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Equal Protection, Economic Legislation, and Racial Discrimination

*William Silverman**

The existence of a permissible purpose cannot sustain an action that has an impermissible effect.[1]

The drive to end racial discrimination now extends beyond blatant racial distinctions to less obvious and less intentional forms of unequal treatment; nonetheless, there still exist laws and governmental programs that are racially neutral on their face but that may have a racially discriminatory impact in practice. Such discrimination can take place when economic and social welfare legislation, lacking a sound economic grounding, attacks symptoms rather than causes and thereby unintentionally compounds the problems facing black people.[2] At the same time, laws that are at the root of unequal treatment seem to go unchallenged. From the point of view of the victim of discrimination, it matters little whether the root of the problem is racists acting with an intent to cause racially discriminatory impact or nonracists acting with no such purpose but causing the same discriminatory result. The black person is denied an education, a job, or a house just the same.

This Article will propose a new direction for law reforms that focuses upon the impact of laws on the causes of unequal treatment; it advocates extending the scope of the equal protection clause to cover racial discrimination resulting from economic and social welfare legislation. The basic rule in this analysis is that the *impact of a law on black people* is the determining factor, not the intentions of those who design and promote the law. This Article will examine three laws in this light—the federal minimum wage law, usury laws, and medical licensure laws[3]—with the thesis[4] that each of these laws has a substantial discrim-

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1. Wright v. City of Emporia, 407 U.S. 451, 462 (1972).

2. Although much of the analysis may be applicable to other racial minorities, this paper will concentrate on discrimination against blacks.

3. This analysis is applicable to many other economic programs and regulatory systems, such as housing codes, water pollution abatement, and free or low-tuition public higher education. *See generally* W. HANSEN & A. WEISBROD, BENEFITS, COSTS AND FINANCE OF PUBLIC HIGHER EDUCATION (1969). For a discussion of the income redistributive effect of a number of public policies such as farm programs, Social Security, and fire protection see Stigler, *Director's Law of Public Income Redistribution*, 13 J. LAW & ECON. I (1971). The minimum wage law, usury laws, and medical licensure have been chosen because their purposes seem so laudable while their impact may be racially discriminatory.

4. This Article lays out the conceptual analysis for evaluating each law. With this focus on

inatory impact on blacks and is therefore vulnerable to equal protection attack.[5]

I. THE CONSTITUTIONAL BACKGROUND

The equal protection clause of the fourteenth amendment[6] is intended to protect black people from governmental activity[7] that is racially discriminatory.[8] A governmental act that either draws racial lines explicitly[9] or has the effect of classifying persons by race establishes a prima facie case of racial discrimination.[10] When there is such a showing

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racially discriminatory impact, it must be emphasized that subsequent empirical investigation is necessary to support a court challenge.

5. It is not constitutionally relevant that in certain cases low-income people, generally, are harmed. Black people are disporportionately represented in the lowest income stratum. Although in 1969 blacks were slightly more than 1/10 of the population, they comprised approximately 3/10 of all persons below the poverty level ($3,743 for a nonfarm family of 4 in 1969). U.S. BUREAU OF LABOR STATISTICS, U.S. DEP'T OF LABOR, REP. NO. 394 & U.S. BUREAU OF CENSUS, U.S. DEP'T OF COMMERCE, CURRENT POPULATION REPORTS, SER. P-23, NO. 38, THE SOCIAL AND ECONOMIC STATUS OF NEGROES IN THE UNITED STATES, 1970, at 35-36 (1971). Blacks constituted approximately 73% of the people with income below the poverty level in 1969 in Atlanta; 68% in Baltimore, 64% in Detroit, 77% in Memphis, 63% in St. Louis, and 83% in Washington, D.C. *See* U.S. BUREAU OF CENSUS, DEP'T OF COMMERCE, GENERAL SOCIAL AND ECONOMIC CHARACTERISTICS 1970 CENSUS, PC (1), Tables 90, 95 (1972).

Given this heavily disproportionate representation of blacks among the poor, the fact that some poor whites may also be affected does not preclude a finding that a law is unconstitutional. To establish a prima facie case of racial discrimination or to prove racial discrimination one need not show that no whites were affected. The essential element is differential impact by race. In Chance v. Board of Examiners, 330 F. Supp. 203 (S.D.N.Y. 1971), *aff'd*, 458 F.2d 1167 (2d Cir. 1972), for example, that whites, including poor whites, were in the class of people who failed the principalship examination did not obscure the fact that black applicants were disproportionately represented in this class.

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

7. In addition, the due process clause of the fifth amendment applies to acts of the federal government. Bolling v. Sharpe, 347 U.S. 497 (1954).

8. *See* Brown v. Board of Educ., 347 U.S. 483, 490 (1954). *See generally* Tussman & tenBroek, *The Equal Protection of the Laws*, 37 CALIF. L. REV. 341 (1949); *Developments in the Law—Equal Protection*, 82 HARV. L. REV. 1065 (1969).

9. *E.g.*, Loving v. Virginia, 388 U.S. 1 (1967); Brown v. Board of Educ., 347 U.S. 483 (1954).

10. *E.g.*, Wright v. City of Emporia, 407 U.S. 451 (1972) (creation of new school district that would have the effect, whether intended or not, of impeding the process of dismantling dual school system may be enjoined); Alexander v. Louisiana, 405 U.S. 625 (1972) (black petitioner's conviction overturned because jury selection process effectively excluded blacks); Coleman v. Alabama, 389 U.S. 22 (1967); Whitus v. Georgia, 385 U.S. 545 (1967); Patton v. Mississippi, 332 U.S. 463 (1947); Norris v. Alabama, 294 U.S. 587 (1935); Yick Wo v. Hopkins, 118 U.S. 356 (1886); Hawkins v. Town of Shaw, 437 F.2d 1286 (5th Cir. 1971), *aff'd on rehearing*, 461 F.2d 1171 (5th Cir. 1972) (en banc); Kennedy Park Homes Ass'n, Inc. v. City of Lackawanna, 436 F.2d 108, 114 (2d Cir. 1970), *cert. denied*, 401 U.S. 1010 (1971); Southern Alameda Spanish Speaking Organization v. Union City, 424 F.2d 291 (9th Cir. 1970); Norwalk CORE v. Norwalk Redevelopment Agency, 395 F.2d 920, 929 (2d Cir. 1968); Hobson v. Hansen, 269 F. Supp. 401 (D.D.C. 1967), *modified sub nom.* Smuck v. Hobson, 408 F.2d 175 (D.C. Cir. 1969). *But cf.* Jefferson v.

of discrimination, judicial scrutiny is rigorous; the government must prove a compelling interest that overrides the racial impact to avoid invalidation of the law.[11] The government also must prove that there is no alternative means of accomplishing its policy that would be less onerous to the burdened class; if the same legitimate policy outcome could be accomplished with a less discriminatory effect, the challenged practice is prohibited.[12]

Equal protection analysis is developing to the point that racial discrimination can be established without a showing of intent; plaintiffs need only demonstrate a substantial discriminatory impact to make a prima facie case.[13] For example, employment tests administered by government,[14] urban renewal,[15] zoning,[16] public housing,[17] and municipal services[18] raise the constitutional issue in terms of the discriminatory impact of these measures on blacks rather than the motives of the government officials who enact and administer them.[19] Even when the

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Hackney, 406 U.S. 535 (1972) (Texas welfare plan that resulted in smaller payments to recipients in programs with highest percentage of blacks and Mexican-Americans does not violate fourteenth amendment).

11. Loving v. Virginia, 388 U.S. 1 (1967); Korematsu v. United States, 323 U.S. 214 (1944).

12. McLaughlin v. Florida, 379 U.S. 184 (1964); Hobson v. Hansen, 269 F. Supp. 401, 508-10 (D.D.C. 1967).

13. "The complaint that analytically no violation of equal protection vests unless the inequalities stem from a deliberately discriminatory plan is simply false. Whatever the law was once, it is a testament to our maturing concept of equality that, with the help of Supreme Court decisions in the last decade, we now firmly recognize that the arbitrary quality of thoughtlessness can be as disastrous to private rights and the public interest as the perversity of a willful scheme." Hobson v. Hansen, 269 F. Supp. 401, 497 (D.D.C. 1967). *See generally* Fessler & Haar, *Beyond the Wrong Side of the Tracks: Municipal Services in the Interstices of Procedure*, 6 HARV. CIV. RIGHTS-CIV. LIB. L. REV. 441 (1971).

14. Castro v. Beecher, 459 F.2d 725 (1st Cir. 1972) (policemen); Carter v. Gallagher, 452 F.2d 315 (8th Cir. 1972) (firemen); Western Addition Community Organization v. Alioto, 340 F. Supp. 1351 (N.D. Cal. 1972) (firemen); Chance v. Board of Examiners, 330 F. Supp. 203 (S.D.N.Y. 1971), *aff'd*, 458 F.2d 1167 (2d Cir. 1972) (school principals); Armstead v. Starkville Municipal Separate School Dist., 325 F. Supp. 560 (N.D. Miss. 1971), *aff'd*, 461 F.2d 276 (5th Cir. 1972) (teachers); Penn v. Stumpf, 308 F. Supp. 1238 (N.D. Cal. 1970) (policemen); Arrington v. Massachusetts Bay Transp. Authority, 306 F. Supp. 1355 (D. Mass. 1969) (bus drivers).

15. Norwalk CORE v. Norwalk Redevelopment Agency, 395 F.2d 920 (2d Cir. 1968).

16. Kennedy Park Homes Ass'n, Inc. v. City of Lackawanna, 436 F.2d 108, 114 (2d Cir. 1970); Southern Alameda Spanish Speaking Organization v. Union City, 424 F.2d 291 (9th Cir. 1970). The latter case involved discrimination against Spanish-speaking people rather than against blacks.

17. Gautreaux v. Romney, 448 F.2d 731, 738 (7th Cir. 1971); Crow v. Brown, 332 F. Supp. 382, 391 (N.D. Ga. 1971), *aff'd*, 457 F.2d 788 (5th Cir. 1972).

18. Hawkins v. Town of Shaw, 437 F.2d 1286 (5th Cir. 1971), *aff'd on rehearing*, 461 F.2d 1171 (5th Cir. 1972) (en banc); Fairfax County Citizens v. County of Fairfax, Civil No. 336-71-A (N.D. Va., Aug. 24, 1971).

19. "Although there is no contention of any intent to discriminate against black or Spanish-speaking persons by means of this [public] test . . . [use of the test by a public agency] produces a de facto racial pattern of classification adversely affecting these minority groups." Arrington v. Massachusetts Bay Transp. Authority, 306 F. Supp. 1355, 1358 (D. Mass. 1969).

differential impact of a government program is one and one-half white to one black, a prima facie case is established.[20] This relatively low ratio constitutes "*substantial* discrimination."[21] In *Griggs v. Duke Power Co.*,[22] the Supreme Court adopted this differential impact analysis in evaluating the employment practices of private employers: "[G]ood intent or absence of discriminatory intent does not redeem employment procedures or testing mechanisms that operate as 'built-in headwinds' for minority groups. . . ."[23]

The Court has also invalidated governmental rules that had a discriminatory effect but did not derive necessarily from discriminatory motive. Thus, the unconstitutionality of the poll tax did not depend upon a finding that Virginia intended to discourage poor voters.[24] Similarly, a showing of discriminatory purpose was not necessary in order to require states to provide criminal defendants with counsel[25] and transcripts on appeal,[26] or to prohibit incarceration of indigents for failure to pay fines in criminal cases.[27]

As a general rule of constitutional law, however,the equal protection clause cannot be used by courts to invalidate legislation concerning economic policy or regulation of business activities—such as the minimum wage law[28]—so long as the legislation bears a reasonable relation to a constitutionally permissible objective.[29] The rationale of this rule is that courts might otherwise become "super-legislatures," judging the soundness of and establishing priorities in all economic programs, tax laws, business regulation, and other legislative areas. Thus, since the late 1930's the Supreme Court has maintained a stance of judicial restraint in the area of economic policy, deferring to the judgments of the legisla-

20. *See* Chance v. Board of Examiners, 330 F. Supp. 203, 210 (S.D.N.Y. 1971), *aff'd*, 458 F.2d 1167 (2d Cir. 1972).

21. *Id.* at 216.

22. 401 U.S. 424 (1971).

23. *Id.* at 432.

24. *See* Harper v. Virginia Bd. of Elections, 383 U.S. 663 (1966).

25. *Cf.* Douglas v. California, 372 U.S. 353 (1963).

26. *Cf.* Griffin v. Illinois, 351 U.S. 12 (1956).

27. Tate v. Short, 401 U.S. 395 (1971); Williams v. Illinois, 399 U.S. 235 (1970).

28. The coverage of the federal minimum wage law was held not subject to equal protection attack in Bastardo v. Warren, 332 F. Supp. 501 (W.D. Wis. 1971).

29. *See* McGowan v. Maryland, 366 U.S. 420, 425 (1961); Williamson v. Lee Optical Co., 348 U.S. 483, 488 (1955); Railway Express Agency v. New York, 336 U.S. 106 (1949).

The Supreme Court has said: "In the area of economics and social welfare, a State does not violate the Equal Protection Clause merely because the classifications made by its laws are imperfect. If the classification has some 'reasonable basis,' it does not offend the Constitution simply because the classification 'is not made with mathematical nicety or because in practice it results in some inequality . . . .' 'A statutory discrimination will not be set aside if any state of facts reasonably may be conceived to justify it.' " Dandridge v. Williams, 397 U.S. 471, 485 (1970). *See also* Richardson v. Belcher, 404 U.S. 78 (1971).

tive and executive branches.[30] Economic policies and business regulation have never been challenged in the Supreme Court as being racially discriminatory. If, however, the minimum wage, usury, or licensure laws have a substantial racially discriminatory impact, such a challenge might be brought. Although such discriminatory treatment of black people should not be beyond the sanctions of the fourteenth amendment, it is not clear whether this novel legal theory can succeed. Nonetheless, in view of the importance of eradicating racial discrimination, public forums—especially courts—should confront the constitutional and policy issues raised herein.

II. THE MINIMUM WAGE LAW

When asking whether the federal minimum wage law has a discriminatory impact on blacks, especially black teenagers, it is worth noting that South Africa has a similar minimum wage requirement as a part of its "civilized labour policy." H.W. Hutt has called this law "the most subtle colour bar that has ever operated" because it "must have the effect of preventing the entry of subordinate races or classes into the protected field (occupations covered by the law) or of actually excluding them from it. This has been . . . the *most effective method of preserving white privileges, largely because it can be represented as non-discriminatory.*"[31]

The Fair Labor Standards Act of 1938[32] (FLSA) provided for a minimum wage of 25 cents per hour;[33] it set sixteen as the minimum age for employment in industries in interstate commerce and set eighteen as the minimum age for certain occupations declared hazardous by the Secretary of Labor.[34] Approximately one-half of the nonsupervisory workers in the private sector were covered by the law. Since the most recent amendments in 1966, the FLSA now covers over 75 percent of the nonsupervisory employees[35] in the private sector and certain state

30. "We refuse to sit as a 'super legislature' to weigh the wisdom of legislation . . . . Whether the legislature takes for its textbook Adam Smith, Herbert Spencer, Lord Keynes, or some other is no concern of ours." Ferguson v. Skrupa, 372 U.S. 726, 731-32 (1963).

Morey v. Doud, 354 U.S. 457 (1957), is the single major exception to the rule. This case has not been followed and the general rule mentioned above remains.

31. H. HUTT, THE ECONOMICS OF THE COLOUR BAR 72 (1964) (emphasis added).

32. Fair Labor Standards Act of 1938, 29 U.S.C. § 202 (1970). The stated purpose of the law was to "correct and as rapidly as practicable to eliminate [labor conditions detrimental to the maintenance of minimum standards of living necessary for health, efficiency and general well-being of workers] without substantially curtailing employment or earning power." *Id.*

33. Fair Labor Standards Act of 1938, ch. 676, § 6, 52 Stat. 1062, *as amended* 29 U.S.C. § 206 (1970).

34. 29 U.S.C. § 203(*l*) (1970) (originally enacted as Fair Labor Standards Act of 1938, ch. 676, § 3(*l*), 52 Stat. 1061).

35. U.S. DEP'T OF LABOR, MINIMUM WAGE AND MAXIMUM HOURS STANDARDS UNDER THE FAIR LABOR STANDARDS ACT 35 (1971).

and local government employees.[36] The minimum wage is currently $1.60 per hour ($1.30 for agricultural workers).[37]

The legal question raised here is whether the FLSA has the effect of denying job opportunities to black teenagers or blacks generally. Unemployment of blacks, particularly black youth, is also a serious policy problem.[38] Lack of job opportunities for young people who want to work may distort careers and aspirations;[39] furthermore, unemployment is not only a tragic waste of human resources, but it may also be a cause of crime and disorder.[40] Thus, an empirical demonstration that the FLSA's minimum wage provision has a discriminatory impact on blacks should warrant constitutional scrutiny.

A. The Minimum Wage As a Market Force

Without a minimum wage law the wage for a given quality of labor (or skill level) is equal to the marginal product of that quality of labor. The statutory minimum wage, however, frequently exceeds the marginal product of less skilled workers. When such a minimum wage is instituted or raised and when the labor market for the affected categories of jobs is not monopsonistic,[41] production costs are higher and management may adjust production in several ways: the work force may be reduced; there may be substitution to fewer, more skilled workers; remaining workers may be required to produce more; capital intensive processes may be introduced to replace the least skilled workers; or firms may cease to operate. Employers faced with an increased minimum wage would compare this wage for a low-skilled worker with that which must be paid for substitute factors of production—more skilled and therefore more productive workers or capital equipment. Thus, the

36. Forty states, Puerto Rico, the District of Columbia, and Guam now have state minimum wage laws in effect. The statutory minima in the City of Baltimore, the District of Columbia, Guam and the 6 states of Alaska, California, Connecticut, Maine, Massachusetts, and New York exceed the federal rate of $1.60. *See* Weissbrodt, *Changes in State Labor Laws in 1971*, 95 MONTHLY LABOR REV. 29 (Jan. 1972).

37. Fair Labor Standards Act § 6, 29 U.S.C. § 206 (1970).

38. TASK FORCE ON EMPLOYMENT PROBLEMS OF BLACK YOUTH, THE TWENTIETH CENTURY FUND, THE JOB CRISIS FOR BLACK YOUTH (1971).

39. PRESIDENT'S COMM'N ON LAW ENFORCEMENT AND ADMINISTRATION OF JUSTICE, *The Prevention of Juvenile Delinquency*, in STUDIES IN JUVENILE DELINQUENCY AND YOUTH CRIME 353, 378 (1967).

40. *See generally* B. FLEISHER, THE ECONOMICS OF DELINQUENCY 68 (1966).

41. If the labor market for the affected job categories were monopsonistic, employment might increase, assuming that the statutory wage was closer to (but not above) the value of the marginal product than the prior wage. *See* Stigler, *The Economics of Minimum Wage Legislation*, 36 AM. ECON. REV. 358 (1946). Urban labor markets for less skilled workers are not monopsonistic.

higher the minimum wage relative to the wages of the more skilled employees, the greater the range of skills excluded from employment and the fewer jobs that are available for less skilled workers. A similar comparison of costs would be made for capital substitution. Over time, the elasticity of demand curve for low-skilled labor would increase and more substitution for the low-skilled workers would take place, increasing their unemployment. Imposition of the minimum wage might also result in the employer's raising the price of the finished product. This price rise may in turn lead to a decrease in jobs through lowered demand for that product, depending on the price elasticity of demand for that product.

Thus, economic theory indicates that the impact of a minimum wage is likely to be a reduction in employment opportunities.[42] The extent of this reduction depends on the elasticities of supply and demand for both the factors of production and the final product,[43] how much the statutory minimum exceeds the market clearing wage,[44] the wage distribution of workers, the portion of a product's total cost that is attributable to labor, and the ability of displaced workers to find other work.[45]

B. Economic Impact of the Minimum Wage

The current unemployment rate for people between the ages of sixteen and nineteen is almost four times the adult rate.[46] The unemployment rate for nonwhite teenagers is much higher than for white teenag-

42. For a summary of empirical studies see U.S. BUREAU OF LABOR STATISTICS, DEP'T OF LABOR, BULL. NO. 1657, YOUTH UNEMPLOYMENT AND MINIMUM WAGES 30 (1970).

43. *See* A. MARSHALL, PRINCIPLES OF ECONOMICS 381 (1920).

44. For an example of estimates of the disemployment of household workers resulting from several different minimum wage rates see J. Matilla, The Impact of Extending Minimum Wages to Private Household Workers, 1972 (manuscript published by Ohio State University).

45. The effect of minimum wages on unemployment rates may be underestimated since a high unemployment rate may lead workers or potential workers to withdraw from the labor force. A high minimum, however, may have the opposite effect; it may draw more workers into the labor force to search for jobs.

46. U.S. DEP'T OF LABOR, MANPOWER REPORT OF THE PRESIDENT 209, Table A-5 (1971).

ers and this differential also has been growing.[47] In 1970, the jobless rate for sixteen and seventeen year-old males was 15.7 percent for whites and 27.8 percent for nonwhites. For eighteen and nineteen year-old males alone, the rates were 12.0 percent for whites and 23.1 percent for nonwhites.[48] From 1954 to 1970 the white teenage unemployment rate has remained steady while that for nonwhites has almost doubled.[49]

Unemployment rates of black youth are affected by many forces: the size of the teenage labor force; racial discrimination; changes in the

47. TABLE I

White and Nonwhite [a]

Teenage Unemployment Rates [b]

Year	White 16-19	Nonwhite 16-19
1954	12.1	16.5
1955	10.3	15.8
1956	10.2	18.2
1957	10.6	19.1
1958	14.4	27.4
1959	13.1	26.1
1960	13.4	24.4
1961	15.3	27.6
1962	13.3	25.1
1963	15.5	30.4
1964	14.8	27.2
1965	13.4	26.2
1966	11.2	25.4
1967	11.0	26.5
1968	11.0	25.0
1969	10.7	24.0
1970	13.5	29.1

[a] About 90% of nonwhites are black. U.S. BUREAU OF LABOR STATISTICS, DEP'T OF LABOR, REPORT NO. 394, *Social and Economic Status of Negroes in the United States* 36 (1970).

[b] Data from U.S. DEP'T OF LABOR, MANPOWER REPORT OF THE PRESIDENT 209 Table A-5 (1971).

48. TABLE II

1970 White and Nonwhite [a]

Unemployment Rates by Age and Sex [b]

	16-17	18-19
White Male	15.7	12.0
Black Male	27.8	23.1
White Female	15.3	11.9
Black Female	36.9	32.9

About 90% of nonwhites are black. *See* Table I, note 47 *supra*.

[b] Data from U.S. DEP'T OF LABOR, MANPOWER REPORT OF THE PRESIDENT, Table A-14, 221 (1971).

49. *See* Table I, note 47 *supra*.

composition of demand; legal restrictions on the employment of youth;[50] and the growth rate of the economy in general. The question here is what impact does one law—the federal minimum wage statute—have on the unemployment rate for black teenagers vis-à-vis white teenagers? Other possible effects—distortion in career choice or incentive to migrate to higher wage areas[51]—will not be considered here.

The disemployment effects of the minimum wage law apply most directly to workers with the lowest productivity, *i.e.* workers whose services are not highly valued in the market because they have had insufficient training and experience. Since blacks and youths between the ages of sixteen and nineteen make up a large proportion of this category of workers,[52] blacks, youths, and especially black youths, are subjected disproportionately to the employment reduction effects of the minimum wage.[53]

Minimum wage laws might have a racially discriminatory impact even if black youth were not disproportionately represented among low productivity workers. Where black and white youth are equally productive, some employers may operate under a prejudicial notion that blacks are not as productive as white workers. When employers exercise such racial preferences in their evaluatons of job applicants, the minimum wage, by precluding lower wage offers to black teenagers, reduces the attractiveness of hiring a black youth. Fewer black people therefore are given jobs. In this way the minimum wage heightens the disemployment effects of employers' racial preferences.[54]

Thus the federal minimum wage, despite its supporters' defense that the Act is a product of nonracist intentions, may injure black

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50. *E.g.*, Sugar Act, 7 U.S.C. § 1131(a) (1970); Fair Labor Standards Act, 29 U.S.C. §§ 203(1), 212 (1970); Walsh-Healey Act, 41 U.S.C. § 36 (1970); Secretary of Labor's Hazardous Occupation Orders, 29 C.F.R. § 570.50-.72 (1972); compulsory education laws of the various states. 51

51. *See* Sjaastad, *The Costs and Returns of Human Migration*, 70 J. POL. ECON. 80 (Supp. 1962). *See also* R. WERTHEIMER, THE MONETARY REWARDS OF MIGRATION WITHIN THE U.S. (1970).

52. Minimum wage laws may not have the same effect on 20-24 year-olds. By that time, most teenagers have acquired either more formal training or some job experience and would no longer be at the bottom of the labor pool. Moore, *The Effect of Minimum Wages on Teenage Unemployment Rates*, 79 J. POL. ECON. 897, 902 (1971).

53. Adie & Chapin, *Teenage Unemployment Effects of Federal Minimum Wages*, INDUSTRIAL RELATIONS RESEARCH SERIES 117, 118 (1970); Brozen, *The Effect of Statutory Minimum Wage Increases on Teenage Employment*, 12 J. LAW & ECON. 139 (1969); Kosters & Welch, *The Effects of Minimum Wages on the Distribution of Changes in Aggregate Employment*, 62 AM. ECON. REV. 323, 327 (June, 1972); Tideman, *Minimum Wage and Non-metropolitan Employment*, HARVARD UNIVERSITY PROGRAM ON REGIONAL ECONOMICS (1971).

54. This analysis should not be taken as condoning racial preferences of employers. Its purpose is to suggest that, given antiblack preferences of certain employers, the minimum wage compounds the disemployment effect on blacks.

people. From the standpoint of the unemployed black youth, the denial of a job is precisely the same as if racist employers had conspired to bar him or her from job opporunities. To argue that anything less than the current minimum wage is "inhuman" does not help individuals who cannot sell their labor for high wages and are denied by the minimum wage an opportunity to work at lower wages if they so choose.[55]

Employment of all teenagers at wages below the statutory rate is preferable to a higher black teenage unemployment caused by a minimum wage. When teenagers who have been unemployed enter the labor market as adults, they are initially less equipped and less productive than teenagers who have had some employment experience. The sooner employment experiences begin, even at the lower wage rate, the more human capital is invested in black teenagers. Work habits, attitudes, and skills are often learned on the job and result in more productive employees in the future.

Government has programs available to replace the minimum wage that could fulfill the stated purposes of FLSA[56] without the side effect of the disemployment of black teenagers; these include wage-related subsidies,[57] for example, the JOBS[58] and the WIN tax credit[59] programs, a negative ineome tax,[60] public employment,[61] public training of low-skilled workers,[62] and special tax treatment for employers who hire people earning low wages.[63] Congress also could exempt teenagers from the FLSA. Several categories of potential workers, such as students, are already exempt.[64] This "youth differential"[65] could preserve the

55. Voluntary agreements for wages below the minimum wage are contrary to public policy even when employees have an earning capacity below the statutory minimum and when the employer hired such people "purely out of sympathy for them." Waiver of these statutory rights is not permissible. Wirtz v. Leonard, 317 F.2d 768, 769 (5th Cir. 1963).

56. Fair Labor Standards Act, 29 U.S.C. §§ 203(L), 212 (1970).

57. *See generally* Crandall & MacRae, *Economic Subsidies in the Urban Ghetto*, 52 SOCIAL SCIENCE Q. 492 (1971).

58. Equal Opportunity Amendments of 1967, Pub. L. No. 90-222, 81 Stat. 672 (codified in scattered sections of 42 U.S.C.). "JOBS" is an acronym derived from "Job Opportunities in the Business Sector."

59. Job Development Related to Work Incentive Program. Revenue Act of 1971, tit. VI, Pub. L. No. 92-178, 85 Stat. 553.

60. Handler & Klein, *A Model Statute Reflecting the Recommendations of the President's Commission on Income Maintenance Programs*, in PRESIDENT'S COMM'N ON INCOME MAINTENANCE, TECHNICAL STUDIES 293 (1970).

61. Emergency Public Employment Act of 1971, Pub. L. No. 92-54, 85 Stat. 146.

62. 42 U.S.C. §§ 2581, 2572(b) (1970).

63. *See also* Buchanan & Moes, *A Regional Countermeasure to National Wage Standardization*, 50 AM. ECON. REV. 434 (June 1960).

64. In 1970, 159,423 persons were exempted from the minimum wage "to prevent curtailment of job opportunities for students and the handicapped . . . ." U.S. DEP'T OF LABOR, MINIMUM WAGE AND MAXIMUM HOURS STANDARDS UNDER THE FAIR LABOR STANDARDS ACT 17

wage floor for adults without disemploying youth. In short, less discriminatory policy alternatives are available.[66]

III. USURY LAWS

A major purpose of usury laws is to protect consumers from high interest rates.[67] Rate maxima are set for mortgages, bank loans, credit company loans, and credit plans of retail merchants; thus, it is argued, usury laws protect people from harsh creditors.[68] But if the statutory maximum is lower than the market rate—the rate that would exist without government interference—what will be the effect of usury laws on blacks?

A. Usury Laws as a Market Force

Two forces help determine interest rates: demand for credit and the risk incurred in making a loan to a given borrower. Money is a scarce commodity and there are obviously competing demands for its use. Lending institutions will prefer generally to distribute funds where the highest rate of return can be earned, other factors remaining constant, and the competition among bidders pushes the interest rates upward. Since lending institutions themselves compete for borrowers, one observes a counter-pressure to offer the lowest interest rate to borrowers.

1. *Credit Demand*—When a statutory maximum for one type of loan or investment is set below the market level, the consequence of the lender's understandable preference for the highest bidder is that funds are diverted into higher earnings opportunities that are not covered by

(1971). The exemption of college students discriminates further against black youths in the labor market, since, according to data compiled by the U.S. Department of Health, Education and Welfare, Office of Civil Rights, only 6% of all undergraduate students in 1968 enrolled in institutions of higher learning are black. U.S. BUREAU OF CENSUS, CURRENT POPULATION REPORTS, SERIES P-20 NO. 190 SCHOOL ENROLLMENT: OCTOBER 1968 AND 1967, 18-20 (1969).

65. *See* statements of Secretary Hodgson in *Hearings on H.R. 7130 Before the Subcomm. on Labor of the House Comm. on Education and Labor*, 92d Cong., 1st Sess. 547 (1971), and *Hearings on S. 1861 and S. 2259 Before the Subcomm. on Labor of the Senate Comm. on Labor and Public Welfare*, 92d Cong., 1st Sess. 25 (1971).

66. A statutory wage maximum, though a political impossibility, would increase employment opportunities for black teenagers, *i.e.* it would have the opposite effect of a minimum wage. A wage ceiling between the market wage of employed workers and the lower wage paid to lower skilled people would result in some high-skilled workers leaving their jobs because the wage ceiling is an inadequate incentive to make them work. Employers would then hire less skilled workers, who are disproportionately black, as substitutes. *See* Demsetz, *Minorities in the Market Place*, 43 N.C.L. REV. 271, 290-91 (1964).

67. *See generally* Blitz & Long, *The Economics of Usury Regulation*, 73 J. POL. ECON. 608 (1965).

68. "[T]o protect the weak, the needy, and the unwary from the rapacity of the avaricious." Universal Credit Co. v. Lowell, 166 Misc. 15, 18, 2 N.Y.S.2d 743, 746 (Rochester City Ct. 1938).

the usury law. Rates of return may be greater in other states or other countries,[69] in real estate investments or equity stock markets,[70] and in areas, such as corporate borrowing, that are exempted from the usury law by statute or court decision.[71] Thus, funds available for areas covered by usury laws are substantially reduced. For example, a drying up of mortgage money took place a few years ago when market interest rates far exceeded the statutory maximum for mortgages.[72] Moreover, artificially low rates may also result in circumvention schemes. When mortgage rates are below market rates, lenders add "points," service charges or insurance fees to raise their rate of return on loans to a level that would have been set by the market equilibrium rate, absent a statutory maximum.[73] Similarly, in installment credit sales a merchant may raise the price of the good to maintain rate of return on his investment.[74]

2. *Credit Risk*—In addition to competing demands for credit, the risk of a loan affects the interest rate. Defaulted loans and the costs of collection are costs of doing business for a lending institution, and lenders, as profits maximizers, will wisely minimize this cost as they do other costs.[75] They will insure themselves against such losses by charging higher interest rates on more risky loans. The risk judgments are based

69. Brimmer, *Statutory Interest Rate Ceilings and the Availability of Mortgage Funds*, 1968 BUS. REV. 4 (Supp.); Brunn, *State Usury Laws and Federal Policy*, 88 BANKING L.J. 963 (1971); Stoddart & Hoover, *Effect of Usury Laws on Home Ownership Needs*, 19 CLEV. ST. L. REV. 49, 57 (1970); *Consumer Credit Study—An Empirical Study of the Arkansas Usury Law: "With Friends Like That . . ."* 1968 U. ILL. L.F. 544.

70. Brunn, *supra* note 69, at 966; Stoddart & Hoover, *supra* note 69, at 51.

71. Benfield, *Money, Mortgages, and Migraine—The Usury Headache*, 19 CASE W. RES. L. REV. 819 (1968); Loiseaux, *Some Usury Problems in Commercial Lending*, 49 TEXAS L. REV. 419 (1971); Merriman & Hanks, *Revising State Usury Statutes in Light of a Tight Money Market*, 27 MD. L. REV. 1 (1967); Shanks, *Practical Problems in the Application of Archaic Usury Statutes*, 53 VA. L. REV. 327 (1967).

72. *See also* Anderson, *Tight-Money Real Estate Financing and the Florida Usury Statute*, 24 U. MIAMI L. REV. 642 (1970); Kripke, *Consumer Credit Regulation: A Creditor-Oriented Viewpoint*, 68 COLUM. L. REV. 445 (1968); Silberfeld, *Legislative and Judicial Developments in 1970*, 88 BANKING L.J. 195 (1971).

73. Hershman, *Usury and the Tight Mortgage Market*, 85 BANKING L.J. 189 (1968); Loiseaux, *supra* note 71, at 422-35; *Consumer Credit Study*, *supra* note 69, at 559-66.

74. Brimmer, *supra* note 69; FEDERAL TRADE COMM'N, ECONOMIC REPORT ON INSTALLMENT CREDIT AND RETAIL SALES PRACTICES OF DISTRICT OF COLUMBIA RETAILERS 16 (1968); Lynch, *Consumer Credit at Ten Per Cent Simple: The Arkansas Case*, 1968 U. ILL. L.F. 592 (1968); *Consumer Credit Study*, *supra* note 69.

75. In the first equal opportunity lender case brought by the Department of Justice, United States v. Household Fin. Co., Civil No. 72-C-515 (N.D. Ill., Feb. 29, 1972), the extent of higher collection costs in high crime areas was not resolved. The parties agreed in the consent decree to further study "(a) what weight, if any, may be given to the applicant's residence in a geographic area that has so high a rate of crime that field calls are deemed by the company to be impracticable; and (b) whether such factors can be quantified for inclusion in the Credit Scoring Guide."

on statistical probabilities that persons with particular jobs, incomes, credit records, etc., will or will not repay loans. The higher the risk, the higher is the interest rate.

The effect of usury laws, however, is to deny the lender this "insurance" against high risks, thereby eliminating the economic incentive necessary to overcome the lender's preference for low-risk borrowers. If a lender cannot charge the higher interest rate, he will make fewer loans to high-risk persons and instead will channel his funds either to higher earnings opportunities[76] or to lower risk people whose risk-adjusted interest rate is at or below the statutory maximum. Thus the consequence of usury laws is to deny funds to higher risk people.[77]

B. Economic Impact of Usury Laws

Blacks are normally disproportionately represented in the higher risk categories;[78] as a matter of statistical probabilities they tend to present greater risks for lenders. For this reason usury laws may have the effect of barring loan funds to blacks. Racially prejudiced lenders may also regard blacks as presenting risks greater than those supported by actual probabilities of repayment. A usury law, by prohibiting higher interest charges to cover this perceived risk, effeetively reduces the granting of credit to blacks. This discriminatory impact falls on all blacks, not merely low-income blacks. Thus, the effect of a lender's racial prejudice is increased by usury laws.[79]

Is it a better policy that black people obtain no loans rather than loans with an interest rate in excess of the statutory maximum? Whether this would be the preference of the potential black borrower who is denied a loan as a result of usury laws is by no means clear. He or she may prefer higher interest rates to no loan at all, just as unemployed black youth may prefer wages lower than the statutory minimum to no wages at all.

When blacks, as higher risk borrowers, cannot find willing, legitimate lenders, and when circumvention devices such as "points" are not available, blacks are forced to turn to extra-legal lenders. Organized crime may find thereby a market for its money,[80] since it does not

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76. *See* notes 69-71 *supra* and accompanying text.

77. The movement of additional funds to lower risk borrowers lowers the interest rate on loans to them. Lower risk people are disproportionately white and upper income. Ironically, the usury law may not only dry up funds for blacks and poor people, it may also make loans cheaper for whitcs and upper income people.

78. *See* Blitz & Long, *supra* note 67, at 613; FTC, *supra* note 74, at 19, 39, 43.

79. This analysis should not be taken as condoning racial preferences of lenders. Its purpose is to point out that, given the antiblack attitudes of certain lenders, a usury law compounds the discriminatory impact of such preferences.

80. *See generally* Schelling, *Economics and Criminal Enterprise*, 17 PUB. INT. 61, 70 (1967).

comply with the statutory maximum and will make money available to higher risk borrowers such as black people. Illegal loans in fact are the second largest source of revenue for organized crime with annual revenues estimated to be from 350,000,000 dollars to billions of dollars.[81] Borrowers in this extra-legal market may face very high interest rates,[82] in part because the lenders face a risk of their own—the risk of arrest—and must bear the special costs of payoffs and legal defense. Since the loan transaction is outside the law, the borrower loses the common-law and statutory protections against fraud and coercion. Even given these additional costs, however, many blacks have no alternative source of funds. In short, laws setting maximum interest rates may have a discriminatory impact on black people. These laws may also have two additional side effects: more money from legitimate lenders is available to white and upper income people thereby reducing the interest rate for them; at the same time the unmet demand for loans provides a market and income to organized crime.

The equal protection analysis applied to minimum wage also is applicable to usury laws. If the law does have a discriminatory effect on blacks, the lack of racist intent on the part of the law's supporters is not constitutionally relevant. The discriminatory impact on blacks should constitute a prima facie case and the government must then show both a compelling state interest and the absence of a less discriminatory alternative means of protecting it. In view of the benefits of usury laws for upper income whites and organized crime, government will have a difficult task. It would have to show that other policy reasons for usury laws override the effective denial of legal, higher-interest loans to black people.

The state or federal government could accomplish the intended protection of certain borrowers without causing racially discriminatory side effects. Interest subsidies and government guarantees of loans to high-risk borrowers are possible alternative policies. For example, interest subsidies[83] and the guaranteeing of mortgages[84] are already in the federal housing legislation. Implementation of these policies in lieu of usury statutes would allow higher risk borrowers to obtain credit from legitimate lenders. Lenders would be willing to incur these risks either

81. *See* PRESIDENT'S COMM'N ON LAW ENFORCEMENT AND ADMINISTRATION OF JUSTICE, THE CHALLENGE OF CRIME IN A FREE SOCIETY 33, 189 (1967).

82. The rates range from 1% to 150% a week according to the President's Commission on Law Enforcement and Administration of Justice. *Id.* at 189. *See also* Comment, *Syndicate Loan-Shark Activities and New York's Usury Statute*, 66 COLUM. L. REV. 167 (1966).

83. National Housing Act § 236, 12 U.S.C. § 1715z-1 (1970).

84. *Id.* § 8, 12 U.S.C. § 1715z (1970).

because interest rates could be adjusted to cover all risks or because the government's guarantee reduces the lender's risk. The actual cost incurred by the borrowers would be reduced. With appropriate levels of subsidies, interest rates would decline to the point at which whites and blacks pay the same rate. The demand for illegal loans from organized crime also would be reduced. Since alternative mechanisms that are less discriminatory than usury laws are thus available, the government's task of justifying usury laws would seem difficult to accomplish.

IV. Licensure Laws and Medical Services

Regulatory commissions, such as licensing boards, that control entry into occupations are normally made up of members of that occupation.[85] These officials have a direct economic interest in the standards they set for the admission of aspirants to practice. Members of a profession, not consumers, lobby for licensure laws because these laws prevent competition from unlicensed practitioners. Medical doctors, for example, fight osteopaths and podiatrists, and barbers try to limit the work of beauticians.[86] Thus, licensure laws are often special interest legislation, despite their justification of "protecting the public interest"[87] under the police power.

Licensing should be distinguished from certification; in the case of certification, a government agency declares that an individual has achieved a certain skill level in an occupation but does not prohibit persons without that skill level from pursuing the occupation. Licensing laws, on the other hand, prohibit practitioners who have not met a certain governmental standard. In the field of accounting, for example, one does not need to be a Certified Public Accountant legally to perform many accounting tasks, but in some states one must be licensed to be a librarian, a barber, a dealer in scrap tobacco, a rainmaker, or a wrestler.[88] In medicine, state licensure is the rule for physicians and for paraprofessionals.[89]

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85. U.S. Dep't of Labor, Occupational Licensing and the Supply of Nonprofessional Manpower 3 (1969).

86. *See also* 51 Nw. U.L. Rev. 123 (1956).

87. Moore, *The Purpose of Licensing*, 4 J. Law & Econ. 93 (1961).

88. U.S. Dep't of Labor, *supra* note 85, at 19-50. The list of licensed occupations includes fourtune-tellers, watchmakers, yacht salesmen, frozen dessert manufacturers, weathermen and florists. *See generally* W. Gellhorn, Individual Freedom and Governmental Restraints 105-51 (1956).

89. *See generally* Forgotson, Roemer & Newman, *Legal Regulation of Health Personnel in the United States*, in 2 Report of the National Advisory Comm'n on Health Manpower 279 (1967).

Medical licensure laws raise several economic policy issues.[90] By setting a minimum standard for practitioners, such laws constitute a barrier to entry into the profession;[91] it is the avowed purpose of these laws to keep out those who are not "qualified."[92] These barriers have economic side effects: the number of people who might otherwise have entered health service jobs is reduced; the earnings of those already in the occupation are increased; this in turn raises the price of medical services for all consumers; and the variety and quality differentials of medical services available to consumers may be greatly restricted.[93] All of these results have a discriminatory effect on blacks.

A. Effect of Licensure on the Price of Medical Services

1. *Accreditation.*—To qualify for a license to practice medicine, one first must graduate from a medical school that is accredited by the medical establishment. The American Medical Association, through its Council on Medical Education, thus limits the number of people who may become physicians by its control over accreditation of medical schools. The *Flexner Report of 1910*,[94] which became a standard for medical school accreditation, resulted in a decline in the number of medical schools and in the annual output of physicians.[95] Flexner contended that there was an "overproduction" of doctors in the United States and that it was necessary to "destroy [medical] schools and restrict output."[96] He saw licensure as a means to reduce this alleged over-production: "The examination for licensure is indubitably the lever with which the entire field may be lifted; *for the power to examine is*

90. For a general discussion of the economics of medical services see Feldstein, *The Rising Price of Physicians' Services*, 52 REV. ECON. & STAT. 121 (1970); Jones, Struve & Stefani, *Health Manpower in 1975—Demand, Supply, and Price*, 2 REPORT OF THE NATIONAL ADVISORY COMM'N ON HEALTH MANPOWER 229 (1967); Kessel, *Price Discrimination in Medicine*, 1 J. LAW & ECON. 20 (1958).

91. Friedman, *Freedom of Contract and Occupational Licensing 1890-1910: A Legal and Social Study*, 53 CALIF. L. REV. 487, 497 (1965).

92. If all persons can qualify, licensing may be used for raising revenue and enforcing rules of behavior rather than limiting entry. *See* Rottenberg, *The Economics of Occupational Licensing*, in ASPECTS OF LABOR ECONOMICS 3 (1962).

93. U.S. DEP'T OF HEALTH, EDUCATION AND WELFARE, REPORT ON LICENSURE AND RELATED HEALTH PERSONNEL CREDENTIALING 3 (1971). Medical licensure laws may also result in an inefficient production and allocation of medical services. Forgotson & Cook, *Innovations and Experiments in Uses of Health Manpower—The Effect of Licensure Laws*, 32 LAW & CONTEMP. PROB. 731 (1967).

94. A. FLEXNER, MEDICAL EDUCATION IN THE UNITED STATES AND CANADA (1910).

95. Kessel, *The A.M.A. and the Supply of Physicians*, 35 LAW & CONTEMP. PROB. 267, 270 (1970). *See also* Kessel, *Higher Education and the Nation's Health: A Review of the Carnegie Commission Report on Medical Education*, 15 J. LAW & ECON. 115 (1972).

96. A. FLEXNER, *supra* note 94, at 16.

the power to destroy."[97] According to the *Flexner Report*, there was one doctor for every 586 people in the U.S. in 1910.[98] Today this ratio has risen to approximately one for 770.[99]

2. *The Supply of Black Doctors.*—The reduction in the availability of medical personnel as a result of accreditation is most pronounced for blacks.

> A little recognized consequence of the Flexner report was its effect on the frequency of Negro doctors in the population and on the number of Negro medical schools. As a result of the AMA's and Flexner's endeavors, the number of medical schools declined from 162 in 1906 to sixty-nine in 1944, *while the number of Negro medical schools went from seven to two.* Moreover, the number of students admitted to the surviving schools decreased. Flexner's views on medical education for Negroes were patronizing: "A well-taught negro sanitarian will be immensely useful; an essentially untrained negro wearing an M.D. degree is dangerous"; "the practice of the negro doctor will be limited to his own race . . . ." According to census figures, the frequency of Negro physicians among all physicians increased sharply from 1900 to 1910 (from 1.3 percent to 2.0 percent) and leveled off afterwards. *In the absence of Flexner's, or more properly the AMA's, repression of medical schools, one would have expected the frequency of Negro physicians to rise as their educational disadvantages were overcome.*[100]

Moreover, if black people prefer to be treated by black doctors, licensure has a racially discriminatory impact not only on blacks who are unable to become doctors but also on black patients.

3. *Higher Costs of Entry.*—Licensure acts as a further barrier to entry by imposing certain costs of preparation on all entrants—for example, tuition costs for a college degree and four years of medical school as well as foregone earnings during this schooling.

4. *Monopoly Pricing.*—Licensure gives license holders a monopoly position because it is a criminal offense in many states for persons without licenses to compete with license holders.[101] As a result, the earnings of license holders may increase because fewer people divide the aggregate demand; the price of the service may increase since there is no competitive bidding from nonlicensed suppliers; and the total amount of services offered may decrease although the median quality level of each service may be higher.[102]

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97. *Id.* at 169 (emphasis added).

98. In urban areas the ratio was 400 persons per doctor. *Id.* at 14.

99. U.S. DEP'T OF HEALTH, EDUCATION AND WELFARE, HEALTH MANPOWER IN THE UNITED STATES 1965-67 16, Table 2 (1968).

100. Kessel, *supra* note 95, at 270 (emphasis added).

101. *E.g.*, N.Y. EDUC. LAW § 7408(1)(b) (McKinney 1972); CONN. GEN. STAT. ANN. §§ 20-281, 20-285 (1968) (C.P.A.'s); N.Y. GEN. CITY LAW § 45 (McKinney 1968) (plumbers); CONN. GEN. STAT. ANN. § 20-312 (1968); WASH. REV. CODE ANN. § 18.85.340 (1961) (real estate brokers).

102. Rottenberg, *supra* note 92, at 7.

This increase in the price of medical services caused by licensure laws bears more heavily on low-income people than the rest of the population.[103] Unless the demand curve for medical services is perfectly inelastic with respect to income and price, everyone will purchase less medical care but lower income people will consume less proportionately than higher income people. Even when the curve is perfectly inelastic, low-income people are the hardest hit by price increases because any increase is a disproportinately larger share of a poor person's income. Since blacks are disproportionately represented in the lower income groups,[104] the effects of licensure will bear more heavily on them than on the white population. These side effects of medical licensure laws may be disregarded by licensing authorities, but they cannot be ignored by black people who have to pay the higher price or forego medical services altogether.

B. Effect of Licensure on the Range of Choice of Medical Services

Organized medicine defends its accreditation and licensure rules as assurances that only "high quality" doctors are allowed to practice. Even if licensure and accreditation accomplish this,[105] these measures may be unsound policy and racially discriminatory. If meat producers, for example, conspired to produce only the higher quality steaks—only those which measure up to the quality of porterhouse—many black people, because they are disproportionately represented in the lower income strata,[106] would be offered no meats in the price range they could afford. Similarly, if lawyers conspired to limit admission to the bar to persons whose scores on the bar exams were as high as those of Harvard graduates: (1) the median quality of practicing lawyers would rise;[107] (2) fewer people would be admitted to practice law; (3) the consumer's cost of legal services would increase even for fairly routine or less skilled legal tasks; and (4) many blacks who could least afford an increased cost for legal services, would be denied legal services; in short, there would be a racially discriminatory effect from raising the minimum quality-level for lawyers. Is it better for black people to get some service, albeit

103. Price increases, of course, are not the only barrier to medical services. *See generally* Berner & Yearby, *Low Income and Barriers to Use of Health Services*, 278 N. ENG. J. MED. 541 (1968).

104. *See* note 5 *supra*.

105. Since licensure seldom requires periodic programs of continuing medical education, and advances in medical research may make previous training obsolete, licensure may not guarantee "high quality." *See also* A. SOMERS, HOSPITAL REGULATION: A DILEMMA IN PUBLIC POLICY 81 (1969).

106. *See* note 5 *supra*.

107. This assumes that scores on bar exams correlate with quality of legal service and that Harvard graduates receive high scores.

of a lower quality, or no service at all? By setting a minimum quality standard, licensure laws make the choice in favor of no service for many black people.

Organized medicine has done precisely what has been described for meat producers and for lawyers. It has set higher standards and through licensure laws prohibited voluntary contracts for less skilled health services from such sources as Army corpsmen or doctors trained in foreign countries. The result is that many black people have been effectively told that unless they can afford highly priced medical services they will receive none.[108]

C. *Alternatives to Licensure*

Does licensure advance a compelling state interest that is sufficient to outweigh its racially discriminatory impact? Do state medical exams and other standards in fact result in higher quality care?[109] In answering these questions, each standard should be evaluated empirically for its effect on public health and safety. Courts generally accept the professional judgment of licensing agencies or the judgment of legislatures for these evaluations;[110] but with the additional showing of racially discriminatory impact, judicial scrutiny should be less deferential and licensing agencies should have to demonstrate direct relationships between standards and health. This shifting of the burden of proof may force a revaluation of many barriers to entry in the medical services field; it may be that some current standards have little relationship to the protection of health.[111]

A system of medical services with certification but no licensure may better serve the health needs of black people. In this arrangement the government would have two functions: (1) to provide information to consumers by certifying the skill level of anyone who enters the health field and by general consumer education, and (2) to police the field to

108. It seems anomalous that black corpsmen who have performed life-saving work in combat situations are prohibited from serving the medical needs of people in their community in the United States.

109. Forgotson, Roemer & Newman, *Licensure of Physicians*, 1967 WASH. U.L.Q. 249.

110. *E.g.*, Tchernoff v. Davidson, 317 N.Y.S.2d 893 (Sup. Ct. 1971); Kansas State Bd. of Healing v. Foote, 200 Kan. 447, 436 P.2d 828 (1968); Berry v. Richardson, 160 Colo. 538, 418 P.2d 523 (1966). Through malpractice suits and criminal proceedings for illegal practice, however, courts do affect the quality of medical services.

111. Licensure laws may cause such inefficiency that the price of medical services increases without raising the quality of the service. As to the effect of licensure on hospital productivity and effectiveness, "the consensus of informed opinion appears to be that the licensure laws are *thoroughly obsolete and more hindrance than help*." A. SOMERS, *supra* note 105, at 89 (emphasis added).

prevent fraud, as is already done by state and local government. Without the barrier of licensure, a new range of health service and health professions could develop.[112] A continuum of skill levels would form with specialist medical doctors at one end, paraprofessionals such as corpsmen and physician's assistants[113] in the middle, and practical nurses at the other end.[114] Nothing would prohibit people from securing medical care from other noncertified practitioners such as midwives. With this continuum of alternatives, blacks would not face the choice of porterhouse steak or no meat. Government and medical organizations would no longer bar new health occupations, alternative health delivery systems, or innovative training. The prohibition of certain consumer choices does not follow from a governmental role as provider of consumer information. It is often suggested that licensure is necessary to protect "less educated" people from their own poor judgment and mistakes. To deprive black people of their freedom of choice, however, denies them self-determination and self-respect.

Allowing the establishment of the continuum of available services would not constitute "second rate" care for blacks. For example, the use of one paraprofessional, the dental hygienist, demonstrates the value of the division of labor in an alternative delivery system for all consumers of dental services. Moreover, what could be more second rate than denying people all care if they cannot afford the most expensive, or foreclosing job opportunities if the applicants have not had the most extensive and costly training.

Thus alternative mechanisms are available which do not have the inherently discriminatory impact of present licensure laws. As empirical support is gathered for this analysis, medical licensure should be subject to an equal protection challenge.

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112. A number of organizations have urged a moratorium on licensure of new health occupations to accomplish this. These organizations include: The American Medical Association; American Hospital Association; Board of Medicine of the National Academy of Sciences; Illinois Hospital Association; Association of Operating Room Technicians and the National League of Nursing. Hersey, *New Directions in Licensure of Health Personnel*, 24 ECON. & BUS. BULL. 22, 27 (1971). *See also* U.S. DEP'T OF HEALTH, EDUCATION AND WELFARE, *supra* note 93, at 144.

113. *E.g.*, CAL. BUS. & PROF. CODE § 2510 (West 1971); COLO. REV. STAT. ANN. § 91-10-1 (Supp. 1969); W. VA. CODE ANN. § 30-3A-1 (1971). *See also* Leff, *Medical Devices and Paramedical Personnel: A Preliminary Context for Emerging Problems*, 1967 WASH. U.L.Q. 332; Sadler & Sadler, *Recent Developments in the Law Relating to the Physician's Assistant*, 24 VAND. L. REV. 1193 (1971).

114. An increase in the productivity of U.S. doctors by only 4%, for example, through the use of paraprofessionals, would increase the aggregate supply of medical services by more than the entire current graduating class from American medical schools. Reinhardt, *A Production Function for Physician Services*, 54 REV. ECON. & STAT. 55 (1972). Thus licensure laws, which inhibit use of paraprofessionals, reduce the total productivity of doctors and exacerbate the problems of an inadequate supply of medical services.

V. CONCLUSION

Are blacks better off with no jobs rather than low-paying jobs? Are not blacks discriminated against when they are told in effect that no loan is available, and that they must go instead to organized crime to borrow money? Are not blacks victims of discrimination from a medical system that provides very expensive care or no care at all, and that has restricted their entry into the profession? If people who traditionally are characterized as racist had devised such laws, civil rights suits would be forthcoming. Minimum wage, usury laws, and medical licensure laws, however, are generally regarded as liberal programs; nevertheless, the discriminatory impact on black people is the same.

Admittedly, this equal protection analysis may require a broad reading of recent cases;[115] but when the discriminatory impact on people is clear and substantial, a law or program should be subject to an equal protection challenge.[116] The fourteenth amendment should protect blacks from government discrimination whether it is intentional or unintentional, and whether it is the result of economic or any other category of legislation.

What is proposed is a new standard for judicial review. Courts should not defer to legislative judgments and priorities when the enactments that embody them have racially discriminatory impacts. Any law that has this result must be supported by a compelling government interest. This standard would impose a limitation upon the legislative process not unlike present judicially imposed requirements of procedural due process in the areas of welfare,[117] license suspension,[118] tax exemption,[119] and public employment.[120] Just as court-imposed standards of procedural fairness have forced legislatures and administrators to include hearing procedures as part of a government program, courts could effectively force legislatures to take into account the manner in which black people will be affected by a proposed program. Courts in

115. *See* notes 10-27 *supra* and accompanying text. It should also be pointed out that Dandridge v. Williams, 397 U.S. 471 (1970), and James v. Valtierra, 402 U.S. 137 (1971), are distinguishable because they were not racial discrimination cases. The rule suggested in this Article, however, is based on racial discrimination.

116. This principle is indeed sweeping, but it can be argued that in a society in which racial prejudice has historically permeated public institutions and programs, such a broad sweep is called for. Even if the judicial challenges suggested here do not succeed, the analysis in this Article should be utilized by legislatures. Impact on black people is clearly an appropriate, if not a compelling, criterion for legislative deliberation.

117. *E.g.*, Goldberg v. Kelly, 397 U.S. 254 (1970).

118. *E.g.*, Bell v. Burson, 402 U.S. 535 (1971).

119. *E.g.*, Speiser v. Randall, 357 U.S. 513, 524-25 (1958).

120. *E.g.*, Slocbower v. Board of Higher Educ. of New York City, 350 U.S. 551 (1956).

fact have already required the Department of Housing and Urban Development[121] and a city housing agency[122] to evaluate the impact of their programs on the racial integration of neighborhoods.

This suggested standard of review is not a resurrection of substantive due process. Instead, it focuses narrowly on the single issue of racial impact rather than a broad-ranging evaluation of the soundness of legislative judgments. Given the purpose of the fourteenth amendment and the obvious and pressing need to provide blacks with equal treatment,[123] the rule of judicial restraint[124] in the economic area should be updated and reformed. When this adjustment takes place, "the theory of equal protection may yet take its rightful place in the unfinished Constitutional struggle for democracy."[125]

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121. *See* Shannon v. Department of Housing & Urban Dev., 436 F.2d 809 (3d Cir. 1970).

122. *See* Gautreaux v. Chicago Housing Authority, 436 F.2d 306, 312 (7th Cir. 1971), *cert. denied*, 402 U.S. 922 (1971).

123. *See generally* NATIONAL ADVISORY COMM'N ON CIVIL DISORDERS, REPORT (Bantam ed. 1968).

124. *See* notes 29-30 *supra* and accompanying text.

125. Tussman & tenBroek, *supra* note 8, at 381.