Cornell Journal of Law and Public Policy

Volume 5
Issue 3 *Spring 1996*

Article 3

Revoking Motor Vehicle and Professional Licenses for Purposes of Child Support Enforcement: Constitutional Challenges and Policy Implications

Mark R. Fondacaro

Dennis P. Stolle

REVOKING MOTOR VEHICLE AND PROFESSIONAL LICENSES FOR PURPOSES OF CHILD SUPPORT ENFORCEMENT: CONSTITUTIONAL CHALLENGES AND POLICY IMPLICATIONS

Mark R. Fondacaro and Dennis P. Stolle†

---

† Mark Fondacaro is a Research Assistant Professor at the Center on Children, Families, and the Law, University of Nebraska-Lincoln. J.D. Columbia Law School (1991), Postdoctoral Scholar, Stanford University (1985-1987), Ph.D. Indiana University (1985).

Dennis Stolle is a National Institute of Mental Health Fellow and a J.D./Ph.D. Candidate at the University of Nebraska-Lincoln Law/Psychology Program.

We gratefully acknowledge the assistance of the Federal Office of Child Support Enforcement, the Nebraska Child Support Enforcement Program, and the members of the State of Nebraska's 1994 Governor's Child Support Study Committee. We are especially grateful for the input and advice provided by the following individuals throughout the many phases of our work: Karen Bartlett, Mary Ann Miller, Diane Dentlinger, Janis Overmiller, Mary Pat Kelley, Julie Meacham, Julie Jonas, Andrew Slain, Thomas Mato, Colburn Jackson, David Braun, and Professors Alan Frank, Frank Grad, Kathryn Olson, Peter Strauss, Ross Thompson, and Brian Wilcox. This research was made possible through support provided by NIMH, Columbia Law School, and the Nebraska Department of Social Services. The views expressed in this article are entirely those of the authors and are not necessarily endorsed by the supporting institutions.

I. INTRODUCTION

There has been a loud public outcry against noncustodial parents who fail to pay their fair share of child support. Because the majority of noncustodial parents are men, most of the public rage has been directed at so called "deadbeat dads." Policymakers and politicians from both sides of the aisle and from both federal and state levels of government have called for tougher enforcement of child support obligations. State governments interested in offsetting the costs of public assistance to single parent families have been particularly eager to adopt new strategies of enforcement that promise to generate more revenues from collections of child support obligations. And from this standpoint of generating revenues, one of the newest and most promising enforcement strategies is revoking motor vehicle and professional licenses ("license revocation") from delinquent obligors.[1]

[1] Office of Child Support Enforcement, License Restriction and Revocation: A Partial Progress Report (1996).

Although there has been wide support for tougher child support enforcement and for license revocation in particular, concerns about the constitutionality of this enforcement strategy have been raised.[2] Therefore, this article addresses the most likely bases for constitutional challenge of license revocation programs. Section II provides some historical background on child support enforcement in the United States, including traditional judicial enforcement strategies and the modern trend towards administrative enforcement. Section III addresses the constitutional parameters of license revocation and the most likely bases for legal challenge which include due process (both procedural and substantive) and equal protection claims. Section III also analyzes separately the constitutionality of motor vehicle and professional license revocation programs. Section IV examines existing legislative schemes for implementing license revocation, and conclusions are presented in Section V.

II. BACKGROUND AND HISTORICAL APPROACH TO CHILD SUPPORT ENFORCEMENT

A. SCOPE OF THE CHILD SUPPORT ENFORCEMENT PROBLEM

A growing number and proportion of American children live in single parent homes; many of these youngsters receive little or no financial support from their noncustodial parents.[3] Since 1970, the number of single-mother families increased by 164 percent.[4] In 1993, 1.2 million children were born out-of-wedlock in the United States.[5] These dramatic social changes have overtaxed the state and local courts and has led to more federal involvement in child support enforcement, which, in turn, has placed additional demands on the judiciary to keep up with new federal requirements.[6]

---

2 *See, e.g.*, Thompson v. Ellenbecker, Civ. 94-4166 (D.S.D. filed Sept. 18, 1995). *See also* Mark R. Fondacaro, License Revocation for Purposes of Child Support Enforcement: Constitutional and Policy Implications, Paper presented at the Interstate\UIFSA-Self-Employed Conference, co-sponsored by the National Child Support Enforcement Association and the Federal Office of Child Support Enforcement (1995).

3 HOUSE COMM. ON WAYS AND MEANS, 103D CONG., 1ST SESS., 1994 GREENBOOK: BACKGROUND MATERIAL AND DATA ON PROGRAMS WITHIN THE JURISDICTION OF THE COMM. ON WAYS AND MEANS 456 (Comm. Print. 1994) [hereinafter 1994 GREENBOOK].

4 *Id.*

5 U.S. DEPARTMENT OF HEALTH AND HUMAN SERVICES, PUBLIC HEALTH SERVICE, CENTERS FOR DISEASE CONTROL AND PREVENTION, NATIONAL CENTER FOR HEALTH STATISTICS, Monthly Vital Statistics Report (Sept. 21, 1995).

6 Traditionally, states have been sovereign in the area of family law. Article 1, Section 8 of the Constitution and the Tenth Amendment may be read together to reserve family law matters to the states. H.R. doc. No. 19, 101st cong., 1st Sess. 11, at 55 (1989). However, the federal funding of the AFDC program creates a nexus between family law and an area in which Congress is authorized to act under the Enumeration of Powers Clause — spending —

This federal/state partnership has met some success. According to the Federal Office of Child Support Enforcement's own estimates, $2.2 billion was spent in 1993 to collect $9.0 billion in child support.[7] A significant share of the amount collected is directly attributable to federally required income withholding from noncustodial parents' wages. Obviously, this strategy of enforcement and collection is effective only in cases where the noncustodial parent is employed in a wage earning job. Collecting child support from the self-employed and non-wage earners has proven more difficult. Consequently, states are continuing to experiment with new strategies to reach these groups. One of the strategies that has proven particularly successful in a number of states is revoking delinquent obligors' professional and motor vehicle licenses.[8] In fact, this approach has proven so successful that proponents of welfare reform on both sides of the political aisle have supported the adoption of a mandate in federal welfare reform legislation requiring all states to adopt license restriction programs.[9] But even before the recently enacted federal mandate, many states, attracted by the apparent success that license revocation programs have achieved in generating support collections, had voluntarily adopted their own license revocation programs.[10]

---

thereby establishing the authority for Congress to enact laws dealing with child support enforcement.

7 For every $1 of administrative expenses, an amount of $3.98 was collected. Also during 1993, 553,000 paternities were established, over 1,000,000 support obligations were established, collections were made for almost 3,000,000 cases, almost 250,000 families were removed from AFDC because of child support collections, and 12.0 percent of AFDC payments were saved as a result of child support enforcement. 1994 GREENBOOK, *supra* note 3, at 455.

8 *See, e.g.*, Ben Rand, *License suspension Statute in Child Support Cases Successful in Other States,* Gannet News Service, June 2, 1995; Matthew Daily, *Nation Seeks New Ways to Combat Deadbeat Parents: State Explores License Revocation,* THE HARTFORD COURANT, Mar. 5, 1995; Leslie Boellstorff, *Maine Law a Factor in Child-Support Debate,* OMAHA WORLD HERALD, May 3, 1995; Mike Dorning, *License Loss a Real Threat to Deadbeats: Maine Child-Support Plan sets Example,* CHICAGO TRIBUNE, Apr. 10, 1995. The Office of Child Support Enforcement's progress report on license revocation reports that between August 1993 and February 1996, Maine collected over $39 million in support. *See supra* note 1.

9 PERSONAL RESPONSIBILITY AND WORK OPPORTUNITY RECONCILIATION ACT OF 1996, H.R. 3734, 104th Cong., 2d Sess. (1996) [hereinafter WELFARE REFORM ACT]. *See also* PERSONAL RESPONSIBILITY ACT OF 1995, H.R. 4, 104th Cong., 1st Sess., Sec. 969 (1995); Family Stability and Work Act of 1995, H.R. 1250, 104th Cong., 1st Sess. (1995).

10 *See, e.g.*, ARIZ. REV. STAT. § 32-3701, § 12-2452; ARK. CODE ANN. § 27-23-125, § 16-22-102, § 17-1-104; CAL. WELF. & INST. CODE § 11350.6; COLO. REV. STAT. § 26-13-123, 42-2-127.5; CONN. PUB. ACTS 95-310; D.C. CODE ANN. § 16-916(e), 30-325; FLA. STAT. ANN. §§ 61.13015, 409.2598, 231.097, 231.28, 322.058, 455.203, 559.79; 305 ILL. COMP. STAT. 5/10-17.6; IND. CODE § 31-6-6.1-16(k), IC 31-1-11.5-13(j), IC 31-6-6.1-16(j), IC 9-25-6-19, IC 9-25-6-20, IC 25-1-1.2; IOWA CODE § 598.23A; KAN STAT. ANN. §§ 74-146, 74-147, 20-1204a; KY. REV. STAT. ANN. § 186.570; LA. REV. STAT. ANN. § 9:315.30-315.35, 32:432; ME. REV. STAT. ANN. tit. 19 §§ 305, 306; ME. REV. STAT. ANN. tit. 29-A § 2459; MD. CODE ANN., FAM. LAW §§ 10-101, 10-119; MASS. ANN. LAWS. ch. 119A § 16; MINN. STAT. § 518.551 (subdivision 12); *id.* § 214.101; MONT. CODE ANN. §§ 40-5-701-713; NEV. REV.

B. THE TRADITIONAL CASE-BY-CASE SYSTEM OF ENFORCEMENT

Until the mid-1970s, single parents with custody of their children could not rely on the federal government to assist them in their efforts to ensure that non-custodial parents paid their fair share of child support.[11] In order to collect delinquent child support, custodial parents were required to initiate enforcement actions, typically in state and local courts. The traditional tools of civil enforcement include wage garnishment, liens against real and personal property, levy and execution, and contempt.[12] These traditional remedies are administered on a case-by-case basis and typically require that legal action be initiated by the custodial parent. The limitations of this approach include the fact that the custodial parent must have the resources available to initiate and prevail in a legal action before delinquent child support can be collected. Moreover, repeated court actions may be necessary to ensure ongoing compliance with support obligations.

The likelihood that individuals can use the courts successfully to enforce support obligations is influenced by whether they have access to the courts and can afford legal representation. Unfortunately, those individuals who are the most in need of support payments are usually the least likely to have the personal, social, and financial resources to initiate and pursue a legal action or actions. Moreover, the fact that legal actions placed on backlogged court dockets can consume inordinate amounts of time coupled with the frequent need for repeated legal actions means that

---

STAT. §§ 425.347, 425.348; N.H. REV. STAT. ANN. § 161-B; N.Y. SOC. SERV. LAW § 111-b (subdivision 12); N.Y. VEH. & TRAF. LAW §§ 502, 510, 511, 530; N.Y. DOM. REL. LAW §§ 244-b, 244-c; N.Y. EDUC. LAW §§ 6509-b, 6501, 6502; N.Y. REAL PROP. LAW §§ 440-a, 441, 441-c; N.Y. ALC. BEV. CONT. LAW § 119; N.Y. JUD. LAW § 90; N.Y. GEN. OBLIG. LAW § 3-503; N.C. GEN. STAT. § 1T-142.2; N.D. CENT. CODE §§ 14-08.1-06, 14-08.1-07; OHIO REV. CODE ANN. §§ 2301.373, 2301.374; OKLA. STAT. ANN. tit. 56 § 240.11; OR. REV. STAT. §§ 25.750, 25.753, 25.756, 25.771, 25.783, 25.759, 25.762, 25.765, 25.768, 25.774, 25.777, 25.780, 25.990; 23 PA. CONS. STAT. ANN. § 4355; P.R. LAWS ANN. tit. 5 § 30; R.I. GEN. LAWS §§ 11-2-1, 11-2-3; S.C. CODE ANN. § 20-7-940; S.D. CODIFIED LAWS §§ 32-12-116, 25-7A-56; VT. STAT. ANN. tit. 15, §§ 795, 798; VA. CODE. ANN. §§ 63.1-263.1; *id.* § 20-60.3. *See also* U.S. DEPARTMENT OF HEALTH AND HUMAN SERVICES, ADMINISTRATION FOR CHILDREN AND FAMILIES, OFFICE OF CHILD SUPPORT ENFORCEMENT, OSCE Information Exchange Matrix on License Revocation (August 1995) (providing a graphical summary of the features of most state license revocation statutes) [hereinafter Matrix on License Revocation].

11 U.S. DEPARTMENT OF HEALTH AND HUMAN SERVICES, ADMINISTRATION FOR CHILDREN AND FAMILIES, OFFICE OF CHILD SUPPORT ENFORCEMENT, ESSENTIALS FOR ATTORNEYS IN CHILD SUPPORT ENFORCEMENT 9 (2d ed. 1992) [hereinafter ESSENTIALS FOR ATTORNEYS].

12 *Id.* at 123. Criminal sanctions including criminal contempt and criminal non-support also are available. *Id. See also* HARRY D. KRAUSE, CHILD SUPPORT IN AMERICA: THE LEGAL PERSPECTIVE 53 (1981) (explaining criminal contempt in the child support context); MARGARET CAMPBELL HAYNES ET AL., CHILD SUPPORT REFERENCE MANUAL: CHILD SUPPORT PROJECT V-26 (1990) (stating that "civil contempt proceedings are less complicated and more widely used than criminal contempt proceedings").

even those with access to the courts may have difficulty ensuring that they receive an ongoing stream of child support.[13]

As divorce rates and the number of out-of-wedlock births climbed steadily throughout the 1960s and 1970s, the federal government became increasingly focused on the problem of child support enforcement.[14] In particular, the rising rates of divorce, separation, and out-of-wedlock births placed increased demands on the public welfare system, which was funded largely by federal tax dollars.[15] The initial efforts to federalize aspects of child support enforcement were more clearly focused on recouping these tax dollars than on increasing the financial resources available to single parent families. Nonetheless, the federal government tackled the issue of child support enforcement by establishing programs through which state agencies would use existing court-based procedures and traditional remedies to establish and enforce child support obligations.[16] These programs had the effect of increasing caseloads in state and local courts, placing even greater demands on the legal system.[17] It quickly became apparent to both state and federal officials that the existing court-based system of child support enforcement was ill equipped to efficiently handle the influx of child-support cases initiated by state agencies. Consequently, legislators began to look for expedited and administrative procedures that could efficiently process the ever increasing number of child support claims.

C. MODERN TRENDS TOWARDS ADMINISTRATIVE ENFORCEMENT

The modern Federal oversight of child support enforcement in the United States is rooted in the Social Services Amendments of 1974, which were signed into law in 1975, creating title IV-D of the Social Security Act.[18] Under title IV-D, the Federal Office of Child Support Enforcement ("OCSE")[19] is responsible for overseeing the operation of

---

13 ESSENTIALS FOR ATTORNEYS, *supra* note 11, at 123. Another barrier to effective use of the traditional enforcement mechanisms is that remedies such as wage garnishment pose difficult problems when enforcement is directed at a self-employed obligor. AMERICAN BAR ASSOCIATION, IMPROVING CHILD SUPPORT PRACTICE II-158 (Vol. I, 1986). Furthermore, although civil contempt may be an available remedy when dealing with a self-employed obligor, many judges hesitate to use civil contempt because of the growing problem of jail overcrowding. HAYNES, *supra* note 12, at V-26.

14 ESSENTIALS FOR ATTORNEYS, *supra* note 11 at 3, 9. "Divorce rates increased dramatically between 1965 and 1974, when the annual number of divorces nationwide more than doubled to 977,000." *Id.* at 3.

15 "Between calendar years 1970 and 1991, total annual AFDC benefit payments increased from $4.1 billion to 20.3 billion." *Id.* at 4.

16 *Id.*

17 *Id.*

18 42 U.S.C. 651 *et seq.*

19 The OCSE is within the Administration for Children and Families, Department of Health and Human Services.

the Child Support Enforcement program.[20] Operational aspects of the program were delegated to the state governments under the 1975 federal initiative.[21] Each State was required to have a federally approved State Plan indicating that the state had designated one organizational unit for program administration and that the state will attempt to establish paternity and support for AFDC recipients and other qualifying individuals.[22] In this effort, the state must agree to cooperate with other states and with local courts and law enforcement officials.[23] Furthermore, the state must establish a parent locator service that integrates the data available through local, state, and federal parent location resources.[24] Any support payments must initially be made to the state, which will record collections and disbursements.[25]

The 1975 federal initiative was followed by two subsequent major federal initiatives: one in 1984,[26] the other in 1988.[27] The 1984 initiative required improvements in state and local child support enforcement in several areas, including mandatory practices and equalization of services for welfare and non-welfare families. In terms of mandatory practices, all states were required to improve their enforcement mechanisms by enacting statutes to provide for "(1) mandatory income withholding procedures; (2) expedited processes for establishing and enforcing support orders; (3) State income tax refund interceptions; (4) liens against real and personal property, security or bonds to assure compliance with support obligations; and (5) reports of support delinquency information to consumer reporting agencies."[28] Several specific requirements also "were directed at improving State services to non-welfare families. All of the mandatory practices must be available to both types of cases; the interception of Federal income tax refunds was extended to non-welfare

---

20 Program oversight includes: "(1) establishing a parent locator service; (2) establishing standards for State program organization, staffing, and operation to assure an effective program; (3) reviewing and approving State plans for the program; (4) evaluating State program operations by conducting audits of each States's program; (5) certifying cases for referral to the Federal courts to enforce support obligations; (6) certifying cases for referral to the IRS for support collections; (7) providing technical assistance to States and assisting them with reporting procedures; (8) maintaining records of program operations, expenditures, and collections; and (9) submitting and annual report to Congress." ESSENTIALS FOR ATTORNEYS, *supra* note 11, at 229.

21 *Id.*

22 *Id.*

23 *Id.*

24 *Id.*

25 *Id.*

26 P.L. 98-378.

27 P.L. 100-485.

28 ESSENTIALS FOR ATTORNEYS, *supra* note 11, at 232.

cases; incentive payments became available for collections on non-welfare cases."[29]

The enactment of the "Family Support Act of 1988" ("FSA") marked the most recent major federal initiative in the area of child support enforcement prior to current welfare reform efforts. The FSA required immediate wage withholding in a wide range of cases, required judges and other officials to use state child support guidelines in setting awards in most cases, added new requirements regarding the periodic review and modification of orders, required states to meet federal performance standards for paternity establishment, and encouraged states to adopt a simple civil process for voluntary paternity acknowledgment.[30] The FSA also required each state to put in place an automated statewide system for tracking and monitoring child support cases.[31]

The periodic addition of new federal requirements added new burdens to the already overtaxed state court systems. In an attempt to address this problem, the FSA encouraged the use of administrative (rather than judicial) procedures where feasible.[32] This move was consistent with more general federal trends toward considerations of administrative efficiency in both constitutional and administrative law.[33] The establishment of license revocation programs is a prime example of this overall shift toward more systemic and administrative models of justice and enforcement.[34]

III. CONSTITUTIONAL PARAMETERS OF LICENSE REVOCATION PROGRAMS

A majority of states have already enacted license revocation programs or are working toward enacting such programs.[35] As reliance on these enforcement tools leads to more actual license revocations, it is inevitable that constitutional challenges to such statutory schemes will be

---

29 *Id.* at 233.

30 *Id.* at 234-35.

31 *Id.*

32 Note: as a general matter, states are free to implement either judicial, administrative, or quasi-judicial procedures to establish child support obligations. However, the requirement that states implement "expedited processes" limits the role of the courts and increases the necessity of reliance on administrative procedures. H.R. Doc. No. 19, 101st Cong., 1st Sess. 11, at 20 (1989).

33 *See generally* Mathews v. Eldridge, 425 U.S. 319 (1976). *See also* Mark R. Fondacaro, *Toward a Synthesis of Law and Social Science: Due Process and Procedural Justice in the Context of National Health Care Reform*, 72 DENVER L. REV. 303, 307 (1995).

34 This movement toward greater reliance on administrative process often clashes with local legal culture and the traditional emphasis on an individualized, case-by-case approach to due process and enforcement.

35 *See supra* note 10.

raised with increasing frequency in states across the country.[36] Constitutional challenges are most likely to focus on whether license revocation programs have exceeded constitutional parameters in the areas of procedural due process, substantive due process, and equal protection.[37] Accordingly, each of these potential bases for constitutional challenge are reviewed below.

A. PROCEDURAL DUE PROCESS

1. *Threshold Constitutional Issues*

Under the United States Constitution, the federal and state governments are prohibited from depriving an individual of "life, liberty, or property without due process of law."[38] In terms of the scope of due process protections, they are mandated by the Federal Constitution only in cases involving government or state action.[39] Given that license revocation laws are generally enacted by state legislatures and implemented and enforced by the administrative and judicial arms of state government, the state action requirement is easily met. Indeed, federal welfare reform initiatives now mandate that states adopt license restriction programs.

The second threshold requirement which must be satisfied before constitutional safeguards are mandated is that the government must threaten to deprive a person of a liberty or property interest.[40] In the context of license revocation programs, the Supreme Court would need to characterize the revocation of the relevant license (motor vehicle, professional) as an infringement on an individual's property or liberty interest. Again, this threshold requirement is easily satisfied. The United States Supreme Court has clearly recognized the issuance of both professional[41] and motor vehicle[42] licenses as creating important property or liberty interests requiring due process protection. Finally, if it is established that a legislative scheme involves both state action and a potential deprivation of property or liberty, a determination is made regarding

---

36 Several such challenges already have been raised. *See* Thompson v. Ellenbecker, Civ. 94-4166 (D.S.D. filed Sept. 18, 1995); Petschen v. Governor of Minnesota, Civ. File No. 3-96-115 (D. Minn. 1996).

37 *See, e.g.*, Thompson v. Ellenbecker, Civ. 94-4166 (D.S.D. filed Sept. 18, 1995).

38 U.S. CONST. amend. V, amend. XIV.

39 The Fourteenth Amendment applies to "state action" taken by state governments, and the Fifth Amendment applies to "government action" taken by the federal government.

40 Fondacaro, *supra* note 33, at 307.

41 Barry v. Barchi, 443 U.S. 55 (1979).

42 Bell v. Burson, 402 U.S. 535 (1971). "Once licenses are issued, as in petitioner's case, their continued possession may become essential in the pursuit of a livelihood. Suspension of issued licenses thus involves state action that adjudicates important interests of the licenses. In such cases the licenses are not to be taken away without that procedural due process required by the Fourteenth Amendment." *Id.* at 539.

"what process is due" in light of the particular context of the legislation under consideration.

In determining "what process is due," the Supreme Court has developed an unusually flexible strategy. In fact, due process, perhaps more than any other constitutional doctrine, is recognized as an evolving, flexible construct, highly dependent on context for its meaning. As noted by Justice Frankfurter, due process is not "a technical conception with a fixed content unrelated to time, place and circumstances."[43]

In recent decades, the Supreme Court has continued to recognize the evolving nature of due process analysis and the importance of being flexible when identifying what specific procedures satisfy requirements of due process and fundamental fairness.[44] In the current context of the dramatic increase in the number of claims for government services and benefits, both the Supreme Court and administrative agencies have become more aware that resources are limited and that government programs must adopt decisionmaking procedures that strike an appropriate balance among fairness, accuracy, and efficiency.[45]

2. *Administrative Review*

Modern Supreme Court doctrine on due process and administrative review is typically traced to the case of *Goldberg v. Kelly*, which the United States Supreme Court decided in 1970.[46] The Court in *Goldberg* addressed whether the state could terminate welfare payments without providing the opportunity for an evidentiary hearing before the depriva-

---

[43] Joint Anti-Fascist Refugee Comm. v. Mcgrath, 341 U.S. 123, 162 (1951) (Frankfurter, J., concurring). Justice Frankfurter characterized the flexibility of due process analysis as follows:

> Expressing as it does in its ultimate analysis respect enforced by law for that feeling of just treatment which has been evolved through centuries of Anglo-American constitutional history and civilization, "due process" cannot be imprisoned within the treacherous limits of any formula. Representing a profound attitude of fairness between man and man, and more particularly between the individual and government, "due process" is compounded of history, past courses of decisions, and stout confidence in the strength of the democratic faith which we profess. Due process is not a mechanical instrument. It is not a yard-stick. It is a process. It is a delicate process of adjustment inescapably involving the exercise of judgment by those whom the Constitution entrusted with the unfolding of the process.

Id. at 162-63.

[44] *See, e.g.*, Cafeteria Workers v. McElroy, 367 U.S. 886, 895 (1961) ("The very nature of due process negates any concept of inflexible procedures universally applicable to every imaginable situation."); Morrissey v. Brewer, 408 U.S. 471, 481 (1972) ("It has been said so often by this Court and others as not to require citation of authority that due process is flexible and calls for such procedural protections as the particular situation demands.").

[45] *See generally* Jerry L. Mashaw, *The Management Side of Due Process: Some Theoretical and Litigation Notes on the Assurance of Accuracy, Fairness, and Timeliness in the Adjudication of Social Welfare Claims*, 59 CORNELL L. REV. 772 (1974).

[46] Goldberg v. Kelly, 397 U.S. 254 (1970).

tion. In *Goldberg*, individuals facing termination of welfare payments were provided with informal pre-termination review procedures. However, the pre-termination review did not include many of the traditional procedural safeguards such as the opportunity for personal appearance, oral presentation of evidence, or confrontation and cross-examination of adverse witnesses.[47] Instead, individuals whose payments were terminated were entitled to a post-deprivation "fair hearing."[48]

The Court focused its analysis on whether the Due Process Clause of the Fourteenth Amendment requires a hearing before welfare benefits can be terminated. The Court acknowledged that termination of welfare benefits involved "state action" and characterized welfare payments as "property" that could not be arbitrarily withdrawn by the government. The Court noted that due process analysis requires consideration of the extent to which a person may be "condemned to suffer grievous loss."[49] Given that welfare provides "the means to obtain essential food, clothing, housing, and medical care," the Court viewed the termination of such benefits as a potential "grievous loss"[50] that clearly triggers due process protection.[51]

Addressing the question of what process is due, the Court held that a pre-deprivation evidentiary hearing must be provided *before* benefits can be terminated.[52] At the hearing, the recipient is entitled to most, but not all, of the traditional procedural safeguards of a formal judicial trial. For example, the recipient is entitled to receive timely and adequate notice detailing the reasons for termination; an opportunity to appear personally before the decisionmaker and to present arguments and evidence orally; an opportunity to confront and cross-examine adverse witnesses; the right to retain an attorney at personal expense; a statement by the decisionmaker indicating the reasons for the determination and the evi-

---

47 *Id.* at 258-59.

48 The "fair hearing" involved a proceeding before an independent state hearing officer. At the fair hearing, the recipient was entitled to appear personally, offer oral evidence, confront and cross-examine witnesses, and have a record made of the hearing. If the recipient prevailed, he or she was paid all funds erroneously withheld. A recipient whose aid was not restored by a fair hearing decision was entitled to judicial review. *Id.* at 259-60.

49 *Id.* at 263-64.

50 In his concurring opinion in *Joint Anti-Fascist Committee v. Mcgrath*, Justice Frankfurter stated "that the right to be heard before being condemned to suffer grievous loss of any kind . . . is a principle basic to our society." 341 U.S. at 168.

51 *Goldberg*, 397 U.S. at 264 (stating "that termination of aid pending resolution of a controversy over eligibility may deprive an *eligible* recipient of the very means by which to live while he waits"). The Court focused narrowly on the welfare context, acknowledging the basic considerations of survival at issue. The Court indicated that for "virtually anyone else whose governmental entitlement are ended," such issues of basic survival are not a factor. The Court also recognized the potential demoralization costs associated with the erroneous termination of welfare benefits. *Id.* at 265. Note: Such demoralization costs also may result from overly aggressive child support enforcement.

52 *Id.* at 261.

dence relied upon; and review by an impartial decisionmaker who was not involved in making the decision under review.[53] The Court concluded that "[t]he opportunity to be heard must be tailored to the capacities and circumstances of those who are to be heard."[54]

Following *Goldberg*, there was a noted tendency by the courts "to judicialize administrative procedures."[55] Around that time, Judge Henry Friendly wrote an influential article that was sharply critical of what some commentators characterized as a due process explosion. Judge Friendly felt that the Supreme Court in particular had "yielded too readily to the notions that the adversary system is the only appropriate model" and had "been too prone to indulge in constitutional codification."[56] As an alternative, he encouraged experimentation with investigative models of factfinding and dispute resolution.[57]

Outside the welfare context, the Supreme Court has more recently applied the balancing test articulated in *Mathews v. Eldridge*[58] when addressing the issue of "what process is due."

In *Mathews* the Court held that disability benefits, unlike welfare benefits, could be terminated without a prior trial-like evidentiary hearing provided that the following three distinct factors are considered:

> First, the private interest that will be affected by the official action; second, the risk of an erroneous deprivation of such interest through the procedures used, and the probable value, if any, of additional or substitute procedural safeguards; and finally, the Government's interest, including the function involved and the fiscal and administrative burdens that the additional or substitute procedural requirement would entail.[59]

The Supreme Court has since applied the *Mathews* balancing test to a wide range of contexts.[60] In each case, the particular procedural safe-

---

53 *Id.* at 267-71.

54 *Id.* at 268-69. Thus, due process required an oral hearing because the Court considered written submissions to be

> an unrealistic option for most recipients, who lack the educational attainment necessary to write effectively and who cannot obtain professional assistance. Moreover, written submissions do not afford the flexibility of oral presentations; they do not permit the recipient to mold his argument to the issues the decision maker appears to regard as important.

Id. at 269.

55 *See* Henry J. Friendly, "*Some Kind of Hearing*," 123 U. PA. L. REV. 1267, 1268-69 (1975); JERRY L. MASHAW, DUE PROCESS IN THE ADMINISTRATIVE STATE 8-9 (1985).

56 *Id.* at 1316.

57 *Id.*

58 Mathews v. Eldridge, 425 U.S. 319 (1976).

59 *Id.* at 335.

60 *See, e.g.*, DAVIS & PIERCE, ADMINISTRATIVE LAW TREATISE 53 (1994).

guards required are tailored to the specific context under consideration. In *Mathews,* the Court held that the opportunity for written presentation prior to the termination of benefits, coupled with the opportunity for a post-termination evidentiary hearing and judicial review, satisfied the requirements of due process.[61]

In the specific context of motor vehicle license suspension, the Supreme Court in *Bell v. Burson* held that pre-deprivation hearings were required for cases in which uninsured motorists involved in accidents were subject to license suspension.[62] In *Bell,* which was decided after *Goldberg* but before *Mathews,* the Court held that "licenses are not to be taken away without that procedural due process required by the Fourteenth Amendment."[63] Notwithstanding the government's claim that a hearing on liability was not needed "because fault and liability [were] irrelevant to the statutory scheme," the Court required a limited pre-deprivation inquiry to determine whether there was "a reasonable possibility of judgments in the amounts claimed being rendered against the licenses."[64]

However, subsequent cases in other contexts have indicated that even when such pre-deprivation procedures are required, they need not always be formal to satisfy constitutional requirements. For example, the Supreme Court indicated in *Goss v.Lopez* that informal, flexible, pre-deprivation procedures may satisfy due process requirements.[65] In *Goss,* the Court held that high school students facing a ten day suspension are entitled to an informal hearing and that generally the hearing should take place before the student is removed from school.[66] Note that this pre-deprivation "opportunity to be heard" can be informal and need not encompass formal process features such as the opportunity to secure counsel, to cross-examine adverse witnesses, or to call witnesses to support one's version of the facts.[67]

Overall, the Supreme Court has operationalized the "opportunity to be heard" along a continuum that ranges from the highly formal in the welfare context[68] to the highly informal in the context of school suspension.[69] Outside of the welfare context, constitutional standards of procedural due process increasingly require the balancing of factors associated

---

61 *Mathews,* 425 U.S. at 349. Some commentators have suggested that post-termination trial-type hearings are very costly and unnecessary after adequate pre-termination hearings have been provided. *See, e.g.,* DAVIS AND PIERCE, *supra* note 60, at 19.

62 Bell v. Burson, 402 U.S. 535 (1971).

63 *Id.* at 539.

64 *Id.*

65 419 U.S. 565 (1975).

66 *Id.* at 582.

67 *Id.* at 583.

68 *Goldberg,* 397 U.S. at 267-71.

69 Goss v. Lopez, 419 U.S. 565, 583-84 (1975).

with fair and accurate decisionmaking against the government interest in conserving administrative and fiscal resources.

3. *Models of Administrative Justice*

In his book entitled *Bureaucratic Justice*, Mashaw outlines several models of due process and bureaucratic justice. Two have particular relevance to developing a procedural framework that can guide the administrative review of decisions to revoke motor vehicle and professional licenses: (1) moral judgment; and (2) bureaucratic rationality.[70] According to Mashaw, the "justice" of an administrative decision is evaluated in terms of "those qualities of a decision process that provide arguments for the acceptability of its decision."[71] For example, within a moral judgment framework, the fairness and acceptability of decisions are assessed in light of traditional trial-like processes for determining individual entitlement. From the standpoint of bureaucratic rationality, justice results when decisions are accurate and efficient realizations of the legislative will.[72]

The moral judgment model is most similar to civil or criminal trials and is concerned primarily with the ability of individuals to assert their rights to resources.[73] The process involves individualized determinations of winners and losers in the context of conflicting and competing interests. Mashaw believes:

> [t]his entitlement-awarding goal of the moral judgment model gives an obvious and distinctive cast to the basic issue of adjudicatory resolution. The issue is the deservingness of some or all of the parties in the context of certain events, transactions, or relationships that give rise to a claim . . . [T]he "justice" in this model inheres in its promise of a full and equal opportunity to obtain one's entitlement.[74]

The value of this approach is "fairness"; the primary goal is conflict resolution.[75]

The bureaucratic model, on the other hand, emphasizes accuracy and cost-effectiveness of claims processing. According to Mashaw:

> A system focused on correctness defines the questions presented to it by implementing decisions in essentially

---

70 JERRY L. MASHAW, BUREAUCRATIC JUSTICE: MANAGING SOCIAL DISABILITY CLAIMS 23-25 (1983).

71 *Id.* at 24-25.

72 *Id.* at 25.

73 *Id.* at 21.

74 *Id.* at 30-31.

75 *Id.*

> factual and technocratic terms. Individual adjudicators must be concerned about the facts in the real world that relate to the truth or falsity of the [claim]. At a managerial level the question becomes technocratic: What is the least-cost methodology for collecting and combining those facts about claims that will reveal the proper decision. To illustrate by contrast, this model would exclude questions of value or preference as obviously irrelevant to the administrative task, and it would view reliance on nonreplicable, nonreviewable *judgment* or *intuition* as a singularly unattractive methodology for decision. The legislature should have previously decided the value questions . . . . From the perspective of bureaucratic rationality, administrative justice is accurate decision-making carried on through processes appropriately rationalized to take account of costs.[76]

Obviously, the values of the bureaucratic model are accuracy and efficiency; the primary goal is program implementation.

Increasingly, traditional adversary procedures rooted in the moral judgment model have been criticized for providing excessive opportunities for obfuscation and delay and for their high costs. The result has been more judicial acceptance of positive case management as a legitimate strategy for achieving fair, accurate, and cost-effective results. In effect, there has been a shift in focus from passive judicial reliance on adversary processes toward more positive judicial management of adjudication.[77] As a result, due process analysis has become more concerned with systemic effects rather than individual injustices and has taken on a managerial orientation that is more consistent with a bureaucratic model of justice.[78] This shift towards a bureaucratic model of justice does not necessarily eliminate the need for more traditional procedural protection given that management practices are directed at solving systemic problems rather than correcting individual decisions.[79] Presumably, however, the need and demand for individualized appeals and judicial review will be reduced if more accurate, timely, and efficient decisions are made.

---

[76] *Id.* at 25-26.

[77] *See* Mashaw, supra note 45, at 779.

[78] Richard H. Fallon, Jr., *Some Confusions About Due Process, Judicial Review, and Constitutional Remedies*, 93 COLUM. L. REV. 309, 373 (1993). This modern focus on systemic issues is reflected in the Supreme Court's analysis in *Mathews*: "procedural due process rules are shaped by the risk error of inherent in the truth-finding process as applied to the generality of cases, not the rare exceptions." *Mathews*, 425 U.S. at 344.

[79] Mashaw, *supra* note 45, at 804.

4. *Judicial Review and Enforcement*

Despite modern trends toward greater reliance on administrative enforcement and bureaucratic models of justice, courts still perform at least three essential functions in carrying out their rights-enforcing role:

> (1) a "blocking function," blocking illegal, often grossly illegal agency actions or refusals to act; (2) an "unmasking function," forcing into political daylight the gap between statutory standards and agency structure and performance, and (3) a "rationality function," requiring agencies to articulate their policies and explain them in relation to goals.[80]

Overall, judicial review serves as an important check on the exercise of authority by program administrators[81] and may contribute to public perceptions that justice has been done.

In the context of child support, there is the question of what, if any, level of judicial review is necessary[82] or desirable. The answer here may depend in part on the nature and structure of the administrative review process established to review claims that licenses have been unjustly revoked. The need and demand for more costly judicial review is likely to decline to the extent that effective administrative review procedures are placed between claimants and the courts, thereby insuring that fair and accurate decisions are made in a cost effective manner. "If a legally and publicly acceptable system is established, then the courts will serve their function primarily by overseeing the integrity of the system. If an adequate system is not established, then more judicial scrutiny will be required by law and demanded by the public."[83] Such increased demands could overwhelm judicial resources, particularly regarding the review of licenses subject to revocation through automated matching procedures.

B. SUBSTANTIVE DUE PROCESS AND EQUAL PROTECTION

1. *Federal Substantive Due Process Doctrine*

The Due Process Clause of the Fourteenth Amendment provides that "no state shall . . . deprive any person of life, liberty, or property, without due process of law."[84] In addition to providing the explicit procedural protections outlined in the preceding section, the Amendment has

---

80 *See* Rand E. Rosenblatt, *The Courts, Health Care Reform, and the Reconstruction of American Social Legislation*, 18 J. HEALTH POLITICS, POL'Y & L. 439, 443 (1993) (citations omitted).

81 *Id.*

82 *See infra* section IV.D.

83 Fondacaro, *supra* note 33, at 324-25.

84 U.S. CONST. amend. XIV, § 1.

been interpreted as providing certain substantive protections.[85] That is, the Court has sometimes interpreted the Fourteenth Amendment as meaning that "deprivations of life, liberty, or property [must] be substantively reasonable."[86] The Court's early substantive due process cases typically involved state economic regulations that the Court found interfered with certain fundamental "liberties" or freedoms. The early cases focused on such economic liberties as the freedom to contract and to own property.[87] In an effort to protect these economic liberties, from the late 1800s until the 1930s — the infamous Lochner era[88] — the Court sporadically relied on substantive due process doctrine to strike down economic and social welfare legislation such as minimum wage laws[89] and maximum hour laws.[90]

However, with the rise of Franklin Roosevelt's New Deal programs, American society experienced a political and philosophical shift away from recognition of economic rights as fundamental liberties and toward an increased emphasis on the need for government involvement in economic and social affairs.[91] *Nebbia v. New York*,[92] decided prior to the New Deal, is often cited as marking the Court's initial movement away from the Lochner era. In *Nebbia*, the Court upheld a state regulation on milk prices, reasoning that states are free "to adopt whatever economic policy may reasonably be deemed to promote public welfare, and to enforce that policy by legislation adapted to its purpose."[93] The Court explicitly retained the requirement that the means of state legislation "have a real and substantial relation to the object sought to be attained."[94] However, as later caselaw developed, the Court abandoned even the sub-

---

85 Allgeyer v. Louisiana, 165 U.S. 578, 591 (1897).

86 Russell W. Galloway, *Basic Substantive Due Process Analysis*, 26 U.S.F. L. REV. 625, 625 (1992).

87 *See, e.g.*, Adkins v. Children's Hosp., 261 U.S. 525 (1923); Coppage v. Kansas, 236 U.S. 1 (1915); Lochner v. New York, 198 U.S. 45 (1905); Allgeyer v. Louisiana, 165 U.S. 578 (1897).

88 Named for *Lochner v. New York*, in which the Court struck down New York legislation that limited bakery working hours to ten hours per day and sixty hours per week. 198 U.S. 45 (1905). This period of constitutional history has become infamous because the Court struck down many statutes geared toward improving work conditions that were, under modern standards, deplorable. However, as noted by Nowak and Rotunda, it is important to stress that this "position resulted from [the Justice's] independent reading of the Constitution and the historic economic freedom of action in American life rather than from some arbitrary desire to protect big business." JOHN E. NOWAK AND RONALD D. ROTUNDA, CONSTITUTIONAL LAW § 11.3, at 376 (5th ed. 1995).

89 Adkins v. Children's Hosp., 261 U.S. 525 (1923).

90 Lochner v. New York, 198 U.S. 45 (1905).

91 *See* Michael J. Phillips, *Another Look at Economic Substantive Due Process*, 1987 WISC. L. REV. 265 (1987).

92 291 U.S. 502 (1934).

93 *Id.* at 537.

94 *Id.* at 511.

stantial relation requirement, finding economic regulatory legislation constitutional if even a hypothetical reasonable relationship existed which the legislature "might have" considered.[95]

In sum, the Supreme Court largely reversed its substantive due process jurisprudence by refusing to recognize economic rights as liberties protected by the Fourteenth Amendment.[96] Now, the Court's jurisprudence is characterized by a hesitance to meaningfully scrutinize state economic or social welfare legislation for violations of substantive due process.[97] In the case of economic regulations, the Court has completely abandoned the use of the substantive due process doctrine to strike down statutes that a "majority of the Court believed to be economically unwise."[98] As long as an economic regulation falls within the state's police power, only a minimally rational relation between the means and ends is required.[99] Similarly, the highly deferential mere rationality standard of review is applied to social welfare legislation, assuming the legislation does not infringe upon a constitutional right that the Court currently deems to be "fundamental."[100] In the context of revoking licenses to enforce child support obligations, revocation statutes will be reviewed under a mere rationality standard unless a litigant can convince the court that the statute infringes upon a fundamental right.[101]

In stark contrast to the modern Court's abdication of substantive due process review of most economic and social welfare legislation through the application of the rationality standard, the modern Court has become more willing to strictly scrutinize legislation infringing upon "fundamental" non-economic rights.[102] The critical step in the Court's substantive due process analysis of non-economic legislation is the initial determination of whether a right is fundamental.[103] If the Court determines that a particular right is not a fundamental right, a state's infringement upon that right will be subject to a highly deferential rationality standard of review.[104] "Although the Supreme court has never totally rejected a ju-

---

95 Williamson v. Lee Optical Co., 348 U.S. 483 (1955).

96 LAURENCE A. TRIBE, AMERICAN CONSTITUTIONAL LAW § 8-7, at 582 (1992).

97 NOWAK & ROTUNDA, *supra* note 88 § 11.4, at 383.

98 Ferguson v. Skrupa, 372 U.S. 726, 731 (1963). The Court has not struck down an economic regulation for violating substantive due process since 1937. G. GUNTHER, CONSTITUTIONAL LAW 472 (11th ed. 1985).

99 Williamson v. Lee Optical Co., 348 U.S. 483 (1955).

100 Whalen v. Roe, 429 U.S. 589 (1977).

101 *See, e.g.*, Thompson v. Ellenbecker, Civ. 94-4166 (D.S.D. filed Sept. 18, 1995); Petschen v. Governor of Minnesota, Civ. File No. 3-96-115 (D. Minn. 1996).

102 The most notable examples are the privacy cases. *See, e.g.*, Griswold v. Connecticut, 281 U.S. 479 (1965).

103 Phillips, *supra* note 91, at 285-86.

104 *See, e.g.*, Maher v. Roe, 432 U.S. 464, 474-78 (1977) (applying the rational basis test after concluding that a woman did not have a fundamental right to an abortion); Thompson v. Ellenbecker, Civ. 94-4166 (D.S.D. filed Sept. 18, 1995) (finding that the revocation of a driv-

dicial role in the review of economic and social welfare legislation, it is rare that any law or classification would be held to violate substantive due process . . . under the rationality standard."[105]

However, if the Court determines that a particular right is fundamental, a state's infringement upon that right will be subject to the two tier strict scrutiny standard of review.[106] Under strict scrutiny, there must first exist a compelling state interest for infringing upon the right.[107] Second, the statute must be narrowly tailored such that the means employed by the state are necessary to reach the compelling objective.[108] Statutes rarely survive this strict scrutiny standard of review. Those rights that the Court has found to be fundamental in the context of substantive due process are typically associated with familial relations,[109] child-rearing,[110] and other rights that may fall under the general category of privacy.[111] Rights outside the scope of privacy and familial relations, such as the right to operate a motor vehicle or the right to engage in one's occupation, have not been classified as fundamental, despite their essential role in human existence. In the context of license revocation for the purpose of child support enforcement, this means that strict scrutiny would be applied if (1) the license revocation statute can be characterized as infringing upon familial relations or some other recognized fundamental right, or (2) the Court recognizes a new category of fundamental rights such as a fundamental right to drive or a fundamental right to livelihood.

2. *Federal Equal Protection Doctrine*

The Equal Protection Clause of the Fourteenth Amendment provides that "no state shall . . . deny to any person within its jurisdiction the equal protection of the laws."[112] This clause prohibits some legislative classifications that fail to treat similarly situated persons similarly.[113]

---

ers license for the purpose of child support enforcement did not infringe upon a fundamental right and consequently applying the rational basis test).

105 NOWAK & ROTUNDA, *supra* note 88 § 11.4, at 389.

106 *Id.* at 384, 399.

107 *Id.* at 384.

108 *Id.*

109 Moore v. East Cleveland, 431 U.S. 494 (1977). When striking down a zoning ordinance which allowed only members of a single nuclear family to live together, the Court subjected the statute to a high level of scrutiny because the members of a non-nuclear family, like members of a nuclear family, have a liberty interest in the right to live together.

110 Pierce v. Society of Sisters, 286 U.S. 510 (1925) (in striking down a statute requiring children to attend public schools and thus preventing them from attending private religious schools the Court relied upon the "liberty of parents and guardians to direct the upbringing and education of children under their control").

111 Griswold v. Connecticut, 381 U.S. 479 (1965).

112 U.S. CONST. amend. XIV, § 1.

113 NOWAK & ROTUNDA, *supra* note 88 § 14.2, at 597.

The Supreme Court's equal protection jurisprudence runs a close parallel to the Court's substantive due process jurisprudence.[114] For example, legislative classifications will be reviewed under a "mere rationality" standard unless the classification is found to effect a fundamental right or create a suspect classification.[115] And most economic and social welfare legislative classifications will not be found to infringe upon a fundamental right or to create a suspect classification.

Like substantive due process analysis, the mere rationality standard of review for equal protection provides that a legislative classification must have a legitimate legislative objective and the classification must bear a rational relation between that objective and the means toward that objective.[116] Most legislative classifications will pass a test of mere rationality;[117] however, unlike substantive due process analysis, the Supreme Court has occasionally[118] struck down legislative classifications under what it has suggested to be the rational basis test.[119] However, commentators have noted that some such cases,[120] although they appear to involve the application of equal protection analysis, are "controlled by other constitutional provisions."[121] Furthermore, such cases typically do not address "solely economic regulation or distribution of government benefits."[122]

Under equal protection analysis, the Court will also subject legislation to strict scrutiny when a legislative classification is found to be suspect.[123] For the purposes of equal protection, a suspect classification is a classification based on race, national origin, or ethnicity.[124] Such classifications are presumptively unconstitutional.[125] Establishing the consti-

---

114 *Id.* § 14.1, at 596.

115 *Id.* § 14.3, at 601.

116 *Id.*

117 TRIBE, *supra* note 96, at 1442 ("the rationality requirement [is] largely equivalent to a strong presumption of constitutionality.").

118 *See, e.g.*, Logan v. Zimmerman Brush Co., 455 U.S. 442 (1982); Allegheny Pittsburgh Coal Co. v. Webster County, 488 U.S. 336 (1989); Metropolitan Life Ins. Co. V. Ward, 470 U.S. 869 (1985); Reed v. Reed, 404 U.S. 71 (1971); Zobel v. Williams, 457 U.S. 55 (1982).

119 TRIBE, *supra* note 96, at 1444.

120 *See, e.g.*, Logan v. Zimmerman Brush Co., 455 U.S. 442 (1982); Zobel v. Williams, 457 U.S. 55 (1982).

121 *See* COHEN & VARAT, CASES AND MATERIALS ON CONSTITUTIONAL LAW 698 (1993). *See also* Westen, *The Empty Idea of Equality*, 95 HARV. L. REV. 537 (1982).

122 Cohen and Varat point to *Reed v. Reed*, 404 U.S. 71 (1971), *City of Cleburne v. Cleburne Living Center*, 473 U.S. 432 (1985), *Zobel v. Williams*, 457 U.S. 55 (1982), and *Metropolitan Life Ins. Co. v. Ward*, 470 U.S. 869 (1985) as examples of cases invalidating statutes under a rational basis test that involved prejudice against particular groups as much as they involved economic regulation or distribution of government benefits. COHEN & VARAT, *supra* note 121, at 699.

123 TRIBE, *supra* note 96, at 1451.

124 NOWAK & ROTUNDA, *supra* note 88, at 637.

125 TRIBE, *supra* note 96, at 1466.

tutionality of a suspect classification requires showing that the classification is necessary to further a compelling state interest.[126] A statutory classification will almost never withstand this level of scrutiny.[127] However, it is highly unlikely that typical license revocation statutes could be convincingly characterized as creating classifications based upon race or national origin.

The Court recognizes some classifications as quasi-suspect.[128] However, unlike suspect classifications, establishing the constitutionality of a quasi-suspect classification requires only the showing that the classification is substantially related to an important state interest.[129] Thus, the Court applies an intermediate level of scrutiny to quasi-suspect classifications — stricter than the rational basis test, but not as strict as strict scrutiny.[130] Quasi-suspect classifications have included classifications based upon such characteristics as gender[131] and illegitimacy.[132] Again, it is unlikely that license revocation statutes could reasonably be characterized as creating such classifications.

Just as the Court will subject a legislative enactment to strict scrutiny when a legislative classification is found to be suspect, the Court will also subject legislation to strict scrutiny when a legislative classification is found to interfere with a fundamental right.[133] For the purposes of equal protection, fundamental rights are those rights explicitly guaranteed by another constitutional provision,[134] as well as those rights that the Court has deemed to be implicitly protected by the Constitution.[135] In the context of equal protection, rights explicitly found to be fundamental have included the right to vote,[136] the right to marry,[137] the right

---

126 NOWAK & ROTUNDA, *supra* note 88 § 14.5, at 637.

127 A notable exception is *Korematsu v. United States*, 323 U.S. 214 (1944), in which the Court upheld a military order restricting the liberty of Japanese persons. Recently, in *Adarand Constructors v. Pena*, the Court stated that they "wish[ed] to dispel the notion that strict scrutiny is 'strict in theory, but fatal in fact.'" 115 S. Ct. 2097, 2117 (1995).

128 *See, e.g.*, Craig v. Boren, 429 U.S. 190 (1976) (women); Clark v. Jeter, 486 U.S. 456 (1988) (illegitimacy).

129 NOWAK & ROTUNDA, *supra* note 88 § 14.3, at 603.

130 *Id.*

131 Craig v. Boren, 429 U.S. 190 (1976).

132 Clark v. Jeter, 486 U.S. 456 (1988).

133 TRIBE, *supra* note 96, at 1454.

134 NOWAK & ROTUNDA, *supra* note 88 § 11.7, at 399.

135 *Id.* This approach has been harshly criticized by proponents of original understanding such as Robert Bork, who has characterized this aspect of equal protection jurisprudence as "substantive equal protection." See ROBERT BORK, THE TEMPTING OF AMERICA 64 (1990).

136 NOWAK & ROTUNDA, *supra* note 88 § 14.31, at 866.

137 Zablocki v. Redhail, 434 U.S. 374 (1978) (striking down a statute restricting remarriage by a parent who was under court order to support a minor child not in his custody).

to use the courts,[138] or the right to travel between states.[139] In the context of child support enforcement, a plausible argument can be made that license revocation statutes infringe upon a fundamental right for the purposes of equal protection, such as the right to travel between states. However, such an argument is unlikely to convince either state or federal courts that a license revocation statute is unconstitutional.

3. *State vs. Federal Constitutional Interpretation*

Generally, a state court may interpret its state constitution as providing its citizens with more, but not less, constitutional protection than the United States Constitution.[140] For example, a state court may strike down a state statute for a violation of state equal protection doctrine even though the state's interpretation of its own equal protection clause is more expansive than the Supreme Court's interpretation of the federal equal protection clause.[141] In such a case, the state constitutional provision will be regarded as an adequate and independent ground for judicial review.[142] Furthermore, as long as such a decision is based upon, and expressly held to be based upon, adequate and independent state grounds, the decision is final and may not be reviewed by the Supreme Court.[143] Clearly, the doctrine of adequate and independent state grounds has major implications for an analysis of the constitutionality of license revocation programs. Currently, such programs are based upon state legislation.[144] Furthermore, although federal law now mandates such programs,[145] the specifics of implementing license restriction programs will continue to be based upon state law.[146] Consequently, challenges to

---

138 Griffin v. Illinois, 351 U.S. 12, 18 (1956).

139 *See, e.g.*, Shapiro v. Thompson, 394 U.S. 618 (1969); *Soto-Lopez*, 476 U.S. at 902; Memorial Hosp. v. Maricopa County, 415 U.S. 250 (1974). It is important to note that the Court has interpreted the "right to travel" to mean exclusively the "right of free interstate migration." *Soto-Lopez*, 470 U.S. at 902. For an argument that "a fundamental right to intrastate travel must exist as a logical and inevitable extension of the interstate travel doctrine," see Andrew C. Porter, *Comment: Toward a Constitutional Analysis of the Right to Intrastate Travel*, 86 NW. U. L. REV. 820 (1992).

140 William J. Brennan, Jr., *State Constitutions and the Protection of Individual Rights*, 90 HARV. L. REV. 489, 491 (1977); J. Skelly Wright, *Commentary, In Praise of State Courts: Confessions of a Federal Judge*, 11 HASTINGS CONST. L.Q. 165, 188 (1984).

141 NOWAK & ROTUNDA, *supra* note 88 § 2.13, at 92-93.

142 *Id.*

143 Michigan v. Long, 463 U.S. 1032 (1983) ("If the state court decision indicates clearly and expressly that it is alternatively based on bona fide separate, adequate, and independent grounds, we of course, will not undertake to review the decision."). *See also* Herv v. Pitcairn, 324 U.S. 117 (1945) ("if the same judgment would be rendered by the state court after we corrected its views of federal laws, our review could amount to nothing more than an advisory opinion.").

144 *See supra* note 10.

145 *See supra* note 9.

146 *Id.*

the constitutionality of such programs may be properly brought in state court, and litigants will likely base their challenge on both state and federal constitutional grounds. State courts considering the constitutionality of such programs would therefore have the authority to strike down the state statutes that implement the program based on state constitutional interpretation, independent of federal constitutional concerns.[147] As long as the state has never previously held the provision of their state constitution in question to hold essentially the same meaning as the federal Constitution's parallel provision and as long as the state constitutional doctrine provides more but not less individual protection than the federal constitution, such a decision may not be reviewed by the United States Supreme Court.[148]

Although state and federal interpretations of parallel constitutional provisions are often nearly indistinguishable,[149] this is not always the case.[150] For example, federal courts have largely abandoned the application of substantive due process except in cases of infringement upon fundamental rights, while substantive due process remains alive in some state courts.[151] Several state courts have, in recent years, found state statutes unconstitutional for violations of state substantive due process doctrine without any showing of an infringement upon a fundamental right.[152] Unfortunately, navigating the contours of such state constitutional law is a difficult task; modern state constitutional law has been aptly characterized as "a vast wasteland of confusing, conflicting, and essentially unintelligible pronouncements."[153] Seldom is it clear when a state supreme court will interpret their state constitution in a manner that provides their citizens with more protection than is provided under federal interpretations of parallel provisions.[154]

---

147 Michigan v. Long, 463 U.S. 1032 (1983). NOWAK & ROTUNDA, *supra* note 88 § 2.13, at 92-93.

148 *Id. See also* COHEN & VARAT, *supra* note 121, at 52 ("a state court decision invalidating a state law on both state and federal constitutional grounds cannot be reviewed by the Supreme Court, even if the bulk of the state court's discussion concerned the United States Constitution."). However, "reliance on the state constitution will not preclude Supreme Court review . . . if the state's constitution has been construed to adopt the United States Supreme Court's construction of the United States constitution." *Id.* at 52 n.1. *See also* Delaware v. Prouse, 440 U.S. 648 (1979).

149 James A. Gardner, *The Failed Discourse of State Constitutionalism*, 90 MICH. L. REV. 761, 788 (1992).

150 *Id.* at 794-95.

151 *Developments in the Law — The Interpretation of State Constitutional Rights*, 95 HARV. L. REV. 1463 (1982). *See also* G. GUNTHER, CONSTITUTIONAL LAW 472 n.1 (11th ed. 1985).

152 Ohio v. Gowdy, 639 N.E.2d 878 (1994); People v. Linder, 535 N.E.2d 829 (1989).

153 Gardner, *supra* note 149, at 763.

154 *Id.* at 792-93.

In a recent Massachusetts case,[155] for example, the plaintiffs noted that their state supreme court had interpreted their state constitution as providing, under some circumstances, a higher level of substantive due process protection than is provided by the federal Constitution. Based on this information, the plaintiffs argued that their state court was bound by precedent to provide a higher level of substantive due process protection under the particular circumstances of their case.[156] Although the Massachusetts Supreme Court agreed that Massachusetts courts "have occasionally been less willing than the Federal courts to ascribe to the Legislature speculative and implausible ends, or to find rational the nexus said to exist between a plausible end and the chosen statutory means,"[157] the court rejected the Plaintiffs' argument. The court stated that they will strike down legislation that does not infringe upon a fundamental right only when the statute has "little or no perceptible relation to the discernible public good."[158] However, when any such relationship does exist, "any difference between the two constitutional standards [governing due process] . . . is narrow."[159] In the Plaintiffs' case, the court found that such a relationship existed.

Thus, it appears that, at least in Massachusetts, the difference in the level of substantive due process protection afforded by the state and federal constitutions is perceptible only in cases in which no fundamental right has been infringed and the legislation bears absolutely no rational relation to a reasonable state interest. In such cases, the U.S. Supreme Court may stretch to find a rational relationship where the state court will not. In cases in which at least a plausible argument can be made that a statute bears a rational relationship to a reasonable state interest, the state substantive due process doctrine will run a close parallel to federal courts' application of the same doctrine. That is, both the state court or federal court would be likely to accept any plausible argument that the rational relationship exists. This distinction does not go far in providing a workable rule to determine when state and federal interpretations of parallel constitutional provisions will be identical. Furthermore, it is not clear that the Massachusetts approach, like that of many other states, is principled. Rather, it seems more likely that state courts provide more substantive due process protection when doing so leads to a result that the state judges simply prefer.[160]

---

155 Rushworth v. Registrar of Motor Vehicles, 596 N.E.2d 340 (Mass. 1992).

156 *Id.* at 343.

157 *Id.* (quoting *Blue Hills Cemetery, Inc. v. Board of Registration in Embalming & Funeral Directing*, 379 Mass. 368, 373 n.8 (1979)).

158 *Id.*

159 *Id.* (quoting *Blue Hills Cemetery, Inc. v. Board of Registration in Embalming & Funeral Directing*).

160 Gardner, *supra* note 149, at 792-93.

Our following analysis of the constitutionality of license revocation programs is based primarily on the perspective of federal constitutional discourse; however, the arguments we present are equally applicable under most state constitutional law and may be met in state courts with a more or possibly less welcome reception than they would in federal court. Where appropriate, we discuss important deviations from the federal approach that may arise in some state courts. We do not attempt to provide an individualized state by state analysis.

4. *Substantive Due Process and Equal Protection Analysis of Motor Vehicle License Revocation*

a. Is there a fundamental right to drive?

Certainly, driving has become a simple fact of life for most Americans. Over 170 million Americans have drivers licenses[161] and over 84 million drive and from their place of employment alone in their vehicle.[162] The continuing, or at least perceived, lack of adequate or convenient public transportation in many cities and in most rural areas makes operation of a motor vehicle a necessity for many, if not most, working Americans. Indeed, without the ability to drive, many Americans would be forced to either relocate, switch employers, or switch careers altogether. Yet, despite the essential nature of driving in American society, it remains unclear how much courts will protect the right to drive. Historically, state courts have recognized driving as a state-granted privilege rather than a right.[163] More recently, in *Bell v. Burson* the Supreme Court recognized that a drivers license, once issued, is an important property interest of the licensee, revocation of which requires procedural due process.[164] However, driving has not been held to be a fundamental or even an important right for the purposes of substantive due process or equal protection.

Determining what characteristics distinguish an important right from a fundamental right is a difficult task.[165] It has been suggested that fundamental rights are those rights that historically have been considered

---

161 U.S. DEPARTMENT OF COMMERCE, STATISTICAL ABSTRACT OF THE UNITED STATES 628 (114 ed., 1994).

162 *Id.* at 627.

163 *See, e.g.*, Hadden v. Aitken, 55 N.W.2d 620, 623 (1952).

164 402 U.S. 535 (1971).

165 Nowak and Rotunda suggest that

> little . . . can be said to accurately describe the nature of a fundamental right, because fundamental rights analysis is simply no more than the modern recognition of the natural law concepts first espoused by Justice Chase in *Calder v. Bull.* Despite claims to the contrary, there has never been a period of time wherein the Court did not actively enforce values which a majority of the Justices felt were essential in our society even though they had no specific textual basis in the Constitution.

NOWAK & ROTUNDA, *supra* note 88 § 11.7, at 399.

beyond the reach of government.[166] However, as pointed out by Professor Laurence Tribe, an historical approach seems to come up short of providing clear guidance as to what constitutes a fundamental right.[167] One approach often taken to identify fundamental rights is simply to list those rights that have previously been held by the Supreme Court to be fundamental.[168] Although sound as a matter of law, this approach leaves something to be desired as a matter of constitutional jurisprudence. In a dissent, Justice Harlan suggested that the liberty protected under substantive due process doctrine

> is not a series of isolated points . . . . It is a rational continuum which, broadly speaking, includes a freedom from all substantial arbitrary impositions and purposeless restraints . . . and which also recognizes, what a reasonable and sensitive judgment must, that certain interests require particularly careful scrutiny of the state needs asserted to justify their abridgment.[169]

Either an historical analysis or an examination of Supreme Court precedent seem to lead to the conclusion that the right to drive is unlikely to be recognized by the Supreme Court as fundamental. Although driving is of critical importance to our modern economic structure, driving is not an activity, or even the kind of activity, that historically has been beyond the reach of government. The operation of the automobile has been regulated by the state nearly since its invention.[170] Additionally, driving is not in the list of rights previously held by the Court to be fundamental. To date, the Supreme Court has not ruled on the question of whether revocation of a drivers license may implicate important or perhaps fundamental rights for the purpose of other constitutional protections such as substantive due process and equal protection. Additionally, several state courts have explicitly held that drivers license revocation does *not* infringe upon a fundamental right.[171] Furthermore, in the context of license revocation for the purpose of child support enforcement, a South Dakota district court applied the rational basis test when consider-

---

166 *Id.* § 11.7, at 399.

167 LAURENCE H. TRIBE & MICHAEL C. DORF, ON READING THE CONSTITUTION (1991).

168 NOWAK & ROTUNDA, *supra* note 88 § 11.7, at 401.

169 Poe v. Ullman, 367 U.S. 497 (1961) (Harlan, J., dissenting). *See* TRIBE & DORF, *supra* note 167, at 76-80.

170 For example, a 1911 Nebraska statute made it a misdemeanor for "any person under sixteen years of age or for an intoxicated person to operate a motor vehicle." 1911 Neb. Laws 398, 400 (Chapter 115, § 6).

171 *See, e.g., Linder.* Consequently, state courts have found that the rational basis test is the appropriate standard of review for examining license revocation statutes for violations of substantive due process. *See, e.g.*, Quiller v. Bowman, 425 S.E.2d 641 (Ga. 1993); Lite v. Florida, 617 So. 2d 1058 (1993).

ing a claim that a license revocation statute violated the plaintiffs' substantive due process rights.[172]

At first blush, it seems that revocation of a drivers license may implicate the "right to travel," which has been held to be fundamental for the purposes of equal protection.[173] However, both the textual origin and the scope of the right to travel are unclear.[174] The so called "right to travel" has been limited to "free interstate migration"[175] and has not included a general right to uninhibited transportation within a state.[176] Those statutory provisions that most often have been found to infringe upon the right to interstate travel are statutes that deny economic or social benefits to new state residents.[177] Such statutes clearly have the effect of deterring interstate migration. In contrast, license revocation statutes do not have a substantial effect on deterring interstate migration. Buses, plains, trains, taxis, etc. provide ways of transporting a person from one state to another without requiring the person to operate a motor vehicle.

In sum, the right to drive has not been historically beyond the reach of government; it has not previously been held by the Supreme Court to be a fundamental right; and it is not inextricable from the constitutional right to travel. Accordingly, it is clear that there is now no fundamental right to drive, and it seems unlikely that such a right will emerge in the constitutional jurisprudence of the Supreme Court or of any state courts at any time in the near future.

b. Is there a rational relationship between driving and child support?

Even if there is no fundamental right to operate a motor vehicle, there still exists the question of whether license revocation for an offense unrelated to operation of a motor vehicle is rationally related to a reasonable state interest for the purposes of substantive due process and equal protection. Under the modern rational basis test, all that is required is that license revocation bear a reasonable relationship to a legitimate state interest.[178] The Supreme Court will refuse to strike down a statute under this test if the rational relationship is even a hypothetical one that the

---

172 Thompson v. Ellenbecker, Civ. 94-4166 (D.S.D. filed Sept. 18, 1995). *See also* Petschen v. Governor of Minnesota, Civ. File No. 3-96-115 (D. Minn. 1996).

173 Shapiro v. Thompson, 394 U.S. 618 (1969).

174 56 COLUM. L. REV. 47 (1956).

175 *Soto-Lopez*, 476 U.S. at 902

176 For an argument that "a fundamental right to intrastate travel must exist as a logical an inevitable extension of the interstate travel doctrine," see Andrew C. Porter, *Comment: Toward a Constitutional Analysis of the Right to Intrastate Travel*, 86 NW. U. L. REV. 820 (1992).

177 Shapiro v. Thompson, 394 U.S. 618 (1969); Dunn v. Blumstein, 405 U.S. 330 (1972).

178 NOWAK & ROTUNDA, *supra* note 88 § 14.3, at 601.

legislature might have considered.[179] In the case of license revocation, one such hypothetical and/or actual relationship is the potential deterrence that the threat of license revocation has on noncompliance with child support obligations. States that have enacted license revocation statutes to enforce child support obligations have seen an increase in child support collections.[180] It is likely that the deterrent effect of license revocation on noncompliance would be a sufficient justification under federal constitutional interpretation.

However, in considering the nexus required between means and ends to meet the rational basis test, the distinction between federal and state constitutional interpretation can become an all important factor. Although in the face of substantive due process challenges state courts have often upheld license revocation statutes that punish conduct unrelated to the operation of a motor vehicle,[181] notable exceptions to this trend do exist. For example, in *People v. Linder*,[182] the Supreme Court of Illinois found that an Illinois statute requiring the revocation of the drivers licenses of criminal sex offenders violated the due process clauses of both the Illinois and United States Constitutions.[183] The court found that the defendant's interest in a drivers license was not a fundamental right and that, consequently, the "rational-basis test" was the appropriate standard of review.[184] The Linder court applied a two part test — (1) the "legislative enactment must bear a reasonable relationship to the public interest intended to be protected,"[185] and (2) "the means adopted must be a reasonable method of accomplishing the desired objective."[186] The court determined that the purpose of the statute, as set forth in the statute itself, was to ensure the "safe operation of motor vehicles"[187] and that the statute did not promote a reasonable means of accomplishing that objective.[188]

---

179 Williamson v. Lee Optical Co., 348 U.S. 483 (1955).

180 *See supra* note 1. *See also* Ben Rand, *License Suspension Statute in Child Support Cases Successful in Other States*, GANNETT NEWS SERVICE, June 2, 1995.

181 For cases of license revocation statutes geared toward alcohol consumption by minors, see *People v. Valenzuela*, 3 Cal. App. 4th Supp. 6 (1991); *Carney v. State*, 808 S.W.2d 755 (1991). In the context of failure to pay certain taxes, see *Bieling v. Malloy*, 346 A.2d 204 (1975).

182 535 N.E.2d 829 (1989).

183 *Id.* at 834.

184 *Id.* at 831.

185 *Id.*

186 *Id.*

187 *Id.* at 832.

188 *Id.*

Focusing on the first prong of the test,[189] the state argued that the court must consider not only the legislature's stated purpose but also any "conceivable basis for the challenged provision,"[190] including punishment of the offender. However, the court rejected this argument on two grounds. First, the court had determined the purpose of the statute based not only upon the legislature's stated purpose but also upon the context of the statute and the surrounding code provisions — the Illinois Vehicle Code.[191] Second, the court found the state's argument unreasonable and stated that their duty to "uphold the constitutionality of legislative enactments is always subject to the qualification that we must do so if that can be *reasonably* done."[192] Although the court rejected the state's argument that one purpose of the statute was punishment, the court considered it *arguendo*.[193] The court stated that even if punishment were one purpose of the statute, revoking licenses is arbitrary and "bears no reasonable relationship to the offense."[194] Later Illinois case-law has expanded *Linder* to include license revocation for violation of controlled substance statutes.[195]

Similarly, the Court of Common Pleas of Ohio found that a law providing for the revocation of drivers licenses of convicted drug traffickers was an unconstitutional violation of substantive due process.[196] The court reasoned that, because the statute did not require the use of a motor vehicle in the commission of the offense, license revocation did not bear a reasonable relationship to the offense.[197] However, in the context of controlled substance violations, other states have held in favor of license revocation statutes. For example, some state courts have generally concluded that the "unlawful sale and use of drugs constitutes a serious problem,"[198] thereby establishing a reasonable state interest.[199] Furthermore, some state courts have generally concluded that license revocation may serve as a "deterrent to illegal drug distribution and use, and as a means of rehabilitation."[200] Additionally, some state courts

---

189 The state had conceded "that if safety were the only purpose of the statute, the challenged provision bears no rational relationship to the statute's purpose and therefore revocation of the defendant's license is unconstitutional." *Id.* at 832.

190 *Id.* at 833. *See also* Williamson v. Lee Optical Co., 348 U.S. 483 (1955).

191 *Id.* at 832.

192 *Id.* at 833 (emphasis added). The court noted that Illinois law provides that "summary suspension of a license before a trial on the merits is an administrative function and not a punishment." *Id.*

193 *Id.* at 833-34.

194 *Id.* at 834.

195 People v. Lawrence, 565 N.E.2d 322 (Ill. App. Ct. 1990).

196 Ohio v. Gowdy, 639 N.E.2d 878 (1994).

197 *Id.* The *Gowdy* court was persuaded by the reasoning of *Linder*.

198 Rushworth v. Registrar of Motor Vehicles, 596 N.E.2d 340 (Mass. 1992).

199 *Id.*

200 *Id.* at 344.

have suggested that license revocation, even for drug offenses not involving the use of a motor vehicle, may help prevent the incidence of driving under the influence of narcotics and help prevent drug trafficking via automobiles.[201] Consequently, these states have found that license revocation statutes for controlled substance violations which do not involve the operation of a motor vehicle have a reasonable relationship to the rational state interest of preventing the unlawful sale and use of drugs.[202]

In the context of license revocation statutes for the purpose of child support enforcement, the possibility exists that the state courts which interpret their constitution as providing a higher level of substantive due process protection than the United States Constitution may strike down these statutes. However, such a decision seems unlikely in light of the strong state interest in increasing child support collections and protecting the welfare of the children within the state. Many state supreme court judges may be more sympathetic to attempts to decrease welfare expenditures and to increase child welfare than to attempts to increase individuals' due process protections.

c. Do license revocation statutes create suspect classifications?

Equal protection arguments have repeatedly been raised in state cases contesting statutory schemes that provide for the revocation of drivers licenses.[203] Driving has not been held to be a fundamental right. Consequently, in an attempt to avoid the application of the rational basis test and bring the statute in question under heightened scrutiny, litigants usually argue that a statute license revocation statute creates an impermissible statutory classification.[204] However, such statutes seldom, if ever, create classifications considered to be suspect such as ones based on race or national origin. Nor do they implicate quasi-suspect classifications such as gender or illegitimacy.

For example, in cases involving the revocation of juveniles' drivers licenses for violations of drug or alcohol statutes, litigants have argued that such statutes violate equal protection by creating classifications based on age.[205] But because age is not a suspect or quasi-suspect classification, courts have applied the rational basis test in such cases.[206] Under the rational basis test, state courts have held that legislative classi-

---

201 *See, e.g.*, State v. Smith, 276 A.2d 369 (N.J. 1971); Quiller v. Bowman, 425 S.E.2d 641 (Ga. 1993).

202 *Id.*

203 *See generally* Jefferey T. Walter, Annotation, *Validity and Application of Statute or Regulation Authorizing Revocation or Suspension of Driver's License for Reason Unrelated to Use of, or Ability to Operate, Motor Vehicle*, 18 A.L.R.5th 542 (1994).

204 *Id.*

205 *See, e.g.*, People v. Valenzuela, 3 Cal. App. 4th Supp. 6 (1991).

206 *See, e.g., id.*

fications based on age are reasonably related to the rational state interest of preventing consumption of alcohol and drugs by minors, as well as the possibility of minors operating motor vehicles under the influence of alcohol or drugs.[207]

Similarly, in cases involving license revocation for failure to pay poll taxes, the Supreme Court of Vermont held that classifications based upon those who pay their poll tax and those who do not pay does not constitute a suspect or quasi-suspect class.[208] Furthermore, revocation of drivers licenses for failure to pay a poll tax does not infringe upon a fundamental right for the purposes of equal protection of those who fail to pay.[209] Consequently, such statutes have been subjected to the mere rationality review and upheld by the Supreme Court of Vermont.[210]

In the case of license revocation statutes for the purpose of child support enforcement, a legislative classification will be created that distinguishes between those delinquent obligors who are licensed to operate a motor vehicle and those who are not. Those obligors who do have drivers licenses will be subject to license revocation. In contrast, those delinquent obligors who are not licensed to drive clearly cannot have a drivers license revoked. No parallel penalty is provided for unlicensed delinquent obligors. A classification based upon one's status with regard to state licensure to operate a motor vehicle clearly does not fall within a traditional suspect classification. Such a classification would be subject to the rational basis test. The Supreme Court has held that the collection of child support obligations is an important state interest.[211] Under the rational basis test, the legislative means — license revocation — is rationally related to the legislative end — collection of delinquent child support obligations. The deterrence generated by the threat of license revocation bears a clear relationship to the goal of increased collections. The fact that the deterrence will be lessened or eliminated altogether among those delinquent obligors who are not licensed to drive does not change the rational relationship between the means and ends for those who are licensed to drive. Consequently, it is likely that these drivers license revocation statutes would easily withstand an equal protection claim based on a classification that distinguishes between obligors who drive and those who do not drive.

---

207 People v. Valenzuela; State v. Preston, 832 P.2d 513 (1992); Washington v. Weese, 834 P.2d 1099 (1992); Washington v. Preston, 832 P.2d 513 (1992).

208 Beiling v. Malloy, 346 A.2d 204 (Vt. 1975). *See also* Aiken v. Malloy, 315 A.2d 488 (Vt. 1974).

209 *Id.*

210 *Id.*

211 Zablocki v. Redhail, 434 U.S. 374 (1978).

5. *Substantive Due Process and Equal Protection Analysis of Professional/Occupational License Revocation*

a. Is there a fundamental right of livelihood?

There has been an increasing interest among some legal scholars in reviving the doctrine of substantive due process in the context of economic rights.[212] Recently, Professor McCormack has argued in favor of reviving the doctrine of substantive due process in the protection of what he termed "the right of livelihood."[213] Professor McCormack argues that the right of livelihood is an economic right worthy of substantive protections because in modern society one's livelihood "perform[s] many of the social functions formerly served by property."[214] That is, the right to choose one's livelihood promotes "maximum productivity,"[215] serves to protect "the fruits of one's labors,"[216] and "encourage[s] the development of personality traits, or what Madison and Field called a person's faculties."[217]

If such an approach were adopted by the Court, the revocation of professional licenses would clearly infringe upon the fundamental right of livelihood, making the legislative scheme subject to a strict scrutiny standard of review, which the statutes would be unlikely to survive. However, the Court does not currently recognize a fundamental right of livelihood, and has given no indication that it is heading in the direction of establishing a fundamental right of livelihood for the purposes of substantive due process.[218] Additionally, state courts and federal district courts have upheld professional license revocations for conduct unrelated to the professional activity across a variety of contexts. For example, state courts have upheld the revocation of medical[219] and dental[220] licenses for attempts to evade the income tax, the revocation of veterinary licenses for possession of controlled substances,[221] revocation of medical licenses for unlawful firearm possession,[222] and revocation of

212 Wayne McCormack, *Economic Substantive Due Process and the Right of Livelihood,* 82 KY. L.J. 397 (1994).

213 *Id.* at 450.

214 *Id.*

215 *Id.* at 451.

216 *Id.*

217 *Id.* at 449 n.305.

218 Interestingly, Professor Charles Black has argued that the Court should recognize a constitutional right to livelihood and should ground the right in the Ninth Amendment. Charles C. Black, Jr., *Further Reflections on the Constitutional Justice of Livelihood,* 86 COLUM. L. REV. 1103 (1986).

219 Windham v. Board of Medical Quality Assur., 104 Cal. App. 3d 461 (1980).

220 Bills v. Weaver, 544 P.2d 690 (1976).

221 Thorpe v. Board of Examiners in Veterinary Medicine, 104 Cal. App. 3d 111 (1980).

222 Raymond v. Board of Registration in Medicine, 443 N.E.2d 391 (1982).

real-estate brokers' licenses for bookmaking,[223] perjury,[224] and securities offenses.[225] Often courts will reason that such offenses involve moral turpitude bringing them within the scope of statutes providing for professional license revocation for acts involving moral turpitude. The commission of a felony, whether or not it involves moral turpitude, and whether or not it is related to professional activities, is sufficiently related to the professional conduct to warrant license revocation or suspension.

It appears that infringements upon one's right to livelihood will be subject only to the mere rationality standard of review.[226] However, as will be seen in the next section, the rational relationship test does retain some bite in the context of the right to livelihood.

b. Is there a rational relationship between professional/ occupational licensure and child support enforcement?

Even if there is no fundamental right to livelihood, the question that still remains is whether there is a rational relationship between professional/occupational licensure and child support enforcement. In some situations, state statutes that interfere with the right to engage in one's chosen occupation have failed the rational basis test. In *Schware v. Board*,[227] the Court held that state qualifications to practice law must "have a rational connection with the applicant's fitness or capacity," and that plaintiff's prior membership in the Communist Party did not have such a rational connection. Similarly, in *Hampton v. Vow Sun Wong*,[228] the Court struck down a Civil Service Commission rule barring aliens from the civil service. The Court stated that the rule could be upheld only if it was "justified by reasons which are properly the concern of the CSC"[229] because the right to work in the federal Civil Service is an "interest in liberty."[230]

In the context of professional license revocation for the purpose of child support enforcement, the primary state objective is not regulation of professions or occupations. Rather the state objective is to increase support collections. If the state objective were to regulate professions and occupations, it might appear to be a strained argument to suggest that failure to pay child support is related to one's professional capacity. However, courts have recognized that failure to pay child support may be

223 Carp v. Florida Real Estate Comm., 211 So. 2d 240 (Dist. Ct. App. 1968).
224 Application of O'Neill, 265 N.Y.S.2d 95 (1965).
225 Ring v. Smith, 5 Cal. App. 2d 197 (1970).
226 Thompson v. Ellenbecker, Civ. 94-4166 (D.S.D. filed Sept. 18, 1995).
227 353 U.S. 232 (1957).
228 426 U.S. 88 (1976).
229 *Id.*
230 *Id.*

related to professional competency. In *Flores v. Board of Psychologist Examiners*, the Arizona Superior Court held that "the failure of a professional to financially support his or her child clearly demonstrates . . . a lack of appropriate character and fitness of the subject professional."[231]

Furthermore, because the state objective is to increase collections, professional license revocation can be argued to bear a rational relationship to the legislative end through the deterrence created by threatening license revocation. However, many opponents of professional license revocation have argued that such statutes are actually counterproductive, suggesting that professional or occupational license revocation will decrease the obligors earning capacity thereby further decreasing the likelihood that the obligor will be able to pay back support.[232] This argument fails in that most professional license revocation statutes provide a lengthy notification period before the license is actually revoked; some programs issue a temporary license and others offer the opportunity to work out a payment plan.[233] This provides a system similar to civil contempt in which the obligor holds the key to the jailhouse door.[234] In the case of professional license revocation, the delinquent obligor has an adequate opportunity to comply with the court order for support before the professional license is revoked, thereby avoiding any real threat of job loss or temporary unemployment.

The establishment of a professional license revocation program is rationally related to the state interest in increasing child support collections. The establishment of such programs will not contribute to increased unemployment and consequently decreased collections if such programs provide sufficient advance notice of license revocation and/or provide for temporary licenses during which time a delinquent obligor may come into compliance with court orders.

c. Do license revocation statutes create unconstitutional classifications?

Professional and occupational license revocation statutes create a legislative classification based upon an individual's type of employment. A delinquent obligor employed in a position that requires licensure will be affected by the revocation statutes and a delinquent obligor employed in a position that does not require licensure will remain largely unaffected.

---

231 Susan Nicholas, *Note: Collecting Child Support from Delinquent Parents: A Constitutional Analysis of an Arizona Enforcement Mechanism*, 34 ARIZ. L. REV. 163, 184 (citing *Flores*, 1992).

232 Bruce Eden, *New Child Support Laws Violate the Rights to Work and Travel*, THE CHILDREN'S ADVOCATE, Mar. 1993, at 6.

233 *See* Matrix, *supra* note 10.

234 DON B. DOBBS, DOBBS ON THE LAW OF REMEDIES 192 (2d ed. 1993).

However, classifications based upon occupation have never been held to be suspect or quasi-suspect classifications and do not hold the traditional indicators of suspect classifications such as being an immutable characteristic.[235] Such classifications are likely to be subject only to a rational basis standard of review.[236] The classifications are likely to be upheld under a rational basis standard because the state interest in increasing support collections is rationally related to license revocation through the deterrent effect created by the threat of license revocation.[237] Furthermore, the non-wage earners are beyond the reach of many of the traditional enforcement mechanisms such as garnishment and wage withholding.[238]

Consequently, the establishment of professional license revocation programs brings that group of non-wage earners within the reach of the child support enforcement mechanism, thereby establishing a financial penalty for both wage earners and self-employed professionals. This inclusion of self-employed professionals adds to the legitimacy of child support enforcement programs by extinguishing the perception that certain groups are beyond the reach of government enforcement. Furthermore, the inclusion of self-employed professionals through license revocation statutes will increase overall collections.[239] These justifications for professional and occupational license revocation statutes strengthen the rational link between the state's means and ends. Classifications created by professional and occupational license revocation are, therefore, likely to be upheld under a rational basis standard.

One final concern in an equal protection analysis is the fact that many state license revocation statutes apply to almost all licensed professionals except for attorneys. This is because in many states attorney discipline is under the exclusive jurisdiction of the state supreme court, whereas the discipline of all other professional groups is subject to regulation by the state legislature.[240] Consequently, writing lawyers out of professional license revocation statutes creates a legislative classification that initially appears to be based upon an arbitrary distinction between types of professions, but is in fact a jurisdictional requirement. However, state supreme courts can easily remedy any inequality of treatment. For example, in Florida the state legislature recently adopted a professional license revocation statute.[241] Because attorney discipline was under the

---

235 TRIBE, *supra* note 96 § 16-13, at 1465.

236 NOWAK & ROTUNDA, *supra* note 88 at § 14.3, at 601.

237 *See infra* note 247.

238 *See supra* note 13.

239 *See supra* note 13.

240 *See, e.g.*, Florida Bar v. Taylor, 648 So. 2d 709 (1995).

241 FLA. STAT. ch. 61.13015 (1995). *See also* License Revocation Matrix, *supra* note 10, at 8-9.

exclusive jurisdiction of the Florida State Supreme Court, attorney's were not covered by the statute.[242] Consequently, the Florida Legislature requested that the Supreme Court amend its disciplinary rules to bring them in line with the new state statute.[243] Recognizing the importance of child support enforcement and the need for equal treatment, the Florida Supreme Court initiated a proposed new rule to address failure to pay child support.[244] The adoption by state supreme courts of analogous rules governing attorneys should eliminate any equal protection claims by "maintain[ing] consistency between the treatment of attorneys who fail to pay child support and the treatment of other professional who likewise fail to pay child support."[245]

IV. ANALYSIS OF EXISTING STATUTORY SCHEMES AND POLICY RECOMMENDATIONS

Since 1990, most states have enacted legislation authorizing license restrictions as a method of child support enforcement.[246] The greatest flurry of legislative activity in this area has occurred over the past year or so, in part spurred on by publicity and success reported by states who entered this arena early.[247] The legislative schemes enacted vary considerably in terms of the types of licenses covered, the criteria used to trigger enforcement, and the availability and scope of administrative and judicial review.[248] Variations along any of these dimensions may have important legal and policy implications.

A. LICENSES AFFECTED

Most states with license revocation laws on the books cover both motor vehicle and professional/occupational licenses.[249] From a legal standpoint, the types of licenses covered may have both due process and equal protection implications. Under federal constitutional standards of

---

242 *See* Florida Bar v. Tayor, 648 So. 2d 709 (1995).

243 *Id.* at 711.

244 *In re* Rules Regulating the Florida Bar — Willful Nonpayment of Child Support, No. 84,390 (Fla. Nov. 3, 1994). Other state supreme courts have taken similar approaches. *See, e.g.*, Donald R. Lundberg, *Supreme Court Makes Major Changes to Lawyer Discipline Rules*, 39 RES GESTAE 6 (1996).

245 Florida Bar v. Taylor, 648 So. 2d 709, 711 (1995).

246 License Revocation Matrix, *supra* note 10.

247 For example, in an article entitled *"Maine Says: Support Your Kids or Walk,"* Boston Globe Columnist Ellen Goodman reported that between August 1993 and June 1994, Maine's license revocation program was responsible for the collection of $12.9 million "before the first license had been taken away." OMAHA WORLD HERALD, July 29, 1994. *See also supra* note 8.

248 *See* License Revocation Matrix, *supra* note 10.

249 *Id.* In fact, under the Welfare Reform Act, states are now required to cover both motor vehicle and professional/occupational licenses as well as sport and recreation licenses. Welfare Reform Act, *supra* note 9.

substantive due process, the requirement that a rational relationship exist between the revocation of either motor vehicle or professional licenses and child support enforcement would most likely be satisfied. However, as noted above, some state courts may be more willing than federal courts to strike down a license revocation law, particularly when the law provides for the revocation of a motor vehicle license for conduct unrelated to the operation of a motor vehicle.[250] This reflects the possibility that it may be more difficult, at least on the surface, to establish a plausible, rational link between child support enforcement and the revocation of a driver's as compared to a professional license. Thus, state courts uncomfortable with increased government involvement in family matters and personal life may be more inclined to draw the line at the revocation of motor vehicle licenses. As a result, they might be more likely to strike down such programs by holding that the nexus between the driving privilege and child support enforcement is insufficient. Again, though, it must be emphasized that this position is likely to be endorsed by only a few, if any, state courts; the majority of state courts will continue to interpret their state constitutional provisions in a manner that closely tracks the interpretation of parallel federal constitutional provisions.[251]

Programs that cover professional licenses may be vulnerable for other reasons. First, some state courts may be persuaded by the argument that the revocation of a professional license infringes on a fundamental right to livelihood.[252] Although this argument is unlikely to be embraced by many courts,[253] those that do accept this line of reasoning will apply strict scrutiny analysis, which almost always results in the scrutinized statutory scheme being held unconstitutional. Although a strong argument can be made that the state has a compelling interest in child support enforcement, the second narrow-tailoring prong of the strict scrutiny test is more difficult to satisfy. Failure to meet the narrow-tailoring requirement would most likely serve as the basis for striking down a license revocation law based on strict scrutiny analysis.

One approach to narrowing the scope of the license revocation program is to clearly spell out in the statute that this remedy will be pursued only after efforts to collect child support through other means (such as

---

250 *See* discussion *supra* section III.B.3.

251 *See* discussion *supra* section III.B.3.

252 *See* discussion *supra* section III.B.5.a.

253 It would seem that conservative courts might be sympathetic to the notion of a fundamental right to livelihood as a shield against government intrusion into an individual's right to earn a living in a chosen profession. However, those same courts are likely to be even more concerned about the ideological and economic implications of constitutionalizing a right to livelihood. Going down this path may ultimately increase the likelihood that implied, affirmative obligations will be imposed on the government to protect a fundamental right to livelihood. *See* Black, *supra* note 218, at 1103.

income-withholding) have failed. This more narrow tailoring of the statutory scheme may increase its chances of surviving strict scrutiny analysis, particularly in state courts inclined to use a more yielding approach to strict scrutiny analysis. Nonetheless, it must be emphasized that most courts will not consider the right to livelihood to be fundamental and will therefore use the rational basis test, which means that a license revocation statute will almost certainly survive constitutional challenge on this basis.

Equal protection issues also may arise in the context of professional license revocation. Professionals may argue that they are being singled out and treated differently from those who do not have professional licenses. Additionally, several state programs that target professional licenses exclude licenses to practice law for reasons noted above.[254] As a result, other professionals facing license revocation for child support enforcement purposes may argue that they are not receiving required equal protection of the laws because lawyers are unfairly singled out for special or different treatment.

As our review of equal protection analysis reveals, the Equal Protection Clause prohibits the states from denying any person within their jurisdiction the equal protection of the laws. In cases that do not involve a fundamental right or a suspect classification such as race or national origin, a rational basis test very similar to the one used in substantive due process analysis applies. This means that a legislative classification must have a legitimate legislative objective and the classification must bear a rational relation between that objective and the means toward that objective.

Thus, if people with professional licenses assert that they are treated differently and unfairly in comparison to those without such licenses, it can be argued that license holders are targeted because the state has a legitimate objective in trying to collect child support from non-wage earners and the self employed. Likewise, if it is necessary to treat attorneys differently from other professionals because attorney discipline is under the exclusive jurisdiction of the State Supreme Court, it can be argued that this difference in treatment is reasonable because attorneys are regulated differently than are other professionals (i.e., by the State Supreme Court rather than legislative authority). Thus, treating them differently (e.g., referring them to the Court designated authority over attorney discipline rather than subjecting them to statutory revocation) is rationally related to the legitimate objective of collecting support from both attorneys and other professionals in a way that will not infringe on the State Supreme Court's authority over attorney discipline.

---

254 *See* discussion *supra* section III.B.5.c.

As noted above, courts will sometimes use an intermediate level of scrutiny when semi-suspect classifications such as gender or illegitimacy are used.[255] However, neither gender nor illegitimacy appear to be directly relevant to any legislative classifications created under license revocation programs.

Perhaps the most important implications of the type of licenses covered are in the realm of public policy. Obviously, almost everyone has a driver's license;[256] this is not the case for professional or occupational licenses. In fact, most people who have a professional/occupational license also have a driver's license, whereas the opposite is not true. Thus, any license revocation program aimed at maximizing the amount of child support collected would need to target driver's licenses to reach the maximum number of individuals who owe child support. However, there are important policy reasons for targeting professional as well as motor vehicle licenses. Although most professionals would already be subject to enforcement under a motor vehicle license revocation program, specifically targeting professionals may expedite enforcement against deadbeat parents who are quite able but unwilling to pay. The threat of loss of a professional license may be particularly salient to this group. Moreover, targeting professional as well as driver's licenses may contribute to overall public perceptions of the fairness of the legislative scheme.[257] Targeting professional licenses demonstrates the seriousness of the problem and signals the government's resolve to go after more affluent as well as less well-off parents who owe child support.[258]

B. TRIGGER CRITERIA

State license revocation programs vary in terms of the criteria that must be triggered before a person is subject to license revocation for purposes of child support enforcement. Some jurisdictions have durational requirements (ranging from a one month[259] to a one year[260] child support delinquency), others have amount requirements (ranging from any arrearage[261] to a $2500[262] arrearage), and some require a court order

---

255 *See* discussion *supra* section III.B.2.

256 *See supra* note 161 and accompanying text.

257 *See generally* TOM R. TYLER, WHY PEOPLE OBEY THE LAW (1990).

258 Mark R. Fondacaro & Andrew J. Slain, *Child Support Enforcement Against Noncustodial Parents: Does it Make a Difference Whether They are Deadbeats or Destitute?* Paper presented at the 1995 Fifth Biennial Conference on Community Research and Action, Chicago, Illinois.

259 *See* VT. STAT. ANN. tit. 15 §§ 795, 798. *See also* License Revocation Matrix, *supra* note 10, at 35 (State of Vermont).

260 KY. REV. STAT. ANN. § 186.570. *See also* License Revocation Matrix, *supra* note 10, at 18 (State of Kentucky).

261 License Revocation Matrix, *supra* note 10, at 32 (Puerto Rico).

262 *Id.* at 23 (State of Oregon).

of contempt[263] before a delinquent obligor is subject to license revocation. This later requirement has important implications for program administration.

Requiring a court order of contempt to initiate the license revocation process severely restricts the number of delinquent obligors who may be persuaded to comply with their child support obligation rather than face the threat of losing a driver's or professional license. Results reported by highly successful license revocation programs in states such as Maine indicate that the mere threat of license revocation has generated tens of millions of dollars of child support collections.[264] This is true because warning letters can be sent to thousands of delinquent obligors, informing them that they are subject to license revocation if they do not comply with statutory requirements. The warning letters may also state that the obligor can avoid further action by voluntarily complying with their support order or working out a payment plan where available and appropriate. The bulk of program administration and enforcement is accomplished without judicial involvement. On the other hand, requiring court orders before the license revocation process can be initiated means that only a limited number of cases can be handled at any one time, which, in turn, means much less delinquent child support can be collected.

C. AVAILABILITY AND SCOPE OF ADMINISTRATIVE AND JUDICIAL REVIEW

Procedural due process requires that before the government can deprive a person of liberty or property the person must be afforded notice and an opportunity to be heard. If an adequate notice and an adequate hearing is provided, then the constitutional requirements of procedural due process are met. Adequate notice "is notice reasonably calculated, under all the circumstances, to appraise interested parties of the pendency of the action and afford them an opportunity to present their objections."[265] Thus, in order to easily survive constitutional challenge, notice can be provided to delinquent obligors by certified mail informing them of the following: that they are subject to license revocation, the basis for the potential action against them, and what they can do to avoid license revocation.

Ample opportunity to be heard should be provided through both administrative review and the opportunity for judicial review. Hearings should be provided *before* licenses are revoked or suspended in order to

---

263 ARIZ. REV. STAT. ANN. §§ 32-3701, 12-2452. *See also* License Revocation Matrix, *supra* note 10, at 10 (State of Arizona).

264 *Supra* note 1.

265 Mullane v. Central Hanover Bank & Trust Co., 339 U.S. 306, 314 (1950).

ensure that constitutional requirements of procedural due process are met. One critical issue with both legal and policy implications is whether such predeprivation hearings should be administrative, judicial, or involve some combination of the two. A second issue is whether postdeprivation review is required as a matter of law or at least desirable as a matter of public policy.

Clearly, a predeprivation administrative fair hearing followed by postdeprivation judicial review would more than satisfy minimal constitutional requirements in this context. As was evidenced in *Bell*, *Goldberg*, and *Mathews*, predeprivation judicial review is not a constitutional requirement.[266] With regard to the predeprivation phase of a license revocation program, an administrative fair hearing that allowed individuals "to make a meaningful presentation"[267] of their case would clearly suffice as a matter of constitutional law. But what about as a matter of public policy? Here, the government's interest in administrative efficiency must be balanced against individual and public perceptions that justice has been done.[268] On the one hand, delinquent obligors facing license revocation may believe that they are getting second class justice if their licenses are revoked without the opportunity to tell their side of the story in a court of law. On the other hand, from the standpoint of efficiency, predeprivation judicial review could be highly costly, time consuming, and lead to decreased child support collections. Moreover, in terms of overall public perceptions, the public at large may not be inclined to demand much more than minimum constitutional due process safeguards given the current climate of hostility toward parents who do not pay their fair share of child support.[269]

Thus, predeprivation hearings conducted administratively rather than by the courts are legally permissible and would seem on balance to be desirable from a public policy standpoint. However, existing license revocation schemes, such as the one used in Maine,[270] tend to err on the side of caution by providing at least some opportunity for judicial review prior to license revocation. This is done presumably to reduce the possibility of successful constitutional challenge on procedural due process grounds.

This approach raises the question of whether an opportunity for predeprivation judicial review imposes undue impediments to efficient

---

266 *See* ALFRED C. AMAN, JR. & WILLIAM T. MAYTON, ADMINISTRATIVE LAW § 12.5.2 (1993).

267 Walters v. National Ass'n of Radiation Survivors, 473 U.S. 305, 335 (1985).

268 *See* TOM R. TYLER, WHY PEOPLE OBEY THE LAW (1990).

269 Obviously, these are empirical questions that could be addressed by systematic social science research.

270 19 M.R.S. § 305 (1994) (occupational licenses); 19 M.R.S. § 306 (1994) (driver's licenses).

program administration. At least in the short run, it appears that providing an opportunity for predeprivation judicial review has a negligible effect on program efficiency. This is due to the fact that the success of license revocation programs such as Maine's appear to rest more on the mere threat of license revocation than the number of license actually revoked. However, over time, if actual license revocation is not pursued aggressively, "the perceived threat may decrease along with collections" directly attributable to the license revocation program.[271]

Although there may be no constitutional right to predeprivation judicial review, that does not mean as a matter of policy that it would not be desirable, at least in the short run, to allow for predeprivation judicial review under certain circumstances. Most of the push toward administrative process has been encouraged by the federal government. This has been in response to the increased claims for federal benefits and services. States have been much slower in adopting a more systemic view of due process; most are still anchored in a case-by-case judicial model of due process. This orientation also is likely to be deeply entrenched in the thinking of many practicing attorneys, particularly those who were trained before the modern push toward greater emphasis on administrative process or whose legal practices have focused on state rather than federal law. In any case, in those states where the bench, bar, and legislature are characterized by a traditional view of due process, it may be easier to get support of a license revocation bill that provides for some form of predeprivation judicial review. In fact, in some states, this may be necessary for the survival of the bill. As suggested, a major draw back is that allowing for predeprivation judicial review may ultimately over-burden the judicial system and lead to less efficient enforcement of the license revocation laws.

D. JUDICIAL INVOLVEMENT IN THE ENFORCEMENT PROCESS

Although the federal government has strongly encouraged the use of administrative procedures to implement and enforce child support laws, states vary considerably in the extent to which the judicial system is integral to program administration. A distinction must be made here between judicial review of the procedures followed in decisionmaking on the one hand, and the requirement that the judiciary be involved in intermediate steps of program administration or in making the ultimate determination of whether a license should be revoked.

For example, Arizona relies heavily on judicial involvement in its professional/occupational license revocation program. The enforcement

271 GOVERNOR'S CHILD SUPPORT STUDY COMMITTEE, REPORT TO GOVERNOR E. BENJAMIN NELSON AND THE NEBRASKA LEGISLATURE, Appendix E, at 6 (1994).

process begins with a petition to enforce overdue child support filed with the superior court. If a judicial determination is made that the obligor is "at least one month in arrears and is or may be licensed or certified as a professional, . . . the court . . . may direct the licensing board or agency to conduct a hearing . . . concerning the suspension of the license or certificate of the person ordered to pay support."[272] In contrast, in Minnesota an initial determination of whether an obligor is in arrears in child support may be made by either the court or by a public authority responsible for child support enforcement.[273] If either the court or the public authority find that an obligor is in arrears and is or may be licensed by a state licensing board, the court or the public authority may direct the licensing board to automatically suspend the license.[274] Although the Arizona and Minnesota plans differ in the degree to which judicial involvement is required before a license may be revoked, both plans attempt to meet minimum due process requirements by providing notice and an opportunity for a hearing prior to license revocation.[275]

There are both legal and policy justifications for providing some form of terminal judicial review of the license revocation decisionmaking process. From a legal standpoint, the prospects of withstanding constitutional challenge would be decreased if there were no opportunity for at least some judicial oversight of the decisionmaking process.[276] From a policy standpoint, one important justification for having some form of terminal, post-deprivation judicial review is that such procedures are likely to contribute to public perceptions of the fairness of the license revocation program. As mentioned above, in some states it may be necessary to go further and to allow for pre- rather than post-deprivation

---

272 ARIZ. REV. STAT. ANN. § 12-2452 (1995).

273 MINN. STAT. ANN. § 518.551(12) (1994).

274 *Id.*

275 Although Arizona and Minnesota differ in the degree of judicial involvement necessary to trigger the initial license revocation, both plans provide for notice and hearing. In Arizona, upon filing of the petition with the superior court, the court will serve an order to appear before the court and a copy of the petition as provided in the Arizona rules of civil procedure. ARIZ. REV. STAT. ANN. § 12-2452(C) (1995). Furthermore, if the court finds the obligor is in arrears and directs a licensing agency to conduct a hearing, within thirty days of receipt of the court order the licensing agency must "provide notice to the licensee or certificate holder and hold a hearing to determine if the person is licensed by the board." *Id.* § 32-3701(A). Similarly, a Minnesota court must provide an obligor with notice of a hearing as provided by the Minnesota rules of civil procedure. If Minnesota public authority determines that an obligor is in arrears, the public authority is required to "mail a written notice to the license holder . . . that the public authority intends to seek license suspension." MINN. STAT. ANN. § 518.551(12) (1994). Such notice must be sent "at least 90 days before notifying the licensing authority." *Id.* Furthermore, such notice must provide that "the license holder must request a hearing within 30 days in order to contest the suspension." *Id.*

276 NOWAK & ROTUNDA, *supra* note 88 § 13.10; AMAN & MAYTON, *supra* note 266 § 12.5.2.

judicial review in order to garner the public and political support necessary for the adoption of a license revocation program.[277]

The advocacy of at least terminal, post-deprivation judicial review of the decision making process in no way reflects an endorsement of involving the judiciary in case-by-case pre-deprivation determinations of whether particular licenses should be revoked. To do so would severely restrict the number of cases that could be processed, overburden judicial resources, and limit the amount of child support that could be collected on behalf of needy families and taxpayers.

V. CONCLUSION

The increased divorce rate and the increasing number of single parent families living below the poverty line have catapulted child support enforcement to the status of a critical social problem of national significance. Legislators at both the state and federal levels have responded to the public outcry against "deadbeat parents" who fail to pay their fair share of child support by adopting new, more aggressive enforcement strategies. One promising strategy is the establishment of motor vehicle and professional license revocation programs. Although license revocation is considered by some to be overly harsh, every state implementing a license revocation statute has seen a marked increase in child support collections. Increased collections means more money going to the children of single parents, which, in turn, may mean that fewer single parent families will require public financial assistance. However, the constitutional rights of parents who owe child support must also be given due consideration.

License revocation statutes could conceivably be challenged on procedural due process, substantive due process, and equal protection grounds. Several such challenges already have been brought in state and federal courts, and more challenges are expected elsewhere. However,

---

277 Even those states opting for pre-deprivation judicial review need not require their courts to engage in case-by-case *de novo* review of factual determinations. Courts apply various standards of review, depending on the nature of the issue examined. The scope of review "determines how far a court can go in overturning or remanding an agency decision." AMAN & MAYTON, *supra* note 266 § 13.2. Courts typically use the substantial evidence test to review agency fact finding in on-the-record hearings. Under this test, if substantial evidence in the record supports the agency's finding, a court will affirm that finding even if the court would not have made the same decision on its own. *Id.* § 13.4; Fondacaro, *supra* note 33, at 322-23. A specific standard of judicial review such as the substantial evidence test may be explicitly authorized by statute and already may be the standard of judicial review of agency factfinding established under the state's Administrative Procedure Act. In any event, states that do elect to adopt a legislative scheme that allows for some pre-deprivation judicial review can avoid involving their courts in making or second guessing case-by-case factual determinations by adopting the substantial evidence test as the standard of judicial review of factual matters.

such constitutional challenges will not pose a serious threat to a well drafted license revocation statute. Both state and federal courts are unlikely to be persuaded that license revocation statutes infringe upon fundamental rights. Furthermore, courts are likely to recognize that child support enforcement is an important state interest and that license revocation statutes are reasonably related to achieving that important state interest. In sum, it is likely that existing license revocation statutes will consistently survive constitutional attack and that all fifty states will ultimately implement license restriction schemes to enforce child support obligations.