

Pursuing Equal Opportunities
The Theory and Practice of
Egalitarian Justice

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Chapter 4

Equal Opportunities and Civil Rights: Merit, Standardized Tests, and Higher Education

4.1 INTRODUCTION

The goal of this chapter is to explain how a familiar account of civil rights flows from the three-dimensional model of equal opportunities as a regulative ideal that I have been defending in the last two chapters. The idea that civil rights are grounded in the ideal of equality of opportunity was once widely held but now seems to be in dispute. This has engendered an intellectual crisis in the sense that civil rights seem to rest on weak foundations, and their defenders have embarked on a search for an alternative or supplementary account of egalitarian justice to ground civil rights.¹ It is my belief that this new search is misdirected and that at least one attractive model of equality of opportunity – the three-dimensional model of equal opportunities as a regulative ideal – can well explain the normative role of civil rights. The main insight I defend is that civil rights are legal devices for promoting status equality as a principle of background fairness.

Although the emphasis is on the idea of civil rights, that idea is notoriously elusive and imprecise. As Lloyd Weinreb has pointed out, "For all the discussion and debate about civil rights, it is striking how little attention is given initially to the question of what civil rights are. There is no well-understood principle of inclusion or exclusion that defines

¹ The most common supplement to equality of opportunity is the so-called antidiscrimination principle discussed in Ch. 2.4. See Paul Brest, 'Forward: In Defense of the Antidiscrimination Principle,' *Harvard Law Review*, Vol. 90 (1976), reprinted in Christopher McCrudden, editor, *Anti-Discrimination Law* (New York: New York University Press, 1991), and Christopher Edley, *Not All Black and White: Affirmative Action and American Values* (New York: Hill & Wang, 1996), ch. 4.

the category."² What I have in mind is the type of trend that flourished in the United States after World War II in a series of statutes culminating in the 1964 Civil Rights Act and the 1965 Voting Rights Act but continued in to the 1990s as evidenced by the passing in 1991 of the new federal Civil Rights Act.³ These pieces of legislation enacted rights for certain minority groups, especially blacks, intended to protect them from certain forms of discrimination and unfair treatment, and made these rights justiciable through the federal courts.⁴ The important legal consequence of these new civil rights is that they complemented both in principle and practice already existing constitutional rights, which regulate government, by imposing these requirements on institutions in civil society.

It is often not fully appreciated that this trend was not unique to the United States. Parallel developments occurred, for example, in both Canada and Britain. In Canada, the Province of Ontario enacted the *Ontario Human Rights Code* in 1962 designed to consolidate all of its previous anti-discrimination statutes.⁵ All but one of the other provinces quickly followed suit with their own codes. And in 1977, the Federal Government passed the *Canadian Human Rights Code*. A similar consolidation occurred in Britain with the *Sex Discrimination Act* passed in 1975 and the *Race Relations Act* a year later. In both countries, quasi-judicial forums were established to investigate and adjudicate complaints based on these new statutes. As in the United States, the legal rights they

² Lloyd L. Weinreb, 'What Are Civil Rights?' in Ellen Paul, Fred Miller, and Jeffrey Paul, editors, *Rethinking Civil Rights* (Cambridge, MA: Blackwell, 1991), p. 1.

³ Although this type of legislation has flourished since the Second World War, it has its origins, of course, in the Reconstruction Era after the American Civil War.

⁴ It is accurate to say that although there was considerable disagreement about the set of minority groups who should be protected by civil rights legislation, there was a consensus that blacks were part of any anticipated set. Less well known is the lack of consensus about including women. The fact that the 1964 Civil Rights Act includes women is largely a consequence of an amendment by opponents of the bill. By amending the bill to include women, these opponents believed that the bill was more likely to be defeated. And even after it passed with the amendment, many supporters of the bill in the Johnson Administration expressly denied that the bill should be used to protect the civil rights of women. See Susan Gluck Mezey, *In Pursuit of Equality: Women, Public Policy, and the Federal Courts* (New York: St. Martin's Press, 1992), pp. 36–42.

⁵ Throughout this chapter, I use the term civil rights rather than human rights mainly because the former captures the broad focus of this book on civil society, whilst the latter is often associated with international law and international declarations of bodies such as the United Nations. My argument in this chapter is not directed at international law.

created were designed to complement existing constitutional rights in the sense that their scope extended to institutions in civil society.⁶

Now, the evolution of civil rights over the past fifty years has been characterized by shifting views about the applicability of civil rights complaints to issues in civil society. What may have once been thought not to raise a question of civil rights has often emerged over time as one.⁷ For critics, civil rights complaints have evolved and multiplied so much that they have lost any coherent meaning.⁸ Rather than being based on principle, civil rights complaints are said to be merely another strategy for pursuing an expressly political agenda. Ironically, those who appeal to civil rights often seem to concur with these critics insofar as when tensions emerged between some civil rights complaints and equality of opportunity – the traditional normative foundations of civil rights – there was little hesitation to look for alternative foundations or to disparage the very idea of foundations. My view, clearly evident in the previous chapters, is that this is a reflection of the failure to recognize the variety of models of equality of opportunity and the robust core of that ideal of egalitarian justice. But I appreciate the importance of looking for new challenges and avenues for civil rights litigation. And I agree that a theory of civil rights must be dynamic enough to provide a rationale for pressing complaints in at least some of these new areas. For these reasons, I outline a theory of civil rights based on the three-dimensional model of equal opportunities as a regulative ideal against the backdrop of an emerging issue in American civil rights litigation – the use of standardized test results in admission decisions by institutions of higher

⁶ The contrast between constitutional rights and civil or human rights is not intended to ignore the very complex relation between constitutional and civil rights. In both the United States and Canada, the courts have recognized the former as more significant than the latter. The United States Supreme Court treats as redundant a complaint based on a civil rights violation when a complaint based on a constitutional right has already been recognized. See *United States v. Fordice*, 505 U.S. 717 (1990). The Supreme Court of Canada has held that human rights codes must conform with the requirements of the Charter of Rights and Freedoms, and so ordered the Province of Alberta to amend its code to provide protection based on sexual orientation since, in an earlier decision, the Supreme Court had held that sexual orientation was protected under Section 15 of the Charter. See *Vriend v. Alberta* (1998) 1 S.C.R. 493.

⁷ The starkest illustration of this in the United States is provided by affirmative action, which in the 1980s seemed only remotely if at all, a question of civil rights but is now widely viewed as one of the most fundamental civil rights issues. I discuss affirmative action in much greater detail in the next chapter.

⁸ See, e.g., Richard Epstein, 'Two Conceptions of Civil Rights' in *Rethinking Civil Rights*.

education. As in Chapter 5 in this book on race, the focus is mainly on the United States. As I explained in the introductory chapter, this is a reflection of my belief that the American experience provides some of the most challenging contexts for thinking about the relationship between race and law.

4.2 STANDARDIZED TESTS IN AMERICAN UNIVERSITIES

It is well known that in the United States, universities and other institutions of higher education utilize the results of scores on standardized tests to make decisions about admission and related matters such as financial assistance and scholarships. This practice, though widespread throughout the country, is especially prevalent in graduate programs and professional schools and those select universities that have a very intense competition for admission into their undergraduate programs. Five standardized tests – the Scholastic Aptitude Test (SAT), the Graduate Record Examination (GRE), the Law School Admission Test (LSAT), the Medical College Admission Test (MCAT), and the American College Test (ACT) – are especially relied upon. These tests are all said to be aptitude tests in the sense that they allegedly test the general proficiency of the candidate rather than something taught or acquired. None claim to measure IQ. This is despite careful documentation showing that there is a high correlation between their results and traditional IQ tests.⁹ The fact that American universities are immense consumers of standardized test results shouldn't be surprising since they were pioneers in the design and application of standardized tests.¹⁰ It is worth noting, however, that universities in other English-speaking industrial countries such as Canada and Britain do not rely on standardized test results to anywhere near the same extent.

The reasons American universities rely on standardized tests in admission competitions are often said to be practical. In a large country, where students come from a wide variety of educational backgrounds, there are immense commensurability problems posed by the task of trying to compare, for example, high school grades or college GPAs. Standardized tests that measure general proficiency provide a way to compare students from these diverse backgrounds in competitive

⁹ Howard Gardner, 'Who Owns Intelligence?', *Atlantic Monthly* (February 1999), p. 70.

¹⁰ For a history, see Nicholas Lemann, 'The Great Sorting', *Atlantic Monthly* (August 1995), 84–100.

processes for admission. Looming behind this rationale, however, is a more complex normative argument about merit and the design of a meritocratic admissions scheme that I shall discuss in the next section of the chapter. For now, it is important to recognize one of the implications of relying on standardized test results to make important decisions about admission into selective universities and professional schools. The context is the well documented 'black-white gap' in test scores across the range of these standardized tests from general proficiency tests such as SAT and LSAT to conventional IQ tests. Although the literature on this gap is immense and controversial, there seems to be a consensus that this gap is about one standard deviation – that is, fifteen points. This means that, in the blunt terms of Christopher Jencks and Meredith Phillips, "the typical American black still scores below 75 percent of American whites on almost every standardized test."¹¹ The important result is that increased reliance on standardized test results will decrease the likelihood of African Americans being admitted into selective universities and competitive professional schools and graduate programs.

Despite this implication, coupled with increased reliance on standardized test results by American universities over the past thirty years, only very recently has the issue emerged as a site for major civil rights complaints, even though the use of standardized tests in employment contexts has been the site of civil rights complaints for more than thirty years. The landmark 1971 U.S. Supreme Court case, *Griggs v. Duke Power Co.*, for example, involved the use of standardized tests in hiring and promotion decisions. What has been the motivation, especially in states such as California, to rethink the civil rights implications of the uses of standardized tests by universities and colleges?

The most important factor is undeniably the retrenchment of affirmative action in admissions to colleges and universities with selective entry policies across the country, especially in Texas and California. The underlying reasoning seems to be that although the use of standardized test scores has always had potentially adverse implications for the admission of certain racial minorities and women into institutions of higher education, the existence of affirmative action programs mitigated this effect and defused the reliance on tests as a civil rights issue. Indeed, Christopher Edley, who served as President Clinton's principal advisor

¹¹ Jencks & Phillips, 'The Black-White Test Score Gap', *The Brookings Review*, Vol. 16 (Spring 1998), p. 24.

on rethinking affirmative action, has described an important function of affirmative action to be "to correct the problems we've inflicted on ourselves with our testing standards."¹² With the prospect of retrenchment, however, affirmative action no longer would function to mitigate for this impact. While I intend to postpone discussing colour-conscious affirmative action in depth until the next chapter, the role it has played in bringing the present issue to the forefront of the American civil rights movement is undeniable.

4.3 MERITOCRACY REGULATED BY EQUAL OPPORTUNITIES

The fundamental question that concerns me is what makes the use of standardized test results by American universities a civil rights issue. While any response to this question presupposes a general theory of civil rights, the most compelling answer revolves around the familiar defense of standardized test results that they enable universities to identify the most applicants with the greatest merit in a competitive process for admission. Merit is understood in the competition to be a combination of ability and effort.¹³ When universities look only at past indicators of merit such as high school grades, however, it is difficult to compare different candidates because of the diversity of educational backgrounds and schools, as noted earlier. Standardized test scores provide a proxy for merit, and are easily compared between candidates. As Iris Marion Young explains:

Standardized tests appear to comply with the requirements of merit evaluation because they are usually procedurally fair. They are blind to race, sex, and

ethnicity. They are *objective* in the sense that when they are used to evaluate individuals we can be sure that all have been evaluated according to the same criteria, and in the sense that for a given individual any scorer will come up with the same score. By quantifying test answers and relying on complex statistical techniques, tests also appear able to measure individual skill precisely and to compare and rank individuals, providing an objective assessment of the most and least qualified.¹⁴

The major testing agencies in the United States, such as the College Examination Board (CEB), validate this equating of merit and test results by providing ample research showing that test scores are useful predictors of success in a student's first year of study.

Many legal commentators have focused, rightly I think, on this idea of merit as the appropriate grounds for bringing forth a civil rights complaint against some universities for their uses of standardized test results.¹⁵ While the precise details of their commentaries vary, the core line of criticism – the radical critique of merit – is similar and involves four principal steps: (1) Standards of merit and corresponding notions of individual desert are social constructions, not something natural or necessarily cross-cultural. (2) Standards of merit in the United States are set by the 'white' majority, and instruments such as standardized tests that are designed to gauge merit reflect this. (3) Thus, although those outside the 'white' majority often fail to meet this standard of merit as indicated by standardized test results, this is a result of the way standards of merit are socially constructed and not necessarily a failing of individuals from the minority group. (4) Standards of merit in the United States should be socially constructed to reflect also the perspective of these marginalized minorities. The basis for a civil rights complaint (concludes this line of criticism) arises when universities don't accommodate for this perspective.

While clearly the arguments about IQ in the last chapter show that I have considerable sympathy for the radical critique of merit, it is nevertheless wrong-headed, principally because it rests on a *common*

¹⁴ Iris Marion Young, *Justice and the Politics of Difference* (Princeton: Princeton University Press, 1990), p. 208.

¹⁵ See, e.g., Richard Delgado, 'Rodrigo's Tenth Chronicle: Merit and Affirmative Action', 83, *Georgetown Law Journal* (1995), pp. 1709–55; Daria Roithmayr, 'Deconstructing the Distinction between Merit and Bias', 85, *California Law Review* (1997), pp. 363–421; Michael Selmi, 'Testing for Equality: Merit, Efficiency, and the Affirmative Action Debate', 42 *UCLA Law Review*, (1995) pp. 1251–1314; Susan Sturm and Lani Guinier, 'The Future of Affirmative Action: Reclaiming the Innovative Ideal', 84, *California Law Review*, (1996), pp. 953–97.

¹² Quoted in Abigail and Stephan Thernstrom, 'Black Progress', *The Brookings Review*, Vol. 16 (Spring 1998), p. 16. Edley in fact embraces a much more pluralistic and complex view of affirmative action. See his account in *Not All Black and White: Affirmative Action and American Values*.

¹³ Norman Daniels, 'Merit and Meritocracy' in *Justice and Justification* (New York: Cambridge University Press, 1996), p. 303. There is, however, no consensus among philosophers about how to define merit. As an alternative to my definition, John Lucas in *Responsibility* (Oxford: Oxford University Press, 1993) defines merit as something stemming from an attribute someone *has* as opposed to something someone *does*. In his view, someone merits being on a sports team because of some attribute he or she has. But clearly having an attribute is not sufficient for this merit; it is also required that one attend practices or training, and so on. My point is that when these additional requirements are acknowledged, merit is something like, as I state in the main text, *ability plus effort*.

misperception about why a college admissions scheme or indeed any other such practice looks to merit to guide its decision-making. Any scheme based on a merit principle is commonly called a meritocracy. It is, however, a common misperception of a meritocracy to think that the concern with merit derives from a more fundamental belief about what particular individuals deserve.¹⁶ In other words, the radical critique conflates two distinct concepts – merit and desert. The mistaken underlying reasoning is that if an admission scheme wants to identify the applicants with the most merit, it is because those individuals most *deserve* to be admitted. But some careful consideration of this reasoning shows why it is flawed. When merit is understood as a function of ability combined with effort, those individuals with the most merit may not be the most deserving since those two factors may have sources such as genetic good luck that do not warrant praise. In other words, although those individuals under a meritocratic admissions scheme with the most merit may be admitted, they are not necessarily the most deserving.¹⁷ Moreover, whereas a meritocracy is forward-looking, desert-based praise is backward looking, rewarding individuals for their past exemplary behaviour. Standardized tests are, as I noted earlier, designed to measure aptitude and provide a basis for making predictions about future performance; they do not purport to measure past educational achievements. This makes the results of such tests a poor gauge of desert but a more promising fit for a merit exercise.

If a meritocratic admissions scheme is not designed to admit the most deserving individuals, what other purpose might it serve? The most plausible answer is that such a scheme best serves society's interests or maximizes the educational resources of society.¹⁸ Defenders of a meritocratic admissions scheme would presumably say that since places in a selective undergraduate program or professional school are scarce

¹⁶ A prominent example of this misperception about meritocracy is Michael Sandel, *Liberalism and the Limits of Justice* (New York: Cambridge University Press, 1982), pp. 72–76.

¹⁷ The distinction I am drawing here turns on the claim that a *necessary* condition for deserving something is that its basis be to some extent voluntary. This claim is the subject of considerable debate. See, e.g., David Miller, 'Desert and Determinism' and Julian Lamont, 'The Concept of Desert in Distributive Justice', both reprinted in Louis P. Pojman and Owen McLeod, editors, *What Do We Deserve?* (New York: Oxford University Press, 1999). It seems to me that many of the objections about the voluntary condition for deserving something hinge on its being a sufficient condition, not merely a necessary condition.

¹⁸ I follow here Daniels, 'Merit and Meritocracy', pp. 302–16.

society has an interest in utilizing those places in the most productive way possible. How might this be done? By selecting those applicants with the most merit, since by definition they are the ones with the optimal combination of ability and effort and will therefore make the most productive use of the educational opportunity. The common contrast defenders of meritocracy make is to a scheme that admits applicants with less than optimal combinations of ability and effort; this will by necessity yield lower rates of productivity with society's educational resources, and therefore is not in the best interests of society. The insight that a meritocracy values merit because it promotes the best interests of society reinforces that the notion it is a mistake to equate merit assessment with judgements about what people deserve. As Joel Feinberg has pointed out, "to say 'S deserves X because giving it to him would be in the public interest' is simply to misuse the word *deserves*."¹⁹

If I am right that the underlying forward-looking rationale for a meritocratic admissions scheme is to maximize the educational resources of society, then this has devastating implications for the radical critique of merit as a basis for civil rights complaints against the use of standardized test results in institutions of higher education. That line of criticism turned on the assumption – expressed in step 4 – that a meritocracy is amenable to perspectives on merit that have their origins in minority groups in the society. In what is, in my view, the most careful presentation of the radical critique of merit including an application to law school admissions, Daria Roithmayr concludes her argument with the following prescription:

Thus, we are left with the task of reconstructing new meanings for merit by having difficult political reservations about what constitutes social value in the legal profession, whether exams accurately predict the ability of a practicing lawyer, whether case law instruction or practical clinical instruction is more appropriate for certain kinds of law, and finally, whether we want our law schools to become resegregated under an admissions process that looks only at the number of a person's LSAT score and GPA, rather than at the content of her character.²⁰

But the underlying assumption here about merit has to be mistaken. Merit in a meritocracy is a function of whatever maximizes the use of

¹⁹ Joel Feinberg, 'Justice and Personal Desert', reprinted in Louis P. Pojman and Owen McLeod, editors, *What Do We Deserve?* (New York: Oxford University Press, 1999), p. 81.

²⁰ Roithmayr, 'Deconstructing the Distinction between Bias and Merit', p. 1507.

society's educational resources. This account leaves no room for majority and minority perspectives. What is valued in a meritocracy – merit – necessarily has a universalist character in the sense that it involves a social calculus that transcends majority/minority groupings in society.²¹ A minority perspective would therefore only make sense if merit is a function of whatever maximizes the minority grouping's use of educational resources (which would be a non-starter for proponents of meritocratic admissions scheme designed for society as whole).

This argument is reinforced by the noticeable lack of any substantial formulation of a 'minority' perspective on merit that differs in any real way from the prevalent perspective. I don't mean to deny that the educational resources of society can be used more productively by including more members of minority groups. This claim is often used, quite rightly, to justify admitting more African American or Latino students into medical or law school. Latino physicians may be more willing to practice in poor predominantly Latino neighbourhoods and therefore society may be better off enrolling a Latino student than a white student with higher test scores.²² But this claim does not turn on applying some different standard of merit when admitting the Latino student, nor is it being claimed that the Latino student is more deserving; it merely shows the complexity of calculating what is in the best interests of society.²³

What basis other than the radical critique of merit might there be for a civil rights complaint against the uses of standardized test scores in institutions of higher education? Recall now that in Chapter 2 I was careful to distinguish between a meritocracy and equality of opportunity. I argued there that the function of a theory of equality of opportunity such as the three-dimensional model of equal opportunities as a regulative ideal is to act as an independent moral critic of competitive processes including presumably meritocratic schemes for determining admission into selective programs and professional schools at institutions of higher education. The foregoing analysis showing that a meritocracy is designed to maximize society's educational resources or serve in society's best interests clarifies the role for equal opportunities as a regulative ideal.

²¹ The universality of merit is claimed by, for instance, Nathan Glazer, *The Limits of Social Policy* (Cambridge, MA: Harvard University Press, 1989), pp. 94–95.

²² Komaromy et al., 'The Role of Black and Hispanic Physicians in Providing Health Care for Underserved Populations,' *The New England Journal of Medicine*, Vol. 332, no. 20 (May 16 1996), p. 1305.

²³ This is discussed by Ronald Dworkin, *A Matter of Principle* (Cambridge, MA: Harvard University Press, 1985), p. 299.

A meritocratic admissions scheme is insensitive to the particular distribution or pattern of university places among members of society. To be sensitive to the particular distribution of university places requires viewing those admitted under such a scheme as individuals rather than merely as receptacles of merit. When the sole goal is assumed to be the maximization of merit, however, there is no room for this. As Amartya Sen and Bernard Williams have observed, in a parallel point about utilitarianism, "Persons do not count as individuals in this any more than individual petrol tanks do in the analysis of the national consumption of petroleum."²⁴ The role of equal opportunities as a regulative ideal is precisely to introduce, for the sake of pursuing equality, sensitivity to the particular distribution of places into a competitive admissions scheme based on merit. But this does not require displacing the meritocratic admission scheme and replacing it with some sort of alternative admission scheme; it requires only placing constraints and regulations on the competition for meritocratic admission. In other words, the proposal is not to abolish using standardized test scores in competitive admission decisions but merely to identify limits and constraints on their uses based on this three-dimensional model of equal opportunities.

The three-dimensional model of equal opportunities as a regulative ideal combines a concern for three dimensions of fairness in a competition – procedural, background, and stakes. As Iris Marion Young stated in the passage quoted at the beginning of Section 4.3, however, the reliance on standardized test scores seems consistent with the ordinary standards of procedural fairness that are applicable to admissions into a competitive university or college program. If there are concerns about the equal opportunities of African American applicants, then they must reflect our standards of background and stakes fairness that govern the competition. I shall first discuss briefly the application of stakes fairness to competitions using standardized test scores, and then concentrate on background fairness with more in-depth analysis. My intention is to lay the theoretical groundwork for a theory of civil rights developed in the next section of this chapter.

From the perspective of stakes fairness, given the disproportionate impact of using standardized test results on African American applicants, it is especially important that what is at stake in the competition be limited in scope. This raises challenging questions about how

²⁴ 'Introduction' to A. Sen and B. Williams, editors, *Utilitarianism and Beyond* (Cambridge, UK: Cambridge University Press, 1982), p. 4.

important an undergraduate degree from a highly selective university or a graduate degree or a professional degree is to accessing certain (elite) opportunities in the United States. Are these the only avenues to access these opportunities, or are there alternatives? Stakes fairness demands that given the reliance on standardized tests for admission into these various degree programs, there should exist a range of other avenues to access these opportunities. A model for this has emerged in recent years in the opportunities to provide legal and medical services. In the case of legal services, there are alternative providers of legal services such as para-legals, immigration consultants, and mediators. These providers do not need a law degree to serve the legal needs of their community. The emergence of alternative medical practitioners such as mid-wives and chiropractors, ordinarily with very different training from physicians are perhaps an even more prominent illustration of how the requirements of stakes fairness might be met. Of course, within the business community, there has long existed a healthy scepticism about the exclusive focus on having a particular degree or professional qualification.

I turn now to the more important application of background fairness. In Section 2.4, I defended with some care the proposition that the principle of status equality should provide the basis for assessing background fairness in a competition in the three-dimensional model of equal opportunities as a regulative ideal. Recall that status equality identifies a starting position – the same moral status for each and no higher moral standing possible – in a competition that all individuals should enjoy. Although I have distinguished moral and social status and insisted that the currency of background fairness be moral status, I also noted that the standard indexes of social status – inequalities in wealth and income power, and privilege – provide evidence of when status equality is compromised. Why might the use of standardized test scores in admission decisions by universities and colleges be seen as a threat to the status equality of African Americans?

Since Chief Justice Warren's famous opinion against racially segregated public schools in *Brown v. Board of Education*, it has become widely recognized that access to educational institutions is of special importance in the determination of the social status of African Americans.²⁵ For this reason alone, it might be held that reliance on

²⁵ 'To separate [children] from others of similar age and qualifications solely because of their race generates a feeling of inferiority as to their status in the community

standardized tests by institutions of higher education amounts to inferior social status since, given the 'black-white' score gap, the effect is to make institutions of higher education less accessible to African Americans. But I doubt that this reasoning on its own will persuade very many who are sympathetic to using standardized tests in higher education decisions that these uses raise questions about equal opportunity. It seems necessary to provide a more subtle two-pronged argument about the relationship between inferior social status and status equality. Debra Satz has perceptively stressed, 'Relationships of unequal status are characterized by lack of reciprocity, hierarchy and lack of accountability.'²⁶ All three are evident in the present context. The important point, as I noted in general terms at the end of the last chapter, is that status equality is especially fragile for vulnerable minorities in competitions where the social construction of advantages and disadvantages reflects the values and interests of the majority.

The first prong of the argument draws attention to the institutional choice to use standardized test scores as a proxy for merit in a competition for university and college places. This sort of social choice reflects a decision about what should count as an advantage – high score results – and a disadvantage – low score results – in an important competitive realm of society. But when the reliance on standardized test scores in university and college admissions became widespread about thirty-five years ago, there was already significant awareness of the black-white gap in scores. It seems pertinent to ask what kind of weight the existence of this gap was given in deliberations around relying on standardized test scores. There may be some grounds for thinking that some of the early proponents of using standardized test scores in admissions decisions embraced this choice precisely because of the black-white test score gap.²⁷ But even if the decision were not invidious, in hindsight it seems to me nearly impossible to draw any inference other than that blacks at the time were not recognized as having the moral standing that would have made this social choice difficult or very controversial if

that may affect their hearts and minds in a way unlikely ever to be undone.' *Brown v. Board of Education of Topeka* 347 U.S. 490 (1954) at 494. Emphasis added.

²⁶ Debra Satz, 'Status Inequalities and Models of Market Socialism' in Erik Olin Wright, editor, *Equal Shares* (New York: Verso, 1996), p. 72.

²⁷ This is suggested, in the case I discuss in some depth later, by some of the plaintiffs' arguments regarding the Mississippi college system. See also the discussion in Rothmayr, 'Deconstructing the Distinction between Bias and Merit,' pp. 1474–87.

their moral status would have been perceived to be equal to that of white Americans. And to continue to act on a social choice made in that context is to reaffirm that view of the moral status of African Americans. No doubt, many people believed at the time that the black-white test score gap would eventually narrow, as indeed it has.²⁸ Yet this does not excuse or hide the fact that if a similar type of social choice by the majority were being made where there were well-known disadvantageous effects on a minority that enjoyed genuine status equality, it seems hard to imagine that choice being made at all, or at least without severe limitations being placed on it. This is further complicated by the undeniable (well-known at the time) historical contributions the state made to the hindrance of educational opportunities for blacks, which have often been thought to be a contributing factor to the black-white test score gap.²⁹

What I am suggesting is that the very fact that standardized test scores gained the currency they have despite the black-white score gap is an indicator that African Americans were not regarded as having equal moral standing. (The demand that all enjoy status equality is I think a less demanding requirement for a collective decision than the requirement that they actually participate in the initial development of standards of merit applied in universities and colleges.³⁰) This point is reinforced by noting the contrast to the response to score gaps between men and women on standardized tests. The specific example I have in mind is with regard to the scores of the Preliminary Scholastic Assessment Test (PSAT), which had long been characterized by a score gap between males and females. In 1995, among high school juniors, boys scored on average 48.8 verbal and 50.8 math compared with 48.6 verbal and 47.4 math for girls. Rather than defending the validity of the test scores, the CEB, which sponsors the test, responded dramatically by

²⁸ William G. Bowen and Derek Bok in *The Shape of the River: Long-Term Consequences of Considering Race in College and University Admissions* (Princeton: Princeton University Press, 1998) point out, for instance, that they found that in admission to selective universities and colleges, the gap between successful black and white applicants in combined SAT scores narrowed from 233 points in 1976 to 165 points in 1989 (p. 30).

²⁹ Commenting on the difficulty of knowing whether the Fourteenth Amendment in 1868 was intended to be applied to public education, Chief Justice Warren in *Brown v. Board of Education* says, "Education of Negroes was almost non-existent, and practically all of the race were illiterate. In fact, any education of Negroes was forbidden by law in some states." *Brown v. Board of Education of Topeka* 347 U.S. 490 at 494.

³⁰ The latter requirement is defended by Duncan Kennedy, 'A Cultural Pluralist Case for Affirmative Action in Legal Academia,' *Duke Law Journal* (1990), p. 705.

changing the design of the test. In 1997, the CEB announced that it was adding a writing skills component to the PSAT, anticipating that girls would perform better than boys on the new writing skills examination and thus reduce the performance gap between men and women.³¹ This type of response is an indicator that within educational institutions, men and women are perceived to have status equality – the same moral status for men and women and no higher moral standing possible – and that choices of mechanisms for distributing competitive advantages and disadvantages are made in the shadow of that perception with an eye to reciprocity. (I suggest in Chapters 8 and 9 that the same cannot be said about the status of women in the labour market or in legal institutions regulating the family.) Conversely, it is precisely because there is no parallel dramatic response to the black-white score gap – only investigations into its accuracy and causes with a view to addressing those causes – that I suggest no similar perception exists.

The second prong of the argument with regard to background fairness concerns how precisely reliance on standardized test scores denies status equality to individual African Americans. Despite the black-white score gap, it might be said that the use of standardized test scores does not function as an exclusionary barrier against individual African Americans because the barriers it resurrects are not against African Americans *per se* but rather those with low test scores, whatever their racial identity. In other words, the reliance on standardized test results by higher education does not compromise the initial standing of an African American applicant because it does not exclude the applicant from the process. There is an interesting parallel here to the use of racial profiling by the police, discussed in Section 2.4. At issue in that case is the idea that a person's race can function as a proxy for an increased statistical likelihood of criminal behaviour. Recall that the principal justification for the use of racial proxies is more effective crime fighting by the police. Defenders of racial profiling commonly highlight the proposition that innocent persons do not suffer greatly because of it; individuals from minority groups might be delayed more by police practicing racial

³¹ Sonini Sengupta, 'Same Subjects, More Verbs in New P.S.A.T.,' *The New York Times* Sunday, October 19, 1997, p. 16. The article states, "The College Board, which designed the test, added a writing skills examination this year in an effort to raise the test scores of girls." The fact that this goal is represented as completely unproblematic is indicative of the contrast I am drawing. I cannot imagine changing the test to "raise the test scores of African Americans" being regarded as similarly unproblematic.

profiling than whites, but assuming the individuals are indeed innocent, racial profiling does not amount to excluding them from important or valuable opportunities. Proponents of the anti-discrimination principle query whether these discriminatory costs on minorities can be justified. In contrast, the principle of status equality holds simply that racial profiling by police should be prohibited because it amounts to ascribing to individuals different standings in criminal investigations based on their race.

Something similar can be said about the use of standardized tests. Much of the focus is on the *exclusionary* effects of relying heavily on test scores. Yet this often leads us to overlook the *costly* burdens on African Americans of relying heavily on standardized test scores to make admissions decisions in institutions of higher education. The basic difference analytically between exclusionary effects and costly burdens is that the latter make it more difficult for African Americans to be admitted into universities and colleges with selective admissions, not impossible. Why think that there are any costs of relying on standardized tests for qualified African Americans? The most interesting and provocative evidence revolves around indicators of the phenomenon of adaptation among African Americans to the reliance on standardized tests. The phenomenon of adaptation arises when individuals adjust their desires or behaviour to social expectations.³² In other words, given the expectation that African Americans will score lower on standardized tests, there is some evidence that individual African Americans adapt their behaviour to meet this expectation. Consider two examples of this adaptation. Claude Steele, for example, has found that African Americans do less well on standardized tests when they are aware of expectations based on the black-white score gap and their results are viewed within the context of that expectation.³³ The conservative economist Gary Becker has found that African Americans, along with certain other disadvantaged minorities, make bad decisions about investing in their own

human capital because of the expectations of others about what they are capable of achieving. For Becker, "the *beliefs* of employers, teachers, and other influential groups that minority members are less productive *can* be self-fulfilling," causing the members of the disadvantaged group to "underinvest in education, training, and work skills" – and this underinvestment does subsequently make them less productive.³⁴ Both of these examples illustrate how adaptation to expectations around standardized test results imposes a costly burden on African Americans and how that cost is borne uniquely by them (and individual members of other similarly situated racial or ethnic minorities). This cost affects the initial starting position of African Americans and would seem to violate the demand of background fairness that in the admissions procedures, all applicants should enjoy status equality.

The characterization of a costly burden just given relies on the test of asking what performance would be like without perceived unequal social and moral status. That test is a counter-factual one that might seem quite speculative. There is, however, some independent evidence to support the conclusions drawn from it. At the University of California, Berkeley, the number of first-year African American students increased by 32 percent from 1981 to 1990.³⁵ The standard view (expressed in the debate around affirmative action) is that Berkeley increased its freshman African American enrollment by lowering its admissions standard, thereby admitting African American applicants with less merit than had previously been the case. And it follows that one would expect lower graduation rates for African Americans over this period. However, this isn't what happened. Among the entering class of 1981, 31 percent graduated within six years. Among the entering class of 1990, 62 percent graduated by 1996. In other words, rather than seeing a decline in graduation rates, the rates doubled for African Americans at Berkeley over this period. The most plausible explanation is the earlier low rates of graduation reflected 'adaptive' performances, which were adjusted as

³² This characterization of adaptation draws on the careful review of the recent literature by Martha Nussbaum, *Women and Human Development: The Capabilities Approach* (Cambridge UK: Cambridge University Press, 2000), ch. 2.

³³ In an influential statement of this phenomenon, Claude Steele says of a black student, "The devalued state of his race devalues him and his work in the classroom. Unable to entrust his sense of himself to this place, he resists measuring himself against its values and goals." See 'Race and the Schooling of Black Americans', *Atlantic Monthly* (April 1992), p. 74. See also 'A Threat in the Air: How Stereotypes Shape Intellectual Identity and Performance', *American Psychologist*, Vol. 52 (1997), pp. 613–29.

³⁴ Gary Becker, 'The Economic Way of Looking at Behavior' (1992 Nobel Address), quoted in Nussbaum, *Women and Human Development*, pp. 126–27. See also Martha Nussbaum, *Sex and Social Justice* (New York: Oxford University Press, 1999), pp. 151–53.

³⁵ The numbers cited in the rest of this paragraph all come from a letter to the editor of *The New York Times*, April 12, 1998, from Genaro Padilla, vice chancellor of undergraduate affairs at Berkeley. Note that in 1998, with the end of affirmative action in the University of California, African American enrollment declined from 6.8 percent in 1997 to 2.4 percent, which was roughly the level it had been in the early 1960s. See Bowen and Bok, *The Shape of the River*, pp. 35–39.

African American students perceived themselves as having greater status equality as their numbers increased significantly as a portion of the total Berkeley student body.³⁶

So far, I have argued that concerns about background unfairness can be raised about the uses of standardized test scores in universities and colleges because of the infringement on the principle of status equality. I have yet to explain how these concerns might warrant the regulation of a meritocratic admissions scheme. For some might say that because it infringes on status equality, we need an alternative admissions scheme that better promotes the value of status equality.

Here, the very idea of status or standing performs some valuable work. Recall that it reflects a concern with the initial starting positions of persons, not the goal or purpose of a competition. Recently, some moral philosophers, in particular Frances Kamm and Thomas Nagel, have argued that status is a unique moral notion because it identifies each person as inviolable in a certain way and therefore grounds constraints on the actions and decisions of others. Nagel explains that,

moral status . . . means that one *may not* be violated in certain ways – such treatment is inadmissible, and if it occurs, the person has been wronged. So someone's having or lacking this status is not equivalent to anything's happening or not happening to him. If he has it, he does not lose it when his rights are violated – rather, such treatment counts as a violation of his rights precisely because he has it.³⁷

It follows that moral status is not something that can be aggregated amongst persons. Nor can the status of one person be compromised or enhanced by compromising or enhancing the status of someone else. Status is a value that does not allow for such trade-offs. As Kamm puts it, "Respecting it provides the background against which we may then seek the welfare of persons or pursue other values. It is not our duty to bring about the existence of such valuable persons, but only to respect the constraints that express the presence of value."³⁸ As I emphasized in Section 2.4, status equality is a regulative ideal about the initial

³⁶ An alternative, cynical, explanation might be that Berkeley relaxed its graduation requirements. In fact, though, this is not supported by the evidence, which shows that while the overall six-year graduation rate increased from 68 percent to 80 percent, it certainly did not parallel the doubling of rates for African Americans.

³⁷ Thomas Nagel, 'Personal Rights and Public Space,' *Philosophy & Public Affairs*, Vol. 24 (Spring 1995), pp. 89–90.

³⁸ Frances Kamm, *Mortality, Morality, Volume II: Rights, Duties, and Status* (Oxford: Oxford University Press, 1996), pp. 272–73.

standing of all individuals in a competition; its function is to set constraints on the competition, not provide the point and purpose for the competition.

I trust that the relevance of this philosophical analysis of moral status is clear. Earlier, I stressed that a meritocratic admissions scheme is insensitive to the particular distribution or pattern of university places among members of society and that the role of equal opportunities as a regulative ideal should be seen as a corrective measure for that failing. Status equality sets constraints on any meritocracy not by identifying another value to be maximized but by positing certain inviolabilities of persons in the pursuit of aggregating merit for the sake of making the most productive use of society's resources. An important basis for civil rights complaints in the particular case of universities and colleges relying on standardized test scores to make admissions decisions for selective programs and professional schools is therefore that they have transgressed certain inviolabilities grounded in the status equality of African Americans. Like a court that fails to grant the presumption of innocence to the accused, some uses of standardized test scores in decision-making procedures by institutions of higher education amount to the denial of equal standing for some racial minorities in those procedures.

4.4 THE IMPLICATIONS FOR CIVIL RIGHTS

Let us begin by drawing a useful distinction between a statute and legislation.³⁹ A statute is the canonical set of sentences enacted by a legislature. Legislation refers to the set of legal rights, duties, responsibilities, powers, permissions, or prohibitions the statute creates or confirms. The examples I used at the beginning of this chapter, including the 1964 Civil Rights Act, the 1965 Voting Rights Act, the 1977 Canadian Human Rights Code, and the 1976 Race Relations, are all statutes. The legislation – the particular set of civil rights that these statutes bring into existence or confirm – is a distinct matter. While the relationship between a statute and legislation is widely contested among legal theorists, it is safe to assume in the case of civil rights statutes that it is necessary at a minimum to have a general theory about what purpose civil rights serve. Following Ronald Dworkin, I shall assume that the distinctive feature of rights is to protect minorities from the excesses of

³⁹ Ronald Dworkin, 'How to Read the Civil Rights Act' in *A Matter of Principle*, p. 319.

social choices made with a view of what is in the best interests of the majority or the common good. As Dworkin has eloquently expressed it, "[R]ights are political trumps held by individuals. Individuals have rights when, for some reason, a collective goal is... not a sufficient justification for imposing some loss or injury upon them."⁴⁰ Rights are an issue in the case of relying on standardized test scores for admissions into colleges and universities because they reflect a social choice based on a collective goal – maximizing the efficient use of scarce educational resources – that imposes an injury upon African Americans. Rights can be of different types. Some types are abstract and moral. Others are specific to particular institutions. Civil rights are legal rights in the sense that they are "an institutional right to the decision of a court in its adjudicative function."⁴¹

Any general theory of civil rights should not only prescribe civil rights legislation, but it should also be able to explain the phenomenology of existing adjudication that surrounds civil rights legislation. I have just suggested that the transgression of certain inviolabilities grounded in the status equality of African Americans provides a basis for civil rights complaints in the particular case of universities and colleges relying on standardized test scores to make admissions decisions for selective programmes and professional schools. The general theory of civil rights underlying this suggestion is that civil rights demarcate certain inviolabilities grounded in the equal moral status of persons.

This theory has considerable explanatory power with regard to civil rights adjudication involving the uses of standardized test scores by institutions of higher education. I noted that the recent emergence of standardized tests as a major civil rights issue is linked to the retrenchment of affirmative action. Universities with affirmative action programs may be tempted to meet a civil rights complaint by appealing to some sort of 'bottom-line' defense showing that it admits more, say African Americans, despite its reliance on standardized test scores – the point being that their admissions decision-making procedure involves a number of components including reliance on standardized test scores and preferential treatment for certain disadvantaged groups and that the procedure should be assessed as a whole. It is the case, however, that the United States Supreme Court has rejected this 'bottom-line' defense,

⁴⁰ Ronald Dworkin, *Taking Rights Seriously*, New Impression (Cambridge, MA: Harvard University Press, 1978), p. xi.

⁴¹ Dworkin, *Taking Rights Seriously*, p. xii.

and the courts do not apply a lower standard of liability to universities with affirmative action programmes that mitigated for the impact of reliance on standardized test scores on minorities than the standard they would apply to universities without affirmative action programmes.⁴² In other words, civil rights complaints against the use of standardized test scores by an institution of higher education do not hinge on the absence or presence of affirmative action, even if, as Edley says in the passage quoted from note 12, an important function of affirmative action is "to correct the problems we've inflicted on ourselves with our testing standards."

This example clearly illustrates that infringements of civil rights cannot be justified by an appeal to some other more basic value or good.⁴³ Yet this characteristic of civil rights is inexplicable under the most familiar theory of civil rights in the United States, which holds that civil rights are designed to promote racial equality. This theory has been embraced by Dworkin, among others, who says, for instance, that the 1964 Civil Rights Act "represents a decision by Congress to advance racial equality in education, employment, and other areas, and to end an economic era in which those blacks not wholly unemployed are largely restricted to lower paying and less interesting jobs."⁴⁴ The problem the example in the previous paragraph poses is quite simple. If civil rights are intended to promote racial equality, and *ipso facto* an affirmative action program promotes racial equality, it seems entirely consistent to allow for the justified infringement of civil rights when an affirmative action programme offsets the losses in terms of the promotion of racial equality. The bottom line is said to be racial equality, and logically civil rights violations can be justified when that bottom-line is promoted. The problem is, of course, that the American courts reject this bottom-line defence when it comes to civil rights. A virtue of the theory that civil rights demarcate certain inviolabilities grounded in the status equality of persons is the ease with which it can explain what is wrong with a bottom-line defence. Any bottom-line defence, including one that justifies civil rights

⁴² As the Ninth Circuit Court pointed out in 1996, "The Supreme Court rejected the so-called 'bottom-line' defence [against disparate impact claims]. In doing so, the Court emphasized that Title VII prohibits 'procedures or testing mechanisms that operate as built-in headwinds for minority groups.'" See *The Association of Mexican-American Educators (AMAE) v. The State of California*, 937 F.Supp. 1397 (9th Circuit, 1996) at 1408, quoting *Connecticut v. Teal*, 457 U.S. 440 (1992).

⁴³ I thank Christopher Edley for drawing my attention to the importance of this point.

⁴⁴ Dworkin, 'How to Read the Civil Rights Act,' p. 319.

infringements by appealing to the existence of an affirmative action programme, assumes that what matters, or is of value, can be aggregated and maximized. Status is not a value of that sort. One person's status cannot, I noted earlier, be traded off or compromised for the sake of someone else's status. Therefore, if status is the value that civil rights protect, neither can civil rights.

The strength of the theory of civil rights I am advancing, by comparison with the more familiar theory that civil rights are designed to promote racial equality, is also evident when we examine the idea of disproportionate or disparate impact. This idea has proven to be one of the most influential insights of the litigation over civil rights in the United States that has been adopted in other nations. The now classic illustration of such a practice comes from the case of *Griggs v. Duke Power Co.*, decided by the Supreme Court of the United States in 1971.⁴⁵ In *Griggs*, black plaintiffs challenged the adoption by Duke Power of the requirement that all successful applicants attain at least a certain score on a standardized aptitude test and have a high school diploma for entry into jobs that had previously been held exclusively by whites. Recognizing the difficulty of establishing that the adoption of these requirements was intended to discriminate against black applicants, the Supreme Court held that the requirements were discriminatory in their effect, and ruled in favour of the request of the plaintiffs for the removal of these requirements for employment. The basic function of the idea of disproportionate impact in civil rights cases such as this is "to challenge those specific, facially-neutral practices that result in discriminatory impact and that by their nature make intentional discrimination difficult or impossible to prove."⁴⁶

The legal standard of 'disproportionate impact' remains controversial in the United States, despite its explicit recognition in the 1991 Civil Rights Act. It is commonly defended as the logical unfolding of the view that racial discrimination involves the use of race as a criterion of selection for opportunities or scarce resources. Historical examples of deliberate racial discrimination by governments abound. These examples typically involve the use of racial criteria in statutes such as the well-known case of the Virginia statute forbidding inter-racial marriage.⁴⁷

But in some cases, criteria appear not to be race-based but are in fact the functional equivalent of race-based criteria. The most familiar examples are voting rights provisions in a number of Southern states at the turn of the century that applied literacy tests to all prospective voters except those who had the right to vote prior to the end of the Civil War and their descendants. These cases have also proved not to be especially difficult to classify as racial discrimination. Disproportionate impact cases are distinct from both of these types of cases because they involve a criterion that functions as a race-based criterion but also functions in other legitimate ways too. The standardized test score and high school diploma requirements at issue in *Griggs* have this character; those hiring criteria did not function solely as a race-based criteria. What then makes this an instance of racial discrimination? In *Griggs*, it is surely significant that the hiring practices before the adoption of these new hiring requirements were discriminatory. The new facially neutral practice at Duke Power had a similar effect to the overtly discriminatory past hiring practice, and in this respect compounded the disadvantage experienced by blacks. Thus, Chief Justice Warren Burger reasoned, "practices, procedures, or tests neutral on their face, and even neutral in . . . intent cannot be maintained if they operate to freeze the status quo of prior discriminatory practices."⁴⁸ This makes the context very important.⁴⁹ In *Griggs*, the context was one where the facially neutral criteria – the IQ test and high school diploma requirements – functioned as a barrier to the racial integration of the workplace. But the Supreme Court was careful not to object to all uses of standardized tests in the workplace but only the arbitrary uses. "If an employment practice which operates to exclude [racial minorities] cannot be shown to be related to job performance," stipulated Chief Justice Burger, "the practice is prohibited."⁵⁰ This raises the prospect of the permissible use of standardized test scores if they are job related and required for sound business reasons. The important point is that civil rights have been assumed to regulate the use of standardized tests, not prohibit them completely, even when they have an adverse impact on a minority group in society.

The point I am emphasizing has unfortunately sometimes been obscured by the debate over the precise legal standard to be applied for

⁴⁵ *Griggs v. Duke Power Co.*, 401 U.S. 424 (1971).

⁴⁶ *Latinos Unidos De Chelsea En Accion v. Secretary of Housing and Urban Development*, 799 F.2d 774 at 786 (1st Circuit, 1986).

⁴⁷ *Loving v. Virginia*, 388 U.S. 1 (1967).

⁴⁸ *Griggs v. Duke Power Co.*, 401 U.S. 424 (1971).

⁴⁹ See, e.g., Michael Perry, 'The Disproportionate Impact Theory of Racial Discrimination', *University of Pennsylvania Law Review*, Vol. 125 (1977), pp. 557–66.

⁵⁰ *Griggs v. Duke Power Co.*, 401 U.S. 424 (1971) at 431.

assessing whether a particular practice is job-related and reflects sound business reasons. Following *Griggs*, the standard was assumed to be that if the plaintiff demonstrated that certain employment practices had effects or impact that were disproportionate or caused disparity on racial lines, the burden of proof was on the employer to show the business necessity of the practices. In 1989, in *Wards Cove Packing Co. v. Atonio*, however, the Supreme Court rejected that assumption, requiring of plaintiffs that they "demonstrate that the disparity they complain of is the result of one or more of the employment practices that they are attacking . . . [and] that each challenged practice has a significantly disparate impact on employment practices for whites and nonwhites."⁵¹ This shifted the burden of proof from the defendants to the plaintiffs. The Civil Rights Act of 1991 shifted the burden of proof back to the defendants. While I appreciate the technical legal implications of the issue, it must be recognized as a derivative one by comparison with the basic feature of the adjudication, which allows for uses of test scores when they are valid, regardless of their impact.

This feature has particular saliency with regard to the uses of standardized test results by institutions of higher education for it is reasonable to assume that the courts will be much more willing to recognize the validity of those results in educational contexts than in employment contexts. In the latter, unlike the former, there is widespread scepticism about any sort of pencil and paper exercise being used to gauge relevant skills. Suppose that complainants were able to show successfully that a reliance on a particular standardized test score by a particular college or university has a significant disparity in impact on certain racial minorities. Nonetheless, it is likely that a court could be persuaded that the use serves a genuine educational purpose, provided there is some minimal relationship between (1) what the test tests for, and (2) that purpose.

A clear illustration of this is provided in the Ninth Circuit Court's 1996 decision in *AMAE v. The State of California*.⁵² At issue in this case was the requirement of the California Commission on Teacher Credentialing that for teacher certification, all individuals have to pass a test in reading, writing, and mathematics known as the California Basic Educational Skills Test (CBEST). The plaintiffs complained that this test requirement had a disparate impact on a class of prospective teachers

⁵¹ *Ward's Cove Packing Company v. Atonio*, 490 U.S. 642 (1989).

⁵² *The Association of Mexican-American Educators (AMAE) v. The State of California*, 937 F.Supp. 1397 (9th Circuit, 1996).

from minority groups. An important issue raised in the case was the type of validity that the use of the CBEST scores should be subject to. Following the Uniform Guidelines, the court considered three distinct types of validity that might be applied: "[Content validity] refers to the extent to which the items on the CBEST are representative of a defined . . . domain of content; in this case, the basic reading, writing, and mathematics skills relevant to the job of teaching . . . [Criterion-related validity] refers to the extent to which an individual's score on the CBEST is predictive of some other criterion, usually job performance . . . [Construct validity] refers to the extent to which the CBEST is a measure of some hypothetical or psychological construct."⁵³ The defendants only provided content validity for CBEST. The plaintiffs argued that they should also show criterion-related validity and construct validity. The Court rejected the arguments of the plaintiffs with regard to validity principally on the grounds that neither criterion-related validity nor construct validity conformed to the recommended uses of CBEST scores. The Court explained, "The CBEST . . . does not purport, and was not designed, to predict a teacher candidate's performance on the job . . . [I]t does not purport to measure a candidate's general mental aptitude, intelligence, or any other construct. Rather, it is designed to measure specific, well-defined skills in reading, mathematics, and writing."⁵⁴ Since the CBEST was validated for measuring these reading, writing, and mathematics skills, and they have an educational purpose, the Court dismissed the complaint.

From the perspective of someone who holds the theory that civil rights are designed to promote racial equality, trying to make sense of opinions such as this is a real challenge. This is because the goal of promoting racial equality does not seem to be at the centre of the Court's reasoning about content validity. If racial equality were the principle at issue, it seems hard to imagine not also considering criterion-related validity since the job performance of certified teachers seems absolutely relevant to the promotion of racial equality, whereas content-validity seems more peripheral to that concern. The goal of racial equality is such a broad, encompassing one that it seems difficult to explain the careful distinctions between uses of standardized test scores that run through the civil rights adjudication on this issue. A more plausible account of the decision in *AMAE v. California* is that the court did not see the CBEST as a threat to the status equality of minority candidates,

⁵³ *AMAE v. The State of California*, 937 F.Supp. 1397 at 1411.

⁵⁴ *AMAE v. The State of California*, 937 F.Supp. 1397 at 1411-12.

provided it was validated for content. It is on this basis that the court was able to distinguish between valid and invalid uses of CBEST.

The general point I am making is that even in disparate impact cases, the role of civil rights is not to introduce some independent value or goal to be promoted by the courts but rather to regulate processes and practices, setting limits and constraints on, for example, the uses of standardized test results. The problem with the popular view that civil rights exist to promote racial equality is precisely that it seems unable to explain this regulatory role since it posits an independent goal – racial equality – that civil rights adjudication would seem intended to promote. By contrast, status equality is indeed a value but not one that is a goal to be promoted. Instead, it provides principles of inviolability that set boundaries on the promotion or pursuit of other goals such as those that characterize a meritocracy. It is thus a regulatory value, and for this reason can so readily explain the regulatory role assumed by civil rights.

Given the black-white test gap, someone may ask quite reasonably why *any* use of standardized test scores is not a violation of status equality. As I have already indicated, this fails to appreciate the extent to which the very idea of disproportionate or disparate impact is inconsistent with the categorical rejection of a practice. The contrast used earlier to illustrate this is between a provision denying voting rights to those whose grandfathers were slaves and the sort of employment practices at stake in *Griggs*. The unfairness of the former is transparent without any appeal to disproportionate impact. The facially neutral character of standardized tests results suggests that in some contexts, they may not be an issue. It is interesting to note that even some of the strongest critics of IQ such as Stephen Jay Gould allow that in some circumstances, IQ test results can have some value.⁵⁵ The more important question that can be raised is whether status equality would provide grounds for prohibiting absolutely some uses of standardized test scores. What uses, if any, of standardized test scores might be prohibited by civil rights designed to protect status equality in the admissions policies of institutions of higher education?

The most widespread use of test scores that would be prohibited is the use of a certain standardized test score as a cut-off point for admissions. Although the use of cut-off scores is quite prevalent, it is not well known that this practice also runs contrary to the recommendations

⁵⁵ Stephen Jay Gould, *The Mismeasure of Man*, revised and expanded (New York: Norton, 1996), p. 185.

of most testing agencies, including the College Board and the Education Testing Service.⁵⁶ The objection to using test scores as a cut-off is that standardized test results then constitute an exclusionary barrier for African Americans to higher education. It is not simply that cut-offs make it more difficult for African Americans to be admitted, but rather that they exclude many African Americans from even competing for admission places.⁵⁷ Consider, for example, a cut-off score of 160 on the LSAT for admission into a law school. In 1992–93, 25.7 percent of white applicants scored at least 160 on the LSAT compared with 12.7 percent of American Indians, 11.5 percent of Latinos, and 2.9 percent of African Americans. Seen in the context of a social choice about what constitutes advantage and disadvantage, the disadvantages of being a minority for whom the choice to use standardized test scores already has disparate impact are magnified when those scores are used to define an absolute cut-off to entry. Thus, they pose a much greater threat to the status equality of African Americans. A similar point can be made about exclusive reliance on standardized test scores for admission into institutions of higher education.

The importance of protecting status equality by prohibiting the use of cut-off scores is evident if we examination the extensive civil rights litigation surrounding the state universities in Mississippi. These cases had a long history dating back to 1975, when a group of private plaintiffs initiated a class action suit on behalf of all black citizens in the state of Mississippi that complained that Mississippi was maintaining a racially dual university system. The eight public universities managed and controlled by the Board of Trustees of State Institutions of Higher Learning were said to have remained segregated, with five historically

⁵⁶ See Jim Vaseleck, 'Stop Working and Put Down Your Pencils: The Use and Misuse of Standardized Admission Tests,' 20 *Journal of College and University Law* (1994), p. 406. Organizations that sponsor standardized tests have, however, been criticized for their lack of genuine concern about valid uses of tests and related phenomena such as cheating. These organizations are sometimes said to be more concerned with covering up such problems because of the belief that it would be bad for business. See, e.g., Eric Douglas and Jon Nordheimer, 'Giant of Exam Business Keeps Quiet on Cheating,' *The New York Times* (Sunday, September 28, 1997), p. 1.

⁵⁷ Implicit here is a distinction between using test score cut-offs in competitive processes such as admissions and using cut-offs in a certification process where there is not a limited number of people certified. This is extremely relevant for explaining my sympathy with the decision in *AAUE v. State of California*. In that case, the cut-off on the CBEST was 50 percent, but the good at stake – teacher certification – was not subject to a competition and not limited in quantity.

white institutions (HWIs) remaining almost exclusively white and three historically black institutions (HBIs) remaining almost exclusively black. The target of the complaint was the 1961 admission policy of the Board of Trustees requiring all applicants to take the American College Test (ACT) and authorizing each university to set a minimum ACT score for admission into undergraduate programs. HWIs by 1963 all required a score of at least 15 on the ACT. The average ACT score at the time for white students was 18 compared with 7 for black students.

In *United States v. Fordice*, the Supreme Court held that these admissions policies were originally adopted for a discriminatory purpose and that their discriminatory effects continued to be felt because the minimum ACT requirements "restrict[ed] the range of choices of entering students as to which institution they may attend in a way that perpetuate[d] segregation."⁵⁸ The objection was to the use of an ACT cut-off in a system where there was not uniformity with regard to that cut-off in admission standards among all the universities in the public system of higher education in Mississippi. The upshot of using an ACT cut-off without this uniformity was that it functioned to stream black citizens to HBIs. The initial reaction of some civil rights activists to this decision was fear that its effect would be the end of historically black colleges in Mississippi.⁵⁹

In the Fall of 1996, the Board of Trustees implemented a new uniform policy of admission requirements for all eight public universities in Mississippi. This policy made regular admission conditional on meeting one of three possible standards – one based solely on GPA, one based on a combination of GPA and an Enhanced ACT score with an absolute cut-off, and one based solely on a cut-off Enhanced ACT score. The policy also allowed for admission via so-called Spring screening and the Summer remedial programme. The effect of this new policy has been the desegregation, to a considerable extent, of the Mississippi university system.

The new admissions policy introduced two distinctive features into that system. The first feature is obviously the uniformity of admission criteria across HWIs and HBIs. The second feature is that for the first

⁵⁸ *Ayers v. Fordice* 111 F.3d 1183 at 1190 (5th Circuit, 1997) at 1193, quoting *United States v. Fordice*.

⁵⁹ Alex M. Johnson, 'Bid Whist, Tonk, and *United States v. Fordice*: Why Integrationism Fails African-Americans Again,' *California Law Review*, Vol. 81 (December 1993), pp. 1401–74.

time since 1961, HWIs allowed for some regular admission that did not require the applicant to meet an ACT cut-off score. The relevant point is that the consequence of the Supreme Court's decision in *United States v. Fordice* is a procedure that recognizes a plurality of standards for regular admission to HWIs rather than sole reliance on ACT cut-offs.

4.5 THE WORRY ABOUT AFFIRMATIVE ACTION

Some readers may worry that the general theory of civil rights I have been defending could be the basis for a powerful objection to affirmative action, understood as a programme or policy that takes group membership or identity into account in order to remedy under-representation of members of certain racial, ethnic, or other minority groups. A familiar objection to affirmative action is that it is unfair because it takes the race or ethnicity of individuals into account, and for some individuals, most notably those in the 'white' majority, this identity counts as a negative factor. Affirmative action is said to violate the civil rights of those individuals because they are in effect being discriminated against on the basis of their race or ethnicity. This objection was at the heart of perhaps the three most controversial cases – *Regents of the University of California v. Bakke*, decided by the U.S. Supreme Court in 1978, *Hopwood v. Texas*, decided by the Fifth Circuit Court in 1996, and *Grutter v. Regents of the University of Michigan*, decided by the Sixth Circuit Court in 2002 and to be heard by the U.S. Supreme Court in 2003 – challenging affirmative action in American universities and colleges.⁶⁰ The general theory of civil rights that says that civil rights are designed to promote racial equality gained wide currency principally as a response to this objection. The reasoning is that since affirmative action promotes racial equality, it is nonsense to ascribe to 'white' individuals civil rights against affirmative action.⁶¹ In contrast, the alternative view I have been defending – that civil rights demarcate certain inviolabilities based on status equality – may appear to support those civil rights complaints against affirmative action. After all, affirmative action seems to promote the interests of admittedly disadvantaged minorities but at the sacrifice of some 'white'

⁶⁰ *Regents of the University of California v. Bakke*, 438 U.S. 265 (1978); *Hopwood v. Texas*, 78 F.3d 932 (5th Circuit, 1996), cert. denied, 116 S.Ct. 2582 (1996); *Grutter v. Lee Bollinger, et al.* (6th Circuit, May 14, 2002).

⁶¹ The best known statement of this view is by Ronald Dworkin: 'Why Bakke has No Case,' reprinted in *A Matter of Principle*, ch. 14.

individuals. Doesn't affirmative action therefore threaten their status equality and violate their civil rights?

This question should be carefully distinguished from the debate around the validity of the 'innocent persons' objection to affirmative action. That objection criticizes affirmative action,

for being unfair to white males who are displaced by the programs even though they have not themselves caused particular harm to blacks or women. The charge is that such programs are always unfair to the individuals (white or male) against whom the preferential treatment is directed, unless those individuals themselves participated in the discrimination against the now-preferred minorities. If they have not personally participated in the particular discrimination in question, then they are considered innocent, and the imposition of an affirmative action quota that disadvantages them is considered an unfair act of discrimination against them simply because they are white or male.⁶²

This "innocent persons" objection has generated some very clever and complex responses among the defenders of affirmative action.⁶³ But I don't think it is necessary to respond to them at all in order to show that affirmative action does not threaten the status equality of those from the 'white' majority.

The argument throughout this chapter has been that the status equality of African Americans is threatened when a social choice is made to use standardized test scores as a proxy for merit in a meritocratic scheme for admitting students into universities and colleges, given the well documented 'black-white' test score gap. In this context, African Americans are a minority group vulnerable to the effect of a social choice reflecting the majority view about what constitutes an advantage and disadvantage in a competitive process. And civil rights have been represented as a regulative device for protecting status equality under threat in this way.

There is no immediate parallel to be drawn to the situation of someone from the 'white' majority who is displaced by an affirmative action programme. That person is not a member of a vulnerable minority group. Moreover, as is often stressed, affirmative action is not motivated by any sort of invidious discrimination against whites or men.

⁶² Ronald Fiscus, *The Constitutional Logic of Affirmative Action* (Durham: Duke University Press, 1992), p. 4.

⁶³ See, especially, Kathleen Sullivan, 'Sins of Discrimination,' *Harvard Law Review*, vol. 100 (1986), pp. 78-98 and Fiscus, *The Constitutional Logic of Affirmative Action*, ch. 1.

Indeed, although this is not always sufficiently appreciated, affirmative action is often characteristically a product of a social choice reflecting the will of the majority. It is not, for instance, a programme imposed by the court as a counter-majoritarian measure. This is true for both Allan Bakke, the white plaintiff in the *Bakke* case, and Cheryl Hopwood, the principal white plaintiff in the *Hopwood* case. In *Bakke*, the subject of the complaint was the affirmative action admissions policy of a state university in California, the University of California at Davis Medical School. In *Hopwood*, the subject of the complaint was the affirmative action programme for admission into a state university in Texas, the University of Texas Law School. In both instances, those affirmative action plans reflected the wishes of the elected legislative assemblies in the state. Indeed, after the Fifth Circuit Court struck down as unconstitutional the University of Texas Law School's affirmative action program in 1996 and the Supreme Court refused to hear an appeal, the Texas Legislative Assembly responded with a new affirmative action policy for state universities – this law guarantees the top 10 percent of the graduating class of every public high school in Texas a place at the public university and campus of their choice – that does not rely on racial classification of applicants to displace from admission some applicants who would otherwise have been admitted. Preliminary evidence suggests that this policy has a similar effect to race-based affirmative action in terms of diversifying the undergraduate student body.⁶⁴ This sort of legislative initiative illustrates vividly that affirmative action policy is generally the product of political decision-making guided by familiar principles of majority rule, in which case it is odd to say that those decisions threaten the status equality of members of the majority.⁶⁵

Another consideration in support of this scepticism is that it is doubtful that affirmative action can even be said to have a significant disparate impact on whites, especially in the admissions process to universities and colleges. It is often assumed that not only does affirmative action have an impact on particular displaced individuals like Allan Bakke and Cheryl Hopwood, but that it also has a significant disproportionate impact on white applicants on the whole. For twenty years from 1978,

⁶⁴ Jodi Wilgoren, 'Texas' Top 10% Law Appears to Preserve College Racial Mix,' *The New York Times*, November 24, 1999, A1, A18.

⁶⁵ An outstanding illustration of the point that anti-discrimination initiatives are the product of familiar majoritarian politics is provided by Paul Burstein, *Discrimination, Jobs, and Politics: The Struggle for Equal Employment Opportunity in the United States Since the New Deal*, New Edition (Chicago: University of Chicago Press, 1998).

there had been almost no statistical evidence to support or refute this assumption. This gap in the research was filled in 1998 with the findings from the database funded by the Mellon Foundation called "College and Beyond" and reported in a book by William Bowen and Derek Bok titled *The Shape of the River*. Bowen, the former president of Princeton, and Bok, the former president of Harvard, draw on the database to present a very sympathetic picture of affirmative action in universities and colleges. The most relevant finding they presented with regard to the present issue was in their examination of admissions into selective universities and colleges – with existing affirmative action programmes, the probability of admission for white applicants was 25 percent; without affirmative action the probability would rise to 26.5 percent.⁶⁶ In other words, contrary to widespread perceptions, the impact of affirmative action on whites as a group in admissions was minimal.

4.6 CONCLUSION

My objective in this chapter has been to show how a general theory of civil rights flows from the model of equal opportunities as a regulative ideal. I have done this by elaborating on the background principle of status equality and showing how it explains some of the major features of civil rights adjudication in the United States better than the more familiar theory that civil rights are designed to promote racial equality. I have also shown why the principle of status equality does not rule out affirmative action programmes. This argument is not in itself an argument for affirmative action. I offer such an argument for race-targeted affirmative action in the next chapter and for sex-targeted affirmative action in Chapter 7 both based on the three-dimensional model of equal opportunities as a regulative ideal.

I have also tried to make sense of the emerging civil rights initiative directed at the use of standardized test scores in American universities and colleges. Rejecting the view that a civil rights perspective rules out any use of standardized test scores, I have made a case for saying that using cut-off test scores in admissions decisions by universities and colleges violates the civil rights of African Americans. For some readers, this may not seem like a very promising or far-reaching conclusion to draw about this emerging civil rights initiative; they may have hoped for much more. But it seems to me very difficult to predict what the

⁶⁶ Bowen and Bok, *The Shape of the River*, p. 36.

implications would be if universities and colleges ceased to use cut-off scores in their admissions decisions. The practice of *de facto* cut-off test scores is very widespread in American institutions of higher education. Ending that practice may well radically change admissions schemes to universities and colleges.

The fact that civil rights are envisioned in a regulatory role overseeing a meritocratic admissions scheme designed to maximize the use of society's educational resources allows also for some rethinking about merit without appealing to the intellectually fuzzy notion of some sort of minority perspective on merit. An extremely important finding of Bowen and Bok, based on the "College and Beyond" database, is that African American graduates of highly selective universities and colleges, even if they were admitted with lower test scores than their white counterparts, have over the past twenty years made immensely valuable and unique contributions to American society.⁶⁷ These findings support the idea questioning the reliance on standardized test scores by universities and colleges without necessarily charging that there is a civil rights issue at stake.

⁶⁷ See, e.g., Bowen and Bok, *The Shape of the River*, p. 284.