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Chapter 11: Constitutional Law

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CHAPTER 11

Constitutional Law

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During the 1955 SURVEY year the Supreme Judicial Court disposed of cases involving a wide array of constitutional issues. It announced revolutionary doctrines in the field of land use regulation and in that of motion picture censorship. In addition, the Court was called upon to adjudicate problems of a more conventional type.

As in the past, not all the constitutional developments of the SURVEY year are discussed in this chapter, but some of them are examined in other chapters, where the cases mentioned involve issues to which constitutional problems are but incidental.

§11.1. Freedom of expression: Film censorship. In two landmark decisions on July 6, 1955, advance censorship of motion picture films appears to be outlawed.

In *Brattle Films, Inc. v. Commissioner of Public Safety*[1] plaintiff theater brought a petition for a binding declaration as to its right to exhibit, on Sunday, a certain film which the Commissioner of Public Safety had refused to approve, and which, for that reason, could not be exhibited on Sunday under the terms of the statute.[2] Although the

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§11.1. 1 1955 Mass. Adv. Sh. 809, 127 N.E.2d 891.

2 G.L., c. 136, §4: "[The] mayor of a city . . . may, upon written application describing the proposed entertainment, grant, upon such terms or conditions as . . . [he] may prescribe, a license to hold on the Lord's Day a public entertainment,

plaintiff's bill, in addition to alleging that the refusal of the approval and license required by the statute was unconstitutional, alleged that the film in question was "not of such a character as to disturb the peace and quiet of the Lord's Day or to interfere with its due observance," [3] the Court did not pause to inquire whether the Commissioner had misused his statutory authority. Instead, the Court proceeded directly to the constitutional issue tendered by the plaintiff, and held that the licensing statute is "void on its face as a prior restraint on the freedom of speech and of the press guaranteed by the First and Fourteenth Amendments [of the Constitution of the United States]." [4]

The Court reached this conclusion upon the authority of the decision of the Supreme Court of the United States in *Joseph Burstyn, Inc. v. Wilson*.[5] There, the Court invalidated the action of a state agency which rescinded the license of an exhibitor for exhibition of a certain film on the ground that the film was "sacrilegious" within the meaning of the pertinent statute. The scope of the principle which the Court found applicable in that case is, however, far from clear.

Justice Clark, in writing the opinion of the Supreme Court, announced that motion pictures, as well as older methods of expression, are included within the constitutional protection of free speech and press.[6] The opinion relied upon *Near v. Minnesota ex rel. Olson*[7] as authority for a principle of constitutional prohibition of previous restraints on publication, to be departed from "only in exceptional cases." [8] The Court ruled that censorship under the statutory "sacrilegious" standard did not present such an exceptional case.[9] Left open, as unnecessary for decision, was the question, "for example, whether a state may censor motion pictures under a clearly drawn statute designed and applied to prevent the showing of obscene films." [10]

Since the *Burstyn* decision, in 1952, the Supreme Court has failed to clarify its doctrine. Several state courts have sustained film censorship statutes upon the ground that they are "clearly" or "narrowly" drawn enactments within the possible exception left open by Justice Clark's opinion in *Burstyn*. The Supreme Court has, in each in-

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in keeping with the character of the day and not inconsistent with its due observance . . . provided, that no such license shall . . . have effect unless the proposed entertainment shall . . . have been approved in writing by the commissioner of public safety as being in keeping with the character of the day and not inconsistent with its due observance."

3 Record, p. 2, par. 7. Note the difference between this language and that of the statute, note 2 *supra*.

4 1955 Mass. Adv. Sh. at 811, 127 N.E.2d at 892.

5 343 U.S. 495, 72 Sup. Ct. 777, 96 L. Ed. 1098 (1952).

6 343 U.S. at 502, 72 Sup. Ct. at 780-781, 96 L. Ed. at 1106 (1952).

7 283 U.S. 697, 51 Sup. Ct. 625, 75 L. Ed. 1357 (1930).

8 343 U.S. at 503-504, 72 Sup. Ct. at 780-781, 96 L. Ed. at 1106-1107 (1952).

9 343 U.S. at 504-505, 72 Sup. Ct. at 782, 96 L. Ed. at 1107 (1952).

10 343 U.S. at 505-506, 72 Sup. Ct. at 782-783, 96 L. Ed. at 1108 (1952).

stance,[11] reversed by per curiam memorandum, citing only the *Burstyn* case and *Superior Films v. Department of Education,*[12] which was itself a per curiam reversal, citing only *Burstyn.*

The Supreme Judicial Court, in the *Brattle Films* case, appears to have concluded that the course of decision in the Supreme Court is indicative of an attitude which would not tolerate previous censorhip of motion pictures under any standard. Thus, the Court found it unnecessary to decide whether the standards set up in the statute for the guidance of the Commissioner were so indefinite as to render the statute void for want of due process.[13]

The Court made two possibly important qualifications of the constitutional doctrine it announced in the *Brattle Films* case. First, it found it unnecessary to discuss the significance of the provisions of the Massachusetts Constitution[14] with respect to freedom of expression.[15] Thus, it will be possible, in the event that the Supreme Court of the United States should recede from its apparently adamant present position against film censorship, to keep the law of Massachusetts as stated in the *Brattle Films* case.[16] Second, the companion case, *Times Film Corp. v. Commissioner of Public Safety,*[17] contains language which may substantially qualify the breadth of the constitutional objection to film censorship. In that case, which was a petition for certiorari to quash the Commissioner's refusal to approve certain films for exhibition on Sunday, the Court said: "In the *Brattle Films* case we have decided that §4 is unconstitutional *as applied to the facts in that case.*"[18] (Emphasis supplied.) That, of course, is not what was said in the *Brattle Films* opinion, which stated that Section 4 "is void on its face."[19] The quoted language in the *Times Film* opinion may mean simply that Section 4 is invalid as applied to films, considered apart from other entertainments covered by the statute. On the other hand, it may imply that another censoring law, with differ-

11 Holmby Productions, Inc. v. Vaughn, 177 Kan. 728, 282 P.2d 412 (1955), *rev'd,* 350 U.S. 870, 76 Sup. Ct. 117, 100 L. Ed. Adv. 73 (1955); Commercial Pictures Corp. v. Regents, 305 N.Y. 336, 113 N.E.2d 502 (1953), *rev'd,* 346 U.S. 587, 74 Sup. Ct. 286, 98 L. Ed. 329 (1954); Superior Films, Inc. v. Department of Education, 159 Ohio St. 315, 112 N.E.2d 311 (1953), *rev'd,* 346 U.S. 587, 74 Sup. Ct. 286, 98 L. Ed. 329 (1954). The Illinois statute, manifestly intended to be "narrowly drawn" and "definite," was sustained by the state court in American Civil Liberties Union v. City of Chicago, 3 Ill. 2d 334, 121 N.E.2d 585 (1954), *appeal dismissed* "for want of a final judgment," 348 U.S. 979, 75 Sup. Ct. 572, 99 L. Ed. 763 (1955).

12 Note 11 *supra.* In this case Justices Douglas and Black concurred specially, contending that all previous censorship is forbidden by the Constitution.

13 1955 Mass. Adv. Sh. at 812, 127 N.E.2d at 893.

14 Mass. Const., Declaration of Rights, Art. XVI, as amended by Amend. Art. LXXVII.

15 1955 Mass. Adv. Sh. at 812, 127 N.E.2d at 893.

16 See Lowell Gas Co. v. Department of Public Utilities, 324 Mass. 80, 84 N.E.2d 811 (1949).

17 1955 Mass. Adv. Sh. 813, 127 N.E.2d 893.

18 1955 Mass. Adv. Sh. at 814, 127 N.E.2d at 893.

19 1955 Mass. Adv. Sh. at 811, 127 N.E.2d at 892.

ent standards for the guidance of the censor, would be consistent with constitutional requirements.

The cases cited indicate that judicial (and perhaps legislative) thinking on the matter of film censorship has been in terms of previous restraints or immunity therefrom, of sufficiency or insufficiency of the statutory standards. Justice Frankfurter, however, has suggested, although he did not pause for definitive exposition, a more discrete, if somewhat mystical, approach to the problem of censorship.[20] This suggestion may have significance, since thoughts expressed in Frankfurter concurrences have been known in the past to emerge finally as the law of the Supreme Court.[21]

§11.2. Standing to raise issues of constitutionality. In two cases the Court announced the existence of a doctrine which had never before been explicitly stated to be applicable in Massachusetts.[1] It ruled that public officers who had no personal stake in the matter in controversy would not be heard to question the constitutional validity of a relevant statute.

In *Assessors of Haverhill v. New England Telephone & Telegraph Co.*,[2] the board of assessors appealed from an Appellate Tax Board decision granting the telephone company an abatement of the tax assessed upon a valuation determined by the assessors. The statute then in force[3] provided that the assessment on the property of a telephone company should be upon the valuation certified to the local assessors by the state Tax Commissioner. The assessors might appeal from the

[20] "Arguments by the parties and in briefs *amici* invite us to pursue to their farthest reach the problems in which this case is involved. Positions are advanced so absolute and abstract that in any event they could not properly determine this controversy. . . . We are asked to decide this case by choosing between two mutually exclusive alternatives: that motion pictures may be subjected to unrestricted censorship, or that they must be allowed to be shown under any circumstances. But only the tyranny of absolutes would rely on such alternatives to meet the problems generated by the need to accommodate the diverse interests affected by the motion pictures in compact modern communities. It would startle Madison and Jefferson and George Mason, could they adjust themselves to our day, to be told that the freedom of speech which they espoused in the Bill of Rights authorizes a showing of 'The Miracle' from windows facing St. Patrick's Cathedral in the forenoon of Easter Sunday, just as it would startle them to be told that any picture, whatever its theme and expression, could be barred from being commercially exhibited. The general principle of free speech, expressed in the First Amendment as to encroachments by Congress, and included as it is in the Fourteenth Amendment, binding on the States, must be placed in its historical and legal contexts. The Constitution, we cannot recall too often, is an organism, not merely a literary composition." Concurring opinion, Joseph Burstyn, Inc. v. Wilson, 343 U.S. 495, 518-519, 72 Sup. Ct. 777, 783, 96 L. Ed. 1098, 1108 (1955).

[21] Compare the concurring opinion in Adamson v. California, 332 U.S. 46, 59, 67 Sup. Ct. 1672, 1679, 91 L. Ed. 1903, 1912 (1947), with the opinions of the Court in Wolf v. Colorado, 338 U.S. 25, 69 Sup. Ct. 1359, 93 L. Ed. 1782 (1949), and Rochin v. California, 342 U.S. 165, 72 Sup. Ct. 205, 96 L. Ed. 183 (1952).

§11.2. [1] See discussion in 1954 Ann. Surv. Mass. Law §13.1.
[2] 332 Mass. 357, 1955 Mass. Adv. Sh. 245, 124 N.E.2d 917.
[3] G.L., c. 59, §39, as enacted by Acts of 1939, c. 451, §22.

certification to the Appellate Tax Board.[4] Once the tax was assessed the company might apply to the state Tax Commissioner for abatement, and, in the event he refused, might appeal to the Appellate Tax Board.[5] In the event of an abatement, however, the assessors had no right of appeal.

The assessors, in the case, did not appeal to the Commissioner from his certification of the valuation of the company's property, but, instead, assessed on the basis of their own independent valuation. After the Appellate Tax Board granted the abatement, the assessors based their appeal upon the contention that the statutes which gave the state Tax Commissioner a part in the assessing process violated the state and federal Constitutions.

The Court fully considered the contentions, and rejected them, point by point. It ruled that there was no violation of the state constitutional requirement[6] that taxes be proportional and reasonable where the valuation of some property is made by the assessors, while that of other property is made by the Commissioner. The constitutional standard is met, ruled the Court, when the valuation criterion applicable to both classes of property is the same. Likewise, there was no invalid delegation of power to the Commissioner. Since the power to determine values must be vested in someone, there is no greater delegation problem when that power is placed in the Commissioner than when it is placed in the assessors. Again, there is no denial of due process or of equal protection in giving the taxpayer an appeal from the Commissioner's denial of an abatement while not giving the assessors an appeal from his allowance of one. The right of public officers to appeal is completely within the discretion of the legislature. Finally, there is no denial of equal protection in provision for valuation of telephone companies' property by the Commissioner, and for valuation of the property of other utility companies by the local assessors. "Sufficient ground for valid classification is found in the differing nature of the services rendered and of the means employed in rendering them." [7]

After disposing, in rather fully documented detail, of the assessors' contentions on their merits, the Court, anticlimactically, indicated that it need not have reached the merits at all. Only persons who are adversely affected by an unconstitutional statute may have the question of constitutionality adjudicated. Since the assessors have no personal or property rights of their own involved in the litigation, their appeal, which was based solely on constitutional grounds, must fail.

In the second case, *Quinn v. School Committee of Plymouth*,[8] the Court was more abrupt in disposing of the constitutional contention.

4 Ibid.
5 G.L., c. 59, §73, as enacted by Acts of 1939, c. 451, §44.
6 Mass. Const., Part II, c. 1, §1, Art. IV.
7 1955 Mass. Adv. Sh. at 248, 124 N.E.2d at 920.
8 332 Mass. 410, 1955 Mass. Adv. Sh. 303, 125 N.E.2d 410.

The plaintiffs there sought mandamus to compel the school committee to furnish transportation such as was furnished to children attending public schools to the children of the plaintiffs who were attending private schools at which denominational doctrine was taught. One defense of the school committee was that the statute[9] requiring transportation of pupils to schools where religious instruction is provided to the same extent that transportation is provided for pupils to public schools was unconstitutional. The Court refused to consider the merits of the contention. Citing the *Haverhill* case, it said, "The committee in this proceeding cannot question the constitutionality of [the statute]." [10]

The principle that, in general,[11] executive or administrative officers should not be heard to question the constitutionality of legislative acts appears sound, and is supported by the authorities, many of which are collected in the opinion in the *Haverhill* case. As a matter of judicial technique it would seem preferable to follow the pattern set in the *Quinn* case, and refuse to consider the merits of a constitutional issue tendered by a party without standing to raise the issue. It is usually the part of wisdom for courts not to resolve constitutional issues in advance of the necessity therefor. There might also be a question of the propriety of deciding an issue one side of which has been presented by a party with no standing to present it. Resolution of the issue may be unduly prejudicial to parties who may have proper standing to present it in other cases.

§11.3. Jurisdiction to try prisoner in federal custody. One of the points raised by two of the defendants in *Commonwealth v. Domanski* [1] was that the state court had no jurisdiction to try them for assault with intent to rob and related offenses because, at the time of the trial, they were in custody of a United States marshal awaiting trial in the United States District Court for the District of Massachusetts on indictments for federal offenses. They were produced by the marshal in the Superior Court in response to a writ of habeas corpus ad respondendum. An Assistant United States Attorney informed the court after the conviction of the defendants that the United States had no objecion to their being sentenced, provided that they would be made available to answer to the pending federal charges.

The Supreme Judicial Court pointed out that the law is well settled to the contrary of the defendants' contention. While it is clear that a state court cannot, by writ of habeas corpus or otherwise, acquire jurisdiction of a prisoner already in federal custody for the purpose of oust-

9 G.L., c. 76, §1.

10 1955 Mass. Adv. Sh. at 306, 125 N.E.2d at 413.

11 In the Haverhill case the Court recognized the danger of laying down completely absolute propositions, and left room for possible extraordinary cases: "If there are exceptions to this principle, there is no reason for counting this case among them." 1955 Mass. Adv. Sh. 245, 249, 124 N.E.2d 917, 921.

§11.3. 1 332 Mass. 66, 1954 Mass. Adv. Sh. 935, 123 N.E.2d 368.

ing a federal court of jurisdiction,[2] it is equally clear that the United States may consent to the acquisition of jurisdiction by the state, and may surrender the prisoner for that purpose. This was established in *Ponzi v. Fessenden,*[3] and has been reiterated in subsequent cases which are cited in the *Domanski* opinion.

Intergovernmental cooperation in cases such as this may be carried to great lengths. A striking instance was seen in the case of Gerald Chapman, the notorious robber of a generation ago. Chapman had been convicted in a federal court of mail robbery and was in the Atlanta Penitentiary serving a 25-year term. When he was indicted in Connecticut for murder, the Attorney General transferred him to a prison in that state and subsequently surrendered him, on a "friendly" writ of habeas corpus, into the custody of the state court for trial. After his conviction and unsuccessful appeal, President Coolidge signed a document commuting his federal sentence to the time already served. Chapman "refused to accept" the commutation, but both the District Court for the District of Connecticut[4] and the Circuit Court of Appeals for the Second Circuit[5] ruled that this was immaterial, and Chapman was led forth to be hanged pursuant to the judgment of the state court. The courts pointed out, as does the Court in the instant case,[6] that the United States is the only party whose rights can be said to be involved, so that, if the United States does not see fit to assert its superior jurisdiction, the prisoner is in no position to raise the question.

§11.4. Free exercise of religion. *Gordon v. Gordon*[1] involved the will of Joseph Gordon, an Orthodox Jew. He died leaving several children, and in his will he made gifts to each of them. The will went on to recite that, "If any of my said children shall marry a person not born in the Hebrew faith," the gift to such child should be revoked and the interest of such child should pass to the other children. Six years after the father's death, one of the sons married a woman who had been born to Catholic parents and who practiced the Catholic faith until shortly before her marriage. She undertook religious instruction under rabbis, and, some six months after her marriage, she became a formal convert to Judaism. The Court ruled that the son's marriage worked a revocation of his rights under the father's will, and that his share of the father's estate passed, under the will, to the other children of the testator.

2 Ableman v. Booth, 21 How. 506, 16 L. Ed. 169 (U.S. 1858).
3 258 U.S. 254, 42 Sup. Ct. 309, 66 L. Ed. 607 (1921).
4 Chapman v. Scott, 10 F.2d 156 (D. Conn. 1925).
5 Chapman v. Scott, 10 F.2d 657 (2d Cir. 1926), *cert. denied,* 270 U.S. 657 (1925).
6 1954 Mass. Adv. Sh. at 940, 123 N.E.2d at 372-373.

§11.4. 1 332 Mass. 197, 124 N.E.2d 228 (1955), *cert. denied,* 349 U.S. 947 (1955). In a companion case, Gordon v. Gordon, 332 Mass. 210, 124 N.E.2d 228 (1955), *cert. denied,* 349 U.S. 947 (1955), the son was removed as fiduciary under the father's will because of his marriage.

One of the principal contentions advanced for the son was that judicial enforcement of the forfeiture provision of the will was forbidden by the constitutional guaranties of freedom of religion. It was argued that the case was analogous to *Shelley v. Kraemer*,[2] where it was held that judicial enforcement of a racial restriction in a conveyance of real estate would constitute official discrimination of a sort forbidden by the Constitution, although the parties to the restriction agreement, being private individuals, are not subject to the inhibitions of the Equal Protection Clause of the Fourteenth Amendment. The Supreme Judicial Court refused to concede that the analogy existed, saying that the cases cited in support of the argument "seem to us to involve quite different considerations from the right to dispose of property by will." [3]

Although the doctrine that courts, as well as other departments of state governments, are bound by constitutional limitations found in the Fourteenth Amendment is not new,[4] its application has been limited to cases where judicial officers were involved in unfair procedures in violation of the Due Process Clause,[5] or were made participants in discriminatory practices in violation of the Equal Protection Clause.[6] In the latter type of case there is uncertainty as to how far the constitutional prohibitions are applicable to judicial action.[7]

To extend the area of constitutional inhibitions of judicial conduct so as to prohibit any impact of judicial decrees upon religion would be to invite some startling problems. Thus, a logical corrolary of the contention which was rejected in the *Gordon* case might be that courts are constitutionally forbidden to enforce legacies to churches because

2 344 U.S. 1, 68 Sup. Ct. 836, 92 L. Ed. 1175 (1948).

3 1955 Mass. Adv. Sh. at 65, 124 N.E.2d at 235.

4 Ex parte Virginia, 100 U.S. 339, 25 L. Ed. 676 (1880).

5 See, e.g., Moore v. Dempsey, 261 U.S. 86, 43 Sup. Ct. 265, 67 L. Ed. 543 (1923). There are cases, such as Bridges v. California, 314 U.S. 252, 62 Sup. Ct. 190, 86 L. Ed. 192 (1941), where judicial action was stricken down in the name of the constitutional guaranties of free speech and press, but those were cases where the courts in question were proceeding for contempt. These cases are thus more nearly akin to those in which a court is rebuked for failure to provide a fair trial than to those in which the objectionable thing is the court's cooperation with some private individual or group for the achievement of a result which the Constitution forbids.

6 Shelley v. Kraemer, 344 U.S. 1, 68 Sup. Ct. 836, 92 L. Ed. 1175 (1948); Barrows v. Jackson, 346 U.S. 249, 73 Sup. Ct. 1031, 98 L. Ed. 361 (1953).

7 Although, as to racial restrictions in deeds, the Supreme Court has refused, on constitutional grounds, to permit injunctions for their enforcement (Shelley v. Kraemer, note 6 *supra*) or damages for their breach (Barrows v. Jackson, note 6 *supra*), a racial restriction in a deed was successfully used as a defense to a damage action. Rice v. Sioux City Memorial Park Cemetery, 245 Iowa 147, 60 N.W.2d 110 (1954), *aff'd* by an evenly divided court, 348 U.S. 880, 75 Sup. Ct. 614, 99 L. Ed. 897 (1954). On rehearing, the Supreme Court successfully masked its views on the merits of the question by granting the rehearing and dismissing the writ of certiorari on the ground that it had been improvidently granted. 349 U.S. 70, 75 Sup. Ct. 614, 99 L. Ed. 897 (1954).

such enforcement would constitute an establishment of religion.[8] It seems the part of wisdom to avoid extension of constitutional prohibitions into such an area, at least until the implications of such an extension are carefully assessed.

§11.5. Pricing-control legislation. *Fournier v. Troianello*[1] rejected a challenge of the validity of the "Unfair Sales Law" [2] which forbids retailers to sell below "cost," as defined in the statute, "with intent to injure competitors or destroy competition." The term "cost" is defined in the law[3] as invoice cost, less trade discounts except customary discounts for cash, plus (1) freight charges not otherwise included in the cost, (2) cartage to the retail outlet if performed or paid for by the retailer, which is deemed to be ¾ of 1 percent of the cost unless a lower cartage cost can be shown, and (3) a markup "to cover in part the cost of doing business" of 6 percent of the total cost at the retail outlet, unless it can be shown that the cost of doing business was lower.

The plaintiff grocer complained that the defendant grocer had advertised for sale at 15 cents, loaves of bread for which his distributor had charged him 17 cents, and which the plaintiff regularly sold at 20 cents.

The Supreme Judicial Court disposed summarily of the defendant's contentions that the statute was unconstitutional. It simply did not "agree that the prohibition relating to advertising to sell below cost is too vague to be enforced." Nor did it feel that the defendant was deprived of "equal and natural rights to engage in commerce for profit." For the latter proposition the Court cited *Merit Oil Co. v. Director, Division on the Necessaries of Life,*[4] to the effect that the legislature, in the exercise of its police power, may regulate, and even prohibit, the advertising of goods and prices.

The case does not appear to have presented for the Court's consideration some of the knottier problems which have been raised elsewhere in connection with this type of legislation. Some courts have found constitutional defects in statutes (particularly those which carry criminal sanctions)[5] prohibiting sales below cost without reference to

[8] See Everson v. Board of Education, 330 U.S. 1, 67 Sup. Ct. 504, 91 L. Ed. 711 (1947); Illinois ex rel. McCollum v. Board of Education, 333 U.S. 203, 68 Sup. Ct. 461, 92 L. Ed. 649 (1948), where the "Establishment" Clause of the First Amendment, included within the Due Process Clause of the Fourteenth, was read as forbidding "laws which aid one religion, aid all religions, or prefer one religion over another." But see also Zorach v. Clauson, 343 U.S. 306, 72 Sup. Ct. 679, 96 L. Ed. 609 (1952).

§11.5. [1] 1955 Mass. Adv. Sh. 597, 127 N.E.2d 167.
[2] G.L., c. 93, §§14E-14K.
[3] Id. §14E(a).
[4] 319 Mass. 301, 65 N.E.2d 529 (1946).
[5] The usual pattern of sales-below-cost statutes is to provide for enforcement by criminal prosecution as well as by civil suit by an interested party.

the effect of such sales upon competition.[6] Such courts have been disturbed by the vague standards which they have perceived in the statutory definition of "cost," and particularly in the provisions which relate the cost of doing business to the invoice cost of goods. These objections, however, tend to disappear when the prohibition of sales below cost is linked with an intent to injure competitors or impair or destroy competition.[7] Another kind of constitutional issue is presented in the practical application of the statute. Section 14F provides that evidence of a sale below cost is prima facie evidence of intent to injure competitors or destroy competition. As a practical matter, it is next to impossible to present evidence in rebuttal of such a conclusion, as the statutory prohibition is manifestly made without reference to a specific subjective intent to injure or destroy, and actual injury or destruction is not a necessary ingredient of a violation of the statute. Courts have thus been required to face (and they have done so with varying results)[8] the objection that the statute violates due process rights by unreasonably establishing a conclusive presumption.[9]

During the 1955 SURVEY year the Court declined to consider the validity of the somewhat related, but entirely different, "Fair Trade Law."[10] This statute, which permits trade-mark owners to control the resale prices of their products in the hands of distributors, poses constitutional problems with respect to delegation of powers, due process in the limitation of the distributor's right to engage in price competition, and, where the subject affects interstate commerce (as it usually does), complex relations between state law and the federal antitrust laws. In *Bond Liquor Store, Inc. v. Moriarty*[11] the Court dismissed,

[6] Daniel Loughran Co. v. Lord Baltimore Candy Co., 178 Md. 38, 12 A.2d 201 (1940); Lief v. Packard-Bamberger & Co., 123 N.J.L. 180, 8 A.2d 291 (1939); Commonwealth v. Zasloff, 338 Pa. 457, 13 A.2d 67, 128 A.L.R. 1120 (1940).

[7] Wholesale Tobacco Dealers v. National Candy Co., 11 Cal. 2d 634, 82 P.2d 3 (1938); McElhorne v. Geror, 207 Minn. 580, 292 N.W. 414 (1940); Associated Merchants v. Ormesher, 107 Mont. 530, 86 P.2d 1031 (1939); McIntire v. Borofsky, 95 N.H. 174, 59 A.2d 471 (1948); Lane Distributors v. Tilton, 7 N.J.L. 349, 81 A.2d 786 (1951); Rust v. Griggs, 172 Tenn. 565; 113 S.W.2d 733 (1938); State v. Langley, 53 Wyo. 332, 84 P.2d 767 (1938). *Contra:* Standard Store v. Safeway Stores, CCH 1955 Trade Cases ¶68,153 (Colo. Dist. Ct.).

[8] Great A. & P. Tea Co. v. Ervin, 23 F. Supp. 70 (D. Minn. 1938); People v. Pay Less Drug Co., 25 Cal. 2d 108, 153 P.2d 9 (1944).

[9] Other constitutional problems sometimes grow out of alleged unequal treatment of various constituent segments of the commercial structure for distribution of goods. See, e.g., Cohen v. Frey & Son, 197 Md. 586, 80 A.2d 267 (1951); Lane Distributors v. Tilton, 7 N.J.L. 349, 81 A.2d 786 (1951); Serrer v. Cigarette Service Co., 148 Ohio St. 519, 76 N.E.2d 91 (1947). For a comprehensive survey of the legal and legal-economic problems involved in the sales-below-cost statutes, see Lovell, Sales Below Cost Prohibitions: Private Price Fixing under State Law, 57 Yale L.J. 391 (1948).

[10] G.L., c. 93, §§14A-14D. The basic difference between the fair trade laws and the unfair sales laws are summarized in Federal Trade Commission, Report on Resale Price Maintenance 847-849 (1945).

[11] 1955 Mass. Adv. Sh. 525, 126 N.E.2d 362.

for want of jurisdiction, a report by a Superior Court justice of a petition for certiorari in which the validity of the Fair Trade Law was challenged. The court pointed out that there is no statutory provision for reporting, without decision, a petition for certiorari, which is, in this respect, unlike a bill in equity.

§11.6. Land use regulation. Two advisory opinions[1] were the vehicles by which the Court announced its departure from a well-settled doctrine of limitation upon legislative power. The legislature had under consideration two bills which would have constituted certain parts of Nantucket, and of Beacon Hill in Boston, "historic districts." [2] The areas within the boundaries of these districts would have been subjected to public control with respect to the demolition of existing buildings or the making of architectural changes of the exteriors of such buildings, with a general view to the preservation of buildings and neighborhoods of historic interest. In imposing these restrictions without compensation to the owners of the property subjected to the regulations it is obvious, as the Court noted, that the bills were not related, in the conventional sense, to public safety, health, or morals.

When the constitutionality of land use regulations, classically exemplified by zoning laws, has been before the courts, the traditional judicial approach has been to sustain the regulations on the rather strained ground that they tend to promote public safety by reducing the congestion of vehicular traffic,[3] or health by providing for open areas,[4] or morals.[5] Occasionally it has been recognized that an additional (but only an additional) justification for such laws might be that they promote aesthetic values in the community.[6]

In rendering its advisory opinions on the historic districts bills, the Court threw off the shackles of these earlier views and ruled that there would be no general constitutional objection to them in that they did not perform the conventional function of promoting health, safety, or morals. The Justices recognized that, in the present day and age, the preservation of imponderable values may be as proper a function of state police power as preservation of the more tangible things such as health and safety.

§11.6. [1] Opinion of the Justices, 1955 Adv. Sh. 823, 128 N.E.2d 557; Opinion of the Justices, 1955 Adv. Sh. 833, 128 N.E.2d 563.

[2] The Nantucket bill became Acts of 1955, c. 601, and the Beacon Hill bill became Acts of 1955, c. 616.

[3] See, e.g., Welch v. Swasey, 193 Mass. 364, 79 N.E. 745 (1907), *aff'd*, 214 U.S. 81, 29 Sup. Ct. 567, 53 L. Ed. 923 (1909).

[4] Euclid v. Amber Realty Co., 272 U.S. 365, 47 Sup. Ct. 114, 71 L. Ed. 303, 54 A.L.R. 1016 (1926).

[5] See Cusack Co. v. Chicago, 242 U.S. 526, 37 Sup. Ct. 190, 61 L. Ed. 472, L.R.A. 1918A 136, Ann. Cas. 1917C 594 (1917).

[6] General Outdoor Advertising Co. v. Department of Public Works, 289 Mass. 149, 193 N.E. 799 (1935), *appeal dismissed*, 296 U.S. 543, 56 Sup. Ct. 95, 80 L. Ed. 385 (1935). See Gardner, The Massachusetts Billboard Decision, 49 Harv. L. Rev. 869 (1936).

Referring to the cases in which zoning and building regulations had been sustained because of a perceived relation to health and safety, the opinion in the Nantucket case recited: "It may be noted that those decisions and statements rested upon precedents that originated before the extensive restrictions upon the use of private property now familiar in zoning rules had met with general acceptance. There is reason to think that more weight might now be given to aesthetic considerations than was given to them a half century ago." [7]

The Justices, however, made it clear that their approval of this new concept of the scope of police power was only to the extent that "in a general sense the proposed act would be an act for the promotion of the general welfare and would be constitutional . . ." [8] They reserved the power to consider the constitutional implications of application of the principles of the bills in particular cases.[9]

§11.7. Tax concessions and public purpose in land planning. In marked contrast to the opinions on the historic district bills was an advisory opinion[1] on a proposal for development of a vacant area in the city of Boston.

The so-called Huntington Avenue Yard of the Boston & Albany Railroad, a tract of some twenty-eight acres, is no longer needed for railroad purposes, and is about to be disposed of. A legislative proposal was made that the land be acquired, by eminent domain or otherwise, by the city of Boston through a Back Bay Development Commission. The land would then be sold, in a single parcel, to a corporation, which would undertake to develop it in accordance with a comprehensive plan to be approved by the commission. The plan would provide for streets, parks and other utilities, would include an auditorium and exhibition hall, and would provide for subdivision of the remaining land into lots for private uses subject to standards set forth in the bill. As an inducement to a prospective developer, the maximum valuation of the property for tax purposes was fixed at approximately 25 percent above the 1954 assessed value for the first five years of the life of the project. Thereafter, assessment valuation must not exceed three times the amount of the 1954 valuation unless the operating receipts of the corporation are sufficient, under a formula expressed in the bill, to pay the tax on a higher valuation. During the first forty-five years of the project there could be no foreclosure of the liens of any unpaid taxes, but any such liens would be preserved.

The Justices ruled that the proposal was constitutionally defective. Their main objections were that (1) the tax benefits to the developer would oblige it to pay less than its share of the cost of government benefits, and (2) the condemnation of property and the expenditure

[7] 1955 Mass. Adv. Sh. at 828, 128 N.E.2d at 561.
[8] 1955 Mass. Adv. Sh. at 830, 128 N.E.2d at 562.
[9] See Nectow v. Cambridge, 277 U.S. 183, 48 Sup. Ct. 447, 72 L. Ed. 842 (1928).

§11.7. [1] Opinion of the Justices, 1955 Mass. Adv. Sh. 541, 126 N.E.2d 795.

of public funds would not be for a public purpose in the light of the ultimate private uses of the land.

The first ground of the opinion was that assessment-valuation concessions and postponement of tax-lien foreclosures are per se in violation of the mandates of the state Constitution that taxes be equal [2] and "proportional and reasonable." [3] This result was reached without consideration of the possibility that the requirement that the developer furnish substantial public facilities might be regarded as a factor which would offset the relatively higher tax obligations of other landowners. Although the opinion intimated that these objections to the proposal might be eliminated by constitutional amendment,[4] that possibility was rendered academic when the opinion pronounced that the proposed tax inequality would violate the Equal Protection Clause of the Fourteenth Amendment of the federal Constitution.[5] This conclusion was reached without specific consideration of the question whether there are sufficient differences between an unique project such as the proposed development and other property to warrant separate classifications for tax purposes.

The answer to the latter question is perhaps implicit in the second major ground of the opinion, that the taking of the land and the use of public funds therefor would not be for a public use. In this portion of the opinion the Justices, in effect, carried into execution the caveat which, the year before, they had announced in *Papadinis v. Somerville*.[6] There, after sustaining the Urban Redevelopment Law as a slum-clearance statute, the Court expressly reserved decision as to whether the law would be constitutional as applied to a "blighted open area." [7] The present opinion, applying the "public use" concept set forth in *Salisbury Land & Improvement Co. v. Commonwealth*,[8] rules that, where the area is not now a slum, and there is only apprehension lest it become one, public funds and the public power of eminent domain may not be used to prevent its future deterioration into a condition from which public funds and the public power of eminent domain may have to be used to rescue it.

In the Nantucket advisory opinion[9] the Justices placed great reli-

[2] Mass. Const., Declaration of Rights, Art. X.

[3] Id., Part II, c. 1, §1, Art. IV.

[4] 1955 Mass. Adv. Sh. at 551, 126 N.E.2d at 801. The Constitution has been amended in the past for the purpose of allaying doubts as to power to provide housing accommodations. Mass. Const. Amend. Arts. XLIII, XLVII. These were subsequently held to be unnecessary to authorize public bodies to engage in public housing projects which were incidental to slum clearance. Allydonn Realty Corp. v. Holyoke Housing Authority, 304 Mass. 288, 23 N.E.2d 665 (1939).

[5] 1955 Mass. Adv. Sh. at 551, 126 N.E.2d at 801.

[6] 331 Mass. 627, 121 N.E.2d 714 (1954). See discussion in 1954 Ann. Surv. Mass. Law §13.2.

[7] 331 Mass. at 634, 121 N.E.2d at 718.

[8] 215 Mass. 371, 102 N.E. 619 (1913).

[9] Opinion of the Justices, 1955 Mass. Adv. Sh. 823, 128 N.E.2d 557. See §11.6 *supra*.

ance upon *Berman v. Parker*,[10] in which the Supreme Court of the United States sustained the urban redevelopment statute of the District of Columbia. In the present opinion it is said that the principle upon which *Berman v. Parker* rests is not applicable. Yet, in writing the caveat in *Papadinis* as to the possible inapplicability of urban redevelopment principles to non-slum land, the Court relied, in part, upon the opinion which the District Court wrote in *Berman v. Parker*.[11] Ignored in the present opinion is the fact that the Supreme Court did not share the constitutional misgivings expressed by the lower court. In its opinion the Supreme Court said, referring to the plaintiff's contention that his property could not be taken against his will because it was not slum property:

> In the present case, Congress and its authorized agencies attack the problem of the blighted parts of the community on an area rather than on a structure-by-structure basis. . . . It was believed that the piecemeal approach, the removal of individual structures that were offensive, would be only a palliative. The entire area needed redesigning so that a balanced, integrated plan could be developed for the region, including not only new homes but also schools, churches, parks, streets, and shopping centers. In this way it was hoped that the cycle of decay of the area could be controlled and the birth of future slums prevented. . . . Such diversification in future use is plainly relevant to the maintenance of the desired housing standards and therefore within congressional power.[12]

While there are undoubtedly factual distinctions which can be drawn between the urban redevelopment project in *Berman v. Parker* and the Huntington Avenue Yard proposal, the basic difference between the opinion of the Supreme Court of the United States and that of the Justices of the Massachusetts Court is a difference as to the proper content of the term "public purpose" as applied to a land taking. It is most interesting to observe that the Justices who, in July,[13] were willing to adapt the concept of police power to meet the social demands of the latter half of the twentieth century, did not feel, in May,[14] a necessity of similarly adapting the concept of public purpose.[15]

§11.8. Tenure of schoolteachers and the privilege against self-incrimination. The House of Representatives requested an advisory

[10] 348 U.S. 26, 75 Sup. Ct. 98, 99 L. Ed. 27 (1954).

[11] Reported sub nom. Schneider v. District of Columbia, 117 F. Supp. 705, 719 et seq. (D.D.C. 1953).

[12] 348 U.S. at 34-35, 75 Sup. Ct. at 103, 99 L. Ed. at 38-39.

[13] Opinion of the Justices, 1955 Mass. Adv. Sh. 823, 128 N.E.2d 557.

[14] Opinion of the Justices, 1955 Mass. Adv. Sh. 541, 126 N.E.2d 795.

[15] A summary discussion of trends of constitutional doctrine with respect to legislation of the sort under discussion is to be found in an article by Professor Corwin W. Johnson, Constitutional Law and Community Planning, 20 Law & Contemporary Problems 199 (1955).

opinion as to the validity of a proposed statute which would require discharge of any teacher at any college, university, teachers' college, or public or private school, who should refuse, at certain trials or duly constituted hearings for the investigation of communism, to testify as to his present or past membership in the Communist Party. Reading the question as referring to refusal to testify on the ground of the constitutional privilege against self-incrimination, the Justices ruled that the bill would be unconstitutional.[1]

Pointing out that both the federal [2] and the state[3] Constitutions contain privileges against self-incrimination, the Justices ruled that the practical working of a statute such as that proposed would require waiver of the privilege under one or the other Constitution as a condition of engaging in the occupation of teaching. Pointing out further, with a number of citations, that both Constitutions secure to individuals the right to engage in lawful occupations, the Justices said that the proposed law would, in effect, allow the exercise of one constitutional right at the price of sacrificing another. This, they ruled, was beyond the power of the legislature to do.

Subsequently, the legislative proposal was modified, so as to be applicable only to teachers in public schools. In a second advisory opinion[4] the Justices ruled that the amended proposal would not violate the Constitutions, on the authority of *Faxon v. School Committee of Boston.*[5] In that case, the Court ruled that discharge of a public school teacher for claiming privilege when questioned by a legislative committee with respect to communist connections did not violate his constitutional right of employment, since there is no constitutional right to be a public employee.

The Justices recognized that the opinion may be subject to modification, as the Supreme Court of the United States has under consideration a case[6] which presents the question whether a statute substantially similar to the proposal is consistent with the Fourteenth Amendment. After the advisory opinion was rendered, the proposal was passed by the House of Representatives, but was laid on the table in the Senate, and no further action was taken before the end of the legislative session.

§11.9. Police power: Public health regulation and dental advertising. A 1954 statute[1] makes it unlawful for dental laboratories to advertise their services, techniques, or materials to the general public

§11.8. [1] Opinion of the Justices, 1955 Mass. Adv. Sh. 711, 127 N.E.2d 663.
[2] Mass. Const., Declaration of Rights, Art. XII.
[3] U.S. Const., Amend. V.
[4] Opinion of the Justices, 1955 Mass. Adv. Sh. 493, 126 N.E.2d 365.
[5] 331 Mass. 531, 120 N.E.2d 772 (1954). This case was discussed in 1954 Ann. Surv. Mass. Law §13.5.
[6] Daniman v. Board of Education, 306 N.Y. 532, 119 N.E.2d 373 (1954), 307 N.Y. 806, 121 N.E.2d 629 (1954), probable jurisdiction noted, sub nom. Slochower v. Board of Education, 348 U.S. 935, 75 Sup. Ct. 356, 99 L. Ed. 732 (1955). This case was carried over to October Term, 1955, as No. 23. It was argued October 19, 1955.

§11.9. [1] G.L., c. 112, §52C.

or to solicit the patronage of the general public. They may, however, advertise in professional and trade papers and in public telephone directories.

The constitutional validity of the statute was drawn into question in *Perlow v. Board of Dental Examiners.*[2] There, the proprietor of a dental laboratory contended that the statutory restrictions constituted an invasion of his constitutional right to seek outlets for his services and his products. He did not, so the argument ran, perform any of the functions which, by law, may be performed only by dentists. He did not, for example, fit dentures to a patient's mouth. He simply made them in compliance with specifications furnished by a registered dentist, and the finished product was fitted in the patient's mouth by the dentist. The statute, the argument concluded, unreasonably restricts the access of the plaintiff, as a manufacturer, to a lawful market for his goods and services, and unlawfully discriminates against him by imposing upon him restrictions which are not imposed upon other manufacturers.

The argument was rejected by the Court and the validity of the statute was sustained. The Court read the statute as auxiliary to the concededly valid statutes[3] which regulate dentists and restrict their advertising. The legislature may have felt, reasoned the Court, that advertising by dental laboratories might become a device for advertising by dentists who are customers of the laboratories. Or it may have felt that laboratory advertising might have a tendency to make the laboratory the initial contact of a prospective dental patient, so that the laboratory might perform the function of "funneling" patients to dentists selected and recommended by it.

The decision is in line with a judicial trend of sustaining legislation which impinges upon the field of public health. So long as there is a perceptible relation, no matter how attenuated, between the legislative regulation and a legitimate public health objective, the judicial disposition is to indulge the legislative discretion. This attitude was emphasized in a case[4] argued to and decided by the Supreme Court of the United States in the interval between the argument and the decision of the *Perlow* case. There the Supreme Court sustained an Oklahoma statute which imposed some extremely rigorous restrictions upon opticians. Although the Court all but said that the justices personally thought some, at least, of the restrictions unnecessary, the decision was that, in matters of this sort, the legislature, not the courts, must be the judge of necessity. This case was cited in the *Perlow* opinion, but the same result would probably have been reached on the basis of the established law with respect to regulation of dentistry.

2 1955 Mass. Adv. Sh. 649, 127 N.E.2d 306.

3 Semler v. Oregon State Board of Dental Examiners, 294 U.S. 608, 55 Sup. Ct. 570, 79 L. Ed. 1086 (1935).

4 Williamson v. Lee Optical Co., 348 U.S. 483, 75 Sup. Ct. 461, 99 L. Ed. 563 (1955).