SCHOOL OF LAW
CASE WESTERN RESERVE UNIVERSITY

Case Western Reserve Law Review

Volume 24 | Issue 1

1972

Personal Rights as an Emerging Approach to Equal Protection: Automobile Financial Responsibility Laws and the Right to Drive

Dennis M. Race

Follow this and additional works at: https://scholarlycommons.law.case.edu/caselrev

Part of the Law Commons

Recommended Citation

Dennis M. Race, *Personal Rights as an Emerging Approach to Equal Protection: Automobile Financial Responsibility Laws and the Right to Drive*, 24 Case W. Res. L. Rev. 163 (1972)
Available at: https://scholarlycommons.law.case.edu/caselrev/vol24/iss1/8

This Note is brought to you for free and open access by the Student Journals at Case Western Reserve University School of Law Scholarly Commons. It has been accepted for inclusion in Case Western Reserve Law Review by an authorized administrator of Case Western Reserve University School of Law Scholarly Commons.

NOTES

Personal Rights as an Emerging Approach to Equal Protection: Automobile Financial Responsibility Laws and the Right to Drive

Focusing on recent Supreme Court decisions, the author examines new developments in equal protection analysis. Although inconsistencies in Court language frustrate easy categorization, the author discerns a recent trend away from the traditional equal protection tests toward a hybrid approach being applied to an emerging category of "personal rights." Throughout the Note the author devotes extensive analysis to automobile financial responsibility statutes to illustrate the operation of the various approaches the Court has applied to equal protection problems.

I. INTRODUCTION

TRADITIONALLY, the Supreme Court has utilized a two-tiered equal protection scheme, requiring the existence of a compelling state interest to validate statutes which involve either the creation of a suspect classification or the infringement of a fundamental right, while merely requiring the existence of a rational basis to validate all other statutes.[1] Recently the Court has indicated that in deciding equal protection cases involving the alleged infringement of rights falling just outside of the fundamental rights category, referred to here, for want of a better term, as "personal rights,"[2] it will no longer automatically defer to the determination of state legislatures by presuming the constitutionality of challenged statutes.[3] The Court, in so doing, has apparently departed from the

[1] *See* notes 52-57 *infra* & accompanying text.

[2] The focus of this Note is on the operation and effect of the personal rights approach to equal protection problems. An attempt will not be made here to describe in detail what individual rights may be deemed to be "personal rights." Such rights are obviously significant enough to warrant at least some protection under the equal protection clause, falling somewhere on the scale of constitutional protection between "economic" rights and "fundamental" rights. Any attempt to define just what are personal rights is hampered by the lack of clear definitional criteria for fundamental rights. *See* notes 72-73 *infra.* It is at least arguable, however, that such important interests as driving, education, housing and the receipt of welfare benefits fall within the aegis of personal rights. *See* notes 161-62 *infra* & accompanying text. In any event, even though the categories of rights suggested here lack clear definitional standards, the Court's approach to equal protection seems to fall into three somewhat distinct operational groups, each having characteristic factual patterns.

[3] *See* Weber v. Aetna Cas. & Sur. Co., 406 U.S. 164 (1972); Stanley v. Illinois, 405 U.S. 645 (1972); Eisenstadt v. Baird, 405 U.S. 438 (1972); Reed v. Reed, 404 U.S. 71 (1971).

two-tiered equal protection scheme, where the choice of the test to be applied virtually decided the outcome of the case, and is heading toward a more flexible approach to equal protection questions.[4] This Note will review the Court's prior treatment of equal protection and will posit and describe the new personal rights approach the Court now seems to be developing. So that the impact and operation of this new approach may be fully understood, this Note will consider in detail the application of the traditional tests and the personal rights approach to automobile financial responsibility laws.

II. FINANCIAL RESPONSIBILITY LAWS

In an attempt to solve some of the serious problems surrounding the compensation of automobile accident victims, all fifty states and the District of Columbia have enacted some form of financial responsibility statute.[5] By requiring every person who may be found legally responsible for damages arising from an automobile accident to show proof of his ability to satisfy an adverse judgment, should one be rendered, these laws increase the likelihood of compensation for injuries caused by careless drivers.[6]

The basic purpose of state financial responsibility statutes is to indemnify injured members of the public against damage caused by automobiles.[7] Upon the occurrence of an automobile accident in-

[4] *See* Note, *New Tenets in Old Houses: Changing Concepts of Equal Protection in Lindsey v. Normet,* 58 VA. L. REV. 930, 937-46 (1972).

[5] *See, e.g.,* OHIO REV. CODE ANN. §§ 4509.09-.99 (Page 1965) [hereinafter cited as O.R.C.]. Most states have virtually identical financial responsibility statutes, which, for the most part, are patterned after the provisions of the Uniform Motor-Vehicle Safety Responsibility Act, UNIFORM VEHICLE CODE ch. 7 (1962 version).

[6] Many state financial responsibility statutes, in an attempt to insure that the accident victim is compensated, also provide a fund for unsatisfied judgments. These funds are accumulated from registration fees and assessments. A driver with an unsatisfied judgment arising from an automobile accident can apply to the court for payment out of that fund. Other states require, instead, that insurers provide uninsured motorist coverage. *See* Hickley v. Ins. Co. of N. Am., 239 F. Supp. 109, 111 (E. D. Tenn. 1965); Woodroof, *A Jurisprudential Look at Automobile Insurance Reform,* 5 CREIGHTON L. REV. 7, 35 (1971).

[7] In Perez v. Campbell, 402 U.S. 637 (1971), Mr. Justice White, in discussing the Arizona court's interpretation of the purpose of the Arizona financial responsibility statute, declared that the "sole emphasis in the Act is one of providing leverage for the collection of damages from drivers who either admit that they are at fault or are adjudged negligent." *Id.* at 646-47. After setting forth decisions of several other state courts, he noted that this purpose was "by no means unusual." *Id.* at 644-45 n.11 and cases cited therein. A survey of state legislation suggests that the early financial responsibility laws were designed not only to assure the compensation of accident victims, but also to aid in accident prevention. The expressed purposes for these original statutes can be classified into three broad categories: (1) segregating the bad driver,

volving personal injury or property damage in excess of a statutory amount, the operators of the motor vehicles involved are required to file with the appropriate state official a written report of the accident.[8] The report must be made within a designated period of time, and failure to comply results in suspension of the operator's license and vehicle registration.[9] When in receipt of the accident report the state official will determine an appropriate amount sufficient to satisfy any judgment for damages against the operator.[10] Should the security not be posted within a certain period of time thereafter, the license and registration of the defaulting operator will be revoked.[11] The security requirement is imposed without respect to fault, although, as will be seen, recent case law requires that some preliminary finding of probable fault be made.[12] Though the security requirement may generally be satisfied by cash or securities,

---

thus preventing or decreasing automobile accidents; (2) compelling the bad driver to insure, thus increasing the proportion of insured cars and drivers; and (3) procuring payment of past damages. While the purposes of the statutes may have at one time included those enumerated above, today's financial responsibility statutes are concerned only with indemnifying injured members of the public against damages caused by financially irresponsible drivers. *See Legislation, A Survey of Financial Responsibility Laws and Compensation of Traffic Victims: A Proposal for Reform*, 21 VAND. L. REV. 1050 (1968). *See also* Aberg, *Effects of and Problems Arising from Financial Responsibility Laws*, 1943 INS. L.J. 72 (1943); Feinsinger, *The Operation of Financial Responsibility Law*, 3 LAW & CONTEMP. PROB. 519 (1936); Grad, *Recent Developments in Automobile Accident Compensation*, 50 COLUM. L. REV. 300 (1950). And while these other so-called "purposes" may indeed be indirect results of the broad compensatory purpose of the statutes, they are not a *necessary* part of the financial responsibility scheme. Schecter v. Killingsworth, 93 Ariz. 273, 280-81, 380 P.2d 136, 140-41 (1963); People v. Nothaus, 147 Colo. 210, 215, 363 P.2d 180, 183 (1961). *See* note 17 *infra.*

[8] In a majority of states, the statutory amount is $100. Nevada is one of the exceptions and does not require an accident report unless the injury or damage is in excess of $250. NEV. REV. STAT. § 485.190 (1961). Some states, on the other hand, have no minimum statutory amount. For example, the Ohio Financial Responsibility Law, O.R.C. § 4509.06, provides that the driver of any motor vehicle which is in *any manner* involved in a motor vehicle accident shall forward a written accident report to the registrar of motor vehicles within 30 days of that accident.

[9] Normally, when both parties are insured there is no necessity to make a report. Moreover, in practice, the mandatory filing period is not strictly enforced. In Ohio, for example, the Bureau of Motor Vehicles notifies the delinquent party and will not suspend a license until at least two notices are sent and disregarded.

[10] In Ohio, for example, this amount is determined by the registrar of motor vehicles. O.R.C. § 4509.12. Practically speaking, all that is required by the states is a minimum amount of insurance coverage to meet this provision. The end result, however, is that the minimum coverage is frequently insufficient to satisfy the resulting judgment.

[11] Some states permit the limited restoration of the operator's license and registration where driving is necessary for occupation or livelihood. *E.g.*, MICH. STAT. ANN. § 9.2204(1) (1968 Revision).

[12] *See* notes 41-49 *infra* & accompanying text.

the vast majority of operators satisfy the requirement by proof of liability insurance coverage.[13] Moreover, in virtually all states, the security requirement is terminated by exoneration settlement, or the lapse of a statutory period in which suit has not been filed.[14] The statutes also require proof of future financial responsibility as a prerequisite to returning operator licenses to persons who have had their licenses suspended for failure to post security or for a poor driving record.[15]

Although strongly supported by the insurance industry,[16] the financial responsibility laws have come under vigorous attack for their alleged failure to achieve their intended purpose[17] and for their al leged unconstitutionality. The latter question appeared to be settled in favor of the statutes as state and lower federal courts almost uniformly upheld the laws in the face of attacks under the due process and equal protection clauses.[18] Recently, however, in *Bell v. Bur-*

---

[13] *See Legislation, supra* note 7, at 1052-54.

[14] *See, e.g.*, O.R.C. § 4509.29, which provides:

> Upon the expiration of two years from the date of any accident for which a security deposit has been made, any security remaining on deposit shall be returned to the depositor or to his personal representative if an affidavit or other evidence satisfactory to the registrar of motor vehicles has been filed:
>
> (A) That no action for damages arising out of the accident for which deposit was made, begun within two years after the date of the accident, is pending against the person on whose behalf the deposit was made;
>
> (B) That there does not exist any unpaid judgment rendered against any such person in such an action.

[15] Proof of future financial responsibility may be given by filing a bond, a certificate of insurance, or a certificate of deposit of money or securities. *E.g.*, O.R.C. § 4509.45. Interestingly, the financial responsibility statutes of 22 states require proof of future financial responsibility not only from serious traffic offenders, but on the basis of involvement in any accident. *Legislation, supra* note 7, at 1053.

[16] The private insurance companies have long supported the financial responsibility statutes since they indirectly force one to insure. Moreover, during the past 15 years, the writing of surety bonds has become a lucrative business. Insurance companies, however, have also strongly opposed any type of compulsory scheme that would force them to insure "high risk" drivers. *See* KEETON & O'CONNELL, BASIC PROTECTION FOR THE TRAFFIC VICTIM 91-102 (1965). Recently, however, the American Insurance Association has begun to promote various "no-fault" insurance schemes, apparently foreseeing even greater profit in some form of no-fault scheme. Berry, *No-Fault Automobile Insurance: An Abolition of the Tort Concept*, 25 OKLA. L. REV. 83 (1972). Some commentaries allege that the insurance companies are promoting no-fault for their own profit by attempting to force an end to personal injury litigation. *See* Lewis, *As I See It*, TRIAL, Sept.-Oct., 1971, at 57.

[17] Indeed, as early as 1937, the original financial responsibility statutes were criticized as ineffective, and as a result, many states adopted new policies which placed lesser emphasis on the safety measures of the statutes, such as quarantining the bad driver by forcing him to prove financial responsibility, and greater emphasis on the compensation of the accident victim. *See* Grad, *supra* note 7.

[18] *See* Annot., 35 A.L.R.2d 1011 (1954).

son,[19] the United States Supreme Court revived the issue by holding that the operation of financial responsibility laws must comport with procedural due process standards by affording a prior hearing on liability.

Although *Bell* did not radically depart from traditional due process analysis, the Court's action could have broad significance, not only for existing financial responsibility schemes, but also for other legislation which affects analogous personal rights. Now that the Court has revived the due process question, it may proceed to consider such legislation under developing equal protection analysis. To illustrate the operation of the developing equal protection doctrines, the Note will trace the court challenges to financial responsibility statutes and will analyze some of the questions likely to be raised in the future.

III. CONSTITUTIONALITY OF FINANCIAL RESPONSIBILITY STATUTES

A. *Due Process*

Although it is well settled that regulation of public highways under the state police power is a proper governmental activity in the interest of public health, welfare, and safety,[20] the fourteenth

[19] 402 U.S. 535 (1971).

[20] In Reitz v. Mealey, 314 U.S. 33 (1941), the Supreme Court declared that financial responsibility statutes were valid exercises of state police power, providing "an enforcement of permissible state policy touching highway safety." *Id.* at 37.

Recently, however, in Perez v. Campbell, 402 U.S. 637 (1971), the Court held that the section of the Arizona Motor Vehicle Safety Responsibility Act which dealt with the discharge of bankruptcy was constitutionally invalid since the section conflicted with the Federal Bankruptcy Act, 11 U.S.C. § 35 (1970). The Court concluded that *Reitz* had "no authoritative effect to the extent that [it is] inconsistent with the controlling principle that any state legislation which frustrates the full effectiveness of federal law is rendered invalid by the Supremacy Clause." 402 U.S. at 652. Even after *Perez*, however, financial responsibility statutes are still valid exercises of state police power so long as their provisions do not conflict with established federal law.

State and lower federal courts have also upheld the validity of financial responsibility statutes. For example, in Sharp v. Dep't of Public Safety, 114 So. 2d 121 (La. Ct. App. 1959), the Louisiana Court of Appeals affirmed a lower state court which held that the Louisiana Motor Vehicle Safety Responsibility Law was a valid exercise of the state police power. The court agreed with the majority of states and declared that:

> [S]uch enactments are sustained under the police power and the compelling public interest of the States to provide some remedy for the uncompensated victims of automobile accidents and thereby to protect the users of the highways and the general public affected by the extensive use of motor vehicles in this motorized age. *Id.* at 123.

Accord, Reutzel v. State, 290 Minn. 88, 186 N.W.2d 521 (1971); State v. Finley, 198 Kan. 585, 426 P.2d 251 (1967); Berberian v. Lussier, 87 R.I., 226, 139 A.2d 869 (1958); Doyle v. Kahl, 242 Iowa 153, 46 N.W.2d 52 (1951); Escobedo v. State Dept. of Motor Vehicles, 35 Cal. 2d 870, 222 P.2d 1 (1950); Ragland v. Wallace, 80 Ohio

amendment requires that such regulation be consistent with due process.[21] Until recently, a great majority of state courts viewed financial responsibility statutes as largely unrestricted by the fourteenth amendment, holding that a license to drive and use the highways was a mere privilege, the right to revoke the privilege being a condition precedent to granting it.[22]

Thus, the early approach to the constitutional validity of the financial responsibility laws was grounded upon the dichotomy of right versus privilege.[23] The due process issue centered around the question of whether a pre-suspension hearing was required, with the vast majority of courts holding that the suspension of a driver's license without a prior hearing did not amount to a taking of property in the due process sense.[24] Courts embracing this position reasoned that if a driver's license represented a mere privilege and not a property right, its regulation, issuance, and suspension could be left within the discretion of an administrator.[25]

A few courts characterized driving as a right. The result of such a categorization, however, is far from clear. For example, in

---

App. 210, 70 N.E.2d 118 (Ct. App. 1946). *But cf.* People v. Nothaus, 147 Colo. 210, 363 P.2d 180 (1961).

[21] Bell v. Burson, 402 U.S. 535 (1971). *See* notes 41-49 *infra* & accompanying text.

[22] *E.g.*, Gillaspie v. Dep't of Public Safety, 152 Tex. 259, 259 S.W.2d 177 (1953). *Accord*, Johnson v. Sanchez, 67 N.M. 41, 351 P.2d 449 (1960); State v. Stehlek, 262 Wis. 642, 56 N.W.2d 514 (1953); Hadden v. Aitken, 156 Neb. 215, 55 N.W.2d 620 (1952); Doyle v. Kahl, 242 Iowa 153, 46 N.W.2d 52 (1951); Goodwin v. Superior Court of Yavapai County, 68 Ariz. 108, 201 P.2d 124 (1948); Larr v. Dignan, 317 Mich. 121, 26 N.W.2d 872 (1947). *Contra* People v. Nothaus, 147 Colo. 210, 363 P.2d 180 (1961); Escobedo v. State Dep't of Motor Vehicles, 35 Cal. 2d 870, 222 P.2d 1 (1950).

[23] The right versus privilege approach, followed by most courts up to the 1950's, including those courts addressing themselves to the constitutionality of financial responsibility statutes, involved a distinction between constitutionally protected rights of private citizens and constitutionally unprotected privileges. An early example of this approach was McAuliffe v. Mayor of New Bedford, 155 Mass. 216, 29 N.E. 517 (1892), wherein the Court upheld the dismissal of a police officer for violating a regulation prohibiting political activity, declaring that "the petitioner may have a constitutional right to talk politics, but he has no constitutional right to be a policeman." *Id.* at 220, 29 N.E. at 517. *See also* Baisky v. Board of Regents, 347 U.S. 442 (1954).

[24] An excellent example of the application and effect of the right versus privilege dichotomy on the financial responsibility laws appeared in Nutler v. State Rd. Comm'n., 119 W. Va. 312, 193 S.E. 549 (1937), wherein the Supreme Court of Appeals of West Virginia stated that:

> The operation of a motor vehicle on the public highways is not a national right, nor is license to do so a contract, or property right, in a Constitutional sense. It is merely a conditional privilege which may be suspended or revoked without notice or an opportunity to be heard. . . . *Id.* at 552.

[25] *E.g.* Commissioner v. Funk, 323 Pa. 390, 186 A. 65 (1936).

Escobedo v. State Department of Motor Vehicles,[26] where an operator's license was suspended without a hearing pursuant to the state financial responsibility statute, the Supreme Court of California spoke positively of the *right* to drive, declaring that "[t]he use of highways for purposes of travel and transportation is not a mere privilege, but a common and fundamental right of which the public and individuals cannot rightfully be deprived."[27] However, the Court in *Escobedo* went on to uphold the validity of the statute, noting that the right to drive was subject to regulation under the state police power and that "[s]uspension of the license without prior hearing but subject to subsequent judicial review did not violate due process if reasonably justified by a compelling public interest," which the court found in the burden which would be engendered by requiring a hearing prior to suspension.[28]

On the other hand, the Colorado Supreme Court, in *People v. Nothaus*,[29] declared that the provision of that state's financial responsibility statute which allowed summary suspension of driver's licenses and registrations without a prior hearing for failure to deposit security was a violation of procedural due process. The court declared that the right to make use of the public highways is "inalienable," and that every citizen has full freedom to travel from place to place in the enjoyment of life and liberty.[30]

The *Nothaus* court conceded that a citizen must meet reasonable standards of fitness and competence to drive a motor vehicle, and that it is the province of the legislature to establish these standards. The court held, however, that once such standards are established, revocation or suspension cannot be accomplished "without notice to the party affected and without an opportunity for him to be heard on the question of whether sufficient grounds exist to warrant a revocation of his right to drive . . . ."[31] To reach this conclusion, the court employed the concept of vested rights, in which the use of property is viewed as inseparable from the property right itself, stating that "property, within the meaning of the due process clause,

---

[26] 35 Cal. 2d 870, 222 P.2d 1 (1950).

[27] *Id.* at 875, 222 P.2d at 5. *Accord*, Wall v. King, 206 F.2d 878, 882 (1st Cir. 1953), *cert. denied*, 346 U.S. 915 (1954); Berberia v. Lussier, 87 R.I. 226, 139 A.2d 869 (1958); Thompson v. Smith, 155 Va. 367, 154 S.E. 579 (1930).

[28] 35 Cal. 2d at 876, 222, P.2d at 5-6.

[29] 147 Colo. 210, 363 P.2d 180 (1961).

[30] *Id.* at 214, 363 P.2d at 182.

[31] *Id.* at 215, 363 P.2d at 182.

includes the right to make full use of the property when one has an inalienable right to acquire."[32]

Another case which described the use of the public highways as a right was *Schecter v. Killingsworth*.[33] *Schecter* recognized, as did *Escobedo*, that this right was subject to reasonable regulation under the state police power.[34] The court, however, avoided the question of whether the exercise of the police power justified license suspension without a prior hearing by construing the statute so as to require a pre-suspension hearing at which the existence of possible liability was to be determined.[35]

Therefore, although it was clear that when driving was held to be merely a privilege a pre-suspension hearing would not be required, the effect of a holding that driving was a right was far from settled.

In any event, the majority of subsequent state court decisions declined to follow *Escobedo*, *Nothaus*, and *Schecter* which held that driving was a right.[36] It should be noted, however, that many states added to their financial responsibility statutes provisions for a hearing upon request.[37]

---

[32] *Id.* The court also noted that the requirement that drivers' licenses be suspended absent a showing of the ability to indemnify the other party was not related to the public safety, health, morals or welfare, but rather was intended to "bring about the posting of security for the payment of a private obligation. . . . The public gets no protection whatever from the deposit of such security." *Id.* at 216, 363 P.2d at 183. The implication from this latter statement is that the state police power could not justify the imposition of such a restriction. Although it is true that the purpose of financial responsibility laws is not public safety, *see* note 7 *supra* & accompanying text, this does not mean that such laws can not be upheld within the state's police power. *See* note 20 *supra* & accompanying text. Furthermore, it is questionable whether the "public" receives no protection from a provision that was intended to benefit so many of its members.

[33] 93 Ariz. 273, 380 P.2d 136 (1963).

[34] *Id.* at 280, 380 P.2d at 140. The court noted also that "the social objective of preventing financial hardship and possible reliance upon the welfare agencies is a permissible goal of police action." *Id.* at 281, 380 P.2d at 141.

[35] *Id.* at 283-84, 380 P.2d at 142-43.

[36] In State v. Finley, 198 Kan. 585, 426 P.2d 251 (1967), the Supreme Court of Kansas noted that the *Nothaus* decision represented the minority view, and declared that the operation of a motor vehicle upon the public streets and highways was not a natural right, but a privilege subject to reasonable state regulation. *Accord*, Thurman v. State Dep't of Pub. Safety, 222 Ga. 843, 152 S.E.2d 884 (1967); Jones v. Kirkman, 138 So. 2d 513 (Fla. 1962).

[37] *E.g.*, TENN. CODE ANN. § 59-1202 (1968 Replacement), which provides in pertinent part:

> a. The commissioner shall administer and enforce the provisions of this chapter and may make rules and regulations necessary for its administration and shall provide for hearings upon request of persons aggrieved by orders or acts of the commissioner under the provisions of this chapter provided that such requests are made with sixty (60) days, following such order or act

It is apparent that all the courts which initially considered the constitutionality of financial responsibility laws focused narrowly upon whether the use of the highways was a right or a privilege. The right/privilege dichotomy, however, was replaced as a method of constitutional analysis when the United States Supreme Court adopted a new position which recognized that if there was a "substantial interest" involved in a particular entitlement, all facets of procedural due process must be observed before that interest might be infringed.[38]

Application of the substantial interest approach to due process problems is most apparent in the flood of litigation instigated in the 1960's involving the administration and termination of public assistance benefits. In confronting these problems, the Supreme Court declared that due process safeguards must be provided where such benefits are to be terminated, regardless of whether the benefits are categorized a right or privilege. *Goldberg v. Kelly*[39] marked the culmination of the right versus privilege debate. In *Goldberg* public assistance benefits were terminated without prior notice and opportunity for hearing being afforded to the recipient. The district court held that only a pre-termination evidentiary hearing would satisfy the due process requirement. In affirming the district court view, the Supreme Court declared that public assistance benefits are a matter of statutory entitlement for persons qualified to receive them, and thus any notion of right or privilege is meaningless. In view of the fact that a recipient of public assistance benefits is likely to suffer "grievous loss" if those benefits are terminated, procedural due process must be afforded prior to termination. The Court made it quite clear that the recipient's interest involved in *Goldberg*, that is, avoiding the loss of benefits, clearly outweighed any state interest in summary adjudication or preservation of state funds.[40] Thus,

---

> and failure to make such request within the time specified shall without exception constitute a waiver of such right.

See N.J. STAT. ANN. § 39.6-67 (Supp. 1971).

[38] *See* Board of Regents of State Colleges v. Roth, 408 U.S. 564, 569-75 (1972).

[39] 397 U.S. 254 (1970).

[40] Speaking for the *Goldberg* Court, Mr. Justice Brennan declared that:

> The constitutional challenge cannot be answered by an argument that public assistance benefits are "a 'privilege' and not a 'right' " [since] . . . [r]elevant constitutional restraints apply as much to the withdrawal of public assistance benefits as to disqualification for unemployment compensation . . . or to denial of a tax exemption . . . or to discharge from public employment. The extent to which procedural due process must be afforded the recipient is influenced by the extent to which he may be "condemned to suffer grievous loss" . . . and depends upon whether the recipient's interest in avoiding that loss outweighs the governmental interests in summary adjudication.

under this approach the command of the due process clause is viewed in terms of a balancing between private and governmental interests.

The notion of substantial interest was applied to the administration of state financial responsibility statutes by the Supreme Court in the recent case of *Bell v. Burson*.[41] There, the Court declared that procedural due process will be satisfied *only* if prior to suspension of a driver's license pursuant to a financial responsibility statute there is an inquiry into the likelihood of there being judgments rendered against the licensee in the amounts being claimed. The substance of that command is that prior to suspension there must be a determination of probable fault.

The petitioner in *Bell* was a clergyman whose ministry required him to travel by car in order to cover three rural Georgia communities. During the course of such travel, Bell was involved in an accident in which a young girl rode her bicycle into the side of his automobile. Pursuant to the Georgia financial responsibility statute,[42] the child's parents filed an accident report with state authorities stating that their daughter had suffered substantial injuries for which they claimed damages of $5,000. Petitioner Bell was thereafter informed by the state that unless he was covered by a liability insurance policy in effect on the date of the accident he must either file a bond or cash security of $5,000 or suffer suspension of his operator's license. Bell requested an administrative hearing on the matter, asserting that he was not liable since the accident was unavoidable, and stating also that he would be seriously handicapped in his ministry by a suspension of his license. At the administrative hearing, Bell's proffer of evidence on liability was rejected, and he was given 30 days in which to comply with the security requirement or face suspension. The Georgia Court of Appeals subsequently up-

---

Id. at 262 (citations omitted). *See* Sniadach v. Family Finance Corp., 395 U.S. 337 (1969); Shapiro v. Thompson, 394 U.S. 618 (1969); Sherbert v. Verner, 374 U.S. 398 (1963).

Goldberg came at the end of a long line of cases from the 1950's and early 1960's which recognized the flexibility of due process standards and expanded the protection offered personal interests. *See, e.g.*, Joint Anti-Facist Refugee Comm. v. McGrath, 341 U.S. 123, 162 (1951), (Frankfurter, J., concurring): "But 'due process,' unlike some legal rules, is not a technical conception with a fixed content unrelated to time, place and circumstances." *See generally*, Sherbert v. Verner, 374 U.S. 398, 404-05 (1963); Van Alstyne, *The Demise of the Right-Privilege Distinction in Constitutional Law*, 81 HARV. L. REV. 1439 (1968).

[41] 402 U.S. 535 (1971).

[42] GA. CODE ANN. §§ 92A-601 to 621 (Supp. 1970).

held the administrative determination[43] and certiorari was granted by the United States Supreme Court upon the denial by the Georgia Supreme Court to consider the matter further.[44]

Mr. Justice Brennan, speaking for a unanimous Court,[45] recognized that just as in the other recent due process cases, the statutory entitlement to drive may be essential in day-to-day living.[46] As such, suspension of issued licenses, like the termination of public assistance benefits, involves state action that affects substantial interests of the licensee. In *Bell*, the Court had no problem finding that the driver's interest outweighed the state interest in saving the expense of expanded hearings and disagreed with the contention that consideration of liability was irrelevant to the scheme of the financial responsibility statute.

Thus, *Bell* clears away much of the indecision created by the application of the right/privilege dichotomy to financial responsibility laws.[47] It is now clear that due process requires a hearing prior to the suspension of a driver's license pursuant to a financial responsibility statute at which time there must be a determination of whether there is a reasonable possibility of judgment being rendered against the licensee as a result of the accident in question. Although the Court in *Bell* was willing to accept alternative procedures to a full evidentiary hearing for a determination of probable fault, its command was clear: licenses are not to be taken away without that procedural due process required by the fourteenth amendment.[48]

Bell indicates the willingness of the Supreme Court to scrutinize financial responsibility statutes under the fourteenth amendment. The Court expressly found that the interest involved in *Bell* was worthy of due process protection, a position which had found little

---

[43] 121 Ga. App. 418, 174 S.E.2d 235 (1970).

[44] 400 U.S. 963 (1970).

[45] Mr. Justice Brennan delivered the opinion of the Court, in which Justices Douglas, Harlan, Stewart, White and Marshall joined. Chief Justice Burger and Justices Black and Blackmun concurred in the result.

[46] 402 U.S. at 539.

[47] *See* notes 22-37 *supra* & accompanying text.

[48] Mr. Justice Brennan suggested that the state of Georgia could adopt various alternative plans such as compulsory insurance or unsatisfied judgment funds instead of its then existing financial responsibility statute, but nonetheless upheld the statute as a whole. The Court's only mandate was to include a hearing prior to suspension of an operator's license. Mr. Justice Brennan summarized that the Court held "only that the failure of the present Georgia scheme to afford the petitioner a prior hearing on liability of the nature we have defined denied him procedural due process in violation of the Fourteenth Amendment." 402 U.S. at 543.

support earlier. Although that result in itself is significant to the extent that states must now satisfy a meaningful due process burden in the administration of their financial responsibility laws,[49] the real significance of *Bell* is arguably that the Supreme Court has reopened the entire question of the constitutional validity of those laws. Indeed, if the interest in *Bell* was worthy of protection under the due process clause, should not that interest also fall within the ambit of the equal protection clause? That question too had been previously foreclosed, but given the Court's willingness in *Bell* to apply fourteenth amendment standards, reconsideration of financial responsibility laws under the equal protection clause is within the realm of possibility.

B. *Equal Protection*

Although states enjoy a fairly broad scope of discretion in enacting laws which create classifications among their citizens,[50] the equal protection clause of the fourteenth amendment dictates that such classifications are valid only so long as all and only those persons who are similarly situated are treated equally with respect to the purpose of the law.[51] The Supreme Court has applied two tests for measuring legislative classifications against the requirements of the equal protection clause. Under the first, the traditional test, the classification involved must be reasonable and bear some rational relationship to a legitimate state end.[52] This is commonly known today as the test for non-suspect classifications.[53] In applying this test, the courts have generally presumed the constitutionality of the statute.[54] Under the second test, the Court has adopted an attitude of active and critical scrutiny of statutory classifications touching on

---

[49] Regardless of administrative difficulty and financial burden, the states will necessarily have to implement a meaningful pre-suspension hearing procedure. Although the Court did not speak directly to the content of such hearings to be provided, it is reasonable to assume that a licensee will have a right to present any probative evidence on the question of fault.

[50] Royster Guano Co. v. Virginia, 253 U.S. 412, 415 (1920).

[51] *Id. See generally Developments in the Law — Equal Protection,* 82 HARV. L. REV. 1065, 1076-87 (1969); Tussman & Ten Broek, *The Equal Protection of the Laws,* 37 CALIF. L. REV. 341, 346 (1949).

[52] McDonald v. Bd. of Election Comm'rs, 394 U.S. 802, 809 (1969). *See* notes 110-21 *infra* & accompanying text.

[53] Classifications which are based solely on alienage, nationality, or race are termed suspect classifications. *See* notes 60-62 *infra* & accompanying text.

[54] *See Developments, supra* note 51, at 1087.

fundamental rights or involving suspect classifications.[55] Under this standard of strict scrutiny the normal presumption of constitutionality is reversed, and the state bears the burden of establishing that a compelling state interest is promoted by the classification.[56] The state must also demonstrate that there is in fact no less onerous alternative means of accomplishing the stated purpose of the law.[57] It is submitted, however, that there may now be a third approach for regulations involving "personal rights," where the Court has taken an active role in attempting to find the requisite rational relationship instead of presuming its existence.[58]

Implicit in the statutory scheme of financial responsibility laws is the creation of a classification among citizens of the state. By requiring proof of ability to respond in damages from those drivers who may potentially be held liable for an accident, the statutes create a classification between drivers who are financially responsible, that is, drivers who post security, and those who, failing to post security, are financially irresponsible. The remainder of this Note will scrutinize the validity of this classification under the various equal protection tests.

1. *The Compelling Interest Test: Suspect Classifications and Fundamental Rights.*— Financial responsibility statutes are coercive in that they depend for their effectiveness upon the suspension of drivers' licenses. But suspension may be avoided in any particular case by either posting security or demonstrating liability insurance coverage. Thus the indigent driver who can afford neither security nor insurance will face suspension — and this without a conclusive determination of liability[59] — while the rich driver will not. It is arguable, therefore, that the classification actually created by financial responsibility laws is not one between financially responsible and financially irresponsible drivers, but rather between rich and poor. Advocates of this position would argue that this classification

---

[55] *See, e.g.*, Shapiro v. Thompson, 394 U.S. 618 (1969); Loving v. Virginia, 388 U.S. 1 (1967).

[56] Shapiro v. Thompson, 394 U.S. 618, 634, 638 (1969). Unlike the traditional test, any legitimate interest that the state may have had in a particular classification does not of itself satisfy the burden of justification where a suspect classification or fundamental right is involved. *See* McLaughlin v. Florida, 379 U.S. 184 (1964).

[57] *See* Tate v. Short, 401 U.S. 395, 399 (1971); Griswold v. Connecticut, 381 U.S. 479, 498 (1965) (Goldberg, J., concurring); Carrington v. Rash, 380 U.S. 89, 96 (1965).

[58] *See* notes 124-49 *infra* & accompanying text.

[59] Bell v. Burson, 402 U.S. 535 (1971), requires only that there be a preliminary determination as to potential liability.

should be subject to strict judicial scrutiny. For this to be the case, the classification must either be suspect or infringe upon a fundamental right.

Classifications based on race,[60] ancestry,[61] and alienage[62] have consistently been held inherently suspect by the Supreme Court. In addition, classifications based on wealth have been disfavored,[63] and strictly scrutinized by the Court.[64] However, in all cases where the Supreme Court has subjected classifications based on wealth to the stricter standard of review, some fundamental right had been impaired.[65] Indeed, no Supreme Court case has held that a classification drawn along the lines of wealth is suspect when no fundamental right has been infringed.[66] And the Court has recently

---

[60] *See, e.g.*, Loving v. Virginia, 388 U.S. 1 (1967); McLaughlin v. Florida, 379 U.S. 184 (1964); Bolling v. Sharpe, 347 U.S. 497 (1954).

[61] *See, e.g.*, Oyama v. California, 332 U.S. 633 (1948); Korematsu v. United States, 323 U.S. 214 (1944); Hirabayashi v. United States, 320 U.S. 81 (1943).

[62] *See, e.g.*, Graham v. Richardson, 403 U.S. 365 (1971); Takahashi v. Fish & Game Comm'n, 334 U.S. 410 (1948).

[63] *See, e.g.*, Harper v. Virginia Bd. of Elections, 383 U.S. 663 (1966); Douglas v. California, 372 U.S. 353 (1963); Griffin v. Illinois, 351 U.S. 12 (1956).

[64] McDonald v. Bd. of Election Comm'rs, 394 U.S. 802 (1969) (dictum).

[65] *E.g.*, Harper v. Virginia Bd. of Elections, 383 U.S. 663 (1966) (right to vote); Douglas v. California, 372 U.S. 353 (1963) (right to counsel); Griffin v. Illinois, 351 U.S. 12 (1956) (right to transcript on appeal). *See* Parker v. Mandel, 344 F. Supp. 1068, 1079 (D. Md. 1972). The California Supreme Court, however, in Serrano v. Priest, 5 Cal. 3d 584, 487 P.2d 1241, 96 Cal. Rptr. 601 (1971), recently reversed a lower court's dismissal on demurrer of a complaint alleging that the California public school financing system, based on local property taxes, was violative of equal protection. After strictly scrutinizing the financing system and the classification it created, the court found that the system discriminated on the basis of wealth, held that education was a "fundamental interest," and discerned no compelling state purpose necessitating the present method of financing. *Id.* at 589, 604, 610, 487, P.2d at 1244, 1255, 1259, 96 Cal. Rptr. at 604, 615, 619. Some commentators have interpreted *Serrano* as declaring that wealth is a suspect classification. *See*, Comment, *Educational Financing, Equal Protection of the Laws, and the Supreme Court*, 70 MICH. L. REV. 1324, 1342 (1972). Such a reading may, however, be unjustified. After discussing the Supreme Court's disfavored treatment of wealth classifications, *Serrano* expressly noted that "[u]ntil the present time wealth classifications have been invalidated only in conjunction with a limited number of fundamental interests. . . ." 5 Cal. 3d at 604, 487 P.2d at 1255, 96 Cal. Rptr. at 615. Then, the court, noting that education had never been held to be a fundamental interest, went on to so hold. Therefore, although admittedly *Serrano* expanded the category of rights deemed "fundamental," it provides no support for the contention that wealth alone is inherently suspect. *See* Comment, *The Evolution of Equal Protection — Education, Municipal Services and Wealth*, 7 HARV. CIV. RIGHTS-CIV. LIB. L. REV. 105, 131 n.111 (1972). Moreover, the very cases used by the court in *Serrano* to establish wealth as a disfavored basis for statutory classification were cases involving impairment of fundamental rights in addition to classifications based on wealth.

[66] *But See* Cruz v. Hauck, 404 U.S. 59, 65 (1971) (Douglas J., concurring). Recently, the United States Supreme Court, in Graham v. Richardson, 403 U.S. 365 (1971), declared that the mere existence of a suspect classification was sufficient for

refused to treat wealth alone, without the concomitant infringement of a fundamental right, as the basis for the creation of a suspect classification.[67]

Therefore, assuming *arguendo* that financial responsibility laws discriminate on the basis of wealth, in order for such a classification to be suspect and thus cause the compelling interest test to be applied it is necessary to demonstrate that such laws impair a fundamental right. The impairment of a fundamental right alone, however, without the existence of a suspect classification, is sufficient to trigger strict judicial scrutiny.[68] As a result, the application of the compelling interest test to financial responsibility laws depends ultimately and completely on whether the right to drive is fundamental.

To date no court has gone so far as to recognize the existence of a fundamental right to drive. It is true that in discussing the validity of financial responsibility laws under the due process clause, although the vast majority of state courts denominated driving a mere privilege, a few state courts did hold driving to be a right or liberty.[69] It cannot be said, however, that such a holding, in a context unrelated to equal protection, is at all indicative that driving is

---

courts to apply a strict standard of review to a legislative classification and require that the states demonstrate the existence of a compelling interest for the classification. In *Graham*, the Court struck down a discriminatory statute involving state participation in the denial of welfare benefits to aliens. In a unanimous decision, the Court found that the classification created by a fifteen year residency requirement for aliens, imposed as a condition to receiving public assistance benefits, was inherently suspect and, as such, was subject to strict judicial review whether or not a fundamental right was impaired. *Id.* at 376. Although holding that no fundamental right need be infringed upon in order to strike a suspect classification, the classifications recognized in *Graham* — race, nationality and alienage — were those, and only those long held *inherently suspect.* Thus, an attempt to extend *Graham* to classifications based on wealth is improper since wealth is deemed a suspect classification *only* when a fundamental right is impaired.

[67] James v. Valtierra, 402 U.S. 137 (1971). *Valtierra* involved a provision of the California Constitution which required referendum approval prior to the development or construction of low cost housing, the enforcement of which had been enjoined by a three-judge district court as being violative of equal protection. 313 F. Supp. 1 (N.D. Cal. 1970). The three-judge court based its holding on Hunter v. Ericson, 393 U.S. 385 (1969), which had held an amendment to the Akron city charter, requiring referendum approval for any ordinance regulating real estate on the basis of race, color, religion, or national origin to be violative of equal protection. In reversing the judgment of the three-judge court, the Supreme Court distinguished *Hunter* on the grounds that the Akron referendum rested on distinctions based on race, which is inherently suspect and subject to strict scrutiny, while the California referendum did not rest upon such a distinction. The Court noted that "[t]he present case could be affirmed only by extending *Hunter*, and this we decline to do." 402 U.S. at 141. *See* Parker v. Mandel, 344 F. Supp. 1068, 1079-80 (D. Md. 1972).

[68] *See, e.g.*, Shapiro v. Thompson, 394 U.S. 618 (1969).

[69] *See* notes 22-37 *supra* & accompanying text.

a *fundamental* right.[70] In addition, although the Supreme Court has characterized driving as an "important interest,"[71] it has not yet held it to be a fundamental right.[72] And the Court does not presently seem anxious to expand the category of fundamental rights.[73]

Therefore, although classifications based on wealth are disfavored, they apparently are not inherently suspect, and, although driving is an important interest, it has not been and is not likely to become a fundamental right. This would seem to foreclose application of the compelling interest test to state financial responsibility laws, even assuming that the classification they create is between rich and poor.[74]

---

[70] *Compare* Goldberg v. Kelly, 397 U.S. 254 (1970) (receipt of welfare benefits was an important right which could not be terminated without according procedural due process to the recipient) *with* Dandridge v. Williams, 397 U.S. 471 (1970) (application of the traditional, rational basis test to determine whether state welfare regulation violated equal protection).

[71] Bell v. Burson, 402 U.S. 535, 539 (1971).

[72] *Cf.* note 70 *supra.* To date the Supreme Court has held few interests to be "fundamental." These include the right to travel interstate, Shapiro v. Thompson, 394 U.S. 618 (1969); the right to vote, Harper v. Virginia Bd. of Elections, 383 U.S. 663 (1966); and the right to fair criminal procedure, Tate v. Short, 401 U.S. 395 (1971); Douglas v. California, 372 U.S. 353 (1963); Griffin v. Illinois, 351 U.S. 12 (1956); and the right to procreation, Skinner v. Oklahoma *ex rel.* Williamson, 316 U.S. 535 (1942). The Court, however, has not clearly articulated those characteristics which render an interest fundamental. It has been suggested that notions of extreme personal detriment and particular societal value underlie the fundamental right concept. *See The Evolution of Equal Protection, supra* note 65 at 115-22. Recent decisions, however, have suggested that whether an interest is fundamental may depend on the existence of a constitutionally protected right. *See* Lindsey v. Normet, 405 U.S. 56, 74 (1972); Dandridge v. Williams, 397 U.S. 471, 484 (1970); Parker v. Mandel, 344 F. Supp. 1068, 1076-77 (D. Md. 1972). *See generally, Educational Financing, supra* note 65 at 1339-40 & n.112.

[73] *See New Tenets in Old Houses, supra* note 4 at 938; *Educational Financing, supra* note 65 at 1333. The California Supreme Court has recently expanded the list of fundamental rights, adding education. Serrano v. Priest, 5 Cal. 3d 584, 487 P.2d 1241, 96 Cal. Rptr. 601 (1971). *See* note 65 *supra. Accord,* Robinson v. Cahill, 118 N.J. Super. 223, 275, 287 A.2d 187, 214 (Super. Ct. 1972). *Contra,* Johnson v. New York State Educ. Dep't, 449 F.2d 871, 879 (2d Cir. 1971); Parker v. Mandel, 344 F. Supp. 1068, 1077 (D. Md. 1972). It is questionable, however, whether the Supreme Court would agree. *Cf.* Burruss v. Wilkerson, 397 U.S. 44 (1970), *aff'g mem.* 310 F. Supp. 572 (W.D. Va. 1969); McInnis v. Ogilvie, 394 U.S. 322 (1969), *aff'g mem. sub nom.* McInnis v. Shapiro, 293 F. Supp. 327 (N.D. Ill. 1968); *The Supreme Court, 1970 Term,* 85 HARV. L. REV. 38, 130 (1971). More recently, the Court rejected the notion of a fundamental right to housing. Lindsey v. Normet, 405 U.S. 56 (1972). For a discussion of the probable reasons underlying the Court's reluctance to expand the number of rights deemed fundamental, see notes 154-56 *infra* & accompanying text.

[74] For an interesting discussion of the arguments, pro and con, concerning application of the compelling interest test to classifications based on wealth in the area of educational financing by combining the disfavored wealth classification and the substantial, but arguably not fundamental, interest in education, see *Educational Financing,*

However, even were this strict standard applied to financial responsibility laws, it is not at all clear that the statutes would be struck down. Where a statutory classification is suspect or infringes upon a fundamental interest, it must bear a higher degree of relevance to purpose than a non-suspect classification not involving fundamental rights:[75] it must be a necessary means of achieving a legitimate state purpose.[76] In other words, there must exist a compelling state interest,[77] the realization of which cannot be accomplished by less onerous means.[78]

The application of the compelling interest test, while seemingly straightforward, apparently encompasses several factors, each of which must be evaluated and weighed against the other in order to arrive at a final determination as to whether the statutory classification under consideration is valid.[79] In this balancing process[80] consideration is given to "the facts and circumstances behind the law, the interests which the state claims to be protecting, and the interests of those who are disadvantaged by the classification,"[81] and to whether the classification is necessary to accomplish the statutory purpose,[82] that is, whether the classification is reasonable in light of the purpose, whether the classification, in fact, accomplishes the purpose with sufficient precision, and whether there exist alternative means for achieving the same objective in a less onerous manner.[83]

---

supra note 65, at 1346-48. *See generally The Evolution of Equal Protection, supra* note 65.

[75] *See Developments, supra* note 51, at 1101-04.

[76] *See* Loving v. Virginia, 388 U.S. 1, 11 (1967); McLaughlin v. Florida, 379 U.S. 184, 196 (1964).

[77] Shapiro v. Thompson, 394 U.S. 618, 634, 638 (1969).

[78] *See* Tate v. Short, 401 U.S. 395, 399 (1971); Griswold v. Connecticut, 381 U.S. 479, 498 (1965) (Goldberg, J., concurring); Carrington v. Rash, 380 U.S. 89, 96 (1965).

[79] *See The Evolution of Equal Protection, supra* note 65, at 105, 113; Sager, *Tight Little Islands: Exclusionary Zoning, Equal Protection, and the Indigent,*, 21 STAN. L. REV. 767, 768, 778 (1969). *See generally, Developments, supra* note 51, at 1101-04.

[80] The balancing process utilized by the Court is not often openly articulated. For example, in Harper v. Virginia Bd. of Elections, 383 U.S. 663 (1966), in considering the constitutionality of Virginia's poll tax requirement, the Court stated that the introduction of "wealth or payment of a fee as a measure of a voter's qualifications [was the introduction of] a capricious or irrelevant factor." *Id.* at 668. Though not articulated, the Court apparently balanced the state's need for revenue against the right to vote in a free and unimpaired manner, and concluded that "the right to vote is too precious, too fundamental to be so burdened or conditioned." *Id.* at 670.

[81] William v. Rhodes, 393 U.S. 23, 30 (1968).

[82] McLaughlin v. Florida, 379 U.S. 184, 196 (1964).

[83] *See* Karst & Horowitz, *Reitman v. Mulkey: A Telophase of Substantive Equal Protection,* 1967 SUPREME COURT REV. 39, 75 (1967); Van Alstyne, *Student Academic*

Therefore, the existence or lack thereof of a "compelling" state interest is, in reality, merely a shorthand way of indicating that, on balance, the state interest does or does not outweigh the individual interests impinged upon by the statutory classification or that the classification is or is not necessary to the accomplishment of the statutory purpose.

Logically, a decision as to whether a particular state interest is sufficient to outweigh any individual interests involved would appear to be preliminary to determining whether the classification created is necessary to the accomplishment of the state interest. The Court, however, has often failed to reach the former question, basing decisions instead on a negative answer to the latter.[84] On the other hand, a finding by the Court that a classification is necessary to accomplish a statutory purpose is not alone sufficient to uphold the validity of the classification. Yet the fact that the classification does accomplish the statutory purpose and that no less onerous alternatives exist, arguably, may be influential in determining the outcome of the balance between the state and individual interests.

It is by no means clear which of the interests involved in the financial responsibility situation — the state's interest in ensuring the indemnification of automobile accident victims,[85] or the individual's interest in driving — would preponderate if a balance were struck between them.[86] If it can be shown, however, that less onerous alternatives exist, or that the classification created by financial responsibility statutes does not, in fact, accomplish the statutory purpose, the statute can be voided on these grounds and the balancing of the respective interests, difficult at best, will not be necessary.

Freedom and the Rule-Making Powers of Public Universities: Some Constitutional Considerations, 2 LAW IN TRANSITION Q. 1 (1965).

[84] *See, e.g.*, Tate v. Short, 401 U.S. 395, 399 (1971) (existence of less onerous alternatives); Kramer v. Union Free School Dist., 395 U.S. 621, 632 (1969) (failure to accomplish purpose with "sufficient precision"). The approach taken by the Court in these cases may be explained, at least partially, by the fact that a balancing of state versus private interests is to a large extent directed by value judgments, and the decision as to which should take precedence is therefore, highly subjective. *Cf.* note 153 *infra*. This is not as true, however, of the relevance to purpose of the classification. A court can, to a much greater degree, objectively determine whether the classification accomplishes the purpose or whether less onerous alternatives exist.

[85] *See* note 7 *supra* & accompanying text.

[86] In order for the compelling interest test to apply to financial responsibility laws, it must be assumed either that the right to drive is fundamental, or, assuming the classification created by financial responsibility laws is one between rich and poor, that classifications based on wealth are suspect *per se*. *But see* notes 65-74 *supra* & accompanying text. If driving were deemed to be a fundamental right, the state interest required to overcome it would, necessarily, need to be substantial.

A close examination of proposed alternatives to financial responsibility laws reveals that, for the most part, they fall short of effectively accomplishing the purposes underlying present financial responsibility laws. It has been suggested that financial responsibility statutes be replaced with some form of compulsory insurance coverage. Some of the proposed plans would simply make automobile medical payments, disability and other forms of coverage, including liability insurance, mandatory.[87] New York[88] and North Carolina[89] have enacted pure compulsory insurance programs. Yet they do not have the highest percentages among the states for automobile insurance coverage.[90] Thus, a pure system of compulsory insurance might result in a larger number of insured motorists than a non-compulsory system which employs the current financial responsibility mechanism, but it still leaves a substantial number of uninsured motorists on the road.[91] The administrative costs of such compulsory programs also suggest that it would be almost impossible to enforce the requirement to the degree necessary to rid the highways of that substantial percentage.[92] Therefore, although compulsory insurance has shortcomings in this respect, it would, by increasing the number of insured drivers, seemingly insure the indemnification of automobile accident victims to a greater extent than financial responsibility laws.

In another respect, however, compulsory insurance clearly falls behind financial responsibility laws in attaining this legislative purpose. Many financial responsibility statutes provide for additional

---

[87] *See, e.g.*, Denenberg, *The Automobile Insurance Problem: Issues and Choices*, 1970 INS. L.J. 455, 461 (1970). The most radical alternative proposal calls for the complete elimination of the tort-liability system and the adoption of a total self insurance system. *See* Ghiardi & Kircher, *Automobile Insurance Reparations Plans: An Analysis of Eight Existing Laws*, 55 MARQ. L. REV. 1, 3 (1972); Ghiardi & Kircher, *Automobile Insurance: The Rockefeller-Stewart Plan*, 37 INS. COUNSEL J. 324 (1970).

[88] N.Y. VEH. & TRAFFIC LAWS § 312 (McKinney 1972).

[89] N.C. GEN. STAT. § 20-309 (Supp. 1971).

[90] Woodroof, *supra* note 6, at 34. For example, in the states of North Carolina and New York approximately 10 percent of all drivers remain uninsured. U.S. DEP'T OF TRANSPORTATION, DRIVER BEHAVIOR AND ACCIDENT INVOLVEMENT: IMPLICATIONS FOR TORT LIABILITY 202-05 (1970). In New York, this amounts to a full 200,000 uninsured drivers still on the road. *Id.* at 203. This results from the fact that a substantial number of drivers purchase the compulsory insurance on an installment basis and allow it to lapse after obtaining registration for their vehicles, while others may, through inadvertence or design, allow their coverage to lapse. *Id.*

[91] Statistics also indicate that many drivers in the compulsory insurance states purchase only the minimum requirement of insurance. KEETON & O'CONNELL, BASIC PROTECTION FOR THE TRAFFIC VICTIM: A BLUEPRINT FOR REFORMING AUTOMOBILE INSURANCE 100 (1965).

[92] U.S. DEPT. OF TRANSPORTATION, *supra* note 90 at 203.

insurance to motorists, often in the form of a fund for the satisfaction of unsatisfied judgments.[93] Under the compulsory insurance programs and proposals there is no provision for unsatisfied judgment funds, and, consequently, judgments received from automobile accidents often remain uncollectible and unsatisfied.[94] Also, there remain the constitutional objections to compulsory insurance raised by many commentators respecting equal protection, due process, and the taking of private property without just compensation.[95]

More importantly, any alternative containing a form of compulsory insurance would be, in reality, *more onerous* than financial responsibility laws. If it is true that the indigent driver is unconstitutionally discriminated against when forced to prove his ability to respond in damages following an automobile accident or face the suspension of his drivers license, it would be all the more so under a compulsory insurance scheme, where the indigent driver would have to purchase insurance as a condition precedent to obtaining a driver's license.

The most recent variation of the compulsory plans is the so-called "no-fault" scheme in which each driver's damages are paid by his own insurer. At present, at least eleven jurisdictions have enacted some form of no-fault automobile insurance.[96] The majority of the remaining states are considering various alternative forms of no-fault insurance.[97] Several of these states have incorporated compul-

---

[93] Other state financial responsibility laws may require drivers to purchase uninsured motorist coverage. *See* note 6 *supra* & accompanying text.

[94] Woodroff, *supra* note 6, at 33.

[95] *Id.* at 33-38. *See* KEETON & O'CONNELL, *supra* note 91, ch. 9.

[96] CONN. LAWS, H.B. 5479 (May, 1972) (to be effective January 1, 1973); DEL. CODE ANN. tit. 21, § 2118 (Supp. 1971); FLA. STAT. ANN. §§ 627.730-.741 (Supp. 1972); MD. LAWS, H.B. 444 (to be effective January 1, 1973); MASS. GEN. LAWS ANN. ch. 90, § 34M (Supp. 1972), held constitutional in Pinnick v. Cleary, 271 N.E.2d 592 (Mass. 1971). MICH. LAWS, H.B. 5939 (to be effective in 1973); MINN. STAT. ANN. § 65B (Supp. 1972); N.J.S.A. 39:6A-1 to 39:6A-18, 39:6A-1 note (to be effective January 1, 1973); ORE. REV. STAT. § 523 (1971); P.R. LAWS ANN. tit. 9, §§ 2051-65 (Supp. 1972); S.D. COMP. LAWS 58-23-6 through 58-23-8 (Supp. 1972). The Illinois no-fault statute, ILL. REV. STAT. ch. 73 §§ 1065-150-.163 (Supp. 1972), was held unconstitutional in Grace v. Howlett, 51 Ill. 2d 479, 283 N.E.2d 474 (1972).

[97] Many of the current no-fault proposals are based on either the Massachusetts Plan, MASS. GEN. LAWS ANN. ch. 90 § 34M (Supp. 1972), the Keeton-O'Connell Basic Protection Plan, Keeton & O'Connell, *Basic Protection Automobile Insurance*, in CRISIS IN CAR INSURANCE 40, 48-75 (1968), or the Federal Uniform Motor Vehicle Insurance Act, S. 945, 92d Cong., 1st Sess. (1971). However, there are numerous other variations of these and other no-fault plans currently being proposed. *See* Annot., 42 A.L.R. 3d 229 (1972); *Automobile Insurance Reparations Plans*, *supra* note 87; Keeton, *No-Fault Insurance: A Status Report*, 51 NEB. L. REV. 183 (1971); *A Symposium on No-Fault Auto Insurance — Perspectives on the Problems and the Plans*,

sory insurance as a necessary element of their no-fault scheme.[98] Such no-fault plans are, therefore, subject to the same criticisms as pure compulsory programs so far as the achievement of the purpose underlying financial responsibility laws is concerned. In addition, the various no-fault schemes, both proposed and enacted, have serious shortcomings of their own in this regard.[99]

In the first place, the various no-fault plans have limited provisions for penalizing or deterring negligent drivers by holding them accountable to those they injure. Under the no-fault system the insured's company is concerned only with the insured and not with the other party, regardless of fault. To the extent that the traditional tort system of financial accountability acts as a deterrent to irresponsible driving,[100] the no-fault plans would be less effective in maintaining public safety than present financial responsibility laws, which hold the negligent driver accountable to injured parties.

Secondly, no-fault plans severely reduce monetary recovery for pain and suffering and other incidental damages.[101] On the other hand, the current financial responsibility statutes provide for the posting of security or demonstration of liability insurance coverage in an amount equal to a possible judgment which might be rendered against the driver. This amount could, at the discretion of the administrator, take into account a possible recovery of damages for

---

21 CATH. L. REV. 259 (1972); *Symposium on No-Fault Insurance*, 74 W. VA. L. REV. 1 (1971). Many state legislatures, though, including Alaska, California, Colorado, Hawaii, New York, Neveda, North Carolina and Virginia have defeated no-fault plans in recent years. *See* Berry, *No-Fault Automobile Insurance: An Abolition of the Tort Concept*, 25 OKLA. L. REV. 83 (1972).

[98] *E.g.*, DEL. CODE ANN. tit. 21, § 2118 (Supp. 1971); FLA. STAT. ANN. §§ 627.730-.741 (Supp. 1972); MASS. GEN. LAWS ANN. ch. 90, § 1A (Supp. 1971).

[99] It is important to note that the primary reason for promoting no-fault insurance is to abolish tort liability either totally or substantially and thus to distribute more evenly and fairly the cost of automobile insurance among members of the public. *See* Brainard, *A No-Fault Catechism: Ten Basic Questions Raised and Answered*, 1972 INS. L.J. 317, 320 (1972). While no-fault is often suggested as the alternative to present financial responsibility statutes, its purposes were not intended to be the same as those of the financial responsibility statutes.

[100] Based on studies for the Defense Research Institute, it was concluded that no-fault would create a driving environment whereby unsafe driving habits would no longer meet with social censure, and consequently, automobile accidents would increase. Lawton, *No-Fault: An Invitation to More Accidents*, 55 MARQ. L. REV. 73 (1972). *See* Berry, *supra* note 97; Mancuso, *The Unitity of the Culpability Concept in Promoting Proper Driving Behavior*, 55 MARQ. L. REV. 85 (1972).

[101] Proposed no-fault systems allow recovery for pain and suffering only under certain circumstances. Such damages may be recovered when the claim exceeds a fixed dollar amount or when injuries are deemed "catastrophic." *See* Keeton & O'Connell, *Alternative Paths Toward Nonfault Automobile Insurance*, 71 COLUM. L. REV. 240, 244; Hart, *A Federal Answer to a Public Demand*, 6 TRIAL, Oct.-Nov., 1970, at 27, 29.

items excluded by the no-fault plans. Although the ultimate pain and suffering award will depend upon a jury determination, an amount approximating a recovery is likely to have been posted pending that determination. Thus, it is diffiult to see how a no-fault scheme, in which some damages may be eliminated, could more effectively accomplish the state goal of insuring indemnification than the existing financial responsibility mechanism. Indeed, it could arguably frustrate that goal.[102]

The foregoing discussion underscores the conclusion that although there are alternatives to the legislative classification created by the existing financial responsibility statutes, those alternatives currently advocated are no better suited to the basic purposes of the existing legislation.[103]

This, however, does not end the requisite analysis under the compelling interest test. It must still be determined whether the statutory purpose is accomplished with "sufficient precision" by the classification created by current financial responsibility laws.[104]

Financial responsibility statutes classify between financially responsible and financially irresponsible drivers, *i.e.*, between drivers who demonstrate the ability to satisfy a potential adverse judgment by posting bond or insurance, and those who, failing to do so, do not demonstrate such ability. The operation of the statute results in the creation of a fund, either in the form of bond or insurance, from which potential judgments against drivers held to be liable may be satisfied. The concomitant classification clearly aids in the accomplishment of the purpose underlying financial responsibility laws, as does the impetus to post security arising from the suspension of financially irresponsible drivers' licenses.[105] However, one important point remains: neither classifying the indigent driver as financially irresponsible nor suspending his driver's license can en-

---

[102] *See generally* Bombaugh, *The Department of Transportation's Auto Insurance Study and Auto Accident Compensation Reform*, 71 COLUM. L. REV. 207, 213-16 (1971); Brainard, *supra* note 184; Sargent, *A Drastic Legal Change*, 6 TRIAL, Oct.-Nov., 1970, at 22, 23; Spangenberg, *The Public Attitude — Let's Not Misinterpret It*, 6 TRIAL, Oct.-Nov., 1970, at 34; Comment, *No Fault Insurance*, 39 TENN. L. REV. 132 (1971).

[103] The discussion herein of no-fault insurance was intended only to demonstrate that it is not a substitute for financial responsibility laws. There are many advantages to a no-fault system which are beyond the scope of the present discussion.

[104] *See* Kramer v. Union Free School Dist., 395 U.S. 621, 632 (1969).

[105] Insuring that the potentially liable driver posts security also has the advantage of ensuring that accident victims will have no need, as a result of the accident, to look to the state for public assistance.

sure the idemnification of his accident victims.[106] Therefore, assuming that financial responsibility laws will be strictly scrutinized by the courts, the fact that the statutory classification does not assist in the accomplishment of the statutory purpose to the extent that it includes indigent drivers, would seem to be sufficient to warrant voiding such statutes as being violative of the equal protection clause.

It must be emphasized that this conclusion rests on the assumption that the compelling interest test is applicable to financial responsibility statutes, which, as has been demonstrated, is not currently supportable.[107] Moreover, it further assumes that even if strict scrutiny is applicable, the fact that no less onerous alternatives exist which adequately accomplish the statutory purpose under consideration, will have little or no effect on the Court's decision. Since, in reality, the application of the compelling interest test involves a balancing of several factors,[108] it cannot be stated conclusively that a finding as to one of them will be determinative.[109]

Having determined that the compelling interest test is inapplicable to financial responsibility statutes, we turn now to a discussion of whether such laws are valid under the rational basis test.

2. *Traditional Equal Protection: Non-Suspect Classification.*— In reviewing legislative classifications under the equal protection clause, the Court has retreated from a period of judicial activism to one of restraint.[110] The following analysis will illustrate just how far the Court has gone, especially in the area of economic regulation, and will introduce what appears to be a new area of concern — personal rights — wherein the Court has recently shown less judicial restraint.

a. *Economic Regulation*[111] — As a general rule, legislative en-

---

[106] The indigent driver is not financially irresponsible because he will not pay, but because he cannot pay. It should be pointed out, however, that short of subsidization of the indigent driver, there is *no* way in which the statutory purpose under consideration can be achieved as far as the indigent driver is concerned. And, as has been pointed out, alternative proposals are, indeed, more onerous from the indigent's point of view than current financial responsibility schemes. *See* note 95 *supra* & accompanying text.

[107] *See* notes 65-74 *supra* & accompanying text.

[108] *See* notes 79-83 *supra* & accompanying text.

[109] *See* notes 84-85 *supra* & accompanying text.

[110] *Compare* Lochner v. New York, 198 U.S. 45 (1905), *with* Madden v. Kentucky, 309 U.S. 83 (1940).

[111] The traditional equal protection test has been applied in all cases not involving inherently suspect classifications or fundamental rights. As a result, it has been utilized in a wide variety of substantive legal areas. It is, however, most closely associated with the Court's treatment of state economic regulation. Therefore, "economic regulation"

actments are accorded a presumption of constitutionality.[112] In addition, the Court has long held that the equal protection clause permits the states wide discretion in enacting laws which may affect different groups of citizens differently.[113] And, so long as the distinctions drawn have some legitimate basis, a statute need not deal with all aspects of a problem at the same time or in the same way.[114] The equal protection clause is offended only when the classification created rests on grounds wholly irrelevant to achieving the statutory purpose, that is, when there is no rational basis for the statutory classification.[115] Indeed, in the area of economic regulation the Court has exercised *extreme* restraint, investing legislation with a presumption of constitutionality, and requiring merely that classifications drawn by a challenged statute bear some rational relationship to any imaginable legitimate state purpose.[116] In effect, therefore, the Court has not only presumed the constitutionality of the statute, but it has also presumed the existence of a rational basis for the statutory classification as well.[117]

Recently, in *Dandridge v. Williams*,[118] the Court reiterated its

---

is used herein as a shorthand expression covering all cases in which the rational basis test has been applied.

[112] McGowen v. Maryland, 366 U.S. 420, 425 (1961).

[113] *See* James v. Valtierra, 402 U.S. 137, 142 (1971); McDonald v. Bd. of Election Comm'rs, 394 U.S. 802, 808 (1969); Lindsley v. Natural Carbonic Gas Co., 220 U.S. 61, 78 (1911).

[114] South Carolina v. Katzenbach, 383 U.S. 301, 331 (1966); Railway Express Agency, Inc. v. New York, 336 U.S. 106 (1949).

[115] McGowen v. Maryland, 366 U.S. 420, 425 (1961). Consequently the burden is on the party challenging the statute to show that there is, in fact, no reasonable basis for its existence. Lindsley v. Natural Carbonic Gas Co., 220 U.S. 61, 79 (1911). *See* Karst, *Individious Discrimination: Justice Douglas and the Return to the Natural-Due-Process Formula*, 16 U.C.L.A.L. REV. 717, 733 (1969).

[116] McDonald v. Bd. of Election Comm'rs, 394 U.S. 802, 809 (1969); McGowan v. Maryland, 366 U.S. 420, 425-26 (1961); Williamson v. Lee Optical Co., 348 U.S. 483 (1955). *See* Heatherington, *State Economic Regulation and Substantive Due Process of Law*, 53 NW. U.L. REV. 13 (1958). As a result of this extreme judicial deference, the only significant case holding a regulatory measure violative of equal protection was Morey v. Doud, 354 U.S. 457 (1957).

This exercise of judicial restraint stems from the recognition that the fourteenth amendment does not give the federal courts "power to impose upon the states their views of what constitutes wise economic or social policy," Dandridge v. Williams, 397 U.S. 471, 486 (1970), which view is a manifestation of the Court's continuing rejection of its earlier intermeddling into state economic affairs under the guise of substantive due process. *See* Ferguson v. Skrupa, 372 U.S. 726 (1963). Furthermore, since the Court does not claim expertise in this area, as it does in areas of procedural due process, its deference to legislative pronouncements is not surprising.

[117] "It would seem, then, that in fiscal and regulatory matters, the Court has . . . in fact almost abandoned the task of reviewing questions of equal protection." *Developments*, *supra* note 51, at 1087.

[118] 397 U.S. 471 (1970).

doctrine of deference in the area of economic regulation in holding that the Maryland public welfare program, which imposed a ceiling on the amount of assistance a family could receive, regardless of its size or actual need, did not violate the equal protection clause.

> 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.
>
> To be sure, the cases . . . enunciating this fundamental standard under the Equal Protection Clause, have in the main involved state regulation of business or industry. The administration of public welfare assistance, by contrast, involves the most basic economic needs of impoverished human beings. We recognize the dramatically real factual difference between the cited cases and this one, but we can find no basis for applying a different constitutional standard. . . .[119]

After noting the importance of welfare assistance[120] and determining nonetheless to apply the rational basis test, the Court proceeded to examine the statutory purpose:

> We need not explore all the reasons that the State advances in justification of the regulation. It is enough that a solid foundation for the regulation can be found in the State's legitimate interest in encouraging employment and in avoiding discrimination between welfare families and the families of the working poor. By combining a limit on the recipient's grant with permission to retain money earned, without reduction in the amount of the grant, Maryland provides an incentive to seek gainful employment. And by keying the maximum family AFDC grants to the minimum wage a steadily employed head of a household receives, the State maintains some semblance of an equitable balance between families on welfare and those supported by an employed breadwinner.
>
> It is true that in some AFDC families there may be no person who is employable. It is also true that with respect to AFDC families whose determined standard of need is below the regulatory maximum, and who therefore receive grants equal to the determined standard, the employment incentive is absent. But the Equal Protection Clause does not require that a State must choose between attacking every aspect of a problem or not attacking the problem at all. It is enough that the State's action be rationally based and free from invidious discrimination. The regulation before us meets that test.[121]

---

[119] *Id.* at 484 (footnotes and citations omitted).

[120] *See* Goldberg v. Kelly, 397 U.S. 254 (1970).

[121] Dandridge v. Williams, 397 U.S. 471, 486-87 (1971) (footnotes and citations omitted).

It should be noted that the *Dandridge* Court discussed the statutory purpose at great length; although applying the rational basis test, *it did not merely presume that the statute was valid under the equal protection clause.*[122] This gives the Court's recognition of the importance of the receipt of welfare benefits added significance. Arguably the Court was unwilling to allow this important personal interest to be infringed without giving some consideration to the validity of the statute. In this sense *Dandridge* presaged the current trend in the Court's treatment of equal protection cases involving important personal rights.

b. *Personal Rights*[123] — Recently, in the area of personal rights, the Court has been less deferential, critically scrutinizing legislative classifications so as to determine whether the requisite rational basis actually exists. Although this change in judicial posture has not always been clearly articulated, it is submitted that there may now exist a modification of the traditional two-tiered equal protection scheme,[124] adding a third test, or more properly a subtest, which falls between the two established tests.[125] Examples of the Court's new activism can be found in recent cases involving differential treatment of males and females in the administration of estates,[126] of married and unmarried persons in the sale or distribution of contraceptives,[127] as well as in cases involving discriminatory treatment accorded unmarried fathers in guardianship proceedings,[128] or illegitimate children in wrongful death[129] or workman's compensation actions.[130]

One of the first cases involving such active review on the part of the Court was *Reed v. Reed*,[131] wherein the petitioner, having

---

122 The Court has in the past discussed legislative purposes in considering statutory validity under the equal protection clause. However, *Dandridge* is significant in that the Court dealt with the actual state interest, as opposed to conceivable purposes which would support the constitutionality of the statute. *Compare Dandridge with* McDonald v. Bd. of Election Comm'rs, 394 U.S. 802, 810-11 (1969) ("the different treatment . . . *may reflect* a legislative determination. . . .") (emphasis added) *and* McGowen v. Maryland, 366 U.S. 420, 426 (1961) ("[i]t would seem that a legislature *could reasonably find* . . . .") (emphasis added).

123 *See* note 2 *supra.*

124 *See* notes 52-57 *supra* & accompanying text.

125 *See New Tenets in Old Houses, supra* note 4 at 941, 945-46. *Cf.* Karst, *supra* note 115.

126 Reed v. Reed, 404 U.S. 71 (1971).

127 Eisenstadt v. Baird, 405 U.S. 438 (1972).

128 Stanley v. Illinois, 405 U.S. 645 (1972).

129 Levy v. Louisiana, 391 U.S. 68 (1968).

130 Weber v. Aetna Cas. & Sur. Co., 406 U.S. 164 (1972).

131 404 U.S. 71 (1971).

sought to be appointed administratrix of her son's estate, appealed from an order granting letters of administration to her husband, which order was based on a statutory provision which provided that as between persons equally entitled and qualified to administer estates, men must be given preference. The Court, applying the rational basis test, scrutinized the statutory purposes put forth by the state: reducing the probate workload and avoiding intra-family controversy. Although finding these purposes legitimate, the Court invalidated the statute because it did not advance them "in a manner consistent with the command of the Equal Protection Clause."[132] Moreover, consideration of an alternative objective of the provision, the establishment of degrees of entitlement of various classes of persons in accordance with their varying degrees and kinds of relationship to the intestate, did not help since "[r]egardless of their sex, persons within any one of the enumerated classes . . . are similarly situated with respect to that objective."[133]

Likewise, in *Eisenstadt v. Baird*[134] the Court held that a state statute prohibiting distribution of contraceptives to single persons violated the equal protection clause since it could find no rational basis for so limiting the prohibition. Noting that it was necessary to determine whether there was "some ground of difference that rationally explain[ed] the different treatment accorded married and unmarried persons,"[135] the Court thoroughly considered all possible purposes for the statute.

Significantly, the *Eisenstadt* Court rejected two of the three proposed statutory purposes. First it refused to regard the Massachusetts statute as a deterrent of premarital sex or fornication since the statute had "at best a marginal relation to the proffered objective."[136] The Court emphasized that the statute regulated the distribution of contraceptives for the prevention of pregnancy but not for protection from disease, and declared that the statute made no attempt to deter married persons from engaging in illicit sexual relations with unmarried partners. Secondly, the Court rejected the contention that the statute was intended to serve the health needs of the community through regulation of the sale and distribution of potentially harmful articles. Agreeing with the First Circuit Court of Ap-

---

[132] *Id.* at 76.
[133] *Id.* at 77.
[134] 405 U.S. 438 (1972).
[135] *Id.* at 447.
[136] *Id.* at 448.

peals that not all contraceptives were dangerous, and that if, indeed, a physician was necessary to prescribe contraceptives, the need would be as great for unmarried as for married persons, the Court concluded that if health were the purpose, the statute would be "both discriminatory and overbroad."[137]

Since the statute could not be upheld as a deterrent to fornication or as a health measure, the Court next considered whether it would be valid as a prohibition of contraception. The Court did not reach the question whether such a purpose would contravene its holding in *Griswold v. Connecticut*,[138] for it held that irrespective of what rights an individual may have concerning access to contraceptives, those rights must be identical for both married and unmarried persons.[139] The Court thus concluded that no rational grounds existed for prohibiting the sale or issuance of contraceptives to single persons, and held that dissimilar treatment for married and unmarried persons who are similarly situated violated the equal protection clause.

The Court in both *Reed* and *Eisenstadt* applied the rational basis test. However, in both cases the Court departed from the traditional equal protection approach by scrutinizing the relationship between the respective classifications and the proffered state interests which the statutes sought to protect, rather than presuming the existence of a rational basis for the classifications. Although not articulated, a new approach to equal protection questions was apparent: an approach similar to the traditional test in that the rational basis test was applied, but, at the same time, similar to the compelling interest test in that the Court was strictly scrutinizing the effect of the classification upon the achievement of the statutory purpose.

In *Weber v. Aetna Casualty & Surety Co.*,[140] the dissent characterized the decision as a departure from the established two-tiered equal protection test.[141] In *Weber*, the Court held that a Louisiana workmen's compensation statute which denied equal recovery rights to dependent, unacknowledged illegitimates violated the equal pro-

---

[137] *Id.* at 450-52.

[138] 381 U.S. 479 (1965).

[139] 405 U.S. at 452-54.

[140] 406 U.S. 164 (1972).

[141] "The Court in today's opinion, recognizing that two different standards have been applied in equal protection cases, apparently formulates a *hybrid standard* which is the basis of the decision here." *Id.* at 181 (Rehnquist, J., dissenting) (emphasis added).

tection clause. After determining that *Levy v. Louisiana*[142] was aplicable, the Court reaffirmed the *Levy* reasoning. Writing for the majority, Mr. Justice Powell noted that to be held valid under the equal protection clause, a state statute, at a minimum, must bear some rational relationship to a legitimate state purpose, but emphasized that

> [t]hough the latitude given state economic and social regulation is necessarily broad, when state statutory classifications approach *sensitive and fundamental personal rights*, this Court exercises a stricter scrutiny . . . . The essential inquiry . . . is, however, inevitably a dual one: What legitimate state interest does the classification promote? What fundamental personal rights might the classification endanger?[143]

Under that test, the Court found nothing wrong in the state of Louisiana's interest in protecting legitimate family relationships. The error, however, was in the manner in which the statute promoted that interest. In striking down the statute, the Court declared:

> The state interest in legitimate family relationships is not served by the statute; the state interest in minimizing problems of proof is not significantly disturbed by our decision. The inferior classification of dependent unacknowledged illegitimates bears, in this instance, no significant relationship to those recognized purposes of recovery which workmen's compensation statutes commendably serve.[144]

Thus, the approach taken by the Court in *Weber* was the same as that utilized in *Reed* and *Eisentadt*.[145] In addition, though the reason for such an approach was not articulated in those cases,[146] *Weber* clearly indicated that the Court was not willing to presume the validity of legislative classifications touching upon "sensitive

[142] 391 U.S. 68 (1968) (wrongful death statute which denied recovery to illegitimate children was struck down as violative of the equal protection clause).

[143] 406 U.S. at 173.

[144] *Id.* at 175.

[145] It is unclear from the majority opinion in *Weber*, however, just what standard was used. Mr. Justice Powell spoke of "fundamental personal rights," but cited cases involving fundamental rights and suspect classifications. *Id.* at 172-73. In questioning the relationship between the statute and the state interest, he quoted from Glona v. American Guar. & Liab. Ins. Co., 391 U.S. 73, 75 (1968), that there was "no possible rational basis . . . ." 406 U.S. at 173. And in striking down the statute, he used traditional equal protection language, *i.e.*, "no significant relationship," *id.* at 175, and then further confused the issue by concluding that "the classification is justified by no legitimate state interest, compelling or otherwise." *Id.* at 176. Looking at what the Court did, however, as opposed to what was said, it is clear that the Court utilized the rational basis test, but in doing so, actively scrutinized the statute to determine whether the requisite rational relationship existed.

[146] *But cf.* Eisenstadt v. Baird, 405 U.S. 438, 447 n.7 (1972).

and fundamental personal rights." However, *Weber* did not indicate what fundamental personal right was involved,[147] or how the test it proposed differed from the compelling interest test.[148] Yet an analysis of *Weber* and other "personal right" cases evidences a departure from the established two-tiered equal protection scheme.

In order to understand the significance of this new approach to equal protection problems, it is necessary to understand precisely how it differs from the two preexisting tests. Whenever an equal protection question is presented, the relationship between the challenged classification and the statutory purpose is important. Under the traditional test the Court merely requires that a rational basis exist — the classification need only be rationally related to any conceivable state interest — and, in practice, the Court has virtually presumed its existence. On the other hand, under the compelling interest test the Court requires that the classification be necessary to the accomplishment of a compelling state interest — the classification must actually help accomplish the statutory purpose and must do so in the least onerous manner possible — and the Court presumes that it is not. When a personal right is infringed upon by a statutory classification, the Court seemingly uses a hybrid approach. While it requires only that there be a rational basis, it scrutinizes the classification and its relation to the actual state interest, rather than presuming the existence of a constitutionally permissible relationship. It can, therefore, discover that the classification, in fact, does not assist at all in the accomplishment of the purpose, and that, as a result, no rational basis exists. Indeed, this is precisely what happened in *Reed*, *Eisenstadt*, and *Weber*. While similar,[149] this is not the same as the requirement under the compelling interest test that the classification be necessary to the accomplishment of the state interest. First of all, the requisite importance of the state interest is much greater under the compelling interest test. Secondly, while there must be a high degree of relevance to purpose under the compelling interest test, there need be only a rational relationship between the statutory classification and purpose in the personal rights area. Only when the classification does not accomplish

[147] *See* 406 U.S. at 181. (Rehnquist, J., dissenting).

[148] *See* note 145 *supra.*

[149] *Compare* Weber v. Aetna Cas. & Sur. Co., 406 U.S. 164, 173 (1972) (personal right: "We do not question the importance of [the state] interest; what we do question is how the challenged statute will promote it") *with* Kramer v. Union Free School Dist., 395 U.S. 621, 632 (1969) (fundamental right: "For, assuming, *arguendo*, that [the state interest is legitimate], close scrutiny of the . . . classifications demonstrates that they do not accomplish this purpose with sufficient precision. . . .").

the purpose is the outcome under the personal rights approach and the compelling interest test the same, for in such a case there is no rational basis, and, *a fortiori*, the compelling interest test is not satisfied. When the classification does aid in the accomplishment of the purpose, however, there may be a rational basis sufficient to satisfy the personal rights approach to equal protection.[150] Admittedly, this is a fine distinction, but it is compelled by the Court's utilization of the rational basis standard in the personal rights cases it has recently decided. And, as we shall see, this lack of a precise definition is one of the main advantages of the personal rights approach.

Thus, a trichotomy is beginning to emerge: (1) When the classification is not suspect and does not involve a fundamental or personal right, the Court merely requires a rational basis for the classification, and in practice it presumes that one exists; (2) when the classification touches upon a personal right, the Court still requires only a rational basis, but it scrutinizes the statutory purpose and the effect of the classification thereon to determine whether a rational basis actually exists; and (3) when there is a suspect classification or fundamental right involved, the Court requires that the classification be more than rationally related to the purpose, *i.e.* that it be necessary to the achievement of a compelling state interest. In other words, as the interest infringed upon by the classification increases in importance, so does the degree of scrutiny given by the Court, the requisite importance of the state interest, and the requisite level of relevance to purpose.

Such a trichotomy may provide greater flexibility in dealing with equal protection questions. In operation, the old two-tiered scheme was basically rigid:[151] the choice of the test to be applied essentially determined the outcome of the case.[152] This led to the criticism that the Court was using the compelling interest test, and its ability thereunder to secure added protection for interests it deemed important by identifying them as fundamental, as a means of "impos[ing] its own value judgments on the nation."[153] Even if this

---

[150] *See* Johnson v. Louisiana, 406 U.S. 356 (1972); Schilb v. Kuebel, 404 U.S. 357 (1971).

[151] *New Tenets in Old Houses*, *supra* note 4, at 938.

[152] *Id.* at 937; *The Evolution of Equal Protection*, *supra* note 65, at 113.

[153] *Educational Financing*, *supra* note 65, at 1341. *See* Parker v. Mandel, 344 F. Supp. 1068, 1076 (D. Md. 1972):

> Few if any guidelines have been suggested by the Supreme Court for determining whether a claimed violation of the equal protection clause should be considered under the strict scrutiny test or under the reasonable basis test. A high degree of subjectivity would appear to be involved in determining

was true, however, the definition of a particular interest as fundamental was not without side effects. Once it had been done, any statutory infringement of such interest had to be supported by a compelling state interest to be valid, which is virtually equivalent to saying that *no* statutory infringement would be permitted.[154] This undoubtedly has led to an unwillingness to render interests "fundamental."[155] In holding that education was not a fundamental interest in a declaratory judgment action contesting the validity of Maryland's public education financing system, a district court noted that

> [t]o hold that the strict scrutiny test applies to legislation of this sort would be to render automatically suspect every statutory classification made by state legislatures in dealing with matters which today occupy a substantial portion of their time and attention. If the test which plaintiffs seek to apply is the appropriate standard here, then a state, on each occasion that a similar Fourteenth Amendment attack were made against a statute dealing with health, education or welfare, would be required to bear the burden of proving the existence of a compelling state interest. This Court cannot conclude that state legislatures are to be strait-jacketed by such recently evolved constitutional theory in areas that have traditionally been the exclusive concern of the state.[156]

The emerging personal rights approach should both end the criticism that the court is acting as a superlegislature and solve the problems created by denominating an interest "fundamental." The weakness of the two-tiered equal protection scheme was neither in the tests themselves nor in the criteria necessary for their application (the presence or absence of a fundamental right or a suspect classification), but in the operation of the tests. In practice each test lay at an extreme: under the rational basis test a challenged statute was presumed, virtually conclusively, to be valid; under the compelling interest test, invalid. Now the Court seemingly is adopting an approach which, while avoiding the necessity of labelling an interest fundamental and the problems resulting therefrom, allows it to scrutinize the statutory classification and purpose to see that

---

whether a subject is to be termed a fundamental interest or whether the classification is to be called suspect.

[154] In addition, a vast increase in litigation may be expected to follow the creation of a new fundamental right. For a discussion of the deluge of litigation in the lower courts following the declaration of the right to travel interstate as fundamental, see Note, *Durational Residency Prerequisites: Receipt of State Benefits*, 6 SUFFOLK L. REV. 620, 625-28 (1972).

[155] *See New Tenets in Old Houses*, *supra* note 4, at 930, 938; *Educational Financing*, *supra* note 65, at 1340-42. *Cf.* Jefferson v. Hackney, 406 U.S. 535, 548-49 (1972).

[156] Parker v. Mandel, 344 F. Supp. 1068, 1079 (D. Md. 1972).

important personal interests are not arbitrarily infringed. While the test is not new — the Court is merely putting teeth in the rational basis test — the approach thereunder clearly is new. And while the Court is no longer deferring *absolutely* to legislative enactments as it previously did under the traditional rational basis test, it is still presuming them valid and placing the burden on the party challenging them to prove otherwise. But it is providing that party with the actual opportunity to do so.[157] For the Court to do less, arguably, is to abdicate its role as constitutional arbiter. For it to do more is arguably to encroach upon the prerogative of the legislature.

The main attribute of the personal rights approach, therefore, is its flexibility. It permits the Court to balance the state interest against the competing personal interests.[158] And assuming the state interest preponderates, it permits the Court to ensure that the state interest is actually furthered by the classification. In so doing, it potentially broadens the protection accorded individuals under the equal protection clause while holding the state to no higher a standard than under the traditional test.[159] The flexibility of the personal rights approach is enhanced, and perhaps made possible by the failure of the Court to precisely define its parameters. As noted in the discussion of the recent personal rights cases,[160] the Court has not yet clearly articulated what rights are to be considered "personal" or how their alleged infringement is to be treated under the equal protection clause. The foregoing analysis of this emerging doctrine has focused on what the Court did in these cases. What has been said is, therefore, to some extent conjectural, and the development of the personal rights approach must await further action by the Court.[161]

[157] It is in this sense the Court is using an old test with a new approach to that test. The test is the rational basis test. However, in applying it the Court has adopted an approach which allows it to consider all the important factors in determining whether the equal protection clause has been satisfied.

[158] *See New Tenets in Old Houses, supra* note 4, at 941.

[159] Of course, the fact that the Court will closely scrutinize the classification's relevance to purpose will in practice impose a greater burden on the state. The degree of relevance required, however, will be no higher.

[160] *See* notes 145-48 *supra* & accompanying text.

[161] Such action will hopefully clarify the criteria necessary for the existence of a personal right. It would perhaps be advisable to equate the increased protection accorded non-fundamental rights under the personal rights approach with that given to "substantial interests" under the due process clause. *See* Goldberg v. Kelley, 397 U.S. 254 (1970). Should this be done, there would be no need to use due process to solve what are largely equal protection problems, *see* Boddie v. Connecticut, 401 U.S. 371 (1971), for fear that the utilization of equal protection theory will sweep too broadly.

Arguably, the right to drive, though not fundamental, is important enough to fall within the realm of "personal rights."[162] Therefore, the classifications created by financial responsibility statutes will not be presumed valid, but will have to be actually rationally related to the purpose underlying such statutes.[163]

As pointed out earlier, the classification between financially responsible and financially irresponsible drivers is directly related to the accomplishment of the purpose underlying financial responsibility statutes, insuring the indemnification of automobile accident victims.[164] However, under the compelling interest test it can be argued that since the resulting classification of the financial responsibility statutes does not necessarily accomplish this purpose due to the inclusion of indigent drivers who cannot afford to post security, the statute would fall.[165] In areas involving personal rights, however, under the rational basis test, such a consideration is not controlling. Given the constitutionally permissible purpose of financial

---

See New Tenets in Old Houses, *supra* note 4, at 938-39, 944-45. Clarification is needed also concerning the factors to be considered under the personal rights approach. Hopefully, though, the Court will not render this approach inflexible as are the traditional and compelling interest tests. There is less need to fear such an occurrence, however, since the very existence of an equal protection doctrine falling between these two tests inevitably creates greater flexibility.

[162] Although *Reed*, *Eisenstadt*, *Weber* and the other personal rights cases dealt with interpersonal relationships, it is arguable that personal rights should include all important individual interests. Assuming that the existence of a fundamental interest is dependent upon the existence of a constitutionally protected right, *see* note 72 *supra*, personal rights may encompass those interests, such as driving, which have been recognized as being substantial, Bell v. Burson, 402 U.S. 535, 539 (1971), but which fall short of being fundamental. *See* note 161 *supra*. The same would be true for other important interests such as education, housing, and the receipt of welfare benefits. The Court has recently recognized the importance of the latter two and, although refusing to apply the compelling interest test to either, did scrutinize rather than presume the existence of a rational basis for the respective classifications. *See* Lindsey v. Normet, 405 U.S. 56 (1972) (housing); Dandridge v. Williams, 397 U.S. 471 (1970) (welfare). *See generally The Evolution of Equal Protection*, *supra* note 65; *Educational Financing*, *supra* note 65.

[163] State judicial decisons in the area of financial responsibility laws have uniformly upheld the classification created by the statutes, finding no denial of equal protection. *See, e.g.*, State v. Finley, 198 Kan. 585, 426 P.2d 251 (1967); Schecter v. Killingsworth, 93 Ariz. 273, 380 P.2d 136 (1963) (the classification created by the statute was reasonable in light of the state's interest in protecting the public from financial hardship). *But cf.* Miller v. Depuy, 307 F. Supp. 166 (E.D. Pa. 1969). Although *Schecter* and *Finley* reflect the holdings of virtually all prior courts, it should be noted that those cases also found that the statutes were consistent with due process, a proposition rejected by the Supreme Court in Bell v. Burson, 402 U.S. 535 (1971). Furthermore, these state courts apparently applied the traditional equal protection test, and, arguably, a stricter standard is called for in light of the Supreme Court's recent treatment of personal rights.

[164] *See* note 105 *supra* & accompanying text.

[165] *See* note 106 *supra* & accompanying text.

responsibility statutes and the classification which has been created to achieve that purpose, all that is required is the actual existence of a rational relationship between the classification and the constitutionally permissible state purpose. The fact that the classification "disadvantages" a particular group or that it does not further the statutory purpose in all respects does not, under the rational basis test, automatically require that the statute be struck down as violative of equal protection.[166] Therefore, even if the relationship between the classification created and purpose of financial responsbility statutes is actually scrutinized, it appears, that so long as the relationship need be only a rational one, the validity of the statutes will be upheld.

It can be argued, however, that the purpose of such statutes is not, in reality, to insure the indemnification of automobile accident victims.[167] Assuming *arguendo* that other purposes do exist, analysis of the relationship between those purposes and the statutory classification indicates that the statutes could still withstand constitutional challenge.

(1) *Segregating the bad driver, thus preventing or decreasing automobile accidents* — Under the financial responsibility statutes, proof of financial responsibility is required only in lieu of suspension of the driver's license. That provision, until recently, operated exclusive of any provision for proof of fault. But, since *Bell v. Burson,*[168] a preliminary determination as to the possibility of a judgment being rendered against the licensee must be made prior to suspension. Although this ensures to a larger degree that the driver who must post security is a "bad driver," the bad driver who does post security under the statute does not lose his driving rights and thus is not segregated.

The operation of financial responsibility statutes thus segregate only the driver who does not post security, who may or may not be the "bad driver." It is reasonable to conclude, however, that *some* bad drivers will be segregated. If the financial responsibility statutes succeed in keeping some bad drivers off the road, the number of automobile accidents will correspondingly diminish. In

---

[166] *See* James v. Valtierra, 402 U.S. 137, 142 (1971) ("But of course a lawmaking procedure that 'disadvantages' a particular group does not always deny equal protection."); Dandridge v. Williams, 397 U.S. 471, 486-87 (1970) ("But the Equal Protection Clause does not require that a state must choose between attacking every aspect of a problem or not attacking the problem at all.").

[167] *See* note 7 *supra* & accompanying text.

[168] 402 U.S. 535, 542 (1971).

other words, though not all bad drivers will be segregated, if some are and accidents decrease, even though those segregated may be the poor,[169] the purpose is achieved to an extent likely to satisfy the rational basis test.[170]

(2) *Compelling the bad driver to insure, thus increasing the proportion of insured cars and drivers* — Certainly some bad drivers who might not have otherwise obtained insurance, do so, after having been involved in an accident, as a result of financial responsibility statutes. Should a negligent driver fail to post security, his license will be suspended. It is not unreasonable to suggest that many of those drivers will insure to prevent future suspensions in the event that they are involved in subsequent accidents.

In addition, the statutes themselves provide that drivers with suspended licenses must show proof of financial responsibility in order to have their licenses returned.[171] Obviously, the result is to increase the proportion of insured cars and drivers, thereby making available the funds of money to be used for the satisfaction of future potential damage claims. There thus exists a direct relationship between the legislative purpose and the statutory mechanism for its accomplishment.

(3) *Procuring payment of past damage* — The great majority of financial responsibility statutes include provisions for the suspension of a driver's license when a past damage judgment against the licensee is left unpaid.[172] This provision is in addition to the suspension for failure to post security or prove liability coverage. The key to the operation of the unpaid damage judgment suspension is the obtaining of a judgment by the injured party. Here too the relationship between the statutory purpose and the mechanism of classification is obvious. The fact that a judgment is obtained and left unpaid presumably identifies the financially irresponsible driver, who then suffers suspension of his license if the judgment against him is not paid. The product of this provision, suspension

---

[169] For a discussion of financial responsibility laws and classifications based on wealth under the equal protection clause see notes 63-74 *supra* & accompanying text.

[170] Lindsley v. Natural Carbonic Gas Co., 220 U.S. 61, 78 (1911). *See* Dandridge v. Williams, 397 U.S. 471, 485 (1970).

[171] *See* note 15 *supra* & accompanying text.

[172] For example, the Ohio Financial Responsibility statute, OHIO REV. CODE ANN. § 4509.40 (Page 1971), provides that:

> Any license, registration, and non-resident's operating privilege suspended for nonpayment of a judgment shall remain so suspended and shall not be renewed, nor shall any license or registration be thereafter issued in the name of such person not previously licensed, until every such judgment is stayed, satisfied in full . . . until the person gives proof of financial responsibility . . . .

of operator's license, acts to deter further withholding of payment of the judgment to the injured party. Thus, the necessary conclusion is that an equal protection attack alleging no rational relationship with respect to this particular purpose will also fail since the statute forces the financially irresponsible driver to reimburse victims injured by his negligent conduct.

Thus, under *any* approach to the legislative purpose for financial responsibility laws, there exists a rational relationship between the purpose, whatever it may be, and the ensuing classification. This is sufficient to sustain the law's validity under the stricter standard of review used by the Court in areas involving personal rights. The Court does not require that the states treat all classes of their citizens alike, but only that where there are distinctions, they must be drawn under some form of rational basis.[173]

IV. Conclusion

Financial responsibility statutes are a product of the states' desire to protect their citizens from financially irresponsible drivers. Since their inception, financial responsibility statutes have been viewed by the vast majority of state legislatures as the most effective means of implementing that desire. Yet the courts have been careful to see that such statutes accomplish their purpose in a constitutionally permissible manner.

Acting consistently with this policy, the United States Supreme Court, in *Bell v. Burson*,[174] brought driving within that class of entitlements denominated "substantial interests" and held that financial responsibility laws shall be governed by the due process clause. This may be significant under the equal protection clause as well, for driving arguably may be a personal right. The specific goal of such laws being to insure indemnification of automobile accident victims, the statutes necessarily create a classification between financially responsible and financially irresponsible drivers. That classification, non-suspect in character, is at the heart of the statutory scheme, and, on its face, is not only rationally, but directly, related

[173] Clearly, if the financial responsibility statutes can withstand the strict scrutiny of the Court under a personal rights approach, they will be valid under the traditional "economic" equal protection test.

[174] 402 U.S. 535 (1971). This was the Court's first direct consideration of the financial responsibility statutes. The Court's only earlier contact with the financial responsibility statutes was for alleged conflicts between the statutes and federal bankruptcy law. *See* Kesler v. Department of Pub. Safety, 369 U.S. 153 (1962); Reitz v. Mealey, 314 U.S. 33 (1941). Both cases, however, were later overruled in Perez v. Campbell, 402 U.S. 637 (1971).

to the legislative purpose of the statute. To sustain the validity of the classification, the rational basis test, even under active and critical analysis where personal rights are involved, requires no more.

Furthermore, even if it were concluded that the actual classification created by the statutes is one between rich and poor, there is no foundation for the contention that such a classification would be suspect and thus subject to the strict standard of judicial review. As has been demonstrated, a rich-poor classification is not suspect unless some fundamental right is impaired by its existence. Although driving is now recognized by the Supreme Court as a substantial interest, it is not in fact a fundamental right. In addition, the currently proposed alternatives to financial responsibility statutes are no less onerous than the existing statutory scheme.

Therefore, the fact that the Court has reopened consideration of financial responsibility laws under the due process clause — the result of significant changes in the law of due process — does not necessarily portend reconsideration of their validity under equal protection. And should such reconsideration be undertaken, it appears that until the Supreme Court is willing to make a crucial assumption — that driving is a fundamental right — the validity of financial responsibility statutes under the equal protection clause must be considered settled.

DENNIS M. RACE