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Constitutional Law - Statutes - Criminal Liability Based upon Ability or Defendant to Pay for Affirmative Defense to Charge of Issuing Insufficient Funds Check Is a Violation of the Equal Protection Clause

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CONSTITUTIONAL LAW -- STATUTES -- CRIMINAL LIABILITY BASED UPON ABILITY OR DEFENDANT TO PAY FOR AFFIRMATIVE DEFENSE TO CHARGE OF ISSUING INSUFFICIENT FUNDS CHECK IS A VIOLATION OF THE EQUAL PROTECTION CLAUSE.

Bruce Allen Fischer, an indigent,[1] was charged with issuing an insufficient funds check[2] in violation of section 6-08-16 of the North Dakota Century Code.[3] Fischer filed a motion to dismiss the charge

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1. Appellant's Brief, app. at 4, State v. Fischer, 349 N.W.2d 16 (N.D. 1984).

2. State v. Fischer, 349 N.W.2d 16, 17 (N.D. 1984). Fischer issued a $100 check dated July 23, 1983 drawn on the Dakota Bank & Trust Company, Fargo, North Dakota, made payable to Hornbacher's of Fargo, North Dakota. Appellant's Brief, app. at 1, *Fischer*.

3. 349 N.W.2d at 17. Section 6-08-16 of the North Dakota Century Code provided in pertinent part as follows:

> 1. A person may not, for himself, as the agent or representative of another, or as an officer or member of a firm, company, copartnership, or corporation make, draw, utter, or deliver any check, draft, or order for the payment of money upon a bank, banker, or depository, if at the time of such making, drawing, uttering, or delivery, or at the time of presentation for payment if made within one week after the original delivery thereof, there are not sufficient funds in or credit with the bank, banker, or depository to meet the check, draft, or order in full upon its presentation. Violation of this subsection is a class B misdemeanor. . . .
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> 4. A notice of dishonor must be sent by the holder of the check upon dishonor, prior to the institution of a criminal proceeding, the notice to be in substantially the following form:
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> Notice of Dishonored Check
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> Date _____
> Name of Issuer _____
> Street Address _____
> City and State _____
> You are according to law hereby notified that a check dated _____, 19____, drawn on the _____ Bank of _____ in the amount of _____ has been returned unpaid with the notation the payment has been refused because of nonsufficient funds. Within ten days from the receipt of this notice, you must pay or tender to _____
> (Holder)
> sufficient moneys to pay such instrument in full and any collection fees or costs not in excess of ten dollars. Payment to holder of the face amount of the instrument, plus any collection fees or costs, not exceeding the additional sum of ten dollars, shall constitute

alleging that section 6-08-16 of the North Dakota Century Code created a classification based on wealth and therefore violated the equal protection clause of the United States Constitution.[4] Fischer's contention in the county court of Cass County was that section 6-08-16 of the North Dakota Century Code unfairly provided a defense to a defendant with the ability to pay while a defendant lacking the ability to pay was not provided a defense.[5] The trial court agreed and granted Fischer's motion to dismiss[6] and the State appealed.[7]

The North Dakota Supreme Court affirmed the trial court's decision and *held* section 6-08-16 of the North Dakota Century Code unconstitutional.[8] The court reasoned that the statute

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> a defense to a criminal charge brought hereunder if paid within ten days from receipt of this notice of dishonor. If payment of the above amounts is not made within ten days from receipt of this notice of dishonor, a civil penalty of the lesser of one hundred dollars or three times the amount of the instrument will be assessed.
> The notice may also contain a recital of the penal provisions of this section and the possibility of a civil action to recover any collection fees or costs or civil penalty authorized by this section.
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> 5. An agent acting for the receiver of a check in violation of this section may present the check to the state's attorney for prosecution if the issuer does not pay to the holder sufficient moneys to pay the check within ten days from receipt of the notice. The criminal complaint for the offense of issuing a check, draft, or money order without sufficient funds under this section must be executed within not more than ninety days after the dishonor by the drawee of said instrument for nonsufficient funds. The failure to execute a complaint within said time shall bar the criminal charge under this section.

Nonsufficient Fund Check Issuance Act, ch. 116, § 1, 1983 N.D. Sess. Laws 296, 296-98 (current version to be codified at N.D. CENT. CODE § 6-08-16 (Supp. 1985)).

4. 349 N.W.2d at 17. U.S. CONST. amend. XIV, § 1. Section one of the fourteenth amendment provides as follows:

> All persons born or naturalized in the United States, and subject to the jurisdiction thereof, are citizens of the United States and of the State wherein they reside. *No State shall* make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor shall any State deprive any person of life, liberty, or property, without due process of law; nor *deny to any person within its jurisdiction the equal protection of the laws.*

Id. (emphasis added).

5. 349 N.W.2d at 17.

6. *Id.* In granting Fischer's motion to dismiss, Judge Cooke relied upon the North Dakota Supreme Court's decision in State v. Carpenter, 301 N.W.2d 106 (N.D. 1980). *Fischer*, 349 N.W.2d at 17. In *Carpenter* the North Dakota Supreme Court ruled that § 6-08-16.2 of the North Dakota Century Code was unconstitutional. State v. Carpenter, 301 N.W.2d 106, 110 (N.D. 1980). The version of § 6-08-16.2 involved in *Carpenter* was a statute similar to § 6-08-16. *See Carpenter*, 301 N.W.2d at 108. Section 6-08-16.2 set forth the circumstances under which the issuance of a no-account or an insufficient funds check was a felony. *See* Issuing Check With Insufficient Funds Act, ch. 77, § 1, 1977 N.D. Sess. Laws 173, 173-74 (current version to be codified at N.D. CENT. CODE § 6-08-16.2 (Supp. 1985)). The court in *Carpenter* determined that § 6-08-16.2 created an impermissible classification based upon wealth that amounted to a denial of equal protection and was therefore constitutionally infirm. *Carpenter*, 301 N.W.2d at 110.

After comparing the statutes involved in *Carpenter* and *Fischer* (North Dakota Century Code §§ 6-08-16.2 and 6-08-16, respectively), Judge Cooke determined that, when read together, the differences between the two statutes were clearly procedural and not substantive; therefore "the net result flowing from either statute is the same in that it sets forth an impermissible classification favoring the wealthy over the indigent. . . . This being the case, 6-08-16 must . . . be declared constitutionally infirm." Appellant's Brief, app. at 15, *Fischer*.

7. Fischer, 349 N.W.2d at 17.

8. *Id.* at 18.

violated the equal protection clause by creating a wealth-based affirmative defense to criminal charges of issuing a check without sufficient funds.[9] *State v. Fischer,* 349 N.W.2d 16 (N.D. 1984).

The power of the legislature to create statutory classifications is not absolute,[10] but is limited by the fourteenth amendment's guarantee of equal protection.[11] In order to determine the validity of classifications created by legislatures, the United States Supreme Court has developed a multi-tiered approach to equal protection analysis.[12] Under this analysis, classifications created in economic and general social welfare regulations are upheld as long as some rational relationship exists between the classification and a legitimate legislative purpose.[13] On the other hand, legislative classifications which are drawn along the lines of a suspect class or which affect a fundamental interest are subjected to strict scrutiny and upheld only if the classification is shown to be necessary to promote a compelling state interest.[14] Classifications which are subject to the most recently developed intermediate standard of review will be upheld only when the state can show that the classification is substantially related to an important governmental objective.[15]

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9. *Id.*

10. *See* Griffin v. Illinois, 351 U.S. 12, 21 (1956) (Frankfurter, J., concurring). In recognizing that the equal protection of the laws concept is not aimed at an abstract notion of equality, Justice Frankfurter stated: "Nor does the equal protection of the laws deny a State the right to make classifications in law when such classifications are rooted in reason." *Id.*

11. *See* San Antonio Indep. School Dist. v. Rodriguez, 411 U.S. 1, 59 (1973) (Stewart, J., concurring). In explaining the function of section one of the fourteenth amendment, Justice Stewart stated that "[t]he function of the Equal Protection Clause . . . is simply to measure the validity of *classifications* created by state laws." *Id.* (emphasis original).

12. *See generally* J. NOWAK, R. ROTUNDA & J. YOUNG, CONSTITUTIONAL LAW ch. 16 § I (2d ed. 1983) (concise historical background to the development of the three standards of review under equal protection analysis).

13. *See, e.g.,* Kotch v. Board of River Port Pilot Comm'rs, 330 U.S. 552 (1947). In *Kotch* the Court rejected an equal protection challenge to Louisiana's pilotage laws that allegedly provided only friends and relatives of incumbent pilots with certification. *Id.* at 553-56. Justice Black's opinion for the Court found that the object of the system was to provide safety and efficiency in pilotage and that "the benefits to morale and *espirit de corps* which family and neighborly tradition might contribute" were not so unrelated to this objective as to violate the equal protection clause. *Id.* at 563-64.

14. *See, e.g.*, Shapiro v. Thompson, 394 U.S. 618 (1969); Loving v. Virginia, 388 U.S. 1 (1967). In *Shapiro* the Court applied the "necessary and compelling" test to statutory provisions of Connecticut, Pennsylvania, and the District of Columbia that denied welfare assistance to persons who had not resided within their jurisdictions for at least one year prior to their application for assistance. *Shapiro,* 394 U.S. at 634. The Court held these provisions unconstitutional as a violation of the equal protection clause because the classification affected the fundamental right of interstate travel. *Id.* at 638. In *Loving* the Court applied strict scrutiny to a Virginia antimiscegenation statute and held that the racial classification contained in the statute violated the equal protection clause. *Loving,* 388 U.S. at 11-12. *See also* Korematsu v. United States, 323 U.S. 214 (1944). In *Korematsu* the Court upheld the temporary exclusion and detention of persons of Japanese ancestry from the West Coast during World War II. *Id.* at 219. The Court, in upholding this racial classification under strict scrutiny, gave great deference to the findings of the military authorities who concluded that it was impossible to immediately segregate the disloyal Japanese Americans from the loyal. *Id.*

15. *See, e.g.*, Craig v. Boren, 429 U.S. 190 (1976). In *Craig* the Court struck down an Oklahoma statute that contained a gender-based classification for the sale of 3.2% beer by applying a standard of review different from either the rational basis or the strict scrutiny approach. *Id.* at 197-210. The

Although the Court has suggested that indigency may be considered a suspect classification in some instances,[16] the Court has never held that discrimination based upon wealth, standing alone, is enough for the Court to invoke strict scrutiny.[17] However, when a wealth classification is coupled with a right that has been deemed "fundamental," the Court has applied strict scrutiny.[18] The Court has consistently ruled that no basis exists for using any standard of review greater than rational basis scrutiny when classifications burden the poor, but involve no recognized fundamental interests.[19] Apparently, the Court has been unwilling to elevate wealth classifications to the point where indigency alone would invoke strict scrutiny because poverty is not always as permanent or irrelevant as traditional suspect classifications.[20] The

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Court stated that "[t]o withstand constitutional challenge, . . . classifications by gender must serve *important* governmental objectives and must be *substantially* related to achievement of those objectives." *Id.* at 197 (emphasis added).

16. *See Rodriguez*, 411 U.S. at 61 (Stewart, J., concurring). Justice Stewart stated that in addition to the prime example of a suspect classification (a classification based upon race) "there are other classifications that, at least in some settings, are also 'suspect' — for example, those based upon . . . indigency. . . ." *Id.* (citations omitted). Wealth classifications have been compared to other suspect classifications when involved in a criminal trial. *See* Griffin v. Illinois, 351 U.S. 12 (1956). In *Griffin* Justice Black stated as follows:

> In criminal trials a State can no more discriminate on account of poverty than on account of religion, race, or color. Plainly the ability to pay . . . bears no rational relationship to a defendant's guilt or innocence and could not be used as an excuse to deprive a defendant of a fair trial.

Id. at 17-18. He went on to state that "[t]here can be no equal justice where the kind of trial a man gets depends on the amount of money he has." *Id.* at 19.

17. *Rodriguez*, 411 U.S. at 29.

18. *See* Memorial Hosp. v. Maricopa County, 415 U.S. 250 (1974) (right to interstate travel); Shapiro v. Thompson, 394 U.S. 618 (1969) (right to interstate travel); Harper v. Virginia Bd. of Elections, 383 U.S. 663 (1966) (right to vote); Douglas v. California, 372 U.S. 353 (1963) (right to fair treatment in a criminal appeal); Griffin v. Illinois, 351 U.S. 12 (1956) (right to fair treatment in a criminal appeal).

19. *See* United States Dept. of Agriculture v. Moreno, 413 U.S. 528 (1973) (rational basis scrutiny used to invalidate amendment to the Food Stamp Act rendering ineligible any household containing an individual unrelated to any other member of the household); San Antonio Indep. School Dist. v. Rodriguez, 411 U.S. 1 (1973) (rational basis scrutiny used to uphold Texas school financing system that supplemented state aid through ad valorem tax on property within the school districts); Ortwein v. Schwab, 410 U.S. 656 (1973) (Oregon's $25 appellate court filing fee, required in order to gain appellate review of decisions of the state welfare division to reduce welfare payments, upheld under rational basis scrutiny); United States v. Kras, 409 U.S. 434 (1973) ($50 filing fee requirement involved in a voluntary petition in bankruptcy does not deny an indigent equal protection of the laws since the right to discharge in bankruptcy is not a "fundamental" right demanding a compelling governmental interest and there is a rational basis for the fee requirement); Dandridge v. Williams, 397 U.S. 471 (1970) (Maryland AFDC regulation setting $250 per month ceiling on AFDC grants regardless of the size of the family and its actual need did not violate the equal protection clause because it was rationally related to the state's interest in encouraging employment and in maintaining a balance between welfare families and families of the working poor).

20. *Rodriguez*, 411 U.S. at 121-22 (Marshall, J., dissenting). Justice Marshall suggests that (1) "[t]he poor may not be seen as politically powerless as certain discrete and insular minority groups;" (2) although "personal poverty may entail much the same social stigma as historically attached to certain racial and ethnic groups," unlike other immutable characteristics, poverty may be overcome; (3) "personal wealth may not share the general irrelevance as a basis for legislative action that race or nationality is recognized to have" since social legislation must frequently take economic status into consideration. *Id.*

Court has been unwilling to impose an affirmative duty on the states to redress economic imbalances.[21] Accordingly, the Court has not interpreted the equal protection clause to require absolute equality or precisely equal advantages when a statute contains a wealth classification.[22]

The primary issue that the North Dakota Supreme Court addressed in *Fischer* was whether the restitution language of section 6-08-16[23] violated the equal protection clause by creating an affirmative defense to the offense of issuing a check without sufficient funds.[24] The court noted that the trial court had relied upon *State v. Carpenter*[25] in granting Fischer's motion to dismiss and recited the language of section 6-08-16.2[26] that had been held unconstitutional in that case.[27]

The State argued that the affirmative defense language of section 6-08-16 involved in *Fischer* was distinguishable from the language of section 6-08-16.2 found unconstitutional in *Carpenter*.[28] The State further claimed that the affirmative defense language of section 6-08-16 did not constitute substantive law but was merely an example of the required notice of dishonor.[29]

21. *See* Douglas v. California, 372 U.S. 353, 362 (1963) (Harlan, J., dissenting) (quoting Griffin v. Illinois, 351 U.S. 12, 34 (1956) (Harlan, J., dissenting)). In *Douglas* Justice Harlan stated that laws of general applicability that may affect the poor more harshly than the rich do not deny equal protection to the less fortunate because "the Equal Protection Clause does not impose on the States 'an affirmative duty to lift the handicaps flowing from differences in economic circumstances.' " *Id.* Justice Harlan further stated that "[t]he State may have a moral obligation to eliminate the evils of poverty, but it is not required by the Equal Protection Clause. . . ." *Id. See also* Griffin v. Illinois, 351 U.S. 12, 28 (1956) (Burton, J., dissenting) (stating that it may be a desirable social policy to make defendants economically equal before the bar of justice, but what may be a good social policy is not necessarily required under the Constitution).

22. *Rodriguez*, 411 U.S. at 24.

23. *See* Nonsufficient Fund Check Issuance Act, ch. 116, § 1, 1983 N.D. Sess. Laws 296, 296-98 (current version to be codified at N.D. CENT. CODE § 6-08-16 (Supp. 1985)). Section 6-08-16(4) provided in pertinent part as follows: *"Payment to holder* of the face amount of the instrument, plus any collection fees or costs, not exceeding the additional sum of ten dollars, shall constitute a *defense* to a criminal charge brought hereunder if paid within ten days from receipt of this notice of dishonor." *Id.* (emphasis added).

24. *Fischer*, 349 N.W.2d at 17.

25. 301 N.W.2d 106 (N.D. 1980). In *Carpenter* the court ruled that a statute providing for an affirmative defense to a felony charge of issuing an insufficient funds or no-account check was unconstitutional because it created an impermissible classification based upon wealth and therefore was a violation of the equal protection clause. *Id.* at 110. *See supra* note 6 and accompanying text.

26. Issuing Check With Insufficient Funds Act, ch. 77, § 1, 1977 N.D. Sess. Laws 173, 173-74 (current version to be codified at N.D. CENT. CODE § 6-08-16.2 (Supp. 1985)). The text of the statute that violated the equal protection clause in *Carpenter* provided in pertinent part as follows: "However, if the *drawer pays* the *holder* of the instrument within thirty days after receiving written notice of non-payment . . . that fact shall constitute an *affirmative defense* to a criminal prosecution under this section." *Id.* (emphasis added).

27. *Fischer*, 349 N.W.2d at 17.

28. *Id.*

29. *Id.* at 17-18. The State argued that if, under the basic rules of statutory construction, a statute can be interpreted in two ways, one of which is constitutional and one unconstitutional, the statute should be read in the manner in which it is constitutional. Appellant's Brief at 11-12, *Fischer*. The State suggested that, although reading the statute in such a manner resulted in a strained construction, the statute must be read that way if it is the only manner in which the statute is constitutional. *Id.* The State further argued that construing the payment defense language of § 6-08-16(4) as part of the preceeding example of the notice of dishonor would render § 6-08-16 constitutionally valid; therefore, that construction was the one the court must accept. *Id.* at 12.

The court disagreed with the State and found that the location of the wealth classification language within the subsection prescribing the form for the required notice of dishonor was unimportant.[30] The court further determined that the relevant language in section 6-08-16 was substantially identical to the language of section 6-08-16.2.[31] The court ruled that, like the language in *Carpenter,* section 6-08-16 created a classification based upon wealth in violation of the equal protection clause and was therefore unconstitutional.[32]

The court in *Fischer* based its holding upon its prior decision in *Carpenter* with no additional analysis of the constitutional issue presented.[33] Therefore, the *Fischer* court's decision can be analyzed only by considering the rationale of the *Carpenter* decision.

In order to begin its analysis of the constitutional validity of section 6-08-16.2 in *Carpenter,* the North Dakota Supreme Court looked to the nature of the wealth classification involved.[34] The court noted that a statute constitutes class legislation when it imposes a burden on some persons but not on others.[35] The court reasoned that because section 6-08-16.2 imposed the burden of criminal prosecution upon indigents and did not impose criminal prosecution upon others, section 6-08-16.2 created class legislation.[36]

Next, the court in *Carpenter* addressed the issue of the

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30. *Fischer,* 349 N.W.2d at 18. The court found that the payment defense language created an impermissible wealth classification regardless of where it was located. *Id.*

31. *Id.* The court agreed with the trial judge's analysis of the similarities and differences between §§ 6-08-16.2 and 6-08-16 of the North Dakota Century Code. *Id.* For the trial judge's analysis, see *supra* note 6.

32. *Fischer,* 349 N.W.2d at 18.

33. *See supra* notes 31, 32 and accompanying text.

34. *Carpenter,* 301 N.W.2d at 109. The court in *Carpenter* determined that § 6-08-16.2 created a classification based on indigency. *Id.*

35. *Id.* To determine whether § 6-08-16.2 constituted class legislation, the court in *Carpenter* relied upon its previous decision in Hospital Servs. Inc. v. Brooks, 229 N.W.2d 69 (N.D. 1975). *Id.* In *Brooks* the North Dakota Supreme Court, noting that the proper scope of inquiry was whether the statute constituted an impermissible classification or invidious discrimination, stated as follows:

> Sections 11 and 20 of the North Dakota Constitution and § 1 of the fourteenth amendment to the United States Constitution do not prohibit or prevent classification, provided such classification is reasonable for the purpose of legislation, is based on proper and justifiable distinctions considering the purpose of the law, is not clearly arbitrary, and is not a subterfuge to shield one class or to burden another or to oppress unlawfully in its administration.

Hospital Servs. Inc. v. Brooks, 229 N.W.2d 69, 72 (N.D. 1975) (quoting *In re* Estate of Jensen, 162 N.W.2d 861, 877 (N.D. 1968)).

The court in *Brooks* declined to decide the equal protection issue under the equal protection clause of the United States Constitution; instead the court found a denial of equal protection under §§ 11 and 20 of the North Dakota State Constitution. *Brooks,* 229 N.W.2d at 72. Although not decided under the equal protection clause of the fourteenth amendment, the court in *Brooks* considered the factors quoted above relevant in determining the permissibility of classifications under the fourteenth amendment. *Id.*

36. *Carpenter,* 301 N.W.2d at 109.

appropriate level of scrutiny for judicial review of wealth classifications.[37] The court recognized that the United States Supreme Court has not declared wealth classifications suspect, but noted that the possibility for such a declaration does exist.[38] The court determined that although indigency alone was not a suspect classification, the combination of the wealth classification and criminal sanctions warranted an intermediate standard of review.[39]

In applying the intermediate standard of review,[40] the court in *Carpenter* determined that although the state had an important interest in preventing the issuance of insufficient-fund checks, no substantial relationship existed between that state interest and the classification based upon the ability of a defendant to pay for an affirmative defense to criminal prosecution.[41] The court in *Carpenter* then held that the classification contained in section 6-08-16.2 amounted to a denial of equal protection and was therefore unconstitutional.[42] The court in *Fischer* found the statutory language before it substantively the same as that in *Carpenter*, and, based on that similarity, reached the same conclusion as it had in *Carpenter*.[43]

37. *Id.* In addressing this issue, the court looked to decisions of the United States Supreme Court in order to find a clear test to be used in determining whether a wealth classification was either a suspect classification or involved a fundamental interest, thereby invoking strict scrutiny under equal protection analysis. *Id.* Finding no clear test readily available, the court noted the following factors that the United States Supreme Court has found important in making this determination: "immutable and highly visible characteristics," "historical disadvantage," and "relative lack of political representation." *Id.*

38. *Id.* For discussion of the United States Supreme Court's decisions dealing with wealth as a suspect classification, see *supra* notes 16-22 and accompanying text.

39. *Carpenter,* 301 N.W.2d at 110. In reaching this conclusion the court stated that such a result was "required by the nature of the interest of [the] defendant." *Id.* The court's rationale on this point is not fully advanced by the text of the opinion. It is apparent, however, that the court found the importance of a "criminal statute," "criminal prosecution," and a "felony" involved in *Carpenter* sufficient to justify a standard of review greater than the rational basis standard. *Id.* Perhaps this classification was deserving of a higher level of scrutiny than rational-basis scrutiny because a non-suspect wealth classification was coupled with the fundamental "right to a fair trial." *Cf.* Wilkinson, *The Supreme Court, the Equal Protection Clause and the Three Faces of Constitutional Equality*, 61 VA. L. REV. 945, 1003 & n.282 (1975) (examining the United States Supreme Court's treatment of wealth classifications in the context of the criminal appeal).

40. *See supra* notes 16, 18, and 39 and accompanying text. Although the preceding discussion in notes 16, 18, 39 and the accompanying text suggests that the court in *Carpenter* could have used strict scrutiny to require the government to show that the classification in § 6-08-16.2 was "necessary" to promote a "compelling" state interest, the court's choice of an intermediate standard of review is not unsupported by language from the United States Supreme Court. In Harper v. Virginia Bd. of Elections, the United States Supreme Court stated that "[l]ines drawn on the basis of wealth or property . . . are traditionally *disfavored.*" Harper v. Virginia Bd. of Elections, 383 U.S. 663, 668 (1966) (citations omitted) (emphasis added). Ten years later in Craig v. Boren, the Court introduced its "intermediate level" of equal protection analysis for classifications made on the basis of gender. *See* Craig v. Boren, 429 U.S. 190 (1976). In objecting to the introduction of that standard of review, Chief Justice Burger stated: "Though today's decision does not go as far as to make gender-based classifications 'suspect,' it makes gender a *disfavored* classification." *Id.* at 217 (Burger, C.J., dissenting) (emphasis added). By reading Chief Justice Burger's comment and the passage from *Harper* together, two things are apparent: (1) wealth classifications are disfavored and (2) disfavored classifications are subject to an intermediate standard of review under equal protection analysis.

41. *Carpenter*, 301 N.W.2d at 110.

42. *Id.*

43. *Fischer*, 349 N.W.2d at 18.

After finding the affirmative defense language of section 6-08-16 unconstitutional, the court in *Fischer* examined the constitutionally offensive language to determine whether it could be severed from the statute while allowing the remainder of section 6-08-16 to remain in effect.[44] The court ruled that because the affirmative defense language ameliorated the otherwise harsh result of the strict liability crime created by section 6-08-16, it constituted such an important and integral part of that section that the legislature would not have intended the statute to stand without it.[45] Therefore, the court held that section 6-08-16 was unconstitutional and invalid in its entirety.[46]

In the interim between the *Fischer* decision and the completion of this case comment, the North Dakota Supreme Court has had an opportunity to further clarify the *Fischer* decision.[47] In *State v. Clark*[48] the state appealed from a county court judge's sua sponte dismissal of a criminal complaint charging the defendant with violating section 6-08-16.[49] The court held that, although the effect of the *Fischer* decision was to render the 1983 version of section 6-08-16 unconstitutional, the *Fischer* decision did not create a prosecutorial void under that section.[50] Rather, the court determined that the version of section 6-08-16 which existed prior to the addition of the unconstitutional language remained in full force and effect after the *Fischer* decision, and that persons could be

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44. *Id.*

45. *Id.* The manner in which the court is to determine the severability of infirm language is found in § 1-02-20 of the North Dakota Century Code, which provides as follows:

> In the event that any clause, sentence, paragraph, chapter, or other part of any title, shall be adjudged by any court of competent or final jurisdiction to be invalid, such judgment shall not affect, impair, nor invalidate any other clause, sentence, paragraph, chapter, section or part of such title, but shall be confined in its operation to the clause, sentence, paragraph, section, or part thereof directly involved in the controversy in which such judgment shall have been rendered.

N.D. CENT. CODE § 1-02-20 (1975). The court has stated, however, that "[t]he question as to whether portions of a statute which are constitutional shall be upheld and given effect, even though portions of the law are struck down as unconstitutional, involves primarily the ascertainment of the intention of the Legislature." Montana Dakota Util. Co. v. Johanneson, 153 N.W.2d 414, 424 (N.D. 1967).

46. *Fischer*, 349 N.W.2d at 18.

47. *See*, State v. Clark 367 N.W.2d 168 (N.D. 1985). In *Clark* the court addressed the issue of whether the *Fischer* decision effectively decriminalized the issuance of nonsufficient fund checks. *Id.* at 168.

48. 367 N.W.2d 168 (N.D. 1985).

49. *Id.* at 168. The judge dismissed the complaint based upon *Fischer*, which had declared § 6-08-16 unconstitutional. *Id.*

50. *Id.* at 169. The court reasoned that under existing case law, the well-established rule is that unconstitutional legislation is void and is to be treated as if it had never been enacted. *Id.* The court further reasoned that when legislation repealing, amending, or modifying an existing statute is declared unconstitutional, the legislation is a nullity and cannot affect the existing statute in any way. *Id.* Instead, the court concluded that the existing statute remains in effect notwithstanding the unsuccessful and invalid attempt to repeal, amend, or modify it. *Id.*

charged thereunder.[51]

The North Dakota State Legislature also acted to remedy the constitutional infirmity existing in section 6-08-16.[52] In 1985, House Bill 1072, which eliminated the payment defense language of section 6-08-16 ruled unconstitutional in *Fischer,* was passed and

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51. *Id.* In applying the law to the facts in *Clark*, the court noted that the 1983 amendments to § 6-08-16 did not repeal, but rather amended and reenacted the 1981 version of § 6-08-16 by adding the unconstitutional payment defense language. *Id. See* Nonsufficient Fund Check Issuance Act, ch. 116, § 1, 1983 N.D. Sess. Laws 296, 296-98 (current version to be codified at N.D. CENT. CODE § 6-08-16 (Supp. 1985)). For portions of the relevant text of § 6-08-16 as it existed after the 1983 amendment, see *supra* note 3. Prior to this 1983 amendment, § 6-08-16 existed as amended and reenacted by the Nonsufficient Fund Check Collection Act, ch. 120, § 1, 1981 N.D. Sess. Laws 266, 266-67 (current version to be codified at N.D. CENT. CODE § 6-08-16 (Supp. 1985)). This act provided in pertinent part as follows:

> 1. Any person who for himself or as the agent or representative of another, or as an officer or member of a firm, company, copartnership, or corporation makes, draws, utters, or delivers any check, draft, or order for the payment of money upon a bank, banker, or depository, and at the time of such making, drawing, uttering, or delivery, or at the time of presentation for payment if made within one week after the original delivery thereof, has not sufficient funds in or credit with such bank, banker, or depository to meet such check, draft, or order in full upon its presentation, is guilty of a class B misdemeanor. . . .
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> 2. A notice of dishonor may be sent by the holder of the check upon dishonor, the notice to be in substantially the following form:
>
> Notice of Dishonored Check
>
> Date _____
> Name of Issuer _____
> Street Address _____
> City and State _____
> You are according to law hereby notified that a check dated _____, 19____, drawn on the _____ Bank of _____ in the amount of _____ has been returned unpaid with the notation the payment has been refused because of nonsufficient funds. Within ten days from the receipt of this notice, you must pay or tender to _____
> (Holder)
> sufficient moneys to pay such instrument in full and any collection fees or costs not in excess of ten dollars.
>
> . . . .
>
> An agent acting for the receiver of a check in violation of this section may present the check to the state's attorney for prosecution if the issuer does not pay to the holder sufficient moneys to pay the check within ten days from receipt of the notice. The criminal complaint for the offense of issuing a check, draft, or money order without sufficient funds under this section must be executed within not more than ninety days after the dishonor by the drawee of said instrument for nonsufficient funds. The failure to execute a complaint within said time shall bar the criminal charge under this section.

Nonsufficient Fund Check Collection Act, ch. 120, §1, 1981 N.D. Sess. Laws 266, 266-67 (current version to be codified at N.D. CENT. CODE § 6-08-16 (Supp. 1985)).

Since the 1983 amendments merely added the payment defense language to the 1981 version of § 6-08-16 without repealing it, the court concluded that the effect of the unconstitutionality of the inseverable 1983 amendments was to render the 1983 version of § 6-08-16 a nullity, thus treating the 1983 amendments as if they had never been enacted. *Clark*, 367 N.W.2d at 169. Consequently, the court determined that the effect of the *Fischer* decision was that the 1981 statute, as it existed prior to the 1983 amendments, was left intact until its valid repeal or amendment. *Id.*

The court had previously examined the 1981 version of § 6-08-16 and found it constitutional in State v. Mathisen, 356 N.W.2d 129 (N.D. 1984). *Clark*, 367 N.W.2d at 169. Therefore, the court concluded that the 1981 version of § 6-08-16 remained in full force and effect and held that Clark could be charged with violating the 1981 version of § 6-08-16. *Id.*

52. *See* Dishonored Checks Act, ch. 127, § 1, 1985 N.D. Sess. Laws 272 (to be codified at N.D. CENT. CODE § 6-08-16 (Supp. 1985)).

signed into law.[53]

Initially, the *Fischer* decision may have caused uncertainty regarding the status of North Dakota's "bad check" law. However, later cases before the North Dakota Supreme Court and the actions of the 1985 North Dakota Legislature have clearly delineated North Dakota's long established policy of proscribing the issuance of checks without sufficient funds.

TIMOTHY R. DITTUS

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53. *Id.* The Dishonored Checks Act amended § 6-08-16 to provide as follows:

6-08-16. Issuing check or draft without sufficient funds or credit - Notice - Time limitation - Financial liability - Penalty.

1. A person may not, for himself, as the agent or representative of another, or as an officer or member of a firm, company, copartnership, or corporation make, draw, utter, or deliver any check, draft, or order for the payment of money upon a bank, banker, or depository, if at the time of such making, drawing, uttering, or delivery, or at the time of presentation for payment if made within one week after the original delivery thereof, there are not sufficient funds in or credit with the bank, banker, or depository to meet the check, draft, or order in full upon its presentation. Violation of this subsection is a class B misdemeanor.
2. The person is also liable for collection fees or costs, not in excess of ten dollars, which are recoverable by civil action by the holder of the check, draft, or order. A civil penalty is also recoverable by civil action by the holder of the check, draft, or order. The civil penalty consists of payment to the holder of the instrument of the lesser of one hundred dollars or three times the amount of the instrument.
3. The word "credit" as used in this section means an arrangement or understanding with the bank, banker, or depository for the payment of the check, draft, or order. The making of a postdated check knowingly received as such, or of a check issued under an agreement with the payee that the check would not be presented for payment for a time specified, does not violate this section.
4. A notice of dishonor may be mailed by the holder of the check upon dishonor. Proof of mailing may be made by return receipt or by an affidavit of mailing signed by the individual making the mailing. The notice must be in substantially the following form:

Notice of Dishonored Check

Date _____
Name of Issuer _____
Street Address _____
City and State _____
You are according to law hereby notified that a check dated _____, 19____, drawn on the _____ Bank of _____ in the amount of _____ has been returned unpaid with the notation the payment has been refused because of nonsufficient funds. Within ten days from the receipt of this notice, you must pay or tender to _____
(Holder)
sufficient moneys to pay such instrument in full and any collection fees or costs not in excess of ten dollars.
The notice may also contain a recital of the penal provisions of this section and the possibility of a civil action to recover any collection fees or costs or civil penalty authorized by this section.

5. An agent acting for the receiver of a check in violation of this section may present the check to the state's attorney for prosecution. The criminal complaint for the offense of issuing a check, draft, or money order without sufficient funds under this section must be executed within not more than ninety days after the dishonor by the drawee of said instrument for nonsufficient funds. The failure to execute a complaint within said time bars the criminal charge under this section.

Id.