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Constitutional Requirements for Standardized Ability Tests Used in Education

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NOTES

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I. INTRODUCTION

In today's universalist society standardized tests pose obstacles that nearly every American must hurdle at some time. They measure an individual's intelligence at regular intervals, determine his scholastic achievement, allocate scholarship funds, indicate his college aptitude and qualifications for graduate or professional study, classify him for military service, assign him to a particular job, and indicate whether he ultimately merits promotion.[1] Although standardized tests are an undeniably concomitant and unquestionably important part of contemporary life, individuals rarely question their test scores; and the constitutional implications of the use of standardized tests, especially in education, therefore remain largely unexplored.[2]

This Note examines the groundwork for possible legal remedies to correct the abuses of tests and testing procedures used by some educators. Because the standardized ability tests administered as prerequisites to college admission are perhaps the most significant obstacles to an individual's educational development, the discussion herein is directed primarily to them. This Note attempts to demonstrate that existing legal doctrines provide an adequate basis for challenging some of the standardized ability tests used in determining college entrance requirements as violations of equal protection and procedural due process. It also discusses the scope of a proper remedy for individuals aggrieved by a faulty standardized ability test.

II. THE SHORTCOMINGS OF STANDARDIZED ABILITY TESTS

Although human ability is a complex and diverse subject, constant demands for selection based upon objective criteria make testing an inevitable aspect of life.[3] As long ago as 1845, Horace Mann required

1. *See generally* B. HOFFMANN, THE TYRANNY OF TESTING 20-21 (1962).

2. *But see* Note, *Legal Implications of the Use of Standardized Ability Tests in Employment and Education*, 68 COLUM. L. REV. 691 (1968).

3. Exact figures apparently are not available, but the number of ability tests given annually in the United States likely exceeds its present population. D. GOSLIN, THE SEARCH FOR ABILITY 54 (1963).

uniform written examinations for the Boston public schools to eliminate all possibilities of favoritism, minimize the element of chance, conserve time, and cover the subject matter tested thoroughly.[4] Modern educators articulate many of the same reasons for using standardized ability tests to help select individuals qualified for college study. They point out that standardized ability tests provide a common reference point against which applicants' grades, testimonials, and personal interviews can be compared and analyzed.[5] Despite claims to the contrary,[6] standardized ability tests unfortunately have not achieved the heights that Mann envisioned for them. This section examines some of the reasons for their shortcomings.

The belief that ability is a "characteristic of an individual prior to any interaction with the environment, and thus independent of any social or specific educational influences"[7] is fundamental to the use of standardized ability tests, and all intelligence tests are constructed on the assumption that ability remains stable throughout life.[8] Psychologists, however, are unable to agree on the exact nature and composition of intelligence,[9] and they are uncertain whether it is innate and unchanging; nevertheless, they justify the use of standardized ability tests because of their correlation with later academic success and conclude that intelligence is simply whatever it is that their tests measure.[10]

Innate ability, however, may in principle be impossible to assess. Attempts to measure an individual's innate ability must rely in some degree upon skills acquired after birth, the extent of which may vary according to the quality of the environment to which the individual has

4. H. CHAUNCEY & J. DOBBIN, TESTING: ITS PLACE IN EDUCATION TODAY 11 (1963).

5. *See generally* B. HOFFMANN, *supra* note 1, at 29-35.

6. *See* H. CHAUNCEY & J. DOBBIN, *supra* note 4, at 80. *See also* EDUCATIONAL TESTING SERVICE, EXPLANATION OF MULTIPLE-CHOICE TESTING (1961).

7. Ryan, *IQ—The Illusion of Objectivity*, in RACE AND INTELLIGENCE 41 (K. Richardson, D. Spears & M. Richards eds. 1972).

8. *Id.* at 43.

9. For a discussion and analysis of the debate see Radford & Burton, *Changing Intelligence*, in RACE AND INTELLIGENCE 19 (K. Richardson, D. Spears & M. Richards eds. 1972). The authors point out that 3 general views on the nature of intelligence prevail among psychologists. The first, inspired by Sir Francis Galton, assumes that intelligence is a "thing," stemming from hereditary factors. A consequence of this view is that intelligence can be measured by a simple test. A second view, inspired by J.P. Guilford, also assumes that intelligence is hereditary and can be measured; however, it views intelligence as the product of many independent variables, each of which can be measured. The third view, inspired by Jean Piaget, rejects the hereditary assumption underlying the first 2 views and considers intelligence to be not unlike a living organism that interacts with its environment. Standardized ability tests are largely based upon the first 2 views.

10. *See* H. CHAUNCEY & J. DOBBIN, *supra* note 4, at 55; B. HOFFMANN, *supra* note 1, at 81-82, 125-30; Ryan, *supra* note 7, at 38.

been exposed.[11] For example, schools reward such middle-class behavior as grammatical speech and build upon skills that middle-class children have greater opportunities to acquire. The lower income home, which offers many distractions and little verbal orientation, breeds the learning of inattention. Questions are not encouraged and the range of stimuli is much narrower. There is less supervision and less meaningful social interaction between parents and children.[12] The middle-class home, on the other hand, offers children the opportunity to practice enunciation, pronunciation, and grammar, and does not breed auditory inattention. It teaches children to expect rewards for successful task completion and consequently increases motivation. Constant interaction with their parents teaches middle-class children to view them as a source of information, correction, and perspective. Not only does the environment in which the student is reared play an important role in test performance, but the environment in which the student takes the examination also influences his performance. A test administrator's behavior, age, sex, race, and socioeconomic class all can influence test performance adversely by affecting expectations of success or failure.[13] Although psychologists are acutely aware of these facts and have attempted to devise tests that minimize environmental influences,[14] the cumulative effects of different social histories always will be reflected in ability test scores because "it is impossible to separate out and measure with a behavioural test only the non-environmental determinants of ability, since these interact with the environment in such a way as to ensure that any test of ability will inevitably involve both aspects."[15] Moreover, the idea that individuals possess innate measurable ability is not logically consistent with the observable fact that manipulation of variables in the testing environment can depress standardized ability test performance.[16]

In defense of the theory that ability is an innate characteristic, it should be noted that ability test scores, which are assumed to be a measure of potential, remain relatively stable after age five.[17] Rather than reflecting innate potential, however, score stability may be caused

11. Ryan, *supra* note 7, at 42.

12. Deutsch, *The Disadvantaged Child and the Learning Process*, in POVERTY IN AMERICA 476-93 (L. Ferman, J. Kornbluh & A. Haber eds., rev. ed. 1968); Note, *supra* note 2, at 734-35.

13. *See* Watson, *Can Racial Discrimination Affect IQ?*, in RACE AND INTELLIGENCE 56-57 (K. Richardson, D. Spears & M. Richards eds. 1972).

14. *See, e.g.*, EDUCATIONAL TESTING SERVICE, 1969-71 ANNUAL REPORT, NEW NEEDS, NEW RESPONSES 26-29 (1972).

15. Ryan, *supra* note 7, at 43.

16. *Id.*

17. *Id.* at 44.

by any of three different factors.[18] First, an unchanging test score may not reflect innate ability, but only the consistent and pervasive influence of environmental factors. Secondly, standardized ability tests may generate their own self-fulfilling prophecy, because a score obtained at one age often determines the quality of an individual's subsequent education. Saddled with the label of a "slow learner," an individual often receives an education designed for the slow student. Consequently, his ability test scores may reflect only his inadequate education. Thirdly, because standardized ability tests assume that ability is stable and unchanging, psychologists design their tests to yield unchanging scores by omitting questions that do not receive similar responses from individuals of supposedly equal ability.

Despite the fact that standardized ability tests may not, and possibly cannot, precisely measure innate characteristics such as intelligence, educability, or ability, there is a positive relationship between test scores and future educational success. That relationship, however, may be indicative only of a selection process that underassesses the ability of some qualified individuals. The inability of some standardized ability tests to assess an individual's talents accurately is, of course, the crux of the problem that any legal challenge must address, and the question to be answered is whether the utility derived from using an imprecise prediction of ability outweighs an inaccurately measured individual's interest in a further education.

Underassessment can result from either of two factors—faults inherent in the composition of the test itself, or the use of insensitive validation procedures—neither of which is related to ability. Faults inherent in the test can result either from ambiguous or poorly worded questions or from leaving some determinants of ability untested. Ambiguous questions can punish good students and reward superficial ones.[19] When a test question contains an obviously correct answer and another partially correct answer, for example, only the average student immediately chooses the obviously correct answer. The superior student, however, pauses, thereby sacrificing precious time, not only on the ambiguous questions, but on the entire test, because he thereafter reads each question warily. The resulting score therefore may not indicate which student is more capable; rather, it may indicate which is more superficial. Indeed, if the answer sought is only partially correct and another answer is also partially correct, the superior student may an-

18. For a more complete discussion of these factors see Ryan, *supra* note 7, at 40-46.

19. *See* B. HOFFMANN, *supra* note 1, at 21-22.

swer the question incorrectly, thinking he has supplied a perceptive answer to a subtle, thought-provoking question.[20] Psychologists themselves also admit that standardized ability tests cannot measure creativity or motivation,[21] and that poorly worded questions may penalize depth, subtlety, and acumen.

Underassessment also may result from the use of insensitive validation procedures. Once a test has been constructed, it is validated by trying it out on a large, representative sample of the population. Test makers validate their tests to prove that each test actually measures what it purports to measure.[22] Scores achieved by the population sample are correlated with some other criterion of the ability that the test seeks to measure. Unless this "outside" criterion is external to and independent of the times within the test, the validation procedure becomes circular, and the test maker validates the test against itself.[23] Psychologists typically validate standardized ability tests by comparing test scores with later college success; new questions are tested by inserting them into an existing test.[24] Using college grades as an ultimate standard of predictability, however, reinjects precisely those subjective elements of selection that the designers of standardized tests seek to avoid.[25] Moreover, validating new test questions by performance on another

20. Professor Hoffmann supplies an example of such a question that he found in a booklet called Science, prepared by the College Entrance Examination Board to describe science tests used by the Board as part of its college entrance testing program, and described as being of average difficulty:

54. The burning of gasoline in an automobile cylinder involves all of the following *except*
(A) reduction
(B) decomposition
(C) an exothermic rcaction
(D) oxidation
(E) conversion of matter to energy.

The average chemistry student chooses (E), the wanted answer, believing that the conversion of matter to energy involves nuclear reactions and thus is inappropriate to the burning of gasoline. The superior student, says Professor Hoffmann, understands the formula $E=mc^2$ and knows that in certain nuclear reactions energy is released when nuclear bonds that compose part of the rest mass of the substance involved in the reaction are broken. The superior student, therefore, faces the prospect of choosing an answer to a question with 5 "correct" answers. *See* B. HOFFMANN, *supra* note 1, at 185-88.

21. *See* H. CHAUNCEY & J. DOBBIN, *supra* note 4, at 19. *See also* Ryan, *supra* note 7, at 47-49, who argues that test questions often are selected upon the criterion of whether they show statistically significant differences between persons of equal age. Ryan argues that the statistical significance of some questions therefore may reflect trivial aspects of behavior rather than ability.

22. *See* H. CHAUNCEY & J. DOBBIN, *supra* note 4, at 9, 55.

23. Ryan, *supra* note 7, at 39.

24. *See* B. HOFFMANN, *supra* note 1, at 130.

25. *Id.*

standardized test may have a deleterious effect upon students taking the test and, in addition, may perpetuate existing deficiences in the older test, which the test maker perhaps validated against the subjectively measured criterion of later college performance.[26] Furthermore, validating a test by correlating it with college success implicitly introduces social and environmental influences into the selection process.[27]

Despite the efforts of psychologists, there is also evidence that the population samples used in constructing standardized ability tests introduce inherent cultural bias into test scores. The population samples ordinarily used conform to the proportion in the most recent census of certain variables—including urban or rural residence, socioeconomic status, and parental education.[28] Census data, however, exclude some migrant and unemployed workers, "who tend to be lost from a census," and at least some standardized ability tests are standardized against an all-white sample.[29] The occasional exclusion of migrants, the unemployed, and blacks can have at least two important consequences. First, the standardization sample will overreflect the influence of individuals of superior economic status. Because test scores may not actually measure intelligence but rather may indicate only an individual's performance in relation to a large group,[30] the scores of individuals from low-income groups may not manifest the same distribution as the scores of the higher income sample; and in the comparison that produces a test score, the low-income individual may fare poorly.[31] A second, obvious consequence results from excluding blacks from standardization samples: the standardized test measures only white abilities. It cannot measure the intelligence of blacks and only provides a measure of how well blacks score on tests of white intelligence,[32] if indeed any test can measure intelligence per se. Because blacks have cultural patterns that are substantially different from those of whites, and are more likely to have a lower socioeconomic status than whites,[33] the lower test scores that blacks customarily achieve on standardized ability tests may be only a measure of their cultural and economic differences from whites.[34]

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26. *Id.*
27. *See* Ryan, *supra* note 7, at 41.
28. *Id.* at 52-53.
29. *Id.*
30. *See* H. CHAUNCEY & J. DOBBIN, *supra* note 4, at 6.
31. *See* Ryan, *supra* note 7, at 53.
32. *Id.*
33. *See* text accompanying notes 13-14, *supra.*
34. *See generally* Note, *supra* note 2, at 734-35. Of course it can be argued that if standard-

The ability of standardized ability tests to measure what such tests purport to measure is expressed as a coefficient of correlation. A coefficient of correlation is a measure of relevance by which psychologists express less than complete correspondence between two variables.[35] Correlations range from +1 to -1. Zero indicates a complete lack of relationship, and both +1 and -1 correspond to perfect relationships, from which the rank of one individual on one test would predict exactly his performance on a second. Perfect relationships rarely occur, but less than perfect relationships are common. Thus, there is a positive correlation between increased height and increased weight; that is, the taller a person is, the heavier he is likely to be. Similarly, as the number of polio vaccinations increases, the number of subsequent polio cases decreases. Interpreting coefficients of correlation is a risky endeavor. A high coefficient does not not indicate a causal relationship between the two variables, but only the strength of their relationship. Moreover, a coefficient of .5, although better than a relationship of .25 and genuinely significant, is not twice as significant as a coefficient of .25 or half as significant as 1.0. Some standardized ability tests used in college admission procedures have a coefficient of correlation with freshman grades of approximately .50.[36] A correlation of .50, however, represents only a thirteen percent improvement over a zero correlation, and is not quite as high as the coefficient for the obviously imperfect height and weight proposition described above.[37] Psychologists themselves caution the public not to assume haphazardly that a standardized ability test predicts with certain accuracy, but some schools and educators heedlessly use such scores as an absolutely infallible measure of ability.[38]

In addition, many people misunderstand the meaning of the scores derived from standardized ability test performance. Ability test scores are not absolute measures of an individual's innate ability; rather, they are comparisons of the individual's performance with that of other persons taking the test or to another group that previously took the test.[39]

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ized ability tests reflect only "the hard facts of social circumstances," it is society itself and not the test that is being unfair. J. CONANT, SLUMS AND SUBURBS 21 (1964), *cited in* Note, *supra* note 2, at 735 n.231. As the author of the above note points out, however, a test score gives society a number sufficient to justify its inequitable treatment of culturally deprived individuals.

35. *See generally* H. KENDLER, BASIC PSYCHOLOGY 69-73 (1963).

36. B. HOFFMANN, *supra* note 1, at 138.

37. *Id.* at 139-40.

38. *See* Armstead v. Starkville Municipal Separate School Dist., 461 F.2d 276 (5th Cir. 1972); EDUCATIONAL TESTING SERVICE, *supra* note 14, at 30-32. The ETS has considered withdrawing services from test users who misuse test scores in this manner. *Id.* at 32.

39. *See* H. CHAUNCEY & J. DOBBIN, *supra* note 4, at 3.

Scores, therefore, do not convey anything about the magnitude of the differences in ability that separate individuals with different test scores. Scores merely reveal that one individual has done better or worse than another on one particular test.[40] Viewed in this manner, test scores are merely indications of an individual's progress on a scale of difficulty against which people of similar age and educational background are measured. Progression on a scale of difficulty, however, is not an idea that educators, attempting to utilize standardized ability tests to measure innate ability at a specific point in time, would acknowledge readily; this focus upon static, absolute measurement is, in effect, a refusal to recognize that an individual can be a slow or late developer and also an intelligent person.[41] Treated as some one of low intelligence, a late developer may never receive the education that he deserves.

One other fact concerning the meaning of standardized ability test scores deserves mention. Such tests do not attempt to measure the overall concept of ability; rather, they attempt to measure the various components of it. The test maker totals scores on the components of the test to produce a composite score. Although their total scores may be equal, individuals' scores on the different components sometimes vary considerably.[42] Consequently, individuals highly qualified for one particular kind of study may achieve low overall ability scores, and some individuals obtaining relatively high scores may not be highly qualified for any particular kind of study.[43]

To summarize the preceding discussion, standardized ability tests have three fundamental deficiencies. First, they may not measure ability at all. Secondly, although they do have an undeniable relationship to

40. *See* Ryan, *supra* note 7, at 49-50.

41. *Id.* Indiscriminate use of test scores has led to the extended use of the terms "underachiever" and "overachiever." If a student performs well on an intelligence test but does poorly in school, he is labelled an underachiever. Similarly, if he scores poorly on such a test but does well in school, he is labelled an overachiever. Teachers' estimates of the child's intelligence are disregarded, and the test scores themselves become the ultimate measures of intelligence. The adverse psychological effect of being saddled with the misnomer underachiever or overachiever is immeasurable. Depending upon a college's admissions standards, either label also might damage one's chance for admission. For a discussion of this problem see B. HOFFMANN, *supra* note 1, at 140-41.

42. *See* Ryan, *supra* note 7, at 51.

43. Some tests avoid this problem by producing a profile for each individual for the several components of the test. *See id.* For other explanations of standardized testing techniques see A. ANASTASI, PSYCHOLOGICAL TESTING (3d ed. 1968); H. BUTCHER, HUMAN INTELLIGENCE: ITS NATURE AND ASSESSMENT (1968); L. CRONBACH, ESSENTIALS OF PSYCHOLOGICAL TESTING (1949); D. LAVIN, THE PREDICTION OF ACADEMIC PERFORMANCE (1965). For other criticisms of standardized testing see L. BARITZ, THE SERVANTS OF POWER (1960); M. GROSS, THE BRAIN WATCHERS (1962); W. WHYTE, THE ORGANIZATION MAN (1956).

future college performance, that relationship is more imprecise than many believe, and a test score may not reveal the true nature of an individual's readiness for college work. Thirdly, employers and educators sometimes use standardized ability test scores as measures of an individual's overall ability at one point in time. In fact, however, ability tests attempt to measure only components of ability and do not account for the possibility that ability might change or that one component of ability might be sufficient to qualify an individual for college study. The remainder of this Note addresses itself to these deficiencies and attempts to use the doctrines of equal protection and due process, the traditional means for protecting an individual's rights from the abuses of governmental powers, to describe an adequate legal remedy.

III. STATE ACTION

A preliminary limitation on invoking the equal protection or due process guarantees of the fourteenth amendment is the requirement of state action.[44] To trigger those guarantees, an individual must show that a state has acted in a constitutonally cognizable manner. The rationale of *Burton v. Wilmington Parking Authority*,[45] which involved a restaurant that leased space within a state-owned parking garage and refused to serve blacks, seemingly provides an umbrella of state action sufficient to invoke the guarantees of equal protection and due process against a public college or university that requires the submission of standardized ability test scores as a prerequisite to admission. In *Burton*, the Supreme Court explained that the state had built the garage with public funds and subsequently had owned and operated it as a parking garage. To service the debts incurred while constructing it, the state leased portions of the building to private individuals. Upkeep, maintenance, and repairs for the building, including the restaurant, were the responsibility of the state. Regardless of improvements to the building, the restaurant received the benefits of the garage's tax exemption. The Court speculated that customers of both the restaurant and the garage probably utilized other facilities in the building, thus conferring incidental benefits on both the state and the restaurant. Concluding that the

44. *See generally* Berle, *Constitutional Limitations on Corporate Activity—Protection of Personal Rights From Invasion Through Economic Power*, 100 U. PA. L. REV. 933 (1952); Black, *The Supreme Court, 1966 Term, Foreword: "State Action," Equal Protection, and California's Proposition 14*, 81 HARV. L. REV. 69 (1967); Lewis, *The Meaning of State Action*, 60 COLUM. L. REV. 1083 (1960); St. Antoine, *Color Blindness But Not Myopia: A New Look at State Action, Equal Protection, and "Private" Racial Discrimination*, 59 MICH. L. REV. 993 (1961); Van Alstyne & Karst, *State Action*, 14 STAN. L. REV. 3 (1961).

45. 365 U.S. 715 (1961).

state had "insinuated itself into a position of interdependence" with the restaurant, the Court found that the case presented a degree of state participation and involvement in a discriminatory action sufficient to fulfill the requirements of state action.[46]

After the *Burton* decision,[47] would-be plaintiffs might have concluded that the requirements of state action are satisfied whenever the state by inaction permits discrimination by private persons with whom it has an official connection. *Moose Lodge No. 107 v. Irvis*,[48] which held that Pennsylvania's regulatory scheme for issuing liquor licenses to private clubs did not implicate the state sufficiently in the actions of a private club that refused to serve blacks, has discredited that view thoroughly. *Moose Lodge* does not, however, impair the underlying principle of *Burton*—that state participation or involvement in discrimination to a significant extent is sufficient to trigger the equal protection or due process guarantees. When a public college or university requires standardized ability test scores as a prerequisite to admission, the argument for finding state participation and involvement is fairly persuasive. Test makers would find it difficult to exist without the support of public institutions that require students to utilize their services, and the state institution relies on the test maker for an important component of its admissions decisions. In all likelihood, students take the test in a public building, and public officials, their teachers, often administer the tests. The institution and the test maker exist in a symbiotic relationship of the type condemned in *Burton*; consequently, the equal protection and due process limitations should apply to the test maker insofar as they applied to the restaurant in *Burton*.

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46. *Id.* at 725.

47. *See also* Smith v. Holiday Inns of America, Inc., 336 F.2d 630 (6th Cir. 1964) (hotel built upon land purchased by Tennessee as a part of a redevelopment project); Simkins v. Moses H. Cone Memorial Hosp., 323 F.2d 959 (4th Cir. 1963) (massive use of federal funds received after state enacted enabling legislation); Lee v. Macon County Board of Educ., 283 F. Supp. 194 (M.D. Ala. 1968) (state high school athletic association whose officials acted as state agents, located in state office building, and paying no rent, with representative on state advisory board). *But see* Browns v. Mitchell, 409 F.2d 593 (10th Cir. 1969) (tax exemption given private university insufficient without a showing that the exemption could be used to dictate or influence school affairs); Powe v. Miles, 407 F.2d 73 (2d Cir. 1968) (incorporation of liberal arts college and state regulation of education insufficient absent showing that state action actually inflicted plaintiff's injury); Eaton v. Board of Managers, 261 F.2d 521 (4th Cir. 1958), *cert. denied*, 359 U.S. 984 (1959) (hospital receiving less than 4 1/2% of its budget from state funds); Grossner v. Trustees of Columbia Univ., 287 F. Supp. 535 (S.D.N.Y. 1968) (state action must be in the actual discriminatory act attacked, although 50% of university's expenses are paid by public funds); Greene v. Howard Univ., 271 F. Supp. 609 (D.D.C. 1967), *remanded*, 412 F.2d 1128 (D.C. Cir. 1969) (university found to be a strictly private enterprise). *See also* Van Alstyne & Karst, *supra* note 44, at 57.

48. 407 U.S. 163 (1972).

As a practical matter, the application of a legal remedy to the use of standardized tests in public institutions probably would carry over to private institutions as well. In addition to state participation, however, the scope of the state action doctrine is perhaps broad enough to apply directly to the testing agency itself, which arguably fulfills a public function. For example, in *Marsh v. Alabama*,[49] a Jehovah's Witness distributing religious literature on a sidewalk in Chickasaw, Alabama, was told to leave because rules of the company that owned the town prohibited solicitation without permission. When she refused to leave, a deputy sheriff employed by the company as the town's policeman arrested her for trespassing. Characterizing the operation of the town as a public function, the Supreme Court reversed her state court conviction and held that the company's property rights were insufficient to justify a restriction of appellant's first and fourteenth amendment rights.

Justice Black's majority opinion in *Marsh* did not make it altogether clear whether the finding of state action rested on the peculiar nature of Chickasaw itself, the fact that the company town fulfilled a public function,[50] Alabama's enforcement of the city's exclusion,[51] or a combination of the three factors. The subsequent decision of *Amalgamated Food Employees Local 590 v. Logan Valley Plaza, Inc.*,[52] which held that a privately owned shopping center could not obtain an injunction prohibiting peaceful picketing against one of its tenants on its parking lot and sidewalk, did not clarify the situation; nor did the decision of *Lloyd Corp. v. Tanner*,[53] which held that a privately owned shopping center could prohibit handbilling in its interior mall. In *Lloyd*, the Supreme Court distinguished *Marsh* by saying that it involved the anomalous "assumption by a private enterprise of all the attributes of a state-created municipality"[54] and distinguished *Logan Valley* by saying that the *Logan Valley* case involved first amendment activity related

49. 326 U.S. 501 (1946).

50. *See* St. Antoine, *supra* note 44, at 1001. *See also* Evans v. Newton, 382 U.S. 296 (1966) (park maintained by private trustees after city resigned as trustee in order to enforce racial restriction on the park's use); Terry v. Adams, 345 U.S. 461 (1953) (voluntary "club" of white Democrats' holding pre-primary elections); Public Util. Comm'n. v. Pollak, 343 U.S. 451 (1952) (public transit system).

51. *See* Shelley v. Kraemer, 334 U.S. 1 (1948). *See also* Barrows v. Jackson, 346 U.S. 249 (1953).

52. 391 U.S. 308 (1968).

53. 407 U.S. 551 (1972).

54. *Id.* at 569. *See also* Central Hardware v. NLRB, 407 U.S. 539 (1972).

to the shopping center's operations that defendants otherwise could not reasonably have conveyed to the public.[55]

A common rationale for the three decisions may be drawn from the fact that the company in *Marsh* supplied all the basic governmental functions, including streets and sidewalks, depriving the Jehovah's Witness of an adequate public forum for expressing her views. In *Logan Valley*, the picketers were similarly without an adequate forum again because public sidewalks were not nearby and because the picketers' target was within the center. In *Lloyd*, on the other hand, the city had fulfilled the function of providing sidewalks nearby, and the handbillers had no specific target within the center. In the two cases finding state action, *Marsh* and *Logan Valley*, a private body had undertaken to supply an otherwise unavailable government service. In *Lloyd*, on the other hand, the government already had supplied a public forum in the form of public facilities for expression.

On the basis of the three decisions, a finding of state action apparently hinges on whether a private body undertakes to supply a governmental service that is otherwise unavailable. State and local governments typically provide a good or service under any of four circumstances.[56] First, joint consumption of the good or service may be possible, so that consumption by one consumer does not diminish the amount available for others. The costs of excluding potential consumers and limiting consumption are infinite. The government, therefore, supplies the good or service and charges each taxpayer for its consumption. An example is mosquito abatement. Secondly, there may be externalities in consumption, so that the benefits or costs of an activity may accrue to or be imposed upon someone other than the consumer. In order to internalize the costs of an activity having externalities, the government undertakes regulation, as in the case of pollution control. Similarly, the government may undertake to supply a good or service because some of its benefits accrue to persons other than the recipient—for example, public education. Thirdly, governments sometimes supply goods or services although neither joint consumption nor externalities are involved. This is likely when the costs of identifying specific consumers would exceed the revenues derived from charging a direct price for the good or service. An example is a public park. Fourthly, some individuals may derive a benefit or pleasure from knowing that other individuals are able to consume more of the good or service than they would be able to if

55. 407 U.S. at 566-70.

56. *See* W. HIRSCH, THE ECONOMICS OF STATE AND LOCAL GOVERNMENT 1-28 (1970).

the marketplace alone determined its distribution. In order to derive those benefits, such individuals are willing to pay higher taxes and permit the government to supply the good or service. Welfare benefits are an example, but education also falls within this category as well as within the second one.

Standardized ability testing presents aspects of both the second and fourth reasons. As in the case of public education, the community as a whole benefits from having each individual who would benefit thereby attend college. Presumably, it therefore could establish a testing procedure designed to find those persons who would profit from a college education. Moreover, some individuals would pay higher taxes in order to attain the benefits of a well-educated populace. In either case, economic theory would support the establishment of government testing programs. When a public institution instead relies on private agencies either to screen applicants or to develop admissions criteria, the force of the *Marsh* and *Logan Valley* decisions seemingly would trigger the guarantees of equal protection and due process against the testing agency regardless of whether it eventually provided a public or private institution with the scores.[57]

IV. EQUAL PROTECTION ANALYSIS

Although the equal protection clause[58] recognizes that state laws

57. Several recent lower federal court decisions have held that private utilities have acted under color of state law according to 42 U.S.C. § 1983 (1970), by terminating the utility services of customers without notice. *See* Ihrke v. Northern States Power Co., 459 F.2d 566 (8th Cir.), *vacated as moot*, 409 U.S. 815 (1972); Davis v. Weir, 328 F. Supp. 317 (N.D. Ga. 1971). *See also* Haydock, *State Action: Public Utilities and the Public Interest*, 6 CLEARINGHOUSE REV. 69 (1972). In *Ihrke*, the court concluded that the utility fulfilled a public function because the local government, in effect, had given the utility a monopoly, and as a practical matter the utility's services were not available elsewhere. 459 F.2d at 570. Although a testing agency is not as entwined with state university control as a public utility is with local government control, the effect is the same—governmental action forces the individual to seek a service from the private sector that is otherwise unavailable. *See also* Marjorie Webster Junior College v. Middle States Ass'n of Colleges & Secondary Schools, 302 F. Supp. 459 (D.D.C. 1969), *rev'd*, 432 F.2d 650 (D.C. Cir.), *cert. denied*, 400 U.S. 965 (1970). In *Marjorie Webster*, the district court found that a college accrediting association fulfilled a public function because accreditation was necessary for a college to continue successful operations and to obtain federal aid-to-education funds, and because the association was recognized by the federal government as a reliable authority on the quality of training offered by educational institutions. 302 F. Supp. at 470. The court of appeals reversed on other grounds, but assumed *arguendo* that state action was present. 432 F.2d at 658-59. Just as accreditation is necessary to operate a college successfully, standardized test scores are prerequisites for college admission. Moreover, the states recognize testing agencies as reliable authorities on scholastic ability.

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

may treat citizens differently for various purposes by classification, "persons who are similarly situated with respect to the purpose of the law" must be accorded equal treatment.[59] Equal protection analysis, therefore, deals with two fundamental questions[60]—whether the state has acted with an unconstitutional purpose and whether the state has classified together all and only those persons who are similarly situated. Depending upon the criteria that the state uses to draw the lines creating the classifications, the nature of the rights asserted by the persons classified, and the means used to create the classifications, the Supreme Court has supplied varying answers to the two questions. This section applies standards recently articulated by the Court to the imprecise classifications drawn by standardized ability tests.

Like state laws, standardized ability tests classify individuals into various groups. When a standardized ability test determines that one's ability is insufficient to satisfy a college's admissions criteria,[61] two theoretical classes of individuals are created: those qualified and those not qualified. The classes in fact may be mutually exclusive, the qualified class containing only qualified persons and the unqualified class containing only the unqualified; however, as section II of this Note demonstrates, it is more probable that each class is both under- and

59. Tussman & tenBroek, *The Equal Protection of the Laws*, 37 CALIF. L. REV. 341, 346 (1949); *cf.* Jenness v. Fortson, 403 U.S. 431 (1971).

60. *See Developments in the Law—Equal Protection*, 82 HARV. L. REV. 1065, 1076 (1969).

61. Of course, many factors in addition to an ability test score figure in a college admissions decision. The following factors, which various institutions rank differently in order of importance, are the most common criteria: (1) high school grades; (2) rank in class; (3) ability test scores from the senior year; (4) ability test scores from the junior year; (5) achievement test scores; (6) National Merit Scholarship Examination (a competitive scholarship exam) scores; (7) various other test scores; (8) extracurricular activity; (9) principal's recommendation; (10) other recommendations; (11) personal interview; (12) family or personal pressures. B. FINE, HOW TO BE ACCEPTED BY THE COLLEGE OF YOUR CHOICE, Appendix (rev. ed. 1966), *cited in* O'Neil, *Preferential Admissions: Equalizing the Access of Minority Groups to Higher Education*, 80 YALE L.J. 699, 702 n.8 (1971).

Admitting or denying an applicant admission is a discretionary act, and few if any institutions likely employ test scores as the sole admissions criteria. The discretionary nature of admissions does not mean, however, that any criteria whatsoever may be employed in exercising discretion. A claim that the choice of criteria on which admissions decisions were made was not attributable solely to chance and, therefore, must have rested on some sort of discriminatory motivation should be sufficient to trigger judicial review. *See* Ely, *Legislative and Administrative Motivation in Constitutional Law*, 79 YALE L.J. 1205, 1254-69 (1970). Moreover, some universities apparently have minimum score requirements. *See, e.g.*, Armstead v. Starkville Municipal Separate School Dist., 461 F.2d 276, 281 (5th Cir. 1972) (Rives, C.J. dissenting) (minimum cutoff score on ability test used to measure capacity for graduate study in education). Presumably, one's test scores could be so low as to preclude entrance because of their impact in the above admissions "formula." Indeed, those most likely to be aggrieved by a standardized ability test are those whose "true" ability lies near the point at which the above factors taken together would fulfill a college's admissions criteria, so that any inaccuracy in the test score could have adverse impact.

over-inclusive, containing persons who should not be included and not containing all those persons who should be included.

A. The Standard of Review for Test-Created Classifications

Despite the occasional imprecision of state-created classifications, the courts traditionally have not reviewed these classifications actively; and a strong presumption of constitutionality applies if the method of classification is rationally related to a valid public purpose.[62] Until recently, the application of this restrained standard of review always has been tantamount to a finding that a method of classification is constitutional. Two elements of the restrained standard have contributed to the occasionally frustrating results produced by its application—the Supreme Court's steadfast refusal to impute an impermissible motive to the purpose of a state-created classification and its imaginativeness when determining whether a method of classification bears a rational relationship to a legitimate public purpose. Because it is virtually impossible for a court, which must act upon the record before it, to ascertain the motive or collection of motives underlying a state-created classification, and because classifications created for an impermissible motive pursuant to a legitimate state objective presumably would be constitutional if adopted for a valid motive, the Court's unwillingness to attribute an impermissible motive to state-created classifications is a sound principle possessing small likelihood of repudiation.[63] In addition, the Court always has afforded ample latitude when the states attempt to regulate a perceived evil by economic or resource-allocation legislation.[64] Because the rationality of a classification created by economic regulation or resource-allocation legislation often depends on "local conditions," a local legislative or administrative body is probably better informed about them than a court.[65] Moreover, legislatures and administrative bodies may possess greater expertise and have access to

62. *See, e.g.*, Goesaert v. Cleary, 335 U.S. 464 (1948) (statute denying bartending licenses to all women except wives or daughters of male bar owners conceivably for the permissible purpose of avoiding social and moral problems rather than the impermissible one of monopolizing jobs for men); Kotch v. Board of River Port Pilot Comm'rs, 330 U.S. 552 (1947) (nepotism in selection of river pilots conceivably related to promoting the public safety). *See also Developments in the Law—Equal Protection, supra* note 60, at 1077-87.

63. The most recent application of the principle was in Palmer v. Thompson, 403 U.S. 217, 224-25 (1971) (refusal to impute racial motivation to the closing of a city's municipal swimming pools following judicially ordered desegregation).

64. *See, e.g.*, Dandridge v. Williams, 397 U.S. 471, 485 (1970). *But see* Morey v. Doud, 354 U.S. 457 (1957).

65. *See, e.g.*, Carmichael v. Southern Coal & Coke Co., 301 U.S. 495, 514-15 (1937).

information-gathering procedures that are unavailable to the courts.[66] As a result, the Court requires only a slight degree of rationality between classifications created by economic or social welfare legislation and a legitimate public purpose. The Court therefore will uphold the classification whenever it can conceive of a "reasonable basis" for sustaining it.[67]

When basic personal interests of individuals are involved, however, the local conditions argument fails because the Court's expertise then equals or exceeds that of a legislature or administrative body and excessive deference or restraint is unwarranted. This is, of course, the argument that underlies the use of the compelling interest test, which the Court perhaps adopted because the traditional standard of review neither adequately protected certain basic freedoms nor fully safeguarded the interests of the politically disadvantaged.[68] The compelling interest standard requires the state to establish not only that it has a compelling interest justifying the classification, but also that the classification is necessary to achieve the state's purpose. The effect of the stricter standard is to reverse the traditional presumption of constitutionality and place a virtually insurmountable burden of proof on the party seeking to sustain the classification. The standard has two branches—the "suspect criteria" branch and the "fundamental interest" branch. A finding that a state-created classification turns on a suspect criterion or burdens a fundamental interest triggers application of the compelling interest standard. The identification of a suspect class or a fundamental interest, however, has been tantamount to a declaration of unconstitutionality,[69] and the determination of whether someone needs the special protection of the compelling interest standard thus involves complex policy evaluations. The Court, therefore, has been noticeably reluctant to expand the range of fundamental interests and suspect classifications.[70]

66. *See Developments in the Law—Equal Protection, supra* note 60, at 1128.

67. Dandridge v. Williams, 397 U.S. 471, 485 (1970). *See also* cases cited note 62 *supra.*

68. *See Developments in the Law—Equal Protection, supra* note 60, at 1128-29.

69. *See, e.g.,* Griffin v. County School Bd., 377 U.S. 218 (1964).

70. The following cases have identified fundamental interests: Dunn v. Blumstein, 405 U.S. 330 (1972) (right to move interstate freely); Kramer v. Union Free School Dist., 395 U.S. 621 (1969), and Harper v. Virginia Bd. of Elections, 383 U.S. 663 (1966) (right to vote); Douglas v. California, 372 U.S. 353 (1963), and Griffin v. Illinois, 351 U.S. 12 (1956) (procedural rights of criminal defendants); Skinner v. Oklahoma *ex rel.* Williamson, 316 U.S. 535 (1942) (right to procreate). Other cases identify possible fundamental interests: Loving v. Virginia, 388 U.S. 1 (1967) (right to marry); Serrano v. Priest, 5 Cal. 3d 584, 487 P.2d 1241, 96 Cal. Rptr. 601 (1971) (right to an education). San Antonio Independent School Dist. v. Rodriguez, 93 S. Ct. 1278 (1973), held that education is not a fundamental interest to which the compelling interest standard applies. The decision probably has halted a growing trend of decisions finding unconstitutional local prop-

Faced with two standards of equal protection review whose eventual effects are mechanically either to uphold or to invalidate state-created classifications, the Supreme Court has begun to articulate a third standard of equal protection review lying between the traditional and compelling interest standards.[71] Although it verbally applies the traditional rational relationship standard, the Court's new approach is basically different; rather than requiring only the ability to conceive a rational basis for the classification, the Court focuses its analysis on the actual means chosen to effect the legislative purpose. The cases articulating the new approach represent a substantial departure from the compelling interest standard, which hinges exclusively on the ultimate effect of a classification. The emphasis now is upon whether state-

erty tax systems used to support public schools. *See* Van Dusartz v. Hatfield, 334 F. Supp. 870 (D. Minn. 1971); Serrano v. Priest, 5 Cal. 3d 584, 487 P.2d 1241, 96 Cal. Rptr. 601 (1971); Robinson v. Cahill, 118 N.J. Super. 223, 287 A.2d 187 (1972). In addition to finding that education is not a fundamental interest, the majority concluded that the state system did not create an impermissible wealth classification. Subsequently, the Court found the system constitutional by applying the traditional, lenient standard of review reserved for economic or resource allocation legislation. Justices White and Marshall wrote dissenting opinions. Justice White, perhaps applying an intermediate standard of review, concluded that the state system lacked a rational basis of classification. *See* 93 S. Ct. 1312, 1346 n.96. Justice Marshall argued that the state had not sufficiently justified its school finance system, that the concept of equal protection includes more than 2 standards of review, that education is a fundamental interest, that the system impermissibly discriminated on the basis of wealth, and that the state had chosen an inappropriate means to further its asserted interest. *See* 93 S. Ct. 1315. If the case had not involved property taxation, a decision that often hinges upon local conditions, the Court might have applied a different standard of review. *See also* Coons, Clune & Sugarman, *Educational Opportunity: A Workable Constitutional Test for State Financial Structures*, 57 CALIF. L. REV. 305 (1969); Horowitz & Neitring, *Equal Protection Aspects of Inequalities in Public Education and Public Assistance Programs From Place to Place Within a State*, 15 U.C.L.A.L. REV. 787 (1968).

The following cases have identified suspect classifications: Graham v. Richardson, 403 U.S. 365 (1971) (alienage); McLaughlin v. Florida, 379 U.S. 184 (1964) (race); Korematsu v. United States, 323 U.S. 214 (1944) (ancestry). The Supreme Court consistently has declined to hold that poverty is a suspect classification. *See, e.g.*, United States v. Kras, 409 U.S. 434 (1973). In the absence of de jure classification, the Supreme Court has assumed the existence of an impermissible purpose to create a suspect classification only when legislative or administrative action falls with disproportionate impact upon the members of different classes and other objective criteria point to the existence of an impermissible purpose. *See, e.g.*, Gomillion v. Lightfoot, 364 U.S. 339 (1960) (redistricting of Tuskegee, Alabama, from a square into a 28-sided figure, thereby excluding virtually all the city's black voters but not one white voter); Hawkins v. Town of Shaw, 437 F.2d 1286 (5th Cir. 1971) (discriminating against black inhabitants in providing municipal services). Although standardized ability test scores have disproportionate impact on the races, demonstrating an impermissible purpose by objective criteria is virtually impossible. *See also* cases discussed in note 94 *infra*.

71. *See* Gunther, *The Supreme Court, 1971 Term, Foreword: In Search of Evolving Doctrine on a Changing Court: A Model for a Newer Equal Protection*, 86 HARV. L. REV. 1 (1972). The following discussion in large measure parallels Professor Gunther's analysis. *But see* United States v. Kras, 409 U.S. 434 (1973).

created classifications bear a substantial relationship to an asserted rather than a conjectural legislative purpose. This standard affords the state wider latitude to classify than does the compelling interest standard, and the classification is measured by its purpose rather than the value judgments of the Court on whether a class is suspect or an interest fundamental. Although the model arguably applies to economic and social welfare legislation as well as to other types, considerations of judicial competence would presumably limit its application to instances in which judicially manageable inquiries are possible. Similarly, the standard also would apply in situations that previously triggered application of the compelling interest standard, but then the importance of the interests involved still would justify strict scrutiny of the state-created classifications.

Two recent cases formulating the new doctrine are *Reed v. Reed*[72] and *Eisenstadt v. Baird*.[73] In *Reed,* the Idaho probate code provided that, in situations in which both male and female members of the same entitlement class had filed letters of administration, males were entitled to preference over females, without regard to individual qualifications as potential estate administrators. Quoting from an earlier case,[74] the Supreme Court invalidated the statute under the equal protection clause, holding: "A classification 'must be reasonable, not arbitrary, and must rest upon some ground of difference having a *fair and substantial* relation to the object of the legislation, so that all persons similarly circumstanced shall be treated alike.' "[75] The state courts had justified the absolute preference for males by reasoning that the legislature had sought to reduce the workload of the probate courts by eliminating one class of contestants for the letters of administration.[76] Examining that justification, the Court found it an unconstitutional "arbitrary

72. 404 U.S. 71 (1971).

73. 405 U.S. 438 (1972). *See also* James v. Strange, 407 U.S. 128 (1972); Jackson v. Indiana, 406 U.S. 715 (1972); Weber v. Aetna Cas. & Sur. Co., 406 U.S. 164 (1972); Stanley v. Illinois, 405 U.S. 645 (1972); Humphrey v. Cady, 405 U.S. 504 (1972); *cf.* Turner v. Fouche, 396 U.S. 346, 364 (1970) ("Without excluding the possibility that other circumstances might present themselves in which a property qualification for office-holding could survive constitutional scrutiny, we cannot say, on the record before us, that the present freeholder requirement for membership on the county board of education amounts to anything more than invidious discrimination."). Gunther theorizes that the new standard of equal protection stems from 3 factors: the reluctance of the Burger Court to expand the scope of the compelling interest standard; its discontent with the previous 2-tiered formulation of equal protection; and a desire to intervene in situations without resorting to the strict scrutiny of the compelling interest standard. Gunther, *supra* note 71, at 12-20.

74. F.S. Royster Guano Co. v. Virginia, 253 U.S. 412, 415 (1920).

75. 404 U.S. at 76 (emphasis added).

76. *See* Reed v. Reed, 93 Idaho 511, 514, 465 P.2d 635, 638 (1970).

legislative choice" forbidden by the equal protection clause.[77] The Court did not indulge in speculation by trying to conceive a rational basis for the legislation; it limited its examination solely to the justifications offered by the state.

The Court adopted a similar analytic approach in *Eisenstadt*, which concerned the validity of a state statute prohibiting the distribution of contraceptives by anyone except pharmacists filling physicians' prescriptions for married persons. The state justified the dissimilar treatment for married and unmarried persons on three bases: first, as a deterrent to fornication; second, as a health measure; and third, as a prohibition on contraception. The Court again did not indulge in speculation; instead, it analyzed the statutory classifications in terms of over- and underinclusion. If the state intended the statute as a deterrent to fornication, the Court reasoned that including married and excluding unmarried persons was irrational because the classes were "riddled with exceptions."[78] The Court cited as examples the facts that the statute did not reach illicit relations between married and unmarried persons and that it prohibited the distribution of contraceptives to prevent pregnancy but not disease. Secondly, the Court refused to believe that the state had enacted the statute as a health measure. Central to that determination was the legislature's inclusion of the statutory section in a chapter of the state code entitled "Crimes Against Chastity, Morality, Decency and Good Order."[79] Nevertheless, the Court reasoned that if the statute was enacted as a health measure, it would "invidiously discriminate" against unmarried persons by denying them statutory protection and would be overbroad with respect to married persons because not all contraceptives are potentially dangerous.[80] Finally, the Court concluded that if the statute was enacted to prohibit contraception, then granting contraceptives to married persons and denying them to unmarried persons would be underinclusive and thus work an invidious discrimination

77. 404 U.S. at 76.

78. 405 U.S. at 449. Essentially, the Court concluded that the classes with respect to deterring fornication were both under- and over-inclusive. By failing to reach relations between married and unmarried persons, the statute was under-inclusive as far as unmarried persons are concerned and over-inclusive as far as married persons are concerned. By prohibiting the distribution only of contraceptives to prevent pregnancy, the statute was clearly under-inclusive with respect to preventing fornication.

79. 405 U.S. at 450. The Court also pointed out that health needs could not possibly vary according to whether the contraceptive was used to prevent pregnancy or prevent disease. 405 U.S. at 451 n.8. Moreover, the Court noted that federal health laws already regulated the distribution of potentially harmful products. 405 U.S. at 452.

80. 405 U.S. at 451 n.8 (referring to methods used by Casanova).

because the two classes were similarly situated with respect to the perceived "evil."[81]

Reed and *Eisenstadt* together may portend the advent of a new constitutional approach with respect to personal interests. When state economic or resource-allocation legislation has been involved, the Court's approach has been to invoke a strong presumption in favor of constitutionality. On the other hand, when state-created classifications have hinged upon suspect criteria or burdened a fundamental interest, the Court essentially has invoked a strong presumption against the classifications. The effect of the new approach may be that when legislation affecting some asserted personal interest is challenged on the basis of equal protection, the Court will not create a presumption either for or against the legislation; instead it will require the party seeking to uphold the classification to carry the burden of proof and demonstrate that a fair and substantial relationship exists between the classifications and a legitimate state purpose.[82] What the Court determines to be a fair and substantial degree of relationship, however, may vary according to the importance of the personal interest affected,[83] and to this extent the ultimate effect of the classification rather than the means used to effect it still will be relevant. In *Eisenstadt*, the affected interests were akin to the marital right of privacy protected in *Griswold v. Connecticut*[84] and

81. 405 U.S. at 454. Although Justice Brennan, who wrote the opinion of the Court, did not express the views of a majority of the Court, support for the new approach has come from all segments of the Court. *See* Gunther, *supra* note 71, at 19 & n.91.

82. Of course, whatever the Court perceives to be the purpose that the state is pursuing will have a great effect on whether it is rational. Indeed, often the purpose simply is inferred by reference to the classification. *See Developments in the Law—Equal Protection, supra* note 60, at 1082. Consequently, if the statute creates classes "riddled with exceptions," the courts may be hesitant to concur in a state's assertion of purpose. *See, e.g.*, Eisenstadt v. Baird, 405 U.S. 438 (1972). *See also* Note, *Legislative Purpose, Rationality, and Equal Protection*, 82 YALE L.J. 123 (1972).

83. *Cf. Developments in the Law—Equal Protection, supra* note 60, at 1120-21: "The interaction of these two factors [suspect criteria and fundamental interests] can be visualized by imagining two gradients. Along the first of these gradients is a hierarchy of classifications, with those which are most invidious—suspect classifications based on traits such as race—at the top. Along the second, arranged in ascending order of importance, are interests such as employment, education, and voting. When the classification drawn lies at the top of the first gradient, it will be subject to strict review even when the interest it affects ranks low on the second gradient—for example, the denial of a driver's license on the basis of race. As the nature of the classification becomes less invidious (descending on the first gradient) the measure will continue to elicit strict review only as it affects interests progressively more important (ascending on the second gradient)." Gunther criticizes this part of the new model, saying that it implicitly reintroduces a "value-laden appraisal of the legitimacy of ends" into the Court's analysis. However, he considers it to be part of the Court's as yet inchoate search for a new equal protection. Gunther, *supra* note 71, at 33-37.

84. 381 U.S. 479 (1965).

the "fundamental" right of procreation protected in *Skinner v. Oklahoma ex rel. Williamson*,[85] and the state consequently had to demonstrate a high degree of relationship. That is, the state had to draw rather preeise classifications. The personal interest affected was too important for the classes to be "riddled with exceptions."[86] In other contexts, when the affected interest is not as personal and judicial competence to evaluate the classification declines, the state will have to demonstrate a lesser degree of relationship.

B. Implementation of the Standard of Review

At least two courts have applied the standards articulated by *Reed* and *Eisenstadt* in contexts other than college admissions testing and determined that a standardized ability test fails the new rational relationship standard of review. The more significant decision, *Armstead v. Starkville Municipal Separate School District*,[87] concerned the use of a

85. 316 U.S. 535 (1942).

86. McDonald v. Board of Election Comm'rs, 394 U.S. 802 (1969), and similar cases are not entirely applicable to the new approach. In *McDonald* inmates awaiting a trial in the county jail were denied the right to receive absentee ballots. The inmates claimed that the distinction between those medically incapacitated, who received absentee ballots, and those judicially incapacitated, who did not, denied them their fundamental right to vote. Characterizing their claim as pertaining to the right to receive an absentee ballot rather than to the right to vote, the Court applied traditional equal protection standards of review and upheld the state's absentee ballot plan because over a 50-year period the state gradually had added groups to absentee coverage as they came to its attention. The underlying theory of *McDonald* must rest upon the distinction between restrictive and remedial state action. *McDonald* seemingly gives the states permission to create under-inclusive classifications with respect to the imposition of a benefit, but *Eisenstadt* and *Reed* apparently do not permit the imposition of a detriment over-inclusively. *See also Developments in the Law—Equal Protection, supra* note 60, at 1084-87.

87. 461 F.2d 276 (5th Cir. 1972), *aff'g* 325 F. Supp. 560 (N.D. Miss. 1971); *accord*, Chance v. Board of Examiners, 458 F.2d 1167 (2d Cir. 1972), *aff'g* 330 F. Supp. 203 (S.D.N.Y. 1971). In *Chance*, New York had required candidates for supervisory positions in New York City's public schools not only to satisfy the state's minimum criteria for such positions, but also to pass examinations administered by the city's Board of Examiners. Plaintiffs, a black and a Puerto Rican, had met the state's requirements but were unable to pass the Board's examination for assistant principals. The district court found that the tests had a discriminatory effect, purportedly applied the compelling interest standard, and subsequently enjoined the tests' use when the Board could not show that its tests were job related. The court of appeals agreed with the district court's findings of fact, but reasoned that the more lenient standards of *Reed* and *Eisenstadt* should apply. Nevertheless, it determined that the Board had failed to meet its burden of justification. The chief significance of the decision lies in the findings of the district court, which rejected the affidavits of noted authorities supporting the Board's test. *See also* Castro v. Beecher, 459 F.2d 725, 736 n.14 (1st Cir. 1972), *rev'g* 334 F. Supp. 930 (D. Mass. 1971) (refused to apply the *Chance* analysis to facts substantially similar to those in *Armstead* and *Chance*); Note, *Validity of Standardized Employment Testing Under Title VII and the Equal Protection Clause*, 37 MO. L. REV. 693 (1972). *But see* Buckner v. Goodyear Tire & Rubber Co., 339 F. Supp. 1108 (N.D. Ala. 1972) (employment test sufficiently job related).

Graduate Record Examination (GRE) administered by the Educational Testing Service and designed to determine an individual's capacity for graduate study in education. Anticipating an order to desegregate its school system immediately, defendant school board adopted an official policy that had the effect of requiring a minimum GRE score for one to retain employment with the board. When the school system consolidated its segregated schools, several black teachers who were not hired as a result of the new policy sued to enjoin its enforcement. The district court granted relief, finding that the GRE score requirement classified applicants on the basis of race, a suspect classification. The Fifth Circuit Court of Appeals affirmed, but found it unnecessary to decide whether the GRE created racial classifications. Citing *Eisenstadt* and *Reed*, the court instead found that the use made of the GRE scores bore no rational relationship to the purpose for which the GRE was designed.[88] Since the examination was designed to measure capacity for graduate study and was not validated for measuring a teacher's effectiveness, the court reasoned that there was no rational relationship between a GRE test score and a teacher's ability. Like the Supreme Court in *Reed* and *Eisenstadt*, the court declined to indulge in judicial speculation and required the school district to justify its procedures by affirmative proof.[89]

A standardized ability test not designed to measure the abilities that its users claim to be testing indeed lacks the "fair and substantial relation" to the purpose of classification required by *Reed* and *Eisenstadt*. *Armstead*, however, did not concern inadequacies of the GRE itself; the test presumably can measure an individual's readiness for graduate study with a predictable degree of accuracy. It was the use to which the test was put—measuring a teacher's effectiveness—that lacked a fair and substantial relation to a GRE test score. Although a standardized ability test in fact may not measure innate ability, but only the extent to which a student has been deprived of a good education by

88. 461 F.2d at 279.

89. The district court also had enjoined a portion of the school board policy that released teachers possessing a masters degree or an AA Teaching Certificate, which itself requires a masters degree, from the GRE minimum score requirement. 325 F. Supp. at 565. The circuit court reversed this part of the district court's decree, saying that the evidence did not support the court's findings that the requirement would have racial implications. 461 F.2d at 280. Judge Rives dissented to this part of the circuit court's opinion. 461 F.2d at 281. He noted that the obvious place for Starkville teachers to seek a masters degree was Mississippi State University, which is also located in Starkville. That university, however, has a minimum GRE score requirement for graduate study that is higher than the one set by the school district for retaining a position in the school system. Consequently, Judge Rives concluded that the masters degree alternative was illusory, serving only to implement the invalid GRE score requirement used by the school district. 461 F.2d at 282.

environmental factors, a test relying on present ability to read and other developmental skills may bear a "fair and substantial" relation to an individual's readiness for, as opposed to his ability to do, college level work.[90]

That argument, however, overlooks what may be the essence of an irrational classification. In cases that involve state-created classifications hinging on "suspect" criteria or burdening a "fundamental" interest, the plaintiff ordinarily does not argue that he has been included in the wrong class; rather, he argues that the ends for which the class was created are constitutionally impermissible.[91] On the other hand, when a plaintiff argues that a method of classification is not rationally related to its purpose, he quarrels not with the state's method of classification but with its precision. He says: "The means that you have used to classify me are legitimate, but they are so imprecise that one cannot possibly tell whether you have classified me correctly." Similarly, a plaintiff challenging his classification by means of a standardized ability test score says: "Testing may be a legitimate means of classification, but this test is so inadequate that one cannot possibly tell whether I am ready for or have the ability to do college level work." Practical experience seems to support such a contention. Some colleges have discovered that minority group applicants for admission can perform as well as middle-class applicants who have achieved significantly higher scores.[92] Moreover, the individual who claims, for example, that he has been penalized by an examination's ambiguous questions does not maintain that his lower score is the result of a poor education. He maintains that his score resulted from imprecision inherent to the test. His claim is that there is no fair and substantial relation between his ability and his test score.[93] Measured against an individual's strong personal interest in education, the use of standardized ability test scores as an admission criterion may be difficult to justify: first, they purport to measure ability, which in fact may be impossible to assess directly, so that the analysis used in *Armstead* would apply; secondly, although they have a

90. *Cf.* Note, *Hobson v. Hansen: Judicial Supervision of the Color-Blind School Board*, 81 HARV. L. REV. 1511, 1520 (1968).

91. *Cf. Developments in the Law—Equal Protection, supra* note 60, at 1077-78.

92. *See* Note, *supra* note 2, at 741. Apparently, one missing critical factor is the tests' inability to assess an individual's motivation. *See id*; text accompanying note 21 *supra*.

93. In such an argument, an essential element of the plaintiff's case is a showing of misclassification. *See* Davis v. Washington, 348 F. Supp. 15 (D.D.C. 1972) (lack of proof that civil service test caused disproportionate impact on employment of blacks). Plaintiffs in *Armstead* also included as an element of their proof a showing that some capable teachers, as measured by other standards, were not hired due to the school board's GRE requirement. *See* 325 F. Supp. at 568.

degree of predictable accuracy in measuring readiness for college work, they may be so imprecise that the *Eisenstadt* rationale would invalidate their use in any case.[94]

V. Due Process Analysis

The fourteenth amendment prohibits any state from denying a person liberty or property without "due process" of law. Due process analysis deals with two basic questions: first, whether the concepts of "liberty" or "property" encompass an asserted interest so that the procedural requirements of due process apply; and secondly, if due process does apply, what formal procedures due process requires to protect the interest adequately. At least since the Supreme Court's decision in *Board of Regents v. Roth*,[95] the concept of property does not include a

94. Two other courts purportedly have applied the compelling interest standard to invalidate the use of standardized ability tests within a school system. Hobson v. Hansen, 269 F. Supp. 401 (D.D.C. 1967), *aff'd sub nom.*, Smuck v. Hobson, 408 F.2d 175 (D.C. Cir. 1969), confronted Judge Skelly Wright with the problem of remedying Washington, D.C.'s de facto segregated school system. The city's schools had adopted a track system designed to assign students of the same general ability to one of 4 tracks, each offering a curriculum of different difficulty. Standardized ability tests were the primary determinant of track assignments. Although the track system was designed to permit each student to work at his optimum level, the system worked rigidly in practice, and students placed in a low track at an early age often had little chance to redeem themselves afterwards. After making exhaustive findings, Judge Wright found that track placement hinged not on ability but rather upon "socio-economic or racial status, or—more precisely—according to environmental and psychological factors which have nothing to do with innate ability." 269 F. Supp. at 514. Subscribing to a special judicial concern for disadvantaged minorities, he placed a "weighty burden" on the school system to explain why the poor and blacks populated "the lower ranks of the track system." *Id.* at 513. His conclusion, however, was that the inadequacies of standardized ability tests violated the underlying premise of the track system and destroyed its rationality. *Id.* at 514. According to his conclusion, Judge Wright's invocation of the compelling interest standard was unnecessary. The traditional standard of review might have sufficed instead. *See also* Note, *supra* note 90, at 1519.

P. v. Riles, 343 F. Supp. 1306 (N.D. Cal. 1972), involved the use of standardized ability tests used to place students in classes for the educable mentally retarded (EMR). Black students from the EMR classes, who had scored above the cutoff point for assignment to EMR classes when tested by black psychologists attempting to overcome test bias, sued to enjoin the use of the tests. Racial imbalance in the classes was admitted. The court, therefore, relied on *Hobson* and required plaintiffs only to show that the tests were the primary determinant of placement in EMR classes before placing a burden on defendants to demonstrate a "rational connection" between the tests and their ultimate use. Although a state statute required a complete psychological examination, parental consent, and school achievement that substantiated ability test scores, plaintiffs met their burden by arguing that test scores were the objective handle that the school system used to justify placement. Defendant's justifications, which centered on an argument that the test had no reasonable alternatives, were equally unsuccessful. *See also* Western Addition Community Organization v. Alioto, 340 F. Supp. 1351 (N.D. Cal. 1972); Penn v. Stumpf, 308 F. Supp. 1238 (N.D. Cal. 1970); Arrington v. Massachusetts Bay Transp. Authority, 306 F. Supp. 1355 (D. Mass. 1960).

95. 408 U.S. 564 (1972).

"unilateral expectation" of a benefit. Thus, although the traditional distinction between rights, which were afforded due process protection, and privileges, which were not, has been discredited thoroughly,[96] an individual still must have a "legitimate claim of entitlement" to a benefit before it will be characterized as a property interest to which the procedural safeguards of due process apply.[97] A college education is not yet a benefit for which someone can assert a claim of entitlement,[98] and claiming that an adverse ability test score has deprived one of a property right likely would encounter little favorable judicial response.

The concept of liberty, on the other hand, has been defined broadly to include the opportunity to choose one's employment[99] and to defend one's good name, reputation, honor, or integrity.[100] In *Wisconsin v. Constantineau*,[101] for example, a state statute provided that certain persons could forbid the sale of liquors for one year to one who displayed described conditions or exhibited specified traits as the result of excessive drinking. To trigger the statute, such persons needed only to sign a statement and post a notice in retail liquor establishments. There was no requirement of notice or hearing prior to the posting. Plaintiff, whose name had been posted by her local police chief without notice or hearing, sued for injunctive relief. Holding that the statute violated procedural due process, a federal district court granted relief, and the Supreme Court affirmed. Pointing out that posting imposed a "stigma" upon an individual, the Court held that the due process safeguards of notice and an opportunity to be heard apply whenever a person's good name, reputation, honor, or integrity are at stake.[102] Although a standardized ability test does not impose any stigma upon an individual in the sense that he is exposed to public embarrassment because of a low test score, it does impair his scholastic reputation. Moreover, insofar as

96. *See* Graham v. Richardson, 403 U.S. 365, 374 (1971): "[T]his Court now has rejected the concept that constitutional rights turn upon whether a governmental benefit is characterized as a 'right' or as a 'privilege.'" *See also* Van Alstyne, *The Demise of the Right-Privilege Distinction in Constitutional Law*, 81 HARV. L. REV. 1439 (1968).

97. Board of Regents v. Roth, 408 U.S. 564, 577 (1972).

98. Of course, once the benefit is conferred, one must be afforded procedural due process before it can be revoked, provided state action is found. *See* Dixon v. Alabama State Bd. of Educ., 294 F.2d 150 (5th Cir.), *cert. denied*, 368 U.S. 930 (1961); Greene v. Howard Univ., 271 F. Supp. 609 (D.D.C. 1967), *remanded*, 412 F.2d 1128 (1969).

99. *See, e.g.*, Truax v. Raich, 239 U.S. 33, 38 (1915).

100. *See, e.g.*, Wieman v. Updegraff, 344 U.S. 183, 191 (1952).

101. 400 U.S. 433 (1971).

102. *See also* Cafeteria Workers v. McElroy, 367 U.S. 886, 898 (1961); Wieman v. Updegraff, 344 U.S. 183, 191 (1952); Joint Anti-Fascist Refugee Comm. v. McGrath, 341 U.S. 123 (1951); United States v. Lovett, 328 U.S. 303, 316-17 (1946).

an individual must reveal his score to colleges requiring an examination score as a prerequisite to admission, he is embarrassed to the same extent as the plaintiff in *Constantineau* was when she sought to purchase liquor, or as an ex-convict is when he seeks employment.

Standardized ability tests also may affect an individual's opportunity to choose his own employment. For example, in *Willner v. Committee on Character and Fitness*,[103] petitioner had passed his state bar examinations but repeatedly had failed to receive a favorable endorsement from the Committee, which was charged by the state courts with investigating the character and fitness of applicants. The Committee, however, had refused steadfastly either to furnish reasons for its refusal or a hearing at which petitioner could confront anyone opposing his admission. Reversing a state court affirmance of the Committee's decision, the Supreme Court held that procedural due process safeguards apply to the decision to deny an individual his right to practice law. In *Willner*, the Committee argued that it acted merely in an advisory capacity and made no quasi-judicial determination of an applicant's fitness. The Court, however, noted that a favorable endorsement from the Committee was a virtual prerequisite for admission; consequently, it concluded that the Committee's role was quasi-judicial and that petitioner was entitled to notice and a hearing. Standardized ability tests often make a similar kind of determination about an individual's capabilities for college study. Because an ability test score is a prerequisite for admission, the testing agency does not merely advise the college; it makes a conclusive determination about an individual's capability. Ability test scores also are required for professional study, and a college degree is a prerequisite for some kinds of employment. Because an adverse test score could impair employment opportunity substantially, the safeguards of procedural due process could apply in some fashion to the testing process.

VI. Possible Remedies

A. Due Process

Once it is determined that the procedural safeguards of due process apply to protect an interest, the second step of the analytical process is to determine the form that the safeguards will take. That analysis in-

103. 373 U.S. 96 (1963). *See also* Cafeteria Workers v. McElroy, 367 U.S. 886, 898 (1961); Schware v. Board of Bar Examiners, 353 U.S. 232, 238-39 (1957); Joint Anti-Fascist Refugee Comm. v. McGrath, 341 U.S. 123, 185 (1951) (Jackson, J., concurring); Truax v. Raich, 239 U.S. 33, 38 (1915).

volves a balancing process and concerns whether the individual's interest in avoiding a restriction upon his protected interest outweighs the government's interest in a summary determination.[104] In some cases, when providing due process safeguards would threaten the public safety, the government may take summary action.[105] Even in such instances, however, it must provide due process safeguards afterwards. The individual, of course, has a strong personal interest in knowing that his standardized ability test score is an accurate assessment of his capabilities. The immediate prospect of a college education, future employment prospects, and large sums of money may hinge upon its accuracy. The testing agency, on the other hand, does not have an overriding interest in a summary determination of an individual's ability. Indeed, it would be to the agency's advantage to discover inaccuracies or faults within its examinations.

The primary disadvantage to the imposition of due process requirements upon the testing agency, of course, would be the huge administrative costs associated with administering a formal system of quasi-judicial procedures; however, the elements of due process necessary to protect against abuse may not require formalized procedures. Moreover, adequate safeguards could be developed to ensure that individuals do not disseminate the contents of an ability test to the public. Providing the student access to a copy of the examination would ensure against incorrect or ambiguous questions. Permitting the student to attach additional information to his score would cause college admission officials to acknowledge the student's objection to the accuracy of his score, and supplying the student either with access to his admissions file or with reasons for a denial of admission would enable him to determine whether a faulty standardized ability test was a key factor in his denial. Armed with the information gained thereby, he perhaps could challenge the examination as a violation of equal protection.[106] In any case, he would have the opportunity to discover whether the test was an accurate measure of his ability.

Congress enacted the federal Fair Credit Reporting Act (FCRA)[107] in response to the same concerns over the subjects of credit reports, about whom specialized credit reporting bureaus supply information to

104. *See* Goldberg v. Kelly, 397 U.S. 254, 263 (1970).

105. *See, e.g.*, Ewing v. Mytinger & Casselberry, Inc., 339 U.S. 594 (1950); Yakus v. United States, 321 U.S. 414 (1944); Gonzalez v. Freeman, 334 F.2d 570 (D.C. Cir. 1964); R.A. Holman & Co. v. SEC, 229 F.2d 127 (D.C. Cir.), *cert. denied*, 370 U.S. 911 (1962).

106. *See* note 61 *supra*.

107. 15 U.S.C. §§ 1681-1681t (1970).

potential creditors. Providing safeguards similar to FCRA would permit persons aggrieved by a standardized ability test to gain the toe-hold necessary for accomplishing internal rather than judicial resolution of their problem.

Section 609 of the FCRA requires credit bureaus to disclose upon demand the nature, substance, and sources of the information contained in their files.[108] A similar requirement, imposed on test score users rather than on suppliers, would enable a student to determine the effect of his test score upon a denial of admission. When imposed on the supplier, it perhaps would enable the student to obtain access to a copy of his examination and the correct answers thereto. In either case, the likelihood of achieving a more accurate measure of an individual's ability would increase.

Section 611 of the Act requires a credit bureau to investigate the completeness or accuracy of any item in its report unless it has reasonable grounds to believe the subject's dispute is irrelevant or frivolous; however, that the bureau's information contradicts the subject's claim is not a reason for believing the dispute is frivolous or irrelevant.[109] If the bureau and the subject are unable to resolve their dispute, the bureau must record that fact in the subject's file.[110] Applying these requirements to standardized ability tests would enable an individual to challenge parts of his examination and require the testing agency to investigate the accuracy of his complaint. Moreover, that the agency disagrees with the student would be an insufficient ground either for refusing to investigate the complaint or for eventually recording its existence.[111]

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108. 15 U.S.C. § 1681g (1970). At least one commentator finds that section wholly inadequate because it does not require the credit bureau to permit the subject actually to read his report. *See* Note, *Protecting the Subjects of Credit Reports*, 80 YALE L.J. 1035, 1064 (1971). Presumably, that inadequcy could be remedied for standardized ability tests.

109. 15 U.S.C. § 1681i (1970). Leaving the credit bureau the right to determine, with one exception, what is irrelevant or frivolous could leave the subject without adequate protection. *See* Note, *supra* note 108, at 1066. Virtually all objections to a standardized ability test, however, presumably would fall within the exception.

110. 15 U.S.C. § 1681i (1970).

111. The FCRA was enacted at least partly because of the failure of 2 common-law doctrines—libel and products liability—to remedy the abuses of credit bureaus adequately. Although libel ordinarily does not require proof of specific economic damages, when extrinsic facts are required in order to make out the defamatory meaning, such libel "per quod" requires proof of damages. *See* W. PROSSER, TORTS § 112 (1971). Consequently, for most potential plaintiffs the burden of proving economic damage would be an insurmountable barrier despite the incorrectness of a test score. Moreover, the ability to prove special damages would not necessarily be conclusive of liability. A testing agency still would have the affirmative defense of a conditional privilege. In situations in which conditional privileges apply, the defendant is not granted absolute immunity for his publication; rather, it is conditioned upon publication in a reasonable manner and for a

B. Equal Protection

The presence of procedural safeguards cannot, however, ensure that admissions testing systems will meet the requirements of the equal protection clause. Nevertheless, given the absence of adequate alternatives or standards for standardized ability tests, their blanket invalidation on equal protection grounds could lead to either of two consequences, each equally undesirable: educators, without the seemingly objective criteria of ability test scores, might adopt more subtle and frustrating criteria having greater potential for discrimination and holding even less relevance to college performance than ability test scores; or courts might respond by setting admission standards themselves. Standards that will diminish substantially the likelihood of potential harm from, and at the same time permit the continued use of, standardized ability tests therefore are indicated. The standards proposed in the remainder of this section hopefully would achieve those goals.

1. *Federal Employment Test Standards.*—Section 703 of Title VII of the Civil Rights Act of 1964[112] permits employers to use professionally developed ability tests to determine qualifications for employment or advancement.[113] Pursuant to the Civil Rights Act, the Equal Employment Opportunity Commission (EEOC) and the Office of Federal Contract Compliance (OFCC) have established guidelines for testing and selecting employees.[114] In *Griggs v. Duke Power Co.*,[115] the

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reasonable purpose. Conditional privileges often are recognized in cases in which the publisher and the recipient have a common interest and the publication is designed to protect or further it, as in the case of the legal contractual obligation of the testing agency to report a student's score. *See id.* at § 115(3). Most courts, by invoking either a theory of tort or of implied warranty, recognize strict liability for the maker or supplier of a product. *See id.* at §§ 97-98. Sellers of services, however, are generally liable only for negligence. *Id.* at § 104. Therefore, the liability of a testing agency would hinge on whether it is supplying a product or a service; and although arguments to the contrary can, of course, be conceived, it is extremely doubtful that a court would find that a testing agency is supplying a product. *See also* Note, *supra* note 108, at 1049-61.

112. 42 U.S.C. §§ 2000e-2(h)(1970).

113. "Sec. 703. (a) It shall be an unlawful employment practice for an employer—

. . . .

(2) to limit, segregate, or classify his employees in any way which would deprive or tend to deprive any individual of employment opportunities or otherwise adversely affect his status as an employee, because of such individual's race, color, religion, sex, or national origin.

. . . .

(h) Notwithstanding any other provision of this title, it shall not be an unlawful employment practice for an employer . . . to give and to act upon the results of any professionally developed ability test provided that such test, its administration or action upon the results is not designed, intended or used to discriminate because of race, color, religion, sex or national origin." 78 Stat. 255, 255-57 *codified at* 42 U.S.C. § 2000e-2 (1970).

114. *See* 29 C.F.R. §§ 1607.1-.14 (1972); 41 C.F.R. §§ 60-3.1 to 60-3.18 (1972).

115. 401 U.S. 424 (1971).

Supreme Court interpreted section 703 to permit the use of ability tests only if such tests are job related.[116] The tests examined by the Court in *Griggs* had no demonstrable relationship with job performance and were simply tests of general ability on which blacks achieved disproportionately lower scores than whites. After concluding that the congressional intent behind section 703 was to require job-related tests, the Court endorsed the EEOC guidelines for testing and selecting employees, which it said were developed to ensure only the use of job-related tests. Although the Court did not apply constitutional standards to the tests used in *Griggs*, any conceptual difference between requiring a "fair and substantial" relationship between test scores and job performance and requiring that test scores be "job-related" appears negligible. Indeed, the EEOC standards endorsed by the Court in *Griggs* may represent its conception of a fair and substantial relationship.[117]

The guidelines developed by the EEOC and OFCC, although strict, are not complex. They basically require each employer to have evidence available to demonstrate that he is not using his tests in a discriminatory manner. To overcome this burden, the employer must be able to show both that his tests are valid and that they evidence a high degree of utility.[118] To apprise the employer of the standards that his tests must meet, the regulations prescribe guideline standards for validation and utility.[119] Minimal validation includes the use of generally accepted psychological procedures, the use of representative samples, and administration and scoring under controlled and standardized conditions—all standards that college entrance examinations should satisfy. Other minimal standards prescribed by the regulations, however, presently may be unattainable for some entrance exams.

One factor that the regulations use to assess utility is the number of applicants who eventually will be hired or admitted.[120] Frequently, when the pressure of applications is strong, employers and colleges can raise their requirements to increase the likelihood that all persons ad-

116. 401 U.S. at 436.

117. *See* Blumrosen, *Strangers in Paradise:* Griggs v. Duke Power Co. *and the Concept of Employment Discrimination*, 71 MICH. L. REV. 59, 63 (1972) ("*Griggs* redefines discrimination in terms of consequence rather than motive, effect rather than purpose."). *But see* United States v. Georgia Power Co., 474 F.2d 906 (5th Cir. 1973).

118. *See, e.g.*, 29 C.F.R. § 1607.4(c) (1972). For thorough discussions of employment testing see Cooper & Sobol, *Seniority and Testing Under Fair Employment Laws: A General Approach to Objective Criteria of Hiring and Promotion*, 82 HARV. L. REV. 1958 (1969); *Developments in the Law—Employment Discrimination and Title VII of the Civil Rights Act of 1964*, 84 HARV. L. REV. 1109, 1113-40 (1971).

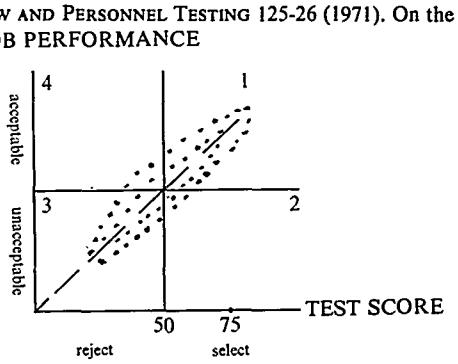
119. *See* 29 C.F.R. § 1607.3 (1972); 41 C.F.R. § 60-3.3 (1972).

120. 29 C.F.R. § 1607.5(c)(2)(i) (1972).

mitted will be qualified. Conversely, when the labor or student market is tight, standards are lower, and a stronger relationship between ability and test performance is needed. If, for example, twenty applicants are available for every position, the score required for admission will be so comparatively high that a coefficient of correlation near .30 will predict correctly 75 percent of the applicants' later performances; however, if there are only five applicants for every position, the necessarily more closely grouped scores mean that the coefficient must exceed .45 to achieve the same predictive accuracy.[121] College entrance examinations, which have coefficients of approximately .5, consequently would be on the borderline under federal standards. Highly selective colleges having a large number of applicants could continue to utilize such examinations, but less selective institutions, which probably admit more than one of every five applicants, might find the use of such examinations foreclosed.[122]

For the question whether the EEOC guidelines should apply to college entrance examinations, the answer lies in the anomalous position

121. W. BYHAM & M. SPITZER, THE LAW AND PERSONNEL TESTING 125-26 (1971). On the following scatter plot each dot represents one person's test score. A test score of 50 is designed to indicate the minimum level needed for school or job performance. If only the applicants in quadrant 1 are selected, all of the individuals would succeed on the job or in school. The test, however, would select all these persons in quadrants 1 and 2. Those in quadrant 2 should not be selected. More importantly, those in quadrant 4 should be selected, but their test score will be unacceptable. Only for those persons in quadrants 1 and 3 will the decision be correct. If there are a great number of applicants, the test user can adopt a minimum score of 75 and insure that he gets only qualified persons; however, as the number of applicants decreases, he cannot be so selective. Moreover, to eliminate the element of chance, the test must have a distribution of scores that is much more elongated. For a detailed discussion of validation see *id.* at 105-46.



122. Despite validation and evidence of utility, the presence of disproportionately lower scores for minorities may be sufficient in and of itself to find a test discriminatory under Title VIII. *Cf.* EEOC Decision No. 71-1418, CCH EMPLOYMENT PRACTICES GUIDE, ¶ 1451.10 (March 17, 1971). The regulations themselves, however, seemingly provide a negative response to the question. *See* 29 C.F.R. § 1607.3 (1972). Another federal standard provides that the relationship between test performance and at least one criterion of job performance must be so statistically significant that only one of every 20 sufficiently high scores occurs by chance. 29 C.F.R. § 1607.5(c)(1) (1972). That standard is, however, unattainable for any known ability test, and in the absence of realistic federal standards the courts have turned to the Supreme Court's language in *Griggs*. *See*

that college entrance examinations would occupy if uniform requirements were not used.[123] With respect to employment tests, an employer must carry the burden of proof to show the value of his examinations. If an educational institution can wait for a minority plaintiff to prove its tests unreasonable, or if the institution's burden is less rigorous, factors other than ability might continue to determine eligibility for college education while we are removing the last vestiges of discrimination in other areas of our culture.

2. *Differential Validation.*—The test maker should not necessarily abandon an examination simply because minority groups achieve disproportionately lower scores. Disproportionately low scores may mean only that a different cutoff score is appropriate for that group. That is, a minority group applicant may have the same capabilities as another applicant, but because of inequities built into the exam, his score is lower. Consequently, the test predicts with the same degree of accuracy for minority groups, but only by using different scores as cutoff points. This phenomenon is known as differential validity.[124] If the institution does not apply different standards and combines the results of all groups, it will accept fewer minority applicants although they have probabilities of success equal to other applicants.

Using lower cutoff scores for minority applicants raises the question whether such a practice is an impermissible racial classification.[125] Several decisions, however, hold that the provision of equal educational opportunity is so compelling that remedial racial classifications are permissible,[126] and the courts generally have allowed school boards to eradicate voluntarily the effects of segregation on education.[127] Using lower cutoff scores for the culturally deprived therefore should be a constitutionally valid means to overcome the disadvantages imposed on

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United States v. Georgia Power Co., 3 CCH EMPLOYMENT PRACTICES DEC. 7073, 7092 (N.D. Ga. 1971), *aff'd in part, rev'd in part*, 474 F.2d 906 (5th Cir. 1973).

123. *Cf.* Chance v. Board of Examiners, 458 F.2d 1167, 1176 (2d Cir. 1972).

124. For a thorough discussion of the concept see W. BYHAM & M. SPITZER, *supra* note 121, at 128-45; Note, *supra* note 2, at 700-06; *see also* 29 C.F.R. § 1607.5(b)(5) (1972). Of course, the test also may be valid for one group but not for another. The obvious solution in such a situation is to use 2 different tests.

125. *See* O'Neil, *supra* note 61, at 705-18.

126. *See* Norwalk CORE v. Norwalk Redevelopment Agency, 395 F.2d 920, 931-32 (2d Cir. 1968); United States v. Board of Pub. Instruction, 395 F.2d 66, 69 (5th Cir. 1968); United States v. Jefferson County Bd. of Educ., 372 F.2d 836, 900 (5th Cir. 1966), *cert. denied*, 389 U.S. 840 (1967); Wanner v. School Bd., 357 F.2d 452 (4th Cir. 1966); United States v. Plaquemines Parish School Bd., 291 F. Supp. 841, 846 (E.D. La. 1967).

127. O'Neil, *supra* note 61, at 715.

some individuals by college entrance examinations.[128]

VII. CONCLUSION

Despite their unquestioned importance, the use of standardized ability tests in education heretofore has been largely unsupervised. Although such tests may be an improvement over subjective forms of evaluation, an individual deprived of further education by a faulty test probably finds little solace in that knowledge. Recent judicial developments suggest that the makers of standardized ability tests soon may have to prove their products worthy of the reliance placed upon them; yet the current inadequacies of their products may fail to withstand scrutiny. Standardized ability tests are in all likelihood here to stay. Required will be judicially manageable standards that the test makers themselves can meet. Coupled with procedural safeguards, such standards will enhance the probability of finally meeting Horace Mann's expectations for standardized tests.

LEWIS D. BECKWITH*

128. Some commentators believe that differential validity may be an illusory phenomenon. *See* Ruch & Ash, *Comments on Psychological Testing*, 69 COLUM. L. REV. 608, 611 (1969). Others are not so dubious. *See* W. BYHAM & M. SPITZER, *supra* note 121, at 128-45. Some of the objections to differential validity dispute not its reality, but the added costs of validation and test administration. *See Developments in the Law—Employment Discrimination and Title VII of the Civil Rights Act of 1964*, at 1129. For tests administered on such a large scale as college entrance examinations, the latter objections have little substance.

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