BIELING V. MALLOY and EQUAL PROTECTION: WHAT DOES THE POLL TAX HAVE TO DO WITH DRIVERS' LICENSES, ANYWAY?

In the case of *Bieling v. Malloy*,[1] the plaintiffs brought an action against the Commissioner of Motor Vehicles to enjoin the enforcement of a Vermont statute[2] which provides for suspension of the drivers' licenses of residents who fail to pay their poll tax.[3] The plaintiffs claimed that the license suspension provision denies due process[4] and equal protection of the laws under the fourteenth amendment of the United States Constitution.[5]

The plaintiffs' argument was that the statute divides taxpayers into classes (drivers and non-drivers) and subjects one class to a different and more severe penalty than the other. The Vermont Supreme Court, focusing on the equal protection issue, held that the

1. 133 Vt. 522, 346 A.2d 204 (1975).

2. VT. STAT. ANN. tit. 23, §604 (1967).

3. Vermont is one of several states which has retained a poll tax. The tax is purely a capitation tax and is in no way related to voting. The tax rate is set by the town and the tax applies to persons between the ages of eighteen and sixty-five. Military personnel, fire company members, disabled veterans, the aged, the blind, and those "actually poor" are exempted from the tax. VT. STAT. ANN. tit. 32, § 3801 (1970).

4. The court dismissed the due process claim on the ground that all due process issues contained in the record had been disposed of by Aiken v. Malloy, 132 Vt. 200, 315 A.2d 488 (1974), which held that the suspension of drivers' licenses without proper notice and an opportunity for hearing denies due process. The plaintiffs' claims to the poverty exemption in *Bieling* were also dismissed because denial of the exemption for persons "actually poor" had not been brought before the Board of Civil Authority, which is the proper route of appeal when an exemption is denied by the lister. Because the claim of poverty was dismissed, the court did not consider the possible issue of an unconstitutional classification based on wealth.

Although the court assumed that *Aiken* disposed of the procedural issues raised by the statute, some constitutional problems may still exist. For example, in order to claim an exemption from the poll tax, the taxpayer has the burden of proving himself to be exempt. It could be argued that forcing the "actually poor" to prove their exemption is a denial of fundamental fairness because the other exempt groups are either not required to prove their exemption, or have relatively simple facts to prove (such as blindness or membership in a fire crew). Also, it is uncertain whether an indigent actually "neglects and refuses" to pay his tax, as required by the statute, if he merely does not have the money on the date of collection. Finally, the standards for determining who qualifies as actually poor are not defined in the statute.

5. In *Bieling*, the plaintiffs also claimed that the statute is beyond the taxing power of the state and violates the uniform taxation clause of the Vermont Constitution, VT. CONST. Ch. I, art. 9. This article has been held to have the same effect as the equal protection clause of the United States Constitution. State v. Auclair, 110 Vt. 147, 4 A.2d 107 (1939).

penalty of suspending drivers' licenses for non-payment of poll taxes does not violate the equal protection clause. The court reasoned that a rational relationship exists between the object of collecting local taxes and the classification created by the statute in that portions of town revenues raised by poll taxes support road maintenance and construction. Furthermore, the court found that financing of municipal operations constitutes a "compelling state interest."[6]

Under the challenged Vermont statute, a person who is delinquent in paying his poll tax becomes subject to the following state actions:

(a) Wages may be attached at the rate of $4.00 per week to collect the tax,[7]
(b) The tax may be collected by civil suit against the delinquent taxpayer, subject to costs,[8]
(c) A lien may be put upon personal property and executed by sale to satisfy the tax,[9]
(d) A delinquent taxpayer's driver's license may be suspended,[10]
(e) The taxpayer may be confined to jail until the tax is paid.[11]

Most of the above collection provisions are remedial in that they effect payment and no more.[12] The license suspension provision and the imprisonment provision are punitive in nature in that they induce payment by denying collateral freedoms. Of the two penal actions, only the license suspension provision is in use.[13]

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6. 133 Vt. at 526, 346 A.2d at 207.

7. VT. STAT. ANN. tit. 32, §§5091-92 (Supp. 1975). Attachment of wages and license suspension are peculiar to poll tax collection. The other collection measures apply to taxes generally.

8. VT. STAT. ANN. tit. 32, §5222 (1970).

9. VT. STAT. ANN. tit. 32, §5071 (1970).

10. VT. STAT. ANN. tit. 23, §604 (1967).

11. VT. STAT. ANN. tit. 32, §5194 (1970).

12. VT. STAT. ANN. tit. 32, §§5071, 5222 (1970); VT. STAT. ANN. tit. 32, §5091 (Supp. 1975).

13. The most recent case found to have applied the imprisonment provision was in 1875. Boardman v. Goldsmith, 48 Vt. 403 (1875). Arrest as a means of collection was felt to be outdated as early as 1876. COOLEY, THE LAW OF TAXATION 301 (1st ed. 1876). Arrest is no longer constitutional as a summary, prejudgment collection device and in Vermont any arrest for

This casenote will focus on the equal protection issue presented by the *Bieling* case: Is the denial of a driver's license for non-payment of the poll tax constitutionally permissible when the result is that drivers are treated differently than non-drivers?

I. Traditional Equal Protection Analysis

Two distinct tests have been applied by the courts in analyzing whether a classification created by a state statute violates the constitutional right to equal protection of the laws: the "rational relationship" test and the "compelling state interest" test. The Vermont Supreme Court found in *Bieling* that the equal protection clause was not violated by the license suspension provision. This result was achieved by a strained application of the first of these tests, and a mere nod to the second. The following discussion of these two tests focuses on the analysis of the court and the merits of the equal protection claim raised in *Bieling.*

A. *Rational Relationship*

The minimum requirement of the equal protection clause is that there must exist a rational relationship between the object of legislation and any classification created by the statute. "[T]he classification must be reasonable, not arbitrary, and must rest upon some ground of difference having a fair and substantial relation to the object of legislation so that all persons similarly circumstanced shall be treated alike."[14] The statute involved in *Bieling* distinguishes between drivers and non-drivers.[15] While all persons of the state are subject to either an exemption or some collection device for non-payment of the tax, only drivers are subject to the *penal* state action. All non-drivers are only subject to the *remedial* collection measures.[16] The question is whether this classification is rationally related to the object of collecting poll taxes.

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collection must now follow a civil judgment for tax delinquency. Op. Att'y. Gen. Vt. 54 (April 6, 1973) citing Sniadach v. Family Finance Corp., 395 U.S. 337 (1969).

14. F.S. Royster Guano Co. v. Virginia, 253 U.S. 412, 415 (1920).

15. About one fourth of Vermont's population in 1970 had driver's licenses. Vermont Facts and Figures (1975).

16. This statement assumes that collecting taxes by arrest as described in Vt. Stat. Ann. tit. 32, §5194 (1970) is not a viable collection device available to the state.

The purpose of the state in licensing motor vehicle drivers is to assure safety and responsibility on the roads and highways of Vermont. Whether or not a driver has paid his poll tax does not affect his driving ability or his qualifications as a driver. It is logical to suspend a driver's license for safety violations[17] because these reflect the driver's ability to drive safely. On the other hand, the payment of a general purpose tax has no bearing on driver safety. The same lack of relationship was recognized with respect to voting by Justice Douglas when he stated in the landmark case of *Harper v. Virginia Board of Elections*, "[v]oter qualifications have no relationship to wealth nor to paying or not paying this or any other tax."[18] In the same way, driving qualifications would seem to "have no relationship" to the payment of a poll tax.

In *Bieling*, Chief Justice Barney of the Vermont Supreme Court inferred that because portions of the poll tax might go toward town road construction and maintenance, there exists a link between the tax and the penalty.[19] The link is extremely weak for two reasons. First, the flow of funds from poll taxes to town road expenditures is small.[20] Second, this sort of link could justify the penal suspension of any right which is regulated by the state. In short, fire protection could be suspended for one who has not paid the poll tax because fire crews are financed through town funds; marriage licenses could be suspended because town funds aid local marriage counselling services; and even the ability to own a dog could be denied for not paying the poll tax because the salary of the dog catcher comes from town funds. In this sense the penalty is arbitrary because any state-regulated activity could be denied in order to coerce the taxpayer into paying so long as the activity has a minute link to town funds.

How strong a relationship must exist to satisfy the "rational

17. VT. STAT. ANN. tit. 23, §671(b) (1967).

18. Harper v. Virginia Bd. of Elections, 383 U.S. 663, 666 (1966).

19. 133 Vt. at 526-27, 346 A.2d at 207.

20. The amount of poll taxes allocated to highway and road maintenance constituted the following percentages of total town highway and road revenues in three of the plaintiffs' towns: Royalton, 1.5%; Weathersfield, 2.2%; West Windsor, 0.8%. The formula for computing these figures is: (Road and Highway tax rate) *multiplied by* (Poll tax assessment) *multiplied by* (Number of polls) *divided by* (Total road and highway revenues from town tax collections). These figures were derived from the 1973 ANNUAL REPORT from each of the above named towns.

relationship" test? The United States Supreme Court has employed at least three conceptions of rationality. During the period of substantive due process in the 1920's and 1930's, the classification had to be "substantially" related to the legislative object.[21] Then, during the retreat from substantive due process, the Supreme Court would not set aside legislation provided a rational object or purpose of the legislation could be conceived by the court.[22] This became known as the "mere rationality" test.[23] In modern equal protection cases, the degree of rationality required seems to fall between "substantial" and "conceivable", often depending on other factors.[24]

Thus, while the definition of "rationality" is somewhat flexible, the better view is that the term should be applied to require a reasonable relationship. "[A] statutory discrimination must be based on differences that are reasonably related to the purpose of the act in which it is found."[25] By this standard, the relationship

21. F.S. Royster Guano Co. v. Virginia, 253 U.S. 412 (1920). *See also* Nebbia v. New York, 291 U.S. 502, 525 (1934).

22. McGowan v. Maryland, 366 U.S. 420, 426 (1961). *See* Kotch v. Bd. of River Port Pilot Comm'rs., 330 U.S. 552 (1947); Salsburg v. Maryland, 346 U.S. 545 (1954); Williamson v. Lee Optical Co., 348 U.S. 483 (1955). For a history of the shift from a strict test to a more permissive test, see McCloskey, *Economic Due Process and the Supreme Court: An Exhumation and Reburial*, 1962 SUP. CT. REV. 34, 38 (1962).

23. The classic expression of the "mere rationality" test is contained in Williamson v. Lee Optical Co., 348 U.S. 483 (1955). In that case the Supreme Court, in an opinion written by Justice Douglas, upheld the rationality of an Oklahoma statute which prohibited all but ophthalmologists or certified optometrists from reinstalling old eyeglass lenses in new or different frames. In doing so the court hypothesized several conceivable purposes for the legislation, even though such purposes did not appear on the face of the statute and there was no showing that they had been actually considered by the legislature. The *Lee Optical* approach has been severely criticized by legal scholars as an abdication of the judicial responsibility to review discriminatory state classifications. *See generally* McCloskey, *supra* note 26; Gunther, *In Search of Evolving Doctrine on a Changing Court: A Model for a Newer Equal Protection*, 86 HARV. L. REV. 1 (1972).

24. For example, in McGowan v. Maryland, 366 U.S. 420 (1961), in which Sunday closing laws were challenged, the court required the relationship to be 'reasonably conceivable'. 366 U.S. at 426. In a case which challenged a classification based on sex, a "fair and substantial relation" was required. Reed v. Reed, 404 U.S. 71, 76 (1971), *quoting* F.S. Royster Guano Co. v. Virginia, 253 U.S. 412,415 (1920). Where state tax measures are involved, wide latitude has generally been given to the states in creating workable tax classifications. Lehnhausen v. Lake Shore Auto Parts Co., 410 U.S. 356 (1973). However the *Bieling* case involves discrimination in the enforcement of a tax rather than the traditional problem of taxing one group differently than another.

25. Morey v. Doud, 354 U.S. 457, 465 (1957).

which the court found in *Bieling* between the classification (drivers and non-drivers) and the legislative object (collecting the poll tax) would appear to be unreasonable. To connect the two, the poll tax must be linked to road maintenance; road maintenance must be linked to highway safety; highway safety must then be linked to the driver's license. There are too many weak connections for the relationship to be reasonable. Such a tenuous relationship does not satisfy the equal protection clause, and to hold otherwise places an intolerable strain on the constitutional requirement of rationality.

B. *Compelling Interest*

In certain cases, where a fundamental right is denied by the state, or where invidious discrimination occurs, the equal protection clause requires more than mere rationality. In such cases, the state must show a "compelling state interest" in order to justify the classification.[26]

There are two reasons that the "compelling interest" test is germane to the *Bieling* case. First, the right to drive, especially in a rural area, would seem sufficiently important and basic that the state interest in denying this right should be questioned. Secondly, the *Bieling* court appears to employ the compelling interest test in parts of its opinion, and in fact utilizes the "compelling state interest" language, although it does not do so consistently, nor does it explain its basis for doing so. For these reasons it is important to examine how the compelling interest test applies to the *Bieling* situation.

The first step in applying the compelling interest test is to determine whether a fundamental right is involved. The right or privilege[27] of driving a car has been recognized in Vermont as important. "The license to operate a [car] is an important and valued privilege which may not be arbitrarily suspended."[28] The right has

26. Skinner v. Oklahoma, 316 U.S. 535 (1942); Douglas v. California, 372 U.S. 353 (1963).

27. For constitutional purposes the distinction between a right and a privilege is no longer significant. The "Court now has rejected the concept that constitutional rights turn upon whether a governmental benefit is characterized as a 'right' or a 'privilege'." Graham v. Richardson, 403 U.S. 365, 374 (1971).

28. Bolio v. Malloy, 126 Vt. 424, 427, 234 A.2d 336, 339 (1967).

been found sufficiently fundamental to require due process in suspending a license.[29] In a rural area,[30] which has little mass transportation, the importance of being able to drive may be considered to fall within the right to travel interstate, which was recognized as fundmental in *Shapiro v. Thompson.*[31] This reasoning has been articulated by at least one federal court,[32] although the right to drive has not been recognized by the Supreme Court as a fundamental constitutional right. The right to drive could be considered fundamental for a second reason. For rural residents, access to employment, social services, and supplies often depends on the license to drive. Thus, when a driver's license is suspended many important related restrictions are imposed. The combined impact of these restrictions easily justifies the conclusion that the court in *Bieling* should have employed a compelling interest test.[33]

The extent to which the court actually employed this test is difficult to discern. The court at one point asserts that the state interest in financing municipal operations is a "compelling state interest".[34] However, the state interest in financing municipal operations through the suspension of drivers' licenses does not appear to meet the constitutional standard. Under the compelling interest test, the state must demonstrate that the need for a classification which limits a fundamental right is "*necessary* to promote a

29. Aiken v. Malloy, 132 Vt. 200, 315 A.2d 488 (1974). *See also* Bell v. Burson, 402 U.S. 535 (1971).

30. As of the 1960 census, Vermont was one of the three most rural states in the union, falling behind only North Dakota and Mississippi. THE WORLD ALMANAC (1967).

31. 394 U.S. 618 (1969). *Shapiro* prohibits state penalties on travelling interstate where there is no compelling state interest.

32. In Bessette v. Malloy, 325 F.Supp. 506, 508 (D. Vt. 1971), Judge Waterman sitting on a three judge district court stated in *dictum:*

> Inasmuch as the privilege of driving an automobile may be related to the right to travel, a right protected by the federal constitution, Vermont may have to show a strongly reasoned connection between failure to pay a poll tax and suspension of the privilege of driving a motor vehicle on Vermont highways. It has been stipulated that a portion of the revenues derived from town poll taxes is expended by the towns on highways, but whether this fact bears any relationship to the penalty, deprivation of the right to operate a motor vehicle, imposed in plaintiffs' cases for nonpayment of poll taxes, is not readily apparent on this record.

33. The Vermont Supreme Court in *Bieling* expressed no opinion as to the "fundamentalness" of the right to drive a car.

34. Bieling v. Malloy, 133 Vt. at 526, 346 A.2d at 207.

compelling state interest."[35] Thus, the test involves a two-step determination; first, whether the state classification is necessary to further the state interest, and secondly, whether the state interest itself is sufficiently compelling.

In the *Bieling* case, the classification is not "necessary" since there are alternative collection measures available to the state which are less restrictive, less severe, and non-penal. The remedial measures such as attachment of wages and civil suit are plausible alternatives. If the license suspension provision were applied only after all the alternative collection measures were exhausted, the only person whose license could be suspended would be a judgment-proof person between the ages of eighteen and sixty-five who has no personal property or wages, and who is not "actually poor"—a rare bird indeed.

Secondly, the state interest in collecting poll taxes is not "compelling" because there are clearly other sources of tax revenue for financing municipal operations. Indeed, preserving—to say nothing of enlarging—the public fisc has explicitly been held not to constitute a compelling state interest.[36]

It should be noted that utilization of the license suspension approach to collection of the poll tax results in a double standard for persons arrested for driving without a license. Vermont law provides that the penalty of imprisonment will not be imposed where the defendant is guilty of driving without a license due to non-payment of poll taxes.[37] This difference in treatment is based on the theory that when a license is suspended for non-payment of the poll tax, all that is involved is a tax violation, while suspension for other reasons involving danger to the public reflects violation of the police power. Nevertheless, this distinction results in a discrepancy in

35. Dunn v. Blumstein, 405 U.S. 330, 342 (1972), *quoting* Shapiro v. Thompson, 394 U.S. 618, 634 (1969).

36. In Riveria v. Dunn, 329 F.Supp. 554, 558 (1971), *aff'd.* 404 U.S. 1054 (1972), the majority stated that:

> The Supreme Court, however, has made it quite clear that conservation of the public fisc is not a sufficient ground to authorize a residency statute which also has the effect of limiting the right of certain citizens to travel freely throughout the United States.

37. VT. STAT. ANN. tit. 23, § 674 (b) (1967).

treatment of persons arrested for the offense of driving without a license. This difference in treatment raises further equal protection problems of its own.

The major argument in favor of license suspension for collecting the poll tax is its ease of application. Minimal effort is required on the part of the town to invoke this penalty. While efficiency of enforcement is a relevant consideration, it is not sufficient justification to sustain a law when its enforcement results in a penal sanction applied discriminatorily,[38] and where effective alternative enforcement mechanisms are available. Moreover, the courts have explicitly rejected administrative efficiency as a compelling state interest.[39]

In light of the alternative collection measures available, the penal nature of the statute, and the other tax forms available to the state, it can hardly be maintained that the state has a compelling interest in collecting the poll tax by penalizing only drivers.

II. Alternative Equal Protection Approaches

There has been a recent dissatisfaction with the "two-tiered" approach to equal protection under which a court must apply either the rational relationship or the compelling interest test. This traditional approach lacks the needed flexibility since often neither of the tests applies neatly to the circumstances of a particular case. This difficulty is illustrated by the *Bieling* case. The right to drive would seem to be fundamental to modern life yet it has not been recognized as "fundamental" for equal protection purposes by the Supreme Court. The rationality of the connection between the classification and the legitimate state interest is weak, yet weaker connections have satisfied the rationality test.[40] Indeed, what Justice Marshall said in a different context applies with equal force here: "This case simply defies easy characterization in terms of one or the other of these 'tests'."[41]

38. *See* text accompanying notes 15-16.
39. Shapiro v. Thompson, 394 U.S. at 636-38.
40. Williamson v. Lee Optical Co., 348 U.S. 483 (1955).
41. Dandridge v. Williams, 397 U.S. 471, 520 (1970) (Marshall J., dissenting).

An alternative approach, called the "sliding scale" test, has been suggested by Justice Marshall in several dissenting opinions.[42] With this analysis, Justice Marshall seeks to overcome the problems raised by a mechanical application of the two-tiered approach. Under the sliding scale approach, the court would evaluate the arbitrariness of the classification, the importance of the right affected, and the strength of the state interest to be furthered by the legislation. On the basis of these criteria, a court would determine whether the legislation under review violated the equal protection clause.

Applying this test to the *Bieling* situation, a court would find the classification to be arbitrary because any other licensed group, such as hunters, fishermen, or professionals, could be subject to license suspension in order to achieve the same object. The right affected is high on the scale of relative importance, particularly in a rural state. Finally, the state interest is weak because there are alternative forms of collection and taxation. Thus, under the Marshall sliding scale approach, there is little question that the statute would not be upheld.

Another approach to equal protection analysis has been suggested by Professor Gunther.[43] The Gunther approach would ask whether the means (license suspension) substantially furthers the state's legislative goals (collecting the poll tax). The court in *Bieling* seemed to put great weight on the fact that the means of suspending licenses is effective in accomplishing the state's objective, and in this respect the court's approach is in accord with Professor Gunther's model.

In addition to requiring a means-ends relationship, however, Gunther would not abandon the requirement that there be a rational relationship between the classification and the legislative object. Thus, even though the court's approach in *Bieling* might pass the simple means-end inquiry of the Gunther analysis, the more traditional aspects of the Gunther test would not be satisfied in *Bieling* because, as demonstrated above, there exists no rational relationship between the classification and the legislative object. In

42. San Antonio Independent School Dist. v. Rodriguez, 411 U.S. 1, 98-99 (1973); Dandridge v. Williams, 397 U.S. 471, 520-21 (1970).

43. Gunther, *supra* note 23.

addition, the fundamental nature of the right to drive would indicate the need for a strong showing of a cogent state interest as Gunther would retain the strict scrutiny approach where fundamental rights are at stake; this was not proffered by the state. If the Gunther equal protection analysis had been applied in *Bieling*, the statute most likely would have failed the test.

III. Conclusion

To summarize, even under the least restrictive "rational relationship" test, the court should have invalidated the statute absent a stronger and more reasonable relationship than the tie of road maintenance. If, as suggested above, the right to drive is sufficiently fundamental so as to require application of the compelling interest test, the state interests appear to be too weak to satisfy this test because license suspension is neither necessary nor compelling in light of the alternative collection measures available. The statute would fail Justice Marshall's sliding scale test due to the fact that the state interest is weak, the classification is arbitrary, and the right affected is important; it would also fail under Professor Gunther's model for equal protection analysis.

As Chief Justice Barney aptly observed, the statutory scheme seeks to provide recovery for those who fail to share in their just burden of government.[44] While some penalty may be appropriate for non-payment of the poll tax, the state must avoid severe and unequal penalties when effective alternatives exist.

While there may be many solutions to the problem of collecting poll taxes, two possibilities stand out from the others. One is a legislative revision of the existing remedial collection measures so as to make them more effective. For example, the procedure for

44. The tenor of the court's opinion in *Bieling* seems to reflect the view that because the suspension provision is basically practical and effective, the constitution does not preclude its use. While this approach may be useful in achieving a particular result, it has been criticized as the basis for judicial decisions unless the reasons which make a particular decision "reasonable" are clearly articulated. As Professor Herbert Wechsler has said, "the main constituent of the judicial process is precisely that it must be genuinely principled, resting with respect to every step that is involved in reaching judgment on analysis and reasons quite transcending the immediate result that is achieved." Wechsler, *Toward Neutral Principles of Constitutional Law*, 73 Harv. L. Rev. 1, 15 (1959).

attaching $4 per week from wages could be efficiently implemented in order to avoid the severe effects of penal license suspension, yet enforce the tax.

As a second solution, the legislature should consider the possibility of abandoning the poll tax as a revenue device in favor of some alternative tax form. The poll tax in Vermont has many serious drawbacks. It is a regressive tax since it takes more in relative value from those who have the least to give. Also, since *Harper* it has a questionable policy basis: Now that the tax has been divorced from the right to vote, its value as a measure of a citizen's civic commitment has been seriously diluted. Furthermore, the poll tax exemption procedures are often degrading. For example, in order to qualify for an exemption a person who is "actually poor" must prove himself to be so before a group of local officials, assuming that he is aware of the exemption.

These drawbacks, coupled with the questionable constitutionality of the license suspension provision, indicate the need to reevaluate the desirability of the poll tax in Vermont.

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