education. When the state distributes factor endowments, then, it is also deciding where the individuals will end up in the consumptive sector.

The distinction between factors and commodities or stocks and flows, while easy to draw in theory, becomes a bit more complex when actually applied to PROPOSITION II. For example, assume that the legislature wants to reward the best artist in America with a trip to Europe and a $10,000 cash prize. Assume further that no Blacks have ever won the award in the 20 years in which it has been given, and that a prima facie showing of discriminatory impact is made. The first analytical question which would have to be asked under PROPOSITION II is whether the state has used factor endowments as the means to reward the achievement of non-efficiency goals. The trip to Europe would clearly not qualify as a factor endowment, because it is distributed solely for the purpose of consumption, and the recipient will in fact consume it whenever the trip is taken. The $10,000 prize, on the other hand, is not as clear. If no strings are attached to its usage, it could either be used by the recipient as a commodity endowment, to the extent he or she buys clothes, food or entertainment services with it. It could also be a factor endowment to the extent that the recipient invests in art courses, oils, and canvas.

The dilemma posed in the above example is not restricted to the case where endowments are given in money form. Any commodity can be traded on the market for what to a particular individual may be a factor. Thus, the artist who won the trip to Europe, might have traded the trip for an art studio which enhanced the artist's ability to produce paintings. In a fluid economy the distinction between factors and commodities disappears in the market place, where all goods have a price and all can be traded.

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144. The notion that one has a right to the beneifts which are producted by one's own industry or capital is the cornerstone of property conceptions in a capitalist economy. As J. S. Mill wrote:

> 3. Nothing is implied in property but the right of each to his (or her) own faculties, to what he can produce by them, and to whatever he can get for them in a fair market: together with his right to give this to any other person if he chooses, and the right of that person to receive and enjoy it. MILL, PRINCIPLES OF POLITICAL ECONOMY 371 (1970).

The fact that there may be substantial gray area in delineating between factors and commodities, does not prevent PROPOSITION II from operating in the first instance to preclude particular governmental distributions. If what the state distributes falls in the classic category of a factor endowment, its use should be enjoined regardless of whether the recipient in fact so used it. Likewise, if the state distributes what are essentially thought to be commodities, one may well look past the initial distribution to see whether they are in fact being traded for factors. This formulation is easily demonstrable: if a state attempts to distribute education using a criterion of subjective merit, its use should be enjoined because the state is in fact distributing a factor endowment, whether or not the individual students in fact use the education received. Moreover, if instead of distributing education using a criterion of subjective merit, the state distributes a cash prize to particular students using such a criterion, and at the same time raises tuition so that all the students who receive the cash prize in fact use it to purchase education, one would look beyond the initial distribution and treat them as though they had been factor endowments. As an alternative, the state could simply place restrictions on the transferability of a commodity endowment.

c. The Inter-Generational Requirement

By its terms, PROPOSITION II does not apply to all state distributions of factor endowments but only to those whose natural effect is to "widen the inter-generational disparity between the races in the proportional distribution of welfare." This additional requirement arises because of the need to be sensitive to questions of degree in anticipating the judicial role.

As we have seen, the effects of a commodity endowment are short-term in that consumption occurs only once and the consumptive benefits are not transferable. In terms of game theroy, it is merely the goods which a player can take to the market at any one point in time. Factor endowments, on the other hand, enable the individual to participate in the consumptive sector for as long as the factor produces the goods which are traded. Of even more importance, it allows the individual to consume the benefits which the factor produces, and then to pass on to future generations the same factor for their ultimate use and production.[145] To reward the meritorious with a gift of a factor endowment is thus not only to reward particular individuals but is to reward their future generations as well. As we shall see, this is impermissible in the context of a free enterprise system.

The distinction in PROPOSITION II between factors and commodities, ultimately involves a question of degree. In this sense, the distinction is not necessarily dispositive under PROPOSITION II. If the value of factor endowments are conceived as the capitalized value of all of the flows which they produce, we put into perspective the nature of what the state is distributing. By distributing higher education as a reward for the meritorious, for example, the state in fact distributes to the individual the present discounted value of a major portion of his or her lifetime income. But the benefits do not stop there; as a factor endowment, the distribution of higher education will have a significant intergenerational impact as well.

Studies have shown that the best predictor of a child's lifetime potential, whether in school or out, is the level of educational attainment of the parents.[146] Transferring of parental human capital to the child is at the heart of the socialization process, and directly bears on the child's ability to make maximizing decisions. Thus, when the state distributes higher education in a manner which has a discriminatory impact upon minorities, the effect is neither small nor short-run, but extends

145. Obviously there is a distinction here between human capital and physical capital; the useful life of the latter is generally shorter in the inter-generational context.

146. Office of Education, U.S. Dept. of H.E.W., *Equality of Educational Opportunity* (1966) [Known as the Coleman Report].

beyond the present generation and is equal to the present discounted value of the expected life time returns of all those generations to whom the benefit is passed on.[147]

If we accept, for a moment, the underlying theory of laissez-faire government upon which this liberal democracy is built,[148] one is compelled to conclude, that the "state has no business giving differential pushes upon an aribitrary basis."[149] The arbitrariness or subjectivity, is no less objectionable because it corresponds, in some vague sense, to majoritarian values. As we have just seen, it is especially pernicious when used to justify discriminatory distribution of the "means of production" in a competitive economy. In this context, there is one conclusion of game theory which is particularly relevant. When the market works efficiently, "the equilibrium position reached in pure competition represents an optimum for each individual consistent with his original endowment."[150] If the initial endowment among individuals is unfair, however, "no amount of economic and social efficiency in the exchange mechanism will do more than make the best of a bad job."[151] To the extent that state provided higher education is a factor endowment, it serves to intensify the conclusions reached in game theory analysis. Not only does it create unfairness in the distribution of commodities for a particular time period, it furthers the unfairness over time. It is within this context that the equal protection clause must be activated if it is to serve as a shelter against majority tyranny and arbitrary government action.

4. *PROPOSITION II and the Hybrid Case*

In discussing the state's goal in PROPOSITION II, we spoke of the ethical notions of scholarship and excellence as the values which motivated state concern for higher education as a final good. The standard which the state espoused in that situation was based upon the equality of merit. There is, however, another possible approach which in effect combines both PROPOSITION I and PROPOSITION II. The state could simply posit as its goal "the promotion of excellence" or the attainment of the highest levels of scholarship as the state goal. The effect would be to transform education as a final good into education as an intermediate good which must be allocated in a manner which maximizes the decision-maker's conception of excellence or scholarship. While the meaning of excellence or scholarship remains in this context undefined and perhaps undefinable, it must be understood as an ideal perhaps best represented by Professor Rawl's "principle of perfection."[152]

In Rawlsian terms, both strict and moderate perfectionism are concerned with directing society, to greater or lesser extents, "to arrange institutions and to define the duties and obligations of individuals so as to maximize the achievement of human excellence in art, science, and culture."[153] As a

147. In fact, even if we assume that abilities and opportunities are equally distributed among races, it would not necessarily follow that differences in the distribution of income among the races would disappear, even over the infinite horizon. This theory is demonstrated by the Loury-Ferguson Model, which examines this proposition in the context of an intergenerational model of the distribution of income and the acquisition of skills. In their model, personal decisions about the acquisition of education and skills are made with the objective of maximizing expected lifetime earnings net of the cost of obtaining training. The subjectively estimated probability of success and the costs, both real and psychic, of acquiring education and skills, are fundamentally affected by the human capital endowments of those around the individuals. It is shown that one cannot rule out the possibility that starting from a point in time when Blacks have lower average human capital endowments than whites, whites may remain forever better off than Blacks. It is pointed out that even if equality is eventually to attain, the duration of inequality may be quite sensitive to small changes in the initial degree of inequality in the distribution of human capital.
Loury and Ferguson, *Notes on a Dynamic Theory of Employment Discrimination*, prepared for the Research Workshop on Equal Employment Opportunity, M.I.T. (Jan. 21-22, 1974).

148. *See generally*, F. VON HAYEK, THE ROAD TO Serfdom (1964); SELDON (Ed.), AGENDA FOR A FREE SOCIETY: ESSAYS ON HAYEK'S THE CONSTITUTION OF LIBERTY (1961); FRIEDMAN, CAPITALISM AND FREEDOM (1962).

149. Coons, Clune, Sugarman, *Education Opportunity: A Workable Constitutional Test for State Financial Structures*, 57 Calif. L. Rev. 305, 385 (1969).

150. NEWMAN, THE THEORY OF EXCHANGE 122 (1965).

151. *Id.* at 122.

152. RAWLS, *supra* note 15 at 325-32.

153. *Id.* at 325. Neitzche's philosophy represents the extreme Perfectionist position. Note this striking statement: "Mankind must work continually to produce individual great human beings — This and nothing else is the task . . . for the questions is: how can your life, the individual life, retain the highest value, the deepest significance? . . . Only by your living for the good of the rarest and most valuable specimens."
J. R. HOLLINGSDALE, NEITZSCHE: THE MAN AND HIS PHILOSOPHY 127 (1965).

teleological theory, it differs from the maximization of total output or the GNP, in that it is influenced by subtle aesthetic preferences and an array of particuarly value-laden criteria. The principle of perfection, like the morality of aspiration, would view higher education as an institution dedicated to preserving and enriching man's social inheritance.[154]

It is precisely because this goal leans on "ideal-regarding principles" — that traditional judicial means of reviewing state classifications for distributions are inappropriate. For unlike the efficiency view, where the efficacy of a classification depended ultimately on an empirical claim, and where the particular means employed could be rationally matched against the end to be sought, the allocation of education so as to maximize excellence merges the means with the end, perhaps hiding both from judicial review. What is basically involved is a legislative or administrative value judgment or value preference, traditionally within the legislature's discretion.

As long as the court is willing to credit as an acceptable state goal, the "pursuit of excellence" or the "promotion of scholarship," the rational relationship test, or any other means-focused judicial review becomes inapplicable.[155] In this sense, Professor Ely's example of the dress code in public education is particularly apt: once the court is willing to credit as an acceptable goal of public education the promotion of "good taste," the traditional rational relationship test or any other means-end focused scrutiny becomes inappropriate for reviewing whether, for example, "outlawing sneakers promotes good taste to a greater extent than outlawing loafers."[156] Judgments of taste, and the manner of their effectuation do not depend for their validity on a reasoned elaboration of the relationship of ends to means. It is thus also inappropriate and misleading to speak of good taste as being maximized by choosing sneakers over loafers; it is more accurate to speak in terms of one being preferred to the other.

It is submitted, that like the promotion of good taste, the promotion of scholarship and excellence are essentially non-rational goals, and as such, virtually any means can be said to further the purported goals. Any means-focused review by the court would be as inept in determining what is good writing, good poetry or good credentials for admission, as it would be for determining what is good taste, good art or good food. Whether a 770 or a 550 on a college entrance examination is rationally related to the promotion of scholarship or excellence cannot be reviewed by the court in the context of a means-end focus. It is related if the state says it is related.[157] And for that matter, choosing the worse student or the lowest scorer on entrance exams could be justified as related to the promotion of scholarship. In short, the court can review such determinations "only by substituting their own aesthetic judgment for that of the political branches — a kind of revisory authority which would negate the assumed grant of authority to the political branches.[158]

Before proceeding further, two points are worth noting. First, when the state espouses the goal of excellence as the value to be maximized, it is essential to understand that we are dealing with the same use of aesthetic value judgments as in the case of rewarding the meritorious. The same objections regarding majority tyranny are thus applicable when aesthetic preferences serve as the justification for a discriminatory impact upon the minority. Secondly, since the courts' role in reviewing and protecting the fairness of distributions is curtailed with respect to discretionary legislative goals, (*i.e.*, the court can either declare the goal impermissible or acquiesce to the legislative choice), the effec-

154. FULLER, *supra* note 110 at 13.
155. Ely, *Legislative and Administrative Motivation in Constitutional Law*, 79 Yale L.J. 1205, 1235-42 (1970) [Hereinafter cited as ELY].
156. *Id.* at 1329.
157. And for that matter, choosing the worst student or the lowest scorer on an entrance exam could be justified as related to the promotion of excellence.
158. ELY, *supra* note 155 at 1239-40.

tiveness of the court as a "counterweight" for an interested majority is compromised.

It is not true, of course, that "criteria of excellence lack a rational basis from the standpoint of everyday life."[159] There clearly are standards, even if somewhat vague, for assessing and appraising creative efforts in the arts and science, as long as one remains within "particular styles and traditions of thought."[160] It would likewise seem that a well-ordered society ought to be allowed to recognize some values of excellence and to preserve and further its culture. The argument here, does not deny that those objectives are important or desirable, it merely relegates them to be pursued in the private sphere.

It is precisely because this nation prides itself in its heterogeneous culture, that the apparatus of the state ought not be employed solely for the purpose of furthering "culture" or encouraging particular styles and tradition of thought. To do so is to risk allowing particular segments of the population to define culture as well as further it. The problem is of course most serious in the context of an insular minority. If subtle aesthetic preferences are to be made the basis for allocating education, there is no reason why the minority's conception of "excellence" ought not be included in the definition of the goal to be maximized.[161] Their exclusion from the goal defining process exacerbates cultural tyranny.

The allocation of higher education so as to maximize excellence and scholarship, is exactly the kind of goal which the private university, as opposed to the public university, ought to pursue. It is perfectly consistent with the liberal theory of democracy and the realization that this is a culturally mixed society, that individuals and associations in the private sphere ought to organize to further or maintain their particular cultural affinities. As Professor Rawls has noted:

> While justice as fairness allows that in a well-ordered society the values of excellence are recognized, the human perfections are to be pursued within the limits of the principle of free association. Persons join together to further their cultural and artistic interests in the same way that they form religious communities. They do not use the coercive apparatus of the state to win for themselves a greater liberty or larger distributive shares on the grounds that their activities are of more intrinsic value.[162]

Thus, if a private university decides to allocate higher education based upon its board of trustees' conception of "excellence" or "scholarship," no problem arises. Although criteria of excellence are necessarily imprecise, unsettled, and idiosyncratic as principles of governmental action, they may be reasonably "invoked and accepted within narrower traditions and communities of thought."[163] A well-ordered society would recognize the value of pursuing excellence and culture in the private sphere, and would dub as its own, the heterogeneity which would emerge. In short, as Professor Rawls again writes:

> The criterion of excellence does not serve here as a political principle; and so, if it wishes, a well ordered society can devote a sizable fraction of its resources to expenditures of this kind. But while the claims of culture can be met in this way, the principles of justice do not permit subsidizing universities and institutes, or opera and the theater, on the grounds that these institutions are intrinsically valuable, and that those who engage in them are to be supported even at some significant expense to others who do not receive compensating benefits.[164]

Allocation of state provided higher education so as to maximize "scholarship" or "excellence" ought to be declared an impermissible state goal.

5. *PROPOSITION II and Distributive Justice*

PROPOSITION II represents a special solution to the question of distributive justice.

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159. RAWLS, *supra* note 15 at 328.
160. *Id.* at 328.
161. This notion in part underlied the demand for Black Studies courses in major universities in 1969.
162. RAWLS, *supra* note 15 at 328-29.
163. *Id.* at 330-31.
164. *Id.* at 332.

Its prescription is direct: to the extent that a state chooses to base a particular distribution on other than efficiency grounds, there is a limit to the quantity and quality of inequality it can effect. The line is drawn, in bright colors, between distributions of commodities and distributions of factors although this distinction ultimately breaks down to a matter of degree. As such, PROPOSITION II recognizes that a discriminatory impact may be justified on some theory of Pareto efficiency, and in that sense, relies on the mandate of PROPOSITION I. It forbids, however, distributions of factors based on subjective merit, since all that remains as justification is naked majoritarian ethics.

6. *PROPOSITION II and the Equal Protection Clause*

The manner in which PROPOSITION II would be articulated in the context of litigation involves a further analytical step which would be inappropriate at this point. The attempt has been to identify the conflicting values and goals at stake when analyzing education as a final good. In general terms, the analysis suggests that to reward the meritorious by a gift of education is an impermissible state goal — not because it is impermissible to reward the meritorious, but because education cannot be the subject of the reward.

PROPOSITION II, by its terms, does not apply to all distributions of factors, but only to those whose natural effect is to "further skew inter-generational disparities between the races." It is submitted, that the trigger for judicial review, ought to be the natural or anticipated effect of a particular distribution based upon a criterion of subjective merit. If its usage may naturally lead to the consequences prescribed in PROPOSITION II, then it should be declared unconstitutional.

CONCLUSION

The model which has been advanced does not purport to be an ideal resolution of all the problems and issued presented. On the contrary, it is best understood as a search for the "minimums" of governmental responsibility in a democratic free enterprise system. The focus on minimums was motivated not only by the concern that the model be pragmatic; it also reflects the recognition that constitutional, as well as self-imposed, constraints upon the judiciary, render models which claim to be ideal solutions to social problems candidates for legislative as opposed to judicial consideration.

PROPOSITIONS I and II, though formulated in the context of higher education, are advanced as general judicial standards for reviewing the efficacy of particular state distributions or allocations. Implicit in PROPOSITION I is the notion that the complex area of trade-offs and compromises among goals in a mixed social welfare function is essentially a matter of legislative choice. As opposed to involving the court in evaluations of the social optimality of such choices, PROPOSITION I directs the court 1) to accord absolute priority to the maximization of all permissible legislative goals; and 2) to give attention to the equality implications of the means adopted. By so doing, the court can legitimately further racial equality without encroaching on the legislative prerogative regarding goal selection.

PROPOSITION II, on the other hand, represents a direct judicial constraint upon the power of the legislature to select certain goals or to adopt particular means. This is consonant, however, with the judiciary's historic role as a legislative check in the balance of power, and as a counterweight to majority tyranny. Both PROPOSITIONS are therefore suitable for the judiciary.

Despite the focus on minimums, this model is not value-free. Both PROPOSITIONS are based on the ethical assumption that society's well-being would be maximized if racial inequality were not the norm. And as an ethical prescription, this model is particularly appropriate for adjudication under the equal

protection clause. For as Professor Paul Freund has stated:

> [T]he equal protection guarantee is a moral standard wrapped in a legal command which allows the Court in establishing constitutional doctrine to help shape the nation's thinking about social justice and ethical conduct.[165]

If that is so, the model asks no more of the court than what is already within its special province.

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165. FREUND, ON LAW AND JUSTICE 35 (1968), cited in DEVELOPMENTS *supra* note 21.

FREEDOM

Freedom will not come
Today, this year
  Nor ever
Through comprimise and fear.

I have as much right
As the other fellow has
  To stand
On my two feet
And own the land.

I tire so of hearing people say,
Let things take their course.
Tomorrow is another day.
I do not need my freedom when I'm dead.
I cannot live on tomorrow's bread.
  Freedom
  Is a strong seed
  Planted
  In a great need.
  I live here, too.
  I want freedom
  Just as you.

Langston Hughes