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Chapter 12: Constitutional Law

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CHAPTER 12

Constitutional Law

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§ 12.1. Due Process — Public Funded Abortions. In *Moe v. Secretary of Administration and Finance,*[1] the Supreme Judicial Court concluded that provisions affecting the Massachusetts Medical Assistance Program (Medicaid),[2] limiting state funding of abortions only to those necessary to prevent the death of the mother,[3] violated the due process guarantee of the Massachusetts Declaration of Rights.[4] This case has additional significance

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§ 12.1. [1] 1981 Mass. Adv. Sh. 464, 417 N.E.2d 387.

[2] G.L. c. 118E, § 1 *et seq.*

[3] These provisions, popularly referred to as the Dogle-Flynn amendments, actually consisted of several pieces of legislation. The legislation affected was as follows: G.L. c. 29, § 20B provides:

> No account or demand approved by the head of a department, office, commission or institution for which it was contracted, requiring the certification of the comptroller or warrant of the governor shall be paid from an appropriation for an abortion, as defined in section twelve K of chapter one hundred and twelve except for an abortion where the attending physician has certified in writing that the abortion is necessary to prevent the death of the mother.

The Medicaid appropriations bill for fiscal year 1979, enacted in 1978 Mass. Acts c. 367, § 2 Item 4402-5000, provides in pertinent part:

> and provided, further that no funds appropriated under this item shall be expended for the payment of abortions not necessary to prevent the death of the mother. This provision does not prohibit payment for medical procedures necessary for the prompt treatment of the victims of forced rape or incest if such rape or incest is reported to a licensed hospital or law enforcement agency within thirty days after said incident.

The Medicaid appropriations bill for fiscal years 1980 and 1981 contained an identical restriction. 1979 Mass. Acts c. 393, § 2 Item 4402-5000 and 1980 Mass. Acts c. 329, § 2 Item 4402-5000 provided in pertinent part "that no funds appropriated under this item shall be expended for the payment of abortions not necessary to prevent the death of the mother." The only appropriations measure that still could be enforced at the time of the decision was chapter 329.

[4] 1981 Mass. Adv. Sh. at 480, 417 N.E.2d at 397. Although the Court decided the case on due process grounds, the plaintiffs also claimed that the provisions violated the constitutional

because seven months earlier, in the companion cases of *Harris v. McRae,*[5] and *Williams v. Zbaraz,*[6] the United States Supreme Court held that virtually identical restrictions contained in the Hyde Amendment,[7] and in an Il-

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guarantee of equal protection and the Equal Rights Amendment. *Id.* at 467-68, 480-81, 417 N.E.2d at 390, 397. According to the Court, the principles of due process are embodied in Part I articles 1, 10 and 12 and Part II, c. 1, § 1 art. 4 of the Massachusetts Constitution. *Id.* at 468 n.4, 417 N.E.2d at 390 n.4. Article 1 provides:

> All people are born free and equal and have certain natural, essential and unalienable rights; among which may be reckoned the right of enjoying and defending their lives and liberties; that of acquiring, possessing and protecting property; in fine, that of seeking and obtaining their safety and happiness. Equality under the law shall not be denied or abridged because of sex, race, color, creed or national origin.

Article 10 provides in part:

> Each individual of the society has a right to be protected by it in the enjoyment of his life, liberty and property, according to standing laws. He is obliged, consequently, to contribute his share to the expense of this protection; to give his personal service, or an equivalent, when necessary: but no part of the property of any individual can, with justice, be taken from him, or applied to public uses, without his own consent, or that of the representative body of the people. In fine, the people of this commonwealth are not controllable by any other laws than those to which their constitutional representative body have given their consent. And whenever the public exigencies require that the property of any individual should be appropriated to public uses, he shall receive a reasonable compensation therefor.

Article 12 provides in pertinent part:

> "[N]o subject shall be ... deprived of his property, immunities or privileges ... or deprived of his life, liberty, or estate, but by the judgment of his peers, or the law of the land." Part II, c. 1, § 1 art. 4 empowers the Legislature to make "all manner of wholesome and reasonable ... laws ... so as the same be not repugnant or contrary to this Constitution, as they shall judge to be for the good and welfare of this Commonwealth."

[5] 448 U.S. 297 (1980).

[6] 448 U.S. 358 (1980).

[7] The Hyde Amendment affected the annual appropriations for the then Department of Health, Education and Welfare (Department of Health and Human Services). As initially passed in 1976, effective for fiscal year 1977, it prohibited federal reimbursement for abortions "except where the life of the mother would be endangered if carried to term." Pub. L. No. 94-439, § 209, 90 Stat. 1434 (1976). The versions applicable for most of fiscal year 1978, and all of fiscal year 1979, extended the scope of reimbursement by adding two additional exceptions. Federal funds would be available

> for such medical procedures necessary for the victims of rape or incest, when such rape or incest has been reported promptly to a law enforcement agency or public health service; ... [and] in those instances where severe and long-lasting physical health damage to the mother would result if the pregnancy were carried to term when so determined by two physicians.

Pub. L. No. 95-205, § 101, 91 Stat. 1460 (1978) and Pub. L. No. 95-480, § 210, 92 Stat. 1586 (1979).

The version passed in 1979 for fiscal year 1980 retained the "life of the mother" and the "rape or incest" exceptions but deleted the "long-lasting physical health damage" exception. Pub. L. No. 96-123, § 109, 93 Stat. 926 (1979). *Harris v. McRae* upheld the constitutionality of all three versions. 448 U.S. at 303, 326-27.

linois statute[8] respectively, violated neither the fifth[9] nor the fourteenth[10] amendment to the United States Constitution.

In order to better understand *Moe,* a brief summary of Medicaid and the controversy surrounding public funding of abortions is necessary. In 1965 Congress added Title XIX[11] (Medicaid) to the already existing Social Security Act.[12] The linchpin of Medicaid is the sharing of costs between the states and federal government incurred in the delivery of health care to the financially disadvantaged.[13] No state is required to participate in Medicaid. However, if a state does choose to participate, that state must provide five general types of medical services[14] to the "categorically needy."[15] Although Title XIX does not specify the actual services that the state's plan must include, it does require that the plan include "reasonable standards ... for determining eligibility for, and the extent of medical assistance ... which ... are consistent with the objectives of [Title XIX]."[16]

In 1969, Massachusetts created the Massachusetts Medical Assistance Program.[17] Under this plan a broad number of services is provided subject to the standard of "medical necessity" as defined in the Massachusetts Code of Regulations.[18]

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[8] ILL. REV. STAT. c. 23 prohibits state medical assistance payments for "abortion, or induced miscarriages or premature births, unless, in the opinion of a physician, such procedures are necessary for the preservation of the life of the woman seeking such treatment..." *Id.*

[9] 448 U.S. at 318, 326. The Court held that the Hyde Amendment violated neither due process nor equal protection. Although the fifth amendment contains no equal protection clause, the Supreme Court has held that the guarantee of equality is embodied within the fifth amendment's due process clause. *See, e.g.,* Bolling v. Sharpe, 347 U.S. 497, 499 (1954). The fifth amendment provides, in pertinent part, "nor shall any person ... be deprived of life, liberty, or property, without due process of law...." U.S. CONST. amend. V.

[10] 448 U.S. at 369. The Court examined the Illinois statute only under the equal protection clause. The fourteenth amendment provides in pertinent part that "[n]o State shall ... deny to any person ... the equal protection of the laws." U.S. CONST. amend. XIV.

[11] 42 U.S.C. § 1396 *et seq.* (1976).

[12] 42 U.S.C. § 301 *et seq.* (1976).

[13] Harris v. McRae, 448 U.S. at 308; King v. Smith, 392 U.S. 309, 316 (1968).

[14] 42 U.S.C. § 1396 *et seq.* (1976). The required services are: "(1) inpatient hospital services ...; (2) outpatient hospital services; (3) ... laboratory and X-ray services; (4)(A) skilled nursing facility services ... (B) ... early and periodic screening and diagnosis of [children] ... to ascertain their physical or mental defects ... (C) family planning services ...; (5) physician services...." 42 U.S.C. § 1396a(a)(13)(B) (1976); 42 U.S.C. § 1396d(a)(1)-(5) (1976).

[15] 42 U.S.C. § 1396a(a)(13)(B) describes the "categorically needy" as "individuals receiving aid or assistance under any plan of the State approved under subchapter I [aged], X [blind], XIV [disabled], or XVI [supplemental security income for the aged, blind and disabled] or part A of subchapter IV [aid to families with dependent children] of this [Social Security] chapter...."

[16] 42 U.S.C. § 1396a(a)(17) (1976).

[17] G.L. c. 118E, § 1 *et seq.*

[18] *Id.* A service is "medically necessary" if it is:

Massachusetts first attempted to limit public funding of abortions in July, 1978, when it passed chapter 367 of the Acts and Resolves.[19] This legislation, which was attached as a rider to the state's 1979 fiscal year Medicaid appropriations bill, limited state reimbursement for abortions only to those necessary to prevent the death of the mother or in certain cases of rape or incest.[20] From 1973 until the time of *Moe,* Massachusetts had funded abortions coextensive with the rights recognized in the United States Supreme Court decision of *Roe v. Wade.*[21]

The federal government, on the other hand, first passed legislation limiting federal Medicaid reimbursement for abortions in 1976.[22] This legislation, commonly referred to as the Hyde Amendment,[23] was immediately challenged in federal court in New York on grounds that it violated, among others, rights under the fifth amendment to the United States Constitution.[24] On January 15, 1980, a United States District Court in New York held the Hyde Amendment unconstitutional.[25]

Chapter 367 was challenged in Massachusetts federal court immediately after its passage on grounds that it violated both the fourteenth amendment to the United States Constitution and Title XIX.[26] Although the district court found chapter 367 a violation of the "reasonable standards" provision of Title XIX, it also concluded that the Hyde Amendment constituted a substantive amendment to Title XIX.[27] Because the court concluded that states participating in Medicaid need not pay the costs of any medical service not eligible for federal reimbursement, the court refused to order the Commonwealth to fund medically necessary abortions.[28] Shortly thereafter, the First Circuit ordered Massachusetts to continue to pay for medically

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(1) reasonable calculated to prevent, diagnose, prevent the worsening of, alleviate, correct, or cure conditions in the recipient that endanger life, cause suffering or pain, cause physical deformity or malfunction, threaten to cause or to aggravate a handicap, or result in illness or infirmity; and (2) there is no other equally effective course of treatment available or suitable for the recipient requesting the service that is more conservative or substantially less costly.

Mass. Admin. Code Tit. 106, § 450.204 (1979).

[19] 1978 Mass. Acts c. 367, § 2, Item 4402-5000. *See supra* note 3 for the pertinent text of this legislation.

[20] *Id.*

[21] 1981 Mass. Adv. Sh. at 470, 417 N.E.2d at 391. *See* Roe v. Wade, 410 U.S. 113 (1973).

[22] Pub. L. No. 94-439, § 209, 90 Stat. 1434. This legislation is commonly referred to as the Hyde Amendment after its original House sponsor. *Id.* For a description of the pertinent portion of the texts of the different versions of the Hyde Amendment *see supra* note 7.

[23] *Id.*

[24] McRae v. Califano, 491 F. Supp. 630 (E.D.N.Y. 1980).

[25] *Id.*

[26] Jaffe v. Sharp, 463 F. Supp. 222, 225 (D. Mass. 1978).

[27] *Id.* at 230.

[28] *Id.*

necessary abortions until it had a chance to hear arguments and to render a decision on the merits.[29] The court of appeals subsequently heard the appeal and, after agreeing with the lower court's statutory ruling,[30] remanded the case to the district court for consideration of the constitutional issues raised earlier but not decided.[31]

On June 30, 1980, the United States Supreme Court rendered decisions in *Harris v. McRae*[32] and *Williams v. Zbaraz.*[33] Those cases held that a state government's refusal to fund medically necessary abortions, not endangering the mother's life, violated neither the federal constitutional guarantees of due process nor equal protection.[34] Shortly thereafter, Massachusetts announced that it intended to abide by the restriction contained in chapter 329 of the 1980 Acts and Resolves[35] and thereby reimburse only for those abortions deemed necessary to protect the life of the mother.[36]

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[29] 1981 Mass. Adv. Sh. at 472, 417 N.E.2d at 392.

[30] Preterm, Inc. v. Dukakis, 591 F.2d 121, 134 (1979). The court agreed that the Commonwealth's failure to fund medically necessary abortions violated Title XIX. *Id.* at 127. However, it further concluded that the Hyde Amendment substantively amended Title XIX and thereby relieved the Commonwealth from what otherwise would have been its obligation to provide for such abortions. *Id.* at 134. In Harris v. McRae, the Court concluded that Congress never intended participating states to fund the cost of any medical service when federal reimbursement was unavailable. 448 U.S. 297, 309-10 (1979). The United States Supreme Court therefore found it unnecessary to resolve the question of whether the Hyde Amendment constituted a substantive amendment to Title XIX. *Id.* at 310 n.14. *See also infra* note 34.

[31] 591 F.2d at 134. The court of appeals continued its prior order enjoining implementation of the funding restriction pending the Commonwealth's petition for writ of certiorari. *Id.* the petition was denied, 441 U.S. 952, *reh'g denied,* 444 U.S. 888 (1979).

[32] 448 U.S. 297 (1980).

[33] 448 U.S. 358 (1980).

[34] 448 U.S. at 318, 326-27 (regarding fifth amendment guarantees of due process and equal protection); 448 U.S. at 369 (regarding fourteenth amendment guarantee of equal protection).

In *Harris,* the Court also decided the statutory question of whether Title XIX imposed an independent obligation on participating states to fund the entire cost of medically necessary abortions. The issue arose, of course, as a result of the Hyde Amendment's restriction on federal reimbursement. It was argued that a state's refusal to provide for such abortions violated the "reasonable standard" provision of Title XIX. This argument seemingly found support in Beal v. Doe, 432 U.S. 438 (1977). In *Beal* the Court held that Title XIX did not require participating states to fund medically unnecessary abortions. However, the Court mentioned that "serious statutory questions might be presented if a state Medicaid plan excluded necessary medical treatment from its coverage...." *Id.* at 444. As noted in *Harris,* however, *Beal* had not considered the effect that the Hyde Amendment would have on Title XIX. 448 U.S. at 307 n.11. *Harris* noted that the touchstone of Medicaid is the sharing of costs between the state and federal government, and that Congress never intended that the states would have to assume the entire cost of any medical service. *Id.* at 308-09.

[35] 1981 Mass. Adv. Sh. at 473, 417 N.E.2d at 393. The legislation effective for fiscal year 1981 is found in 1981 Mass. Acts c. 329, § 2, Item 4402-5000. For a description of this legislation *see supra* note 3.

[36] *See* 1980 Mass. Acts c. 329. Unlike chapter 367, which, in addition, contained a "rape or

Moe clearly illustrates that a state constitutional provision may accord an individual more protection than a similar provision in the federal counterpart.[37] What is not so apparent, however, at least initially, is the reason why the Supreme Judicial Court in *Moe* reached a conclusion different from that of the United States Supreme Court in *Harris v. McRae* and *Williams v. Zbaraz*. A possible explanation could be that the right protected under the Massachusetts Declaration of Rights is substantively different, from, and broader than, the right protected under the United States Constitution. That does not seem to be the case, however.

At the outset of the opinion, after disposing of some preliminary questions,[38] Justice Quirico explained the formulation by which the Court would analyze plaintiffs' claim. First, the Court would examine the nature of the right claimed to be impaired by chapter 329.[39] Second, the Court would determine the degree to which chapter 329 impaired the exercise of that

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incest" exception, chapter 329 only excepted abortions necessary to protect the mother's life. *Id.*

[37] 1981 Mass. Adv. Sh. at 484, 486, 417 N.E.2d at 399, 400. *See also,* Wilkins *Judicial Treatment of the Massachusetts Declaration of Rights in Relation to Cognate Provisions of the United States Constitution,* 14 SUFF. U. L. REV. 887 (1980).

[38] 1981 Mass. Adv. Sh. at 476-80, 417 N.E.2d at 396-97. The Commonwealth argued that the Court lacked subject matter jurisdiction on the grounds that because the restriction concerned an appropriations measure, and because appropriations are solely a legislative concern, the Court would violate the principle of separation of powers, as embodied in article 30 of the Massachusetts Declaration of Rights, were it to decide the case. This argument was rejected for several reasons. First, the funds already had been appropriated by the legislature. Second, regardless of how the Court resolved the issue, its action would not cause only additional expenditures; indeed, a decision striking down the legislation conceivably would result in less expenditures since the medical costs of childbirth tend to be higher than those of abortion. Third, simply because legislative action involves appropriations, that action is not necessarily insulated from judicial review. *Id.* at 476-77.

Sua sponte, the Court considered whether the case could be resolved on statutory grounds and thereby remove from consideration the constitutional question. As noted by the Court, chapter 329 permitted reimbursement only for those abortions necessary to save the mother's life. Yet, the then current version of the Hyde Amendment permitted federal funding not only for abortions necessary to preserve the woman's life, but also, in certain instances of rape or incest. Since chapter 329 was more restrictive than the Hyde Amendment, then, pursuant to the Supremacy Clause of the United States Constitution, chapter 329 would fall. As noted by the Court, the question then would be whether chapter 329 should be set aside entirely or only so far as it was repugnant to the Hyde Amendment. At least one court, confronted with the same issue, invalidated the entire state law. *See* Roe v. Casey, 623 F.2d 829, 839 (3d Cir. 1980). However, in 1980 Congress passed legislation providing that "[s]tates are and shall remain free not to fund abortions to the extent that they in their sole discretion deem appropriate." Pub. L. No. 96-536, § 109, 94 Stat. 3170 (1980). Concluding then that no statutory ground existed by which the case could be decided, the Court proceeded to the constitutional question. 1981 Mass. Adv. Sh. at 479-80, 417 N.E.2d at 396.

[39] 1981 Mass. Adv. Sh. at 481-85, 417 N.E.2d at 397-99.

right.[40] Finally, assuming that the right was impaired, the Court would consider whether any state interests justified its impairment.[41]

Although, after analyzing the first issue, the Court remarked "having [now] defined the right involved we turn to the question whether it is infringed by the funding restriction",[42] the Court simply never did specify clearly the "right involved." Nor did it indicate whether that right was, in some way, different from the right protected under the federal constitution. *Roe v. Wade,*[43] of course, established the basic formulation of individual and state rights in the abortion context.[44] As explained by the Supreme Court in *Maher v. Roe,*[45] and later in *Harris v. McRae,*[46] the principle of *Wade* is the protection of a woman "from unduly burdensome interference with her freedom to decide whether to terminate her pregnancy."[47] *Moe* acknowledged *Wade* as the touchstone.[48] However, the majority, in citing from its recent decision *In the Matter of Spring,*[49] noted:

> something approaching consensus in support of the principle that a person has a stong interest in being free from non-consensual invasion of his bodily integrity, and a constitutional right of privacy that may be asserted to prevent unwanted infringements of bodily integrity.[50]

Arguably, the freedom to choose abortion over childbirth is different from, and perhaps narrower than, the right to be free from involuntary bodily intrusions. If this is the case, then, of course, the different result reached by the state's and the nation's highest court is easily explained. Indeed, Chief Justice Hennessey, in dissent, criticized the majority for broadening the right recognized in *Wade.*[51] However, in quoting from its decision in *Fram-*

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[40] *Id.* at 481, 485-91, 417 N.E.2d at 397, 400-02.

[41] *Id.* at 481, 491-95, 417 N.E.2d at 397, 402-04.

[42] *Id.* at 485, 417 N.E.2d at 399.

[43] 410 U.S. 113 (1973).

[44] *Id.* at 153-65. The fourteenth amendment recognizes a right of privacy in the context of decisions regarding abortion and childbirth. That right is fundamental. Consequently, a state cannot impair the exercise of that right unless it can demonstrate a compelling justification for so doing, and, even then, only if it proceeds in the least restrictive manner. Two state interests recognized in the abortion context are the health of the mother and the potential life of the unborn. Each of these interests becomes compelling during different stages of the gestation process. In the second trimester the state's interest in the woman's health is sufficiently compelling such that the state can take action designed to promote the health. At the point of viability, approximately the third trimester, the state's interest in protecting the unborn is sufficiently compelling so as to permit the state to prohibit abortion altogether; assuming, of course, the abortion is not necessary to protect the woman's health. *Id.* at 153-65.

[45] 432 U.S 464 (1977).

[46] 448 U.S. at 314.

[47] *Id.* (quoting Maher v. Roe, 432 U.S. at 473-74).

[48] 1981 Mass. Adv. Sh. at 481, 417 N.E.2d at 397.

[49] 1980 Mass. Adv. Sh. 1209, 1214, 405 N.E.2d 115, 118.

[50] 1981 Mass. Adv. Sh. at 484, 417 N.E.2d at 399.

[51] *Id.* at 498, 417 N.E.2d at 406.

ingham Clinic, Inc. v. Southborough,[52] the Court explained the principle of *Wade* as "forbid[ing] the State [from] interpos[ing] material obstacles to the effectuation of a woman's counselled decision to terminate her pregnancy during the first trimester."[53] It would seem then that the right recognized in *Moe* is substantively the same as the interest protected under *Wade.*

The question considered next was whether the funding restriction imposed by chapter 329 impaired an indigent woman's right to choose.[54] Here a difference between *Moe* and *Harris* is apparent. The *Harris* majority noted that nothing in *Wade* suggested that the government could not make a "value judgment favoring childbirth over abortion. . ."[55] Indeed, *Wade* recognized the state's important interest in protecting potential life,[56] an interest which becomes compelling at viability.[57] Both *Harris*[58] and *Maher v. Roe*[59] reasoned that there is a real difference between direct government interference with a protected right and government sanctioned activity believed to be in the public interest. The Hyde Amendment was viewed not as a barrier to an indigent woman's protected right to choose, but rather, as a permissible means of effectuating the public good.[60] Although it is true that an indigent woman who lacks the funds needed for a desired abortion may be forced to carry her fetus to term, it simply does not follow that this enforced pregnancy is the product of direct governmental intervention.[61] According to a majority of the Supreme Court:

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[52] 373 Mass. 279, 367 N.E.2d 606 (1977).

[53] 1981 Mass. Adv. Sh. at 483, 417 N.E.2d at 398 (quoting Framingham Clinic, Inc. v. Southborough, 373 Mass. at 288, 367 N.E.2d at 611).

[54] 1981 Mass. Adv. Sh. at 485-91, 417 N.E.2d at 400-02.

[55] 448 U.S. at 314 (quoting Maher v. Roe, 432 U.S. at 474).

[56] 410 U.S. at 159.

[57] 448 U.S. at 315.

[58] 432 U.S. 464, 475 (1977). *Maher* concluded that a Medicaid participating state's decision not to fund medically *unnecessary* abortions did not violate equal protection.

[59] This is a critical distinction between *Moe* and *Harris. Moe* reasoned that the Commonwealth had a clear obligation to remain neutral. It could neither encourage nor discourage a woman from terminating or continuing her pregnancy; assuming of course the fetus was not yet viable. *Harris* and *Maher,* on the other hand, emphasized the negative principle of *Wade*: a woman has a right to be free from burdensome state interference regarding the decision to bear or beget a child. Indeed, in both *Harris* and *Maher* the Court stated: "[c]onstitutional concerns are greatest when the state attempts to impose its will by force of law; the State's power to encourage actions deemed to be in the public interest is necessarily far broader." 448 U.S. at 315; 432 U.S. at 476. In explaining this principle, *Harris* cited Griswold v. Connecticut, 381 U.S. 479 (1965) and Pierce v. Society of Sisters, 268 U.S. 510 (1925). After *Griswold,* states cannot prohibit the use of contraceptives. Pursuant to *Pierce,* states cannot prohibit parents from sending their children to non-public schools. Yet it does not follow that states have an obligation to provide contraceptives to those who can't afford them or to fund non-public schools. 448 U.S. at 318.

[60] 448 U.S. at 314-15; 432 U.S. at 475.

[61] 448 U.S. at 315-16; 432 U.S. at 474.

> [A] woman's freedom of choice [does not] carr[y] with it a constitutional entitlement to the financial resources to avail herself of the full range of protected choices ... [A]lthough government may not place obstacles in the path of a woman's exercise of her freedom of choice, it need not remove those not of its own creation. Indigency falls in the latter category.[62]

According to *Harris,* a finding that the Hyde Amendment violated due process would rest on a premise that women have a constitutional right to a medically necessary abortion.[63] Therefore, Congress would have an affirmative obligation to fund such procedures.[64] Yet Congress was never under an obligation to create Medicaid or, for that matter, to fund any medically necessary services at all.[65]

The Supreme Judicial Court acknowledged that under the Massachusetts Constitution, a woman enjoyed neither an independent right to an abortion, nor a right to a publicly funded medically necessary abortion.[66] The fault of the Massachusetts funding scheme lay in its disparate treatment.[67] Medicaid funded the medically necessary costs of childbirth yet not the medically necessary costs of abortion. Although the United States Supreme Court relied heavily on the distinction between direct government interference and governmental encouragement of alternate activity, the Supreme Judicial Court did not. According to Justice Quirico "when the question is whether a selective grant of benefits impinges on a right held to

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[62] 448 U.S. at 316 (citing Maher v. Roe, 432 U.S. at 474).

[63] 448 U.S. at 318.

[64] *Id.*

[65] 432 U.S. at 469.

[66] 1981 Mass. Adv. Sh. at 487, 417 N.E.2d at 400.

[67] It is surprising that the Court adjudicated this case on due process, and not on equal protection, grounds. In Roe v. Norton, 408 F. Supp. 660, 663 (D. Conn. 1975), Zbaraz v. Quern, 469 F. Supp. 1212, 1221 (N.D. Ill. 1979) and McRae v. Califano, 491 F. Supp. 630, 737 (1980) (the lower court decisions in Maher v. Roe, Williams v. Zbaraz and Haris v. McRae respectively), each court emphasized the disparate treatment accorded abortion funding vis a vis other Medicaid services, and each court decided its case on equal protection grounds. Indeed, in Maher v. Roe, the Court commented on the lower court's acknowledgment that the constitution confers no independent right to a state financed abortion. 432 U.S. at 468. In *Moe* the plaintiffs recognized that women do not have either an independent right to abortions generally or to public funded abortions specifically. 1981 Mass. Adv. Sh. at 487, 417 N.E.2d at 400-01. Rather their "claim [was] ... limited to an assertion of the right to have abortions nondiscriminatorily funded." *Id.,* 417 N.E.2d at 401 (*quoting* Singleton v. Wulff, 428 U.S. 106, 118-19 n.7 (1976)). Clearly then, the gravamen of the plaintiffs' complaint concerned the validity of the Commonwealth's classificatory scheme. Apart from equal participation in the electoral process, the equal protection clause of the fourteenth amendment is not a repository of constitutional rights. *See, e.g.,* Dunn v. Blumstein, 405 U.S. 330, 336 (1971). It is designed to measure the validity of classifications, San Antonio v. Rodriquez, 411 U.S. 1, 40-41 (1973) (Stewart, J., concurring); precisely the nature of plaintiffs' claim in *Moe.* This case, of course, was decided under the state, and not the federal, constitution. Nevertheless, it seems equal protection would have been a preferred mode of adjudication.

be fundamental it is unimportant whether the burden is direct or indirect."[68] As viewed by the Court, chapter 329 simply was an attempt by the Commonwealth to discourage indigent women from choosing abortion.[69] Since the state therefore violated its role of neutrality, the only question remaining was whether it had sufficient justifications for doing so.[70]

Under the federal scheme of adjudication, legislation challenged as impairing the exercise of a fundamental right is subjected to so-called "strict scrutiny".[71] Unless the government can demonstrate that the legislation serves a compelling interest and that it is the least restrictive means of achieving that interest, it will not withstand attack.[72] *Roe v. Wade* recognized two state interests, each of which becomes compelling at various stages of the gestation process.[73] The first interest, the woman's health, becomes compelling at the end of the first trimester, and, the second,[74] protecting the potential life of the fetus, becomes compelling upon the fetus reaching viability.[75] A state, therefore, if it so desired, could prevent a woman from aborting a viable fetus provided that in doing so this action did not jeopardize the woman's health. Protecting the mother's health cer-

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[68] 1981 Mass. Adv. Sh. at 488, 417 N.E.2d at 401.

[69] *Id.* at 490, 417 N.E.2d at 402.

[70] *Id.* at 491, 417 N.E.2d at 401-02.

[71] 448 U.S. at 470. *See also* Massachusetts Board of Retirement v. Murgia, 427 U.S. 307, 312, 314 (1976); San Antonio v. Rodriquez, 411 U.S. 1, 17 (1973). Strict scrutiny also is applied where the governmental action is predicated on a suspect classification. 448 U.S. at 470; 427 U.S. at 312; 411 U.S. at 17. As described in San Antonio v. Rodriquez, a suspect class is a "class ... saddled with such disabilities, or subjected to such history of purposeful unequal treatment, or relegated to such a position of political powerlessness as to command extraordinary protection from the majoritarian political process." 411 U.S. at 28.

In McRae v. Califano, 491 F. Supp. 630 (1980) (the lower court proceeding in Harris v. McRae), the court indicated that the Hyde Amendment affected a suspect class, namely indigent adolescent women; particularly those under age 18. *Id.* at 738. Apparently this conclusion was premised on the fact that such women had a disproportionately higher need for medically necessary abortions. However, as noted in Harris v. McRae, the lower court's analysis is flawed. 448 U.S. at 323 n.26. Initially, age is not a suspect class. Massachusetts Board of Retirement v. Murgia, 427 U.S. at 313-14. Secondly, heightened review will not be triggered unless the discrimination is purposeful. Washington v. Davis, 426 U.S. 229, 247 (1976). The Hyde Amendment was age neutral. As explained in Massachusetts v. Feeney, 442 U.S. 256 (1979) where a facially neutral statute is challenged as denying equal protecion, it must be shown that the action was taken "because of" and not simply "in spite of" the impact that it has on the affected group. *Id.* at 279. It could hardly be said that Congress enacted the Hyde Amendment because of its desire to disadvantage indigent adolescent women.

[72] *See, e.g.,* Carey v. Population Services Int'l, 431 U.S. 678, 686 (1977); San Antonio v. Rodriquez, 411 U.S. 1, 29-31, 51 (1973); Shapiro v. Thompson, 394 U.S. 618, 634 (1969).

[73] 410 U.S. at 159, 162.

[74] *Id.* at 163.

[75] *Id.*

tainly was not the aim of chapter 329. Furthermore, because protecting potential life becomes compelling only when the fetus reaches viability, and because the funding restriction was not limited to previability abortions, chapter 329 would not be recognized as compelling under the federal scheme of analysis. The Supreme Judicial Court, however, suggested that its method of analysis is not as ritualistic as the federal formulation.[76] Rather, the Court explained, it prefers to examine the state's interests in the matter and to weigh those interests against the implicated rights of the individual.[77] Citing its recent decisions in *Commissioner v. Myers,*[78] and *Belchertown State School v. Saikewicz,*[79] the Court reiterated four state concerns often present in cases involving involuntary bodily intrusions. These concerns are: 1) preservation of life, 2) protection of innocent third parties, 3) prevention of suicide, and 4) maintenance of the ethical integrity of the medical profession.[80] The only state interest seriously implicated here was the preservation of life;[81] albeit the life of the unborn. On the other hand, the funding restriction prevented indigent women from obtaining a

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[76] 1981 Mass. Adv. Sh. at 491, 417 N.E.2d at 463 (quoting Marcoux v. Attorney General, 375 Mass. 63, 375 N.E.2d 688 (1978)). As stated in Marcoux:

> The cases at times speak of legislation which need only undergo a test of "reasonable relation" and legislation that must survive "strict scrutiny," but we conceive that these soubriquets are a shorthand for referring to the opposite ends of a continuum of constitutional vulnerability determined at every point by the competing values involved.

Id. at 65 n.4, 375 N.E.2d at 689 n.4.

[77] 1981 Mass. Adv. Sh. at 491-93, 417 N.E.2d at 402-04.

[78] 379 Mass. 255, 399 N.E.2d 452 (1979). In *Myers,* a prison inmate developed a serious kidney disease while incarcerated. In order for him to survive he was required to undergo hemodialysis three times a week. After receiving these treatments for approximately one year, the inmate indicated that he would no longer submit to them. His refusal was not grounded on any religious beliefs or on a desire to die. Apparently, he was displeased with his placement in a medium, as opposed to a minimum, security facility. The court noted that the bodily intrusion was substantial. It further observed that the primary state interest implicated was the preservation of life. Those two interests yielded a close balance. What tipped the scales in the Commonwealth's favor was its interest in maintaining order in the administration of its prisons. *Id.* at 263-64, 399 N.E.2d at 454-58.

[79] 373 Mass. 728, 370 N.E.2d 417 (1977). In *Saihewicz* a 67 year old incompetent man who had been institutionalized most of his life, contracted leukemia. If the man were to undergo chemotherapy there was a 30-40% chance of a remission lasting up from 2-13 months. Without the chemotherapy his life expectancy was only a few months. His death, however, would be relatively painless. In order for the therapy to be successfully administered his cooperation would be needed. Yet, due to his incompetency, he was incapable of voluntarily providing the necessary assistance. In addition, the chemotherapy had numerous unpleasant side effects. The Commonwealth's principal interest in preservation of life was not sufficient to overcome the individual's interest in preventing unwanted bodily intrusions. *Id.* at 744-45, 370 N.E.2d at 420-27.

[80] 1981 Mass. Adv. Sh. at 493, 417 N.E.2d at 404.

[81] *Id.* at 494, 417 N.E.2d at 404.

desired abortion. Perceiving this enforced pregnancy as an involuntary bodily intrusion,[82] and weighing the woman's interest in being free from such nonconsensual invasions against the state's interest in preserving potential life, the Court concluded that the balance clearly favored the woman.[83] Therefore, having determined that the Commonwealth breached its role of neutrality regarding the woman's right to choose abortion over childbirth, and having found no overriding justification for the Commonwealth's action, the Court held that the legislation violated the Declaration of Rights' guarantee of due process.[84]

§ 12.2. Freedom of Religion — Adjudicating Church Property Disputes. In *Antioch Temple, Inc. v. Parekh,*[1] the Court concluded that the guarantee of freedom of religion protected under the first amendment to the United States Constitution[2] did not bar the courts of the Commonwealth from adjudicating a claim between rival factions of a church group concerning disputed ownership and control of church property.[3] Significantly, albeit in dicta, the Court suggested that it would adopt the neutral principle of laws method[4] for resolving church property disputes recently enunciated by the United States Supreme Court in *Jones v. Wolf.*[5]

Antioch Temple and William Tompkins, who claimed to be Antioch's president and pastor, initiated the action against Edith Parekh seeking to recover property standing in her name, but which they claimed was held by her as trustee for Antioch.[6] The case was submitted to a master to make findings of fact and conclusions of law.[7] Two years after this action had

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[82] *Id.*

[83] *Id.* at 495, 417 N.E.2d at 404.

[84] *Id.* at 481, 495, 417 N.E.2d at 397, 404.

§ 12.2. [1] 1981 Mass. Adv. Sh. 1523, 422 N.E.2d 1337.

[2] U.S. CONST. amend. I provides in part: "Congress shall make no law respecting an establishment of religion, or prohibiting the free exercise thereof;..." The first amendment is applicable to the states through the due process clause of the fourteenth amendment. Gitlow v. New York, 268 U.S. 652, 666 (1925).

[3] 1981 Mass. Adv. Sh. at 1534-35, 422 N.E.2d at 1344. Although the Court described this case as a church property dispute, possibly it is more than that. Although one issue did concern ownership and use of church property, a dispute as to who was the true pastor and president of Antioch Temple also was resolved by the superior court. *Id.* at 1535, 422 N.E.2d at 1344. Arguably this second issue is ecclesiastical and therefore beyond the jurisdiction of the Court. *See infra* note 62.

[4] 1981 Mass. Adv. Sh. at 1535-38, 422 N.E.2d at 1345-46. For a discussion of this method see *infra* note 60.

[5] *Id.* at 1536-38, 422 N.E.2d at 1345-46; *see* Jones v. Wolf, 443 U.S. 595, 602-06 (1979).

[6] 1981 Mass. Adv. Sh. at 1524, 422 N.E.2d at 1339.

[7] *Id.* While the hearing before the master was in progress, Ms. Parekh reconveyed the property to Antioch Temple. Judgment dismissing the case against her was entered. *Id.*

commenced, Ivory Miles intervened.[8] Miles contended that he, and not Tompkins, was the true pastor and president of Antioch and, therefore, he had the right to use and control the disputed property.[9] Miles and Tompkins agreed to have the master adjudicate this dispute in order to avoid additional litigation.[10]

The pertinent facts found by the master were as follows: In 1962 Antioch was incorporated pursuant to chapter 180 of the Massachusetts General Laws for the purpose of promulgating the apostolic faith.[11] By-laws were enacted and a board of directors was selected.[12] Responsibility for managing Antioch, including the power to appoint and remove the pastor, lay with the board.[13]

In 1963, Antioch purchased property in Cambridge (the property) to be used for meetings and services.[14] Also in 1963, the board appointed Tompkins pastor.[15] Tompkins resigned from this position in 1966.[16] He was replaced by Miles, who earlier in the year had been named assistant pastor.[17] Shortly after his appointment, Miles moved his family into the property and continued to occupy the premises throughout the instant proceeding.[18]

Prior to 1966, Tompkins, Miles and Antioch all belonged to the Pentecostal Church of the Apostolic Faith Association, Inc. (PCAF), an organization existing under the laws of Michigan, and established to promote the tenets of the apostolic faith.[19] Membership in PCAF was not a condition precedent to practicing the apostolic faith.[20] Members could dissolve their affiliation with PCAF for any reason at any time and incur no penalty upon so doing.[21] PCAF had no supervisory powers over its members and it had no established tribunal for resolving disputes between its members.[22]

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[8] *Id.*

[9] *Id.*

[10] *Id.*

[11] *Id.* at 1524-25, 422 N.E.2d at 1339. Section three of chapter 180 of the Massachusetts General Laws provides in part that a "[a] corporation may be formed for . . . (a) . . . any . . . religious purpose."

[12] 1981 Mass. Adv. Sh. at 1525, 422 N.E.2d at 1339.

[13] *Id.*

[14] *Id.*

[15] *Id.*

[16] *Id.*

[17] *Id.*

[18] *Id.*

[19] *Id.*

[20] *Id.*

[21] *Id.*

[22] *Id.*

In 1968 friction developed between Miles and the board over responsibility for controlling and operating Antioch.[23] Miles, stating that he was "Antioch Temple," claimed all other church members were subservient to him.[24] In March, the board convened and voted to remove Miles as pastor, to request him to vacate the premises and to resign its affiliation with PCAF.[25] Shortly thereafter PCAF was so informed.[26] Miles refused to vacate.[27] Indeed, he disrupted meetings held at the property to such an extent that it became necessary to locate temporary quarters elsewhere in order to conduct church business.[28] On advice of counsel, the board also authorized conveyance of the property to a straw in order to safeguard the Temple's title to the property from any possible claims by Miles.[29] On other occasions Miles was again requested to vacate.[30] Each time he refused.[31]

In May of 1971, and 1976, Tompkins was elected to five year terms as president and pastor of Antioch.[32] In 1971, both Tompkins and Miles, as individuals, submitted their dispute to PCAF.[33] A board comprised of PCAF bishops ruled in Miles' favor.[34] Tompkins refused to recognize the ruling and shortly thereafter resigned from PCAF.[35] To these findings Miles filed no objection.[36]

The master's findings were adopted and confirmed by the superior court.[37] The judge concluded that Tompkins was the president and pastor of Antioch and therefore was entitled to conduct services at the Temple.[38] He further ruled that Miles had no right to occupy the property and ordered him to vacate.[39]

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[23] *Id.*

[24] 1981 Mass. Adv. Sh. at 1526 n.3, 422 N.E.2d at 1340 n.3.

[25] *Id.* at 1526, 422 N.E.2d at 1340.

[26] *Id.*

[27] *Id.*

[28] *Id.*

[29] *Id.*

[30] *Id.*

[31] *Id.*

[32] *Id.*

[33] *Id.* The opinion describes Miles and Tompkins as submitting "a" dispute. *Id.* Whether that dispute concerned use of the property in question and the identity of the true pastor of Antioch, or some other issue, is not clear.

[34] *Id.* at 1527, 422 N.E.2d at 1340. The bishops also stated that Tompkins "agreed to lay no further claims to Antioch Temple." *Id.* It is not clear whether, in fact, Tompkins did so agree.

[35] *Id.*

[36] *Id.* Rule 53(e)(2) of the Massachusetts Rules of Civil Procedure provides that a party may file written objections to a master's findings and that such objections shall "clearly state the grounds for each objection." In addition, those findings are binding "unless clearly erroneous." *Id.*

[37] 1981 Mass. Adv. Sh. at 1527, 422 N.E.2d at 1340.

[38] *Id.*

[39] *Id.*

As noted by the Supreme Judicial Court, the first amendment to the United States Constitution does not altogether bar civil courts from adjudicating church property disputes.[40] Indeed, the United States Supreme Court has recognized that states have an obvious interest in providing a forum whereby churches and their members can seek a practical and conclusive resolution to their property claims.[41] Nevertheless, because the danger is real that the state may become emeshed in an essentially religious controversy, or, perhaps even effectively become the champion of a religious cause, the first amendment severely circumscribes the civil court's role in adjudicating religious property disputes.[42] If a civil court does exercise jurisdiction in such a case, the first amendment mandates that the decision not be founded on dogma or religious practice.[43]

An issue sometimes discussed in church property controversies, and accorded considerable weight in the instant case, was the fact question of whether the church structure was congregational or hierarchical.[44] Although neither conclusion is outcome determinative, as stated in *Antioch,* in controversies "involving hierarchical churches ... civil courts must tread more cautiously."[45] This is in recognition of the fact that such churches often have formal procedures and tribunals for resolving internal controversies.[46] This is not to suggest, however, that in property disputes

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[40] *Id.* at 1528-29, 422 N.E.2d at 1341 (citing Presbyterian Church v. Hull Church, 393 U.S. 440, 449 (1969)).

[41] Jones v. Wolf, 443 U.S. 595, 602 (1979).

[42] 1981 Mass. Adv. Sh. at 1528, 422 N.E.2d at 1341 (citing Presbyterian Church v. Hull Church, 393 U.S. 440, 449 (1969)). *See also* Serbian Orthodox Diocese v. Milivojevich, 426 U.S. 696, 698 (1976).

[43] 1981 Mass. Adv. Sh. at 1528, 422 N.E.2d at 1341 (citing Jones v. Wolf, 443 U.S. 595, 602 (1979) and Serbian Orthodox Diocese v. Milivojevich, 426 U.S. 696, 710 (1976)).

[44] 1981 Mass. Adv. Sh. at 1529, 422 N.E.2d at 1341. Wheeler v. Roman Catholic Archdiocese of Boston, 378 Mass. 58, 62 n.2, 389 N.E.2d 966, 968 n.2 (1979) states:

> There are at least three kinds of internal church structures, or polity, which may be discerned; congregational, presbyterial, and episcopal. In the congregational form, each local congregation is self-governing. The presbyterial polities are representative, authority being exercised by laymen and ministers organized in an ascending succession of judicatories—prebystery over the session of the local church, synod over presbytery, and general assembly over all. In the episcopal form power reposes in clerical superiors, such as bishops. Roughly presbyterial and episcopal polities may be considered hierarchical, as opposed to congregational polities, in which the autonomy of the local congregation is the central principle. Note, *Judicial Intervention in Disputes over the Use of Church Property,* 75 HARV. L. REV. 1142, 1143-44 (1962). Accordingly, whether or not a given church is hierarchical is a question of fact. *See* Kelley v. Riverside Boulevard Independent Church of God, 44 Ill. App. 3d 673 (1976); State ex rel. Morrow v. Hill, 51 Ohio St. 2d 74 (1977).

[45] 1981 Mass. Adv. Sh. at 1530, 422 N.E.2d at 1342 (citing Serbian Orthodox Diocese v. Milivojevich, 426 U.S. 696, 724 (1976)).

[46] *Id. see* Serbian Orthodox Diocese v. Milivojevich, 426 U.S. 696, 724 (1976).

civil courts always must accept as final, decisions from such judicatories. Indeed in *Jones v. Wolf,* the Supreme Court made it clear that state courts would not be so bound.[47] In any event, as noted by the Supreme Judicial Court, decisions of the authorized body of a Congregational church regarding property or related matters may be affirmed by civil courts.[48] Here, the master made no explicit finding regarding Antioch's structure.[49] Nevertheless, his general findings indicated, and the Supreme Judicial Court concluded, that Antioch was as Congregational church.[50] Because the master determined that the board was the duly authorized decision making body of the church, and because the board had removed Miles and elected Tompkins as pastor and president, the Supreme Judicial Court affirmed the lower court's judgment ordering Miles' removal from the property and declaring Tompkins to be Antioch's pastor and president.[51]

The Court submitted that even if Antioch were a hierarchical church, the result would be the same.[52] Although PCAF did not have a formal dispute resolution tribunal,[53] and, although *Wheeler v. Archdiocese of Boston*[54] left open the question of whether a civil court properly could exercise jurisdiction in a church property dispute involving a hierarchical church having no formal judicatory,[55] the Court emphasized that *Wheeler* was decided shortly before *Jones v. Wolf.*[56] In *Jones,* the Supreme Court made it clear that a state court was not necessarily bound by a hierarchical church's decision in such a property dispute case.[57] The Supreme Court emphasized that in adjudicating such controversies, a state can apply any one of several methods

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[47] 443 U.S. 595, 602 (1979).

[48] 1981 Mass. Adv. Sh. at 1529, 422 N.E.2d at 1341-42 (citing Maryland & Virginia Eldership of the Churches of God v. Church of God at Sharpsburg, 396 U.S. 367, 368 (1970)).

[49] 1981 Mass. Adv. Sh. at 1532, 422 N.E.2d at 1343.

[50] *Id.* By incorporating under chapter 180 of the Massachusetts General Laws, Antioch was not considered a subdivision of any other entity. Antioch's own by-laws empowered its board of directors to manage and control its affairs as well as to appoint and remove its officers or employees. In addition, nothing in the PCAF constitution established PCAF's dominance over member churches. Indeed, at a meeting in June, 1966, the issue of PCAF's authority over Antioch was discussed. The attorney who had organized Antioch explained to the board of directors and officers that pursuant to Massachusetts law, and Antioch's by-laws, the board, and not PCAF, had the authority to remove employees. A bishop from PCAF also present at that meeting, apparently disagreed with the attorney. *Id.* at 1525-26, 422 N.E.2d at 1339-40.

[51] *Id.* at 1535, 422 N.E.2d at 1344-45.

[52] *Id.* at 1535-37, 422 N.E.2d at 1345.

[53] *Id.* at 1535, 422 N.E.2d at 1345.

[54] 378 Mass. 58, 389 N.E.2d 966 (1979).

[55] *Id.* at 62 n.3, 389 N.E.2d at 968 n.3.

[56] 1981 Mass. Adv. Sh. at 1535, 422 N.E.2d at 1345. *Jones* was decided on July 2, 1979. *Wheeler* was decided on May 10, 1979.

[57] 443 U.S. at 602 (citing Serbian Orthodox Diocese v. Milivojevich, 426 U.S. 696, 724-25 (1976)).

"so long as it involves no consideration of doctrinal matters, whether the ritual and liturgy of worship or the tenets of faith."[58] Specifically approved in *Jones,*[59] and acknowledged in *Antioch,*[60] was the "neutral principles of laws" method.[61] If that method were applied here, the Court would analyze the pertinent sections of chapter 180 of the Massachusetts General Laws, the constitutions and by-laws of PACF and Antioch as they relate to ownership, control and use of property and the deed to the property itself.[62] Moreover, as stated by the Chief Justice "even were we to hold that Antioch is part of a hierarchical church whose highest tribunal ruled on the dispute (by granting Miles the control and use of the . . . property), the First Amendment would not command us to accept that ruling."[63]

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[58] 443 U.S. at 602 (quoting Maryland & Virginia Churches v. Sharpsburg Church, 396 U.S. 367, 368 (1970)).

[59] 443 U.S. at 603.

[60] 1981 Mass. Adv. Sh. at 1535-37, 422 N.E.2d at 1345.

[61] The neutral principles of law method was first alluded to in a decision authored by Justice Brennan when he remarked that "there are neutral principles of law, developed for use in all property disputes, which can be applied without establishing churches to which property is awarded." Presbyterian Church v. Hull Church, 393 U.S. 440, 449 (1969). *See also* Maryland & Virginia Churches v. Sharpsburg Church, 396 U.S. 367, 368-70 (1970). In describing this method in Jones v. Wolf, Mr. Justice Blackman stated:

> The primary advantages of the neutral-principles approach are that it is completely secular in operation, and yet flexible enough to accommodate all forms of religious organization and polity. The method relies exclusively on objective, well-established concepts of trust and property law familiar to lawyers and judges. It thereby promises to free civil courts completely from entaglement in questions of religious doctrine, polity, and practice. Furthermore, the neutral-principles analysis shares the peculiar genius of private-law systems in general—Flexibility in ordering private rights and obligations to reflect the intentions of the parties. Through appropriate reversionary clauses and trust provisions religious societies can specify what is to happen to church property in the event of a particular contingency, or what religious body will determine the ownership in the event of a schism or doctrinal controversy. In this manner, a religious organization can ensure that a dispute over the ownership of church property will be resolved in accord with the desires of the members.

443 U.S. at 603-04.

[62] 1981 Mass. Adv. Sh. at 1537, 422 N.E.2d at 1346. As noted by the Court, pursuant to section six of chapter 180 of the Massachusetts General Laws, Antioch was entitled to hold and convey property provided the property was used for the religious purposes set out in the articles of organization. Pursuant to Antioch's by-laws, its board of directors was responsible for operating the church. Nothing in PCAF's articles of organization indicated that property held by a church which later repudiated its membership would revert to PCAF. No evidence was adduced which suggested that legal title to the property was in anyone other than Antioch. *Id.*

[63] *Id.* As mentioned in *supra* note 3, the dispute perhaps goes beyond mere ownership and control of property. Miles, Tompkins and Antioch also were at odds as to who was the true pastor and president. The master found that it was Tompkins. *Id.* at 1527, 422 N.E.2d at 1340. This finding was adopted and confirmed by the Superior Court. Apparently, however, in 1972, when both Miles and Tompkins submitted "a" dispute to PCAF, PCAF ruled that Miles was Antioch's pastor and president. *Id.* If this is an ecclesiastical question, and if PCAF is a hier-

§ 12.3. Political Rights—Independent Candidates. In *Bachrach v. Secretary of the Commonwealth,*[1] a case raising an issue never before decided, the Court concluded that legislation affecting Independent candidates for political office by regulating the use of political designations on the ballot and on nomination papers violated provisions of the Massachusetts Declaration of Rights and the United States Constitution.[2]

The instant legislation was enacted in 1979.[3] Prior to its enactment, candidates, not nominated by a political party,[4] and seeking office such as state senator, could choose, with some limitations, a desired political designation to appear on his or her nomination papers and on the ballot.[5] The designation could not exceed three words and no one word could refer to an existing political party.[6] Obviously then, under prior law, candidates wishing to designate themselves as Independents could do so. Chapter 745 of the 1979 Acts and Resolves changed this.[7] The word "Independent" was pro-

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archical church, and, if, in fact, this question was decided at the 1972 meeting, its resolution would be beyond the jurisdiction of the Massachusetts' courts. *See* Jones v. Wolf, 443 U.S. 595, 602 (1979). Indeed, the facts in *Jones* are remarkably similar. Each of the two rival factions of a church, which was part of a hierarchical structure, claimed to be the true representative of the local church and thereby entitled to use and enjoy the church property. *Id.* at 598. The hierarchical tribunal ruled in favor of the minority group. *Id.* The state court ruled in favor of the majority without indicating the reasons for its ruling. *Id.* at 599. The minority claimed this issue was beyond the jurisdiction of the court. *Id.* at 607. In remanding the case to the state court for further consideration on this issue, the Supreme Court noted the possible validity of the minority's claim. *Id.* at 608-10. If the state court reached its decision pursuant to a purely secular rule such as a presumption of majority rule, then its decision would stand. *Id.* If, however, its decision required it to examine religious doctrine, polity or practice then its ruling would be without force. *Id.* at 607-610.

§ 12.3. [1] 1981 Mass. Adv. Sh. 93, 415 N.E.2d 832.

[2] *Id.* at 93-103, 415 N.E.2d at 837-39. Rights guaranteed under the first and fourteenth amendments to the United States Constitution, and articles 1 and 16 of the Massachusetts Declaration of Rights were implicated. *Id.* For the text of these provisions *see infra* note 32.

[3] 1979 Mass. Acts c. 745. The Court focused primarily on sections 2 and 7 of chapter 745. These sections amended G.L. c. 53, § 8 and G.L. c. 54, § 41. *See infra* note 7.

[4] Political Party is defined in G.L. c. 50, § 1 as an organization whose candidate for Governor received at least 3 percent of the vote for that office in the previous statewide election and which has not been adjudicated subversive under G.L. c. 264, § 18.

[5] G.L. c. 53, § 8 describes the information permitted to be printed on nomination papers. Prior to 1979, the word "Independent" was permitted. G.L. c. 54, § 41 provides for the information contained on the ballot. Again, prior law permitted the designation "Independent."

[6] G.L. c. 53, § 8.

[7] Section 2 of chapter 745 amended G.L. c. 53, § 8 in pertinent part as follows:

> All certificates of nomination and nomination papers shall, specify as to each, (1) his residence, with street and number, if any, (2) the office for which he is nominated, and (3) except as otherwise provided in this section and except for city and town elections which are not preceded by primaries or political party caucuses, the political designation, if any, which he represents, expressed in not more than three words; provided, however, that the designation "Independent" shall not be used.

hibited from appearing on both the nomination papers and the ballot.[8] Moreover, if a candidate failed to indicate a permissible designation, the word "Unenrolled" would be placed on the ballot.[9]

George Bachrach, a one time Democrat who no longer sympathized with that party's philosophies or ideologies, initiated this action in the Supreme Judicial Court seeking declaratory and injunctive relief.[10] A single justice granted Bachrach's motion for summary judgment and then reported the case to the full court.[11] During his 1980 campaign for the state senate, Mr. Bachrach described himself as an Independent/Democrat or simply as an Independent. The Secretary of State's Office informed him that this description was impermissible and that if he failed to choose an appropriate designation, the word "Unenrolled" would appear on the ballot.[12]

The Court noted that the Commonwealth has some discretion regarding the nature and the scope of information contained on the ballot.[13] Indeed, Justice Kaplan, writing for the majority, indicated that a state perhaps could place no information at all on the ballot regarding political affiliation.[14] Rather, responsibility for educating the electorate on that issue possibly could be left to the candidate and to the people themselves.[15] Here, of course, the legislation was struck down. Although the Court could not find any case precisely on point, it cited several decisions involving similar facts.[16] In each case the reviewing court had applied a rigorous standard of

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Section 7 of chapter 745 amended G.L. c. 54, § 41, in pertinent part, as follows:

> To the name of each candidate for a state or city office, except for city elections, which are not preceded by primaries, shall be added in the same space his party or political designation; provided, however, that the designation shall not include the term "Independent". Failure to make a political designation shall result in the term "Unenrolled" being used.

[8] 1979 Mass. Acts. c. 745.

[9] 1979 Mass. Acts c. 745, § 2 (amending G.L. c. 54, § 41).

[10] *Id.* at 93, 415 N.E.2d at 832. G.L. c. 231A, § 1 authorizes the Supreme Judicial Court to issue declaratory judgments. General equity jurisdiction is conferred on the Court pursuant to chapter 214, section 1.

[11] 1981 Mass. Adv. Sh. at 93, 415 N.E.2d at 833.

[12] 1981 Mass. Adv. Sh. at 95-96, 415 N.E.2d at 834.

[13] 1981 Mass. Adv. Sh. at 98, 415 N.E.2d at 835 (*citing* Opinion of the Justices, 368 Mass. 819, 821, 333 N.E.2d 380, 382 (1975)).

[14] *Id.*

[15] *Id.*; *see* Libertarian Party of California v. Eu, 102 Cal. App.3d 446, 455, 162 Cal. Rptr. 381, 386 (1980).

[16] In Libertarian Party of California v. Eu, 102 Cal. App.3d 446, 162 Cal. Rptr. 381 (1980), the court of appeal held unconstitutional a statute which, in certain instances, mandated that the word "Independent" appear on the ballot opposite an candidate's name instead of that candidate's desired political designation. If a candidate qualified to be placed on the ballot via participation in a statewide primary, then the name of that candidate's political party would appear on the ballot. If, however, the candidate qualified by virtue of the state's petitions procedure, then the word "Independent" would appear. The court concluded that this statutory

review.[17] The Supreme Judicial Court agreed that since the legislation affected constitutional rights, strict scrutiny was appropriate.[18] The state argued that the legislation was designed to achieve a compelling interest, to wit, prevention of voter confusion as to candidates' true political beliefs.[19] The parties, in fact, had stipulated that the designation "Independent" did

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classification impaired the exercise of the fundamental rights of freedom of association and equal participation in the electoral process and thereby violated the guarantee of equal protection. *Id.* at 457-58, 162 Cal. Rptr. at 387-88.

In Minnesota Fifth Cong. Dist. Independent-Republican Party v. Minn. *ex rel.* Spannaus, 295 N.W.2d 650 (Minn. 1980), a law requiring Independent candidates to execute an affidavit stating that he or she did not seek, and would not seek or accept, any political party's support in the forthcoming election was struck down as violating the first amendment rights of freedom of expression and association. *Id.* at 655.

Ridell v. National Democratic Party, 508 F.2d 770 (5th Cir. 1975) considered the constitutionality of a Mississippi law granting the exclusive right to use the name of a political party to the group who first registered the name. A dispute arose between two rival factions of the Democratic Party; each claiming to be the true representatives of that party. The lower court ruled that the faction first registering the name "Democratic" had the right to use that description. The court of appeals concluded that the statute impermissibly interfered with freedom of association and therefore violated the fourteenth amendment to the United States Constitution. *Id.* at 779.

[17] The courts in all three decisions referred to in *supra* note 16, concluded that the statutes in question touched upon fundamental rights and therefore applied strict scrutiny. In Libertarian Party of Calfornia v. Eu, 102 Cal. App.3d at 456, 162 Cal. Rptr. at 386, the court agreed that regulating the number of candidates on the ballot was a compelling interest. Nevertheless, the court refused to accept the state's assertion that this, in fact, was the purpose of the statute. The court next suggested that the state's interests in preventing a candidate from misrepresenting his or her status as a nominee of non-qualified parties, and "maintaining the stability of its political system by preventing unrestrained proliferation of parties", could be compelling. However, because the instant statute was not the least restrictive means of achieving these interests, the court refused to uphold it. *Id.* at 458, 162 Cal. Rptr. at 387.

In Minnesota Fifth Cong. Dist. Independent Republican Party v. Minn. *ex rel.* Spannaus, 295 N.W.2d at 635, the court accepted the state's interest in ensuring the bona fides of a candidate's claim to be "Independent" as compelling. The court concluded that this was not the actual purpose of the law, and that, in any event, there would be other, less drastic methods of achieving that goal. *Id.* at 654.

Preventing voter confusion was the asserted state interest in Riddell v. National Democratic Party, 508 F.2d at 777. The court is unclear as to whether that interest was compelling. Even if it were, however, it would not have survived the rigors of strict scrutiny since the court did conclude that the legislation was not the least restrictive means of realizing that end. *Id.* at 778.

[18] 1981 Mass. Adv. Sh. at 101, 415 N.E.2d at 836. Although the Court agreed that strict scrunity was appropriate, seemingly, that formulation is not as rigidly applied by the Supreme Judicial Court as it is by the United States Supreme Court. *Id.* at 101 n.18, 415 N.E.2d at 837 n.18. *See* Marcoux v. Attorney General, 375 Mass. 63, 65 n.4, 375 N.E.2d 688, 689 n.4 (1978). *See also* Moe v. Secretary of Administration and Finance, 1981 Mass. Adv. Sh. 48, 49, 417 N.E.2d 387, 388 (1981). For a discussion regarding the Supreme Judicial Court's perspective on strict scrutiny *see supra* note 76, § 2.1, and accompanying text.

[19] 1981 Mass. Adv. Sh. at 102, 415 N.E.2d at 837.

not evoke a consistent or clear meaning in voters' minds.[20] Apparently some people associated the label with generally conservative ideas while others believed it denoted generally liberal views. However, the parties also had stipulated that the description "Citizens Party," which was to appear on the November 1980 ballot, likewise generated no consistent meaning.[21] Thus, although the Court was willing to assume *arguendo* that prevention of voter confusion perhaps could constitute a compelling interest, that, in fact, was not the true purpose of this legislation. The state also contended that the instant provisions were intended to prevent Independents from realizing an unfair advantage over other candidates.[22] Again, the parties had stipulated that the description "Independent," although perhaps creating inconsistent ideas in voters' minds, did generate an overall favorable impression.[23] This objective, like prevention of confusion, was rejected as not representing the real purpose of the statute.[24] Indeed, Justice Kaplan suggested that the provision well may have been intended to further insulate the reigning political parties from criticism.[25] Even if preventing unfair advantage were compelling, an assumption incidentally not made by the Court, it, like prevention of confusion, would have failed the means portion of the strict scrutiny formulation.[26] Although not expressly stated by the Court, other less restrictive methods could have been used to achieve that statutory purpose.[27]

Viewed most simply, the legislation, in effect, prevented all candidates from formally using the word "Independent". According to the Court, this was analogous to a state prohibiting a candidate from discussing a particular topic during a campaign.[28] Thus, the Court concluded, the legisla-

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[20] *Id.* at 96-97, 415 N.E.2d at 834.

[21] *Id.* at 97, 415 N.E.2d at 834. Also to appear on the ballot were the designations "Against Politician's Raise" and "The Anderson Coalition". *Id.*

[22] 1981 Mass. Adv. Sh. at 102, 415 N.E.2d at 836.

[23] *Id.* at 97, 415 N.E.2d at 834. The Court also noted that the term "Unenrolled" well might cause a negative reaction with voters. *Id.*

[24] *Id.* at 102-103, 415 N.E.2d at 837.

[25] *Id.* at 106, 415 N.E.2d at 839 (*citing* Cox, *The Supreme Court 1979 Term Forward: Freedom of Expression in the Burger Court,* 94 HARV. L. REV. 1, 67 (1980)).

[26] 1981 Mass. Adv. Sh. at 103, 415 N.E.2d at 836.

[27] *Id.* The Commonwealth seemed to concede that other permitted designations were as confusing as "Independent". *Id.* Nevertheless, it asserted, because the legislation was designed to deal with the issue of voter confusion, the legislature should be permitted to proceed one step at a time in addressing that problem. *Id.* at 103, 415 N.E.2d at 837. This argument was rejected because, as noted by the Court, the legislation touched on fundamental rights. *Id.* at 102-03, 415 N.E.2d at 836-37. However, the Supreme Court has often stated that when a nonfundamental right is infringed and hence, the normal rational basis standard of review is applied, the legislation need not be precisely tailored. *See, e.g.,* Williamson v. Lee Optical Co., 348 U.S. 483 (1955).

[28] 1981 Mass. Adv. Sh. at 99, 415 N.E.2d at 836; *cf.* Consolidated Edison Co. of New York

tion impaired freedom of expression.[29] In addition, the provisions impaired the ability of candidates, and their supporters, to organize and associate for political purposes, thereby burdening freedom of association.[30] This legislation was particulary egregious, as noted by the Court, because not only did it curtail the exercise of constitutional rights, but also, it did so in a discriminatory fashion.[31] The Commonwealth generally allowed candidates to select their desired political designation. Only those candidates wishing to identify themselves as Independents were singled out for special treatment. Thus, the Court concluded the provisions violated the fourteenth amendment to the United States Constitution as well as Articles 1 and 16 of the Massachusetts Declaration of Rights.[32]

§ 12.4. Seizure of the MBTA—Separation of Powers/Inherent Authority of the Governor. In *Massachusetts Bay Transportation Authority Advisory Board v. Massachusetts Bay Transportation Authority,*[1] the Court considered the legality of Governor Edward King's seizure of the MBTA in November 1980.

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v. Public Service Comm'n of New York, 447 U.S. 530, 537-40 (1980) (public service commission's prohibition against utility companies' insertion of controversial information with monthly bill violated first amendment).

[29] 1981 Mass. Adv. Sh. at 99-100, 415 N.E.2d at 836.

[30] *Id.* at 100-101, 415 N.E.2d at 836.

[31] *Id.* at 101, 415 N.E.2d at 386.

[32] *Id.* at 93-103, 415 N.E.2d at 837-39. Article 1 of the Massachusetts Constitution provides:

> All people are born free and equal and have certain natural, essential and unalienable rights; among which may be reckoned the right of enjoying and defending their lives and liberties; that of acquiring, possessing and protecting property; in fine, that of seeking and obtaining their safety and happiness. Equality under the law shall not be denied or abridged because of sex, race, color, creed or national origin.

Article 16 of the Massachusetts Constitution provides:

> The liberty of the press is essential to the security of freedom in a state: it ought not, therefore, to be restrained in this commonwealth. The right of free speech shall not be abridged.

The Court never decided whether Article 9 of the Massachusetts Constitution also was violated. *Id.* at 99 n.12, 415 N.E.2d at 835 n.12. Article 9 provides that "All elections ought to be free; and all the inhabitants of this commonwealth, having such qualifications as they shall establish by their frame of government, have an equal right to elect officers, and to be elected, for public employments." The fourteenth amendment to the United States Constitution provides in pertinent part: "[N]or shall any state ... deny to any person within its jurisdiction the equal protection of the laws." The Court expressed no opinion as to whether chapter 745 also violated due process. However, because the Court concluded that it impaired rights protected by the first amendment, and because the first amendment is incorporated into the fourteenth amendment, presumably the legislation violated the constitutional guarantee of due process. *See* Gitlow v. New York, 268 U.S. 652 (1925).

§ 12.4. [1] 1981 Mass. Adv. Sh. 403, 417 N.E.2d 7.

The MBTA Advisory Board[2] authorized a budget for the MBTA's 1980 operating year for an amount slighty in excess of $302,130,000.[3] However, in August of 1980 it became apparent that operating costs would exceed that amount and, therefore, the Board of Directors[4] of the MBTA requested that the Advisory Board approve a supplemental budget approaching $41,000,000.[5] This request was denied.[6] On October 31, 1980, the Advisory Board initiated the instant proceeding seeking declaratory and injunctive relief designed to prevent the MBTA from expending beyond its initially authorized budget.[7] On November 10, 1980, a superior court judge issued a

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[2] G.L. c. 161A, § 7 provides in part:
There shall be an advisory board to the authority consisting of the city manager in the case of a Plan D or E city or the mayor of each other city, and the chairman of the board of selectmen of each town, constituting the authority. Each mayor or city manager and each chairman may, by writing filed with the authority, from time to time appoint a designee to act for him on the advisory board or to act for him in exercising the powers of the sixty-four cities and towns or of the fourteen cities and towns under section six. Each city and each town shall have one vote on the advisory board plus additional votes and fractions thereof determined by multiplying one and one half times the total number of cities and towns in the authority by a fraction of which the numerator shall be the total amount of all assessments made by the state treasurer to such city or town under this chapter and the denominator shall be the total amount of all assessments made by the state treasurer to all such cities and towns.

[3] G.L. c. 161A, § 5(i) provides in pertinent part:
(i) All current expenses of the authority shall be in accordance with an itemized budget. The authority, in consultation with the secretary and the advisory board, shall prepare said budget and shall submit it to the secretary and the advisory board not later than October first of each year for the ensuing calendar year. The secretary shall review and make recommendations regarding said budget within thirty days after submission. Within ninety days after such submission, the advisory board shall approve said budget as submitted or subject it to such itemized reductions therein as the advisory board shall deem appropriate. The budget shall govern the current expenses of the authority during such calendar year. No such expenses may be incurred in excess of those shown in the budget, but the budget may from time to time be amended by the preparation and submission by the authority to the advisory board and the secretary of supplements thereto. The secretary shall review and make recommendations regarding said supplementary budget within fifteen days after its submission. The advisory board shall within thirty days after submission to it approve or reduce any such supplementary budget as provided above.

[4] G.L. c. 161A § 6 provides in part:
The authority shall be managed by a board of seven directors, called the directors, one of whom shall be the secretary, who shall be the chairman and shall not be compensated therefor, six of whom shall be appointed by the governor and who shall serve coterminous with the governor, one with the approval of the advisory board, one with the approval of the fourteen cities and towns, and one with the approval of the sixty-four cities and towns.

[5] 1981 Mass. Adv. Sh. at 406, 417 N.E.2d at 10.

[6] *Id.* at 406-07, 417 N.E.2d at 10.

[7] *Id.* at 404, 417 N.E.2d at 9.

preliminary injunction enjoining certain of the then named defendants from certifying, charging, authorizing or expending any amount beyond the originally approved budget.[8] On November 16, 1980, the Advisory Board convened but again refused to authorize any additional expenditures.[9] The following day, November 17, the legislature convened in special session but failed to take any action.[10] On November 18, Governor King issued Executive Order 189 declaring the existence of an emergency and seizing con-

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The annual deficit of the MBTA, referred to as the net cost of service, is defined in G.L. c. 161A, § 1 as, in essence, the difference between income from sources including operations and state and federal assistance and expenses not constituting capitalized expenditures. As provided in section 12 of chapter 161A, the MBTA certifies the net cost of service to the Treasurer and Receiver General. The seventy-nine cities and towns within the MBTA district are then assessed, pursuant to formulas set out in sections 8-11, their allocable share of the net cost of service. The superior court judge indicated that it was highly unlikely that the cities and towns improperly assessed for costs incurred under Executive Order 189 could recover those costs. 1981 Mass. Adv. Sh. at 407, 417 N.E.2d at 10.

In Massachusetts Bay Transportation Authority Advisory Board v. The Governor, 1981 Mass. Adv. Sh. 549, 417 N.E.2d 419, the Advisory Board, as well as certain cities and towns within the MBTA district, sought to prevent assessment of nearly $12,000,000 in costs incurred under Executive Order 172. The facts giving rise to that order were similar to those involving Executive Order 189. In July 1979, the Advisory Board approved a supplemental budget of approximately $11,000,000. However, it stated that no further increases would be forthcoming and no cuts in service would be permitted. By mid-December 1979 operating costs reached the budget ceiling. The Board of Directors of the MBTA thereupon voted to shut down the system on December 18. On that same day Governor King issued Executive Order 172 calling for the continued operation of the MBTA for the remainder of the year. The Supreme Judicial Court noted that Executive Order 172 was beyond the powers of the Governor and therefore of no force or effect. The Court acknowledged that "[f]or purposes of the present case we accept the plaintiffs' contention that, in the absence of legislative action, the expenditures of nearly $12 million pursuant to Executive Order 172 was not part of the net cost of service to be assessed to the cities and towns in the MBTA district...." *Id.* at 552, 417 N.E.2d at 421. Nevertheless, the Court refused to enjoin assessment because in 1980 the legislature appropriated additional funds to reduce the 1979 net cost of service. The Court concluded that the practical effect of the legislative action was a ratification of Executive Order 172. *Id.* at 553-54, 417 N.E.2d at 422.

[8] 1981 Mass. Adv. Sh. at 404-05, 417 N.E.2d at 9. The original defendants were the MBTA, its Board of Directors and Controller, Barry Locke and the Treasurer and Receiver General of the Commonwealth. The injunction prohibited the defendants, other than the Treasurer and Receiver General, against whom the injunction was not directed, from "(1) certifying or charging to the Treasurer and Receiver General any sums attributable to the MBTA net cost of service which derived from expenditures in excess of $302,130,152, and (2) expending or authorizing expenditures attributable to MBTA operations during the calendar year 1980 in excess of $302,130,152." *Id.* at 405, 417 N.E.2d at 9. Part 2 of the injunction was stayed until November 30, 1980.

[9] 1981 Mass. Adv. Sh. at 405, 417 N.E.2d at 9.

[10] *Id.*

trol of MBTA operations.[11] The Advisory Board promptly amended its complaint and named Governor King as an additional defendant.[12]

The Governor claimed both statutory and constitutional authority in support of the takeover.[13] Citing chapter 161A, § 20 as his principal source of statutory authority the Governor noted that he is empowered to take control of the MBTA in certain emergency situations.[14] However, as indicated by the Court, that provision applies only when a slowdown, interruption or stoppage of service occurs after the issuance of, and in violation of, an

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[11] *Id.* at 404, 417 N.E.2d at 9. Pursuant to that Order, authority for running the system was placed with the Board of Directors. Pursuant to G.L. c. 161A, § 6 the MBTA is managed by the seven members of its Board of Directors.

[12] 1981 Mass. Adv. Sh. at 405, 417 N.E.2d at 9. The Governor claimed that neither injunctive nor declaratory relief was appropriate. With regard to injunctive relief he cited Rice v. Governor, 207 Mass. 577, 579, 93 N.E. 821, 823 (1911) for the proposition that mandamus is inapplicable against the Governor with respect to performance of his official duties. The Supreme Judicial Court noted that injunctive relief had not been granted with respect to Executive Order 189. 1981 Mass. Adv. Sh. at 408, 417 N.E.2d at 11. The Governor also indicated that G.L. c. 231A, § 2 which concerns controversies to which declaratory relief is applicable, provides that "this section shall not apply to the governor ...." The Court pointed out that, consistent with chapter 231A, § 2, declaratory relief may be denied if such relief "would not terminate the uncertainty or controversy giving rise to the proceedings." 1981 Mass. Adv. Sh. at 408, 417 N.E.2d at 11. After concluding that the lower court's "preliminary declaration" was inappropriate, the Court stated that it would treat the plaintiffs' request for declaratory relief as a motion for partial summary judgment. *Id.* at 409, 417 N.E.2d at 11.

[13] 1981 Mass. Adv. Sh. at 410-13, 417 N.E.2d at 12-13.

[14] *Id.* at 410-12, 417 N.E.2d at 12-13. G.L. c. 161A, § 20 provides:

> Notwithstanding any contrary provision of law, whenever there exists a continued interruption, stoppage or slowdown of transportation of passengers on any vehicle or line of the authority or a strike causing the same, and which is in violation of an injunction, a temporary injunction, a restraining order, or other order of a court of competent jurisdiction, and which threatens the availability of essential services of transportation to such an extent as to endanger the health, safety or welfare of the community, the governor may declare that an emergency exists. During such emergency he may take possession of, and operate in whole or in part, the lines and facilities of the authority in order to safeguard the public health, safety and welfare. Such power and authority may be exercised through any department or agency of the commonwealth or through any person or persons and with the assistance of such public or private instrumentalities as may be designated by him. Such lines and facilities shall be operated for the account of the authority. The powers hereby granted to the governor shall expire forty-five days after his proclamation that state of emergency exists.

As an additional source of statutory authority, the Governor cited chapter 639 of the 1950 Acts and Resolves, as amended by chapter 425, § 1 of the 1958 Acts and Resolves. *Id.* at 412, 417 N.E.2d at 13. This legislation, often referred to as the civil defense statute, is entitled "[a]n Act authorizing the governor to deal with the threat of danger by drought." It provides, in pertinent part, that "whenever because of absence of rainfall or other cause a condition exists in all or any part of the commonwealth where it may reasonably be anticipated that the health, safety or property of the citizens thereof will be endangered because of fire or shortage of food" the Governor may declare an emergency. The Court quickly concluded that a financial dispute did not constitute "[an]other cause." *Id.*

existing court order.[15] Because the present case involved no such order, that statute was inapplicable.

The Governor further contended that, as the Commonwealth's chief executive, he possessed inherent authority for dealing with emergencies such as an imminent MBTA shutdown.[16] The Court acknowledged that although the Governor indeed has incidental powers necessary to discharge his principal constitutional role of "chief executive magistrate,"[17] here he exceeded those powers[18] and, in so doing, violated the principle of separation of powers. Pursuant to chapter 161A, § 5(i), "[a]ll current expenses of the authority shall be in accordance with an itemized budget .... The budget shall govern the current expenses of the authority during such calendar year. No such expenses may be incurred in excess of those shown in the budget."[19] Moreover, article 20 of the Massachusetts Declaration of Rights clearly designates the legislature as the only branch having the power to suspend execution of any law.[20] By authorizing an additional $41,000,000 to the MBTA's 1980 budget, not only did Governor King suspend chapter 161A, § 5(i), a clear violation of article 20, but also, in effect, he appropriated funds, a function clearly relegated to the legislature.[21]

The Court acknowledged the difficult situation confronting the Governor.[22] The Advisory Board had refused to authorize a supplemental budget. The legislature had convened but failed to resolve the problem. A shutdown of service could well endanger the safety and welfare of the citizens of the

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[15] *Id.*

[16] *Id.*

[17] *Id.* MASS. CONST., Part II, c. 2, § 1, Art. 1 provides that "[t]here shall be a supreme executive magistrate, who shall be styled, the Governor of the Commonwealth of Massachusetts, and whose title shall be—His Excellency."

The Executive is not the only branch possessing inherent powers. Both the legislature and the judiciary possess such power. *See, e.g.,* Attorney General v. Brissenden, 271 Mass. 172, 177, 171 N.E. 82, 86 (1930) (legislature); O'Coins, Inc. v. Treasurer, 362 Mass. 507, 409-10, 287 N.E.2d 608, 611 (1972) (judiciary).

[18] 1981 Mass. Adv. Sh. at 412, 417 N.E.2d at 13. MASS. CONST. Part I. Art. 30 provides:

> In the government of this commonwealth, the legislative department shall never exercise the executive and judicial powers, or either of them: the executive shall never exercise the legislative and judicial powers, or either of them: the judicial shall never exercise the legislative and executive powers, or either of them: to the end it may be a government of laws and not of men.

[19] G.L. c. 161A, § 5(i).

[20] MASS. CONST. Part I, Art. 20 provides:

> "The power of suspending the laws, or the execution of the laws, ought never to be exercised but by the legislature, or by authority derived from it, to be exercised in such particular cases only as the legislature shall expressly provide for."

[21] *See, e.g.,* Opinion of the Justices, 375 Mass. 827, 833, 376 N.E.2d 1217, 1222 (1978); Baker v. Commonwealth, 312 Mass. 490, 493, 45 N.E.2d 470, 472 (1942); Opinion of the Justices, 302 Mass. 605, 614, 19 N.E.2d 807, 813 (1939).

[22] 1981 Mass. Adv. Sh. at 413, 417 N.E.2d at 13.

Commonwealth by causing traffic congestion and thereby impair access of fire, police and other emergency personnel. The Court finally concluded that the Governor could operate the MBTA until 12 p.m. December 5, 1981, the date by which the majority of the Court felt the legislature reasonably could be expected to have convened.[23]

The Court did not clearly state the source of power permitting the Governor to operate the MBTA for that limited period. It is clear that the Governor could not authorize the additional $41,000,000, for that would result in an obvious violation of the principle of separation of powers. Yet the mere operation of the MBTA for the limited period would cause an expenditure of funds over the originally approved budget. Apparently the Court concluded that the Governor had implied power to deal with the emergency until the appropriate branch of government could convene and consider the problem. It is unfortunate that the Court did not explain this issue more clearly.

§ 12.5. First Amendment — Public Access to Criminal Trials. In *Globe Newspaper Co. v. Superior Court*[1] *(Globe II)*,[2] a case on remand from the United States Supreme Court,[3] the Supreme Judicial Court considered whether Massachusetts General Laws, chapter 278, section 16A,[4] which mandates closing a trial during the testimony of a minor victim to a sex crime, violated the first amendment to the United States Constitution.[5]

The instant case arose out of a case prosecuted in Norfolk County in which the defendant was charged with forcible rape and forced unnatural rape.[6] The three complaining female witnesses were minors.[7] The superior court judge ordered all preliminary hearings, as well as the trial itself, closed

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[23] *Id.* at 404, 413, 417 N.E.2d at 9, 14.

§ 12.5. [1] 1981 Mass. Adv. Sh. 1493, 423 N.E.2d 773.

[2] The designation, *Globe I,* refers to the initial case on appeal to the Supreme Judicial Court. Globe Newspaper Co. v. Superior Court, 379 Mass. 846, 401 N.E.2d 360 (1980). *Globe II* refers to the instant case, *i.e.,* the case on remand to the Supreme Judicial Court from the United States Supreme Court. *See supra* note 1.

[3] 449 U.S. 890 (1982).

[4] G.L. c. 278, § 16A provides in pertinent part:

> At the trial of a complaint or indictment for rape, incest, carnal abuse or other crime involving sex, where a minor under eighteen years of age is the person upon, with or against whom the crime is alleged to have been committed ... the presiding justice shall exclude the general public from the courtroom, admitting only such persons as may have a direct interest in the case.

[5] U.S. CONST. amend. I provides in pertinent part that "Congress shall make no law ... abridging the freedom of speech, or of the press; or the right of the people to peaceably assemble ..."

[6] Commonwealth v. Aladjem, Norfolk Superior Court No. 73102-9.

[7] 1981 Mass. Adv. Sh. at 1494, 423 N.E.2d at 774.

to the public and press.[8] The Boston Globe filed motions with the court requesting that the closure order be rescinded and that it (Globe) be allowed to intervene for the purpose of asserting its right of access.[9] Relying on section 16A, the court denied the Globe's motions.[10] Pursuant to Massachusetts General Laws, chapter 211, section 3,[11] the Globe then sought injunctive relief from a single justice of the Supreme Judicial Court.[12] This was denied.[13] Thereupon the Globe appealed to the full court (*Globe I*).[14]

Because the criminal trial had long since ended in acquittal by the time the case was decided on appeal,[15] the Court considered the case moot.[16] Nevertheless, since the issue was "significant and troublesome [yet] capable of repetition [but] evading review,"[17] the Court proceeded to the merits. Although it eschewed any consideration of the constitutional questions raised by the Globe,[18] the Court did construe section 16A and concluded

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[8] *Id.* at 1494, 423 N.E.2d at 774; 379 Mass. at 848, 401 N.E.2d at 363. Court personnel were instructed not to permit anyone to enter the courtroom. In addition, a sign indicating that the room was closed was placed on the courtroom door. *Id.* at 848, 401 N.E.2d at 363.

[9] 1981 Mass. Adv. Sh. at 1494, 423 N.E.2d at 774. The Globe filed a motion to intervene, a motion for a hearing and a motion to revoke the order barring the press from attending the proceeding. 379 Mass. at 847, 401 N.E.2d at 362.

[10] 1981 Mass. Adv. Sh. at 1494, 423 N.E.2d at 774.

[11] G.L. c. 211, § 3 provides in pertinent part:

> [t]he justices of the supreme judicial court shall also have general superintendence of the administration of all courts of inferior jurisdiction, including, without limitation, the prompt hearing and disposition of matters pending therein,... and it may issue such writs, summonses and other processes and such orders, directions and rules as may be necessary or desirable for the furtherance of justice, the regular execution of the laws, the improvement of the administration of such courts, and the securing of their proper and efficient administration.

[12] 1981 Mass. Adv. Sh. at 1495, 423 N.E.2d at 774-75. Specifically, the Globe requested "a temporary restraining order and permanent injunction ordering the judge to permit members of the press to attend the trial and related proceedings." 379 Mass. at 847, 401 N.E.2d at 362.

[13] 1981 Mass. Adv. Sh. at 1494 n.2, 423 N.E.2d at 774 n.2.

[14] *See supra* note 2.

[15] Judgment of acquittal was entered on May 7, 1979. *Globe I* was argued on October 9, 1979 and decided on February 26, 1980.

[16] 1981 Mass. Adv. Sh. at 1495, 423 N.E.2d at 775.

[17] 379 Mass. at 848, 401 N.E.2d at 362 (*quoting* Southern Pac. Terminal Co. v. ICC, 219 U.S. 498, 515 (1911)).

[18] 1981 Mass. Adv. Sh. at 1495, 423 N.E.2d at 775. The Court refrained from considering the constitutional questions for several reasons. Although Richmond Newspapers, Inc. v. Virginia, 448 U.S. 555 (1980), already had been argued before the United States Supreme Court, a decision had not yet been rendered. 379 Mass. at 854, 401 N.E.2d at 366. In addition, the Supreme Judicial Court felt that the case could properly be disposed of on statutory grounds. *Id.* at 854, 401 N.E.2d at 366. Finally, the Court speculated that its decision, even though based on non-constitutional grounds, would closely approximate a decision grounded on the constitution. *Id.* at 855, 401 N.E.2d at 366. The Court so speculated because section 16A was

that closure was required only during that portion of the trial during which the minor victim testifies.[19] The Court went on to note, however, that the trial judge, in exercising discretion, and, after having accorded all affected parties an opportunity to be heard, may remove all persons, including the press, from any other portion of the trial.[20]

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determined by the Court to be in derogation of the common law history of open criminal trials. A familiar rule of statutory construction provides that such statutes are to be strictly construed. *Id.* at 853, 401 N.E.2d at 366 (citations ommitted). Therefore, since section 16A would be construed so as to favor publicity, the Court felt its conclusion would "minimize constitutional doubts." *Id.* at 855, 401 N.E.2d at 366.

The Globe, in *Globe I,* claimed that it had a right of access under both the first amendment of the United States Constitution and under article 16 of the Massachusetts Constitution. *Id.* at 854, 401 N.E.2d at 366. The Court, however, stated that the Globe failed to brief fully its article 16 argument and therefore that issue was not properly before it. *Id.* In addition, the Globe argued that it should be able to assert the sixth amendment right of the accused. *Id.* Of course, as noted above, these constitutional questions were not considered by the Court. The sixth amendment argument was raised again in *Globe II.* The Court disagreed with the Globe's contention noting that the defendant, while objecting to the superior court's closure order, had filed no appeal. The Court concluded that the sixth amendment rights, being personal in nature, could not properly be asserted by the Globe. 1981 Mass. Adv. Sh. at 1497 n.5, 423 N.E.2d at 366 n.5. *See, e.g.,* Gannett Co. v. DePasquale, 443 U.S. 368, 387 (1979). When the case was eventually argued before the United States Supreme Court, the sixth amendment issue again was raised. Since the Supreme Court resolved the case on first amendment grounds it never considered the merits of this question. 102 S. Ct. 2613, 2618 n.10 (1982).

[19] 379 Mass. at 861, 401 N.E.2d at 370. The Court discerned three possible ambiguities in section 16A. The first uncertainty concerned the phrase "[a]t the trial." *Id.* at 851, 401 N.E.2d at 364. Although the word "trial" is itself ambiguous, having no "single irresistible interpretation", *id.* at 852, 401 N.E.2d at 365, and the words "at the" are susceptible to conflicting constructions such as "throughout" or "at some time in" or "during part of", *id.* at 852-53, 401 N.E.2d at 365, the Court concluded that the phrase "at the trial," when examined in light of the intended purposes of section 16A, relates to closure only during that portion of the proceeding during which the victim testifies. *Id.* at 861, 401 N.E.2d at 370. With respect to the second possible ambiguity, the Court concluded that the word "shall" is used in a mandatory, and not a directory, sense. *Id.* at 863, 401 N.E.2d at 371. The final uncertainty concerned persons not subject to a closure order. Section 16A provides that "such persons as may have a direct interest in the case," are not to be removed from the trial. In Commonwealth v. Blondin, 324 Mass. 564, 87 N.E.2d 455 (1949), *cert. denied,* 339 U.S. 984 (1950), the Court had stated that that language was intended "to distinguish between [those] persons having a legitimate reason for being present and [those] mere idle spectators who are often attracted in large numbers to sensational trials involving sex issues . . . ." *Id.* at 571, 87 N.E.2d at 460. The Globe argued that it had a legitimate reason for being at the trial and therefore should be included within the exemption. 379 Mass. at 863-64, 401 N.E.2d at 371. Such a construction, however, the Court concluded, would totally frustrate the intended purposes of section 16A. *Id.* at 864, 401 N.E.2d at 371.

[20] 379 Mass. at 864, 401 N.E.2d at 371. According to the Court, the trial judge, in exercising discretion, should conduct a hearing before closing any other portion of the trial. At this hearing all interested parties should have an opportunity to state their reasons for objecting to the order. In addition, if the Commonwealth requests closure the burden of demonstrating that such closure is necessary to preserve evidence required for a just conviction should be borne by

The Globe appealed to the United States Supreme Court.[21] That Court, in turn, vacated the judgment and remanded the case to the Supreme Judicial Court[22] requesting that the decision be reconsidered in light of the then recent *Richmond Newspapers, Inc. v. Virginia.*[23] Although *Richmond Newspapers* contained no opinion of the Court,[24] the seven justices who voted for reversal agreed that the first amendment guaranteed the public and the press a right of access to criminal trials.[25]

In *Globe II,* the Globe acknowledged that some minor victims of sex crimes may be unable emotionally to withstand the rigors of testifying unless the courtroom first was cleared.[26] It argued, however, that a closure order could be justified only after the trial justice, having first accorded interested parties, including the press, an opportunity to present their position, made an independent determination as to the need for closure.[27] It was the mandatory feature of section 16A that the Globe believed offended the first amendment principle recognized in *Richmond Newspapers.*[28] The Court, of course, disagreed. Although it did note that in *Richmond*

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it. At the conclusion of the hearing, the trial judge should articulate findings of fact. *Id.* at 864-65, 401 N.E.2d at 372.

[21] 28 U.S.C. § 1257 (1948) provides in part:

> Final judgments or decrees rendered by the highest court of a state in which a decision could be had, may be reviewed by Supreme Court as follows:
>
> . . .
>
> (2) By appeal, where is drawn in question the validity of a statute of any state on the grounds of its being repugnant to the Constitution ... of the United States, and the decision is in favor of its validity.

[22] 449 U.S. 894 (1982).

[23] 448 U.S. 555 (1980).

[24] Chief Justice Burger announced the judgment of the Court. He was joined by Justices White and Stevens, each of whom also wrote separate concurring opinions. Separate opinions concurring in judgment were written by Justices Brennan, with whom Justice Marshall joined, Justice Stewart and Justice Blackmun. Justice Powell did not participate. Justice Rehnquist dissented.

[25] 448 U.S. at 558-81 (plurality opinion); *id.* at 584-98 (Brennan, J., concurring); *id.* at 598-601 (Stewart, J., concurring); *id.* at 601-04 (Blackmun, J. concurring). Although Justice Powell did not participate he had previously indicated that the first amendment did confer a public right of access to criminal trials. *See* Gannett Co. v. DePasquale, 443 U.S. 368, 397-98 (1979). In *Gannett* the Court concluded that the sixth amendment did not confer a public right of access to pretrial criminal proceedings. *Id.* at 391. The Court left open the question whether the first amendment guaranteed a public right of access to such proceedings. *Id.* at 391-93.

In *Richmond Newspapers,* the Chief Justice commented that the Court was being asked to decide, for the first time, "whether a criminal trial itself may be closed to the public upon the unopposed request of a defendant, without any demonstration that closure is required to protect the defendant's superior right to a fair trial, or that some other overriding consideration requires closure." 448 U.S. at 564 (plurality opinion).

[26] 1981 Mass. Adv. Sh. at 1496, 423 N.E.2d at 775.

[27] *Id.*

[28] *Id.*

Newspapers several separate opinions emphasized the unbroken tradition and the common law history of open criminal trials as support for the proposition that the first amendment guaranteed a right of public access to such proceedings,[29] the Supreme Judicial Court discerned "at least one notable exception to this history. In cases involving sexual assaults, portions of trials have been closed to some segment of the public even when the victim was an adult."[30] Indeed, as the Court further noted, the seven justices voting for reversal in *Richmond Newspapers* themselves indicated that the right of access was not absolute and that certain circumstances could warrant the closing of portions of a trial.[31] The question then remaining, the Court believed, was whether the interests promoted by section 16A justified suspension of the first amendment right of access.[32] In *Globe I* the Court had identified several interests served by section 16A.[33] As noted later by the United States Supreme Court, these interests essentially reduced to two, namely, "the protection of minor victims of sex crimes from further trauma and embarrassment; and the encouragement of such victims to come forward and testify in a truthful and credible manner."[34] These specific interests, as well as the general governmental interest in protecting minors, when weighed against the public's right of access to criminal trials struck a

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[29] *Id.* at 1498-99, 423 N.E.2d at 776-77. The plurality opinion of Chief Justice Burger as well as the opinions concurring in judgment written by Justices Blackmun, Brennan and Stewart emphasized the tradition of openness associated with criminal trials as evidence of the fundamental character of the right of public access to criminal trials.

[30] 1981 Mass. Adv. Sh. at 1501, 423 N.E.2d at 779.

[31] *Id.* at 1499-1500, 423 N.E.2d at 777. *See* 448 U.S. at 581 n.18 (plurality opinion) where the Chief Justice remarked, "[w]e have no occasion here to define the circumstances in which all or parts of a criminal trial may be closed to the public, *cf., e.g.,* 6 J. WIGMORE, EVIDENCE § 1835 (J. Chadbourn rev. 1976), but our holding today does not mean that the First Amendment rights of the public and the press are absolute." Interestingly, the above cited section in Wigmore observes:

> The danger of overcrowding, the risk of violence or brawls, the moral harm of satisfying puriency in trials of certain crimes — these are the ordinary grounds for exclusion. It cannot be doubted that such exceptions are within the judicial power to allow.
>
> By statute in most states they are expressly sanctioned, either in general terms, or for *special classes of cases,* such as divorce, rape, and the like, or for *special classes of persons,* such as minors (emphasis in original) J. WIGMORE, *supra* at 443-45.

The other justices concurring in the judgment noted that the public right of access to criminal trial is not absolute. 448 U.S. at 598, 600.

[32] 1981 Mass. Adv. Sh. at 1503, 423 N.E.2d at 779.

[33] These interests were defined as: 1) To encourage minors to initiate complaints and to testify, 379 Mass. at 857, 401 N.E.2d at 368; 2) To protect minors from humiliation, embarrassment and degradation, *id.* at 857-60, 401 N.E.2d at 368; 3) To enhance the likelihood of more credible testimony, *id.* at 860, 401 N.E.2d at 369; 4) To provide sound and orderly administration of justice, *id.*; and 5) To assist in obtaining just convictions. *Id.*

[34] 102 S. Ct. at 2620-21.

balance in favor of the validity of section 16A.[35] As stated by the Supreme Judicial Court in concluding, "[a]lthough there is some temporary diminution of information, we cannot say that *Richmond Newspapers* requires the invalidation of the requirement, given the statute's narrow scope in an area of traditional sensitivity to the needs of victims."[36]

Once again the Globe appealed the case to the United States Supreme Court.[37] That Court, after disposing of a threshhold question,[38] and after explaining the reasoning in *Richmond Newspapers,*[39] proceeded to analyze section 16A.[40] Because section 16A impaired the public's right of access to criminal trials, a right now guranteed by the first amendment, the Court exercised strict scrutiny and considered whether the legislation furthered a "compelling governmental interest, and [was] closely tailored to serve that interest."[41]

As noted above,[42] the several purposes served by section 16A, as identified in *Globe I,* essentially reduced to two. With regard to the first interest — protecting minor victims of a sex crime from physical and emotional

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[35] 1981 Mass. Adv. Sh. at 1506-07, 423 N.E.2d at 781.

[36] *Id.* at 1507, 423 N.E.2d at 781.

[37] Probable jurisdiction is noted at 454 U.S. 1051 (1981).

[38] Because the closure order had expired upon the defendant's acquittal, the Court first had to decide whether the case was moot. Reasoning that the issue was clearly "capable of repetition" yet, because of the often short duration of a trial, quite possibly could escape plenary review, the Court concluded that the case was indeed a case or controversy within the meaning of Article III, § 2 of the United States Constitution and therefore was not moot. 102 S. Ct. at 2618 (citing Nebraska Press Ass'n v. Stuart, 427 U.S. 539, 546 (1976); Southern Pac. Terminal Co. v. ICC, 219 U.S. 498, 515 (1911)).

[39] 102 S. Ct. at 2618-20. Although the right of access to criminal trials is not expressly mentioned in the first amendment, that amendment, the Court stated, is broad enough to include those rights which, while not explicit, are necessary to effectuate the expressly guaranteed rights. *Id.* at 2619. A core purpose of the amendment is "to protect the free discussion of governmental affairs," Mills v. Alabama, 384 U.S. 214, 218 (1966), and to foster "communication on matters relating to the functioning of government," Richmond Newspapers, Inc. v. Virginia, 448 U.S. at 575 (plurality opinion). The right of access to criminal trials, the Court opined, would ensure that those discussions and communications were informed. 102 S. Ct. at 2619. The Court went on to note two aspects of the criminal justice system which further explain why the right of access to criminal trials is of constitutional dimension. The first was the history and tradition of openness associated with criminal trials. *Id.* "This uniform rule of openness has been viewed as significant in constitutional terms not only 'because the Constitution carries the gloss of history', but also because 'a tradition of accessibility implies the favorable judgment of experience.' " *Id.* (quoting Richmond Newspaper, Inc. v. Virginia, 448 U.S. at 589 (Brennan, J., concurring). In addition, the Court explained, the right of access to criminal trials plays a crucial role "in the functioning of the judicial process and government as a whole." 102 S. Ct. at 2620.

[40] 102 S. Ct. at 2620-22.

[41] *Id.* at 2620.

[42] Note 32 *supra* and accompanying text.

trauma, the Court concluded that a compelling interest was furthered.[43] A madatory closing of the portion of the trial during which the minor testifies, however, was not considered by the Supreme Court as the least restrictive means of achieving that result.[44] As noted, such a rule fails to consider factors such as the victim's age or emotional maturity. Yet those variables clearly affect the degree to which a person might be traumatized by giving testimony in public.[45] Indeed, a victim might very well desire that the public have first hand knowledge as to the acts of degradation to which he or she was forced to submit by the accused.[46] Yet the mandatory closure rule of section 16A would prevent this. If, however, the trial judge were allowed to make a case by case determination, then the Court felt that the public's right of access and the state's interest in protecting minors could be accommodated.[47]

The second asserted interest — encouraging minor victims of sex crimes to testify, was not considered by the Supreme Court as an actual goal of section 16A.[48] A victim's name, as well as an account of his or her ordeal could be learned from a variety of sources.[49] Once learned, that information could be published with impunity.[50] Therefore, to the extent that the Commonwealth hoped to encourage such victims to testify by suggesting that they would remain anonymous, that goal was not necessarily promoted by the statute.[51] Even assuming that section 16A did encourage such victim's testimony, that interest would not be compelling.[52] That interest, as noted by the Court, could be asserted in numerous instances other than those involving minor victims to sex crimes.[53] Therefore, the Court concluded, sec-

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[43] 102 S. Ct. at 2621.

[44] *Id.*

[45] *Id.* at 2622.

[46] Indeed, the victims in the instant case apparently had no objection to the press attending. They did not, however, want to be interviewed, identified or photographed. This information was conveyed to the trial judge prior to trial. 379 Mass. at 846, 401 N.E.2d at 361.

[47] 102 S. Ct. at 2621-22. This is not to suggest that the court, in considering whether to close a portion of a trial would have to permit the victim to be cross-examined by those parties who might be excluded. The trial court could certainly exercise discretion. It would be necessary, however, that the public and the press be given a "meaningful opportunity to be heard on the question of their exclusion." *Id.* at 2622 n.25 (quoting Gannett Co. v. DePasquale, 443 U.S. 368, 401 (1979) (Powell, J., concurring)).

[48] 102 S. Ct. at 2622.

[49] Section 16A would not prevent the press from procuring a transcript, talking with court personnel or discussing the proceeding with any persons who were permitted to remain.

[50] 102 S. Ct. at 2621 n.23 (citing Cox Broadcasting Corp. v. Cohn, 420 U.S. 469, 495 (1975); Smith v. Daily Mail Publishing Co., 443 U.S. 97, 104 (1979)).

[51] 102 S. Ct. at 2622.

[52] *Id.*

[53] *Id.*

tion 16A violated the first[54] and fourteenth amendments[55] to the United States Constitution.

§ 12.6. Preemption — Employee Benefit Plans. In *Commonwealth v. Federico*[1] the Court considered whether a provision contained in the 1974 Federal Employment Retirement Income Security Act[2] (ERISA) preempted a criminal statute within Massachusetts' Health, Welfare and retirement Fund Act[3] thereby precluding the Commonwealth from prosecuting under it.

A complaint, initiated in the district court, charged the defendant with violating Massachusetts General Laws chapter 151D, section 11 for refusing, failing or neglecting to make required contributions to an employee benefit plan.[4] The defendant moved to dismiss the complaint contending that, among other things, the Massachusetts statute was preempted by Title 29, § 1144(a) of the United States Code.[5] The district court judge reported

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[54] *Id.* The Court made it clear that its decision was based on the mandatory feature of section 16A. Under appropriate circumstances, the public and the press could be banned from attending portions of a criminal trial. *Id.* at 2622 n.27.

[55] The first amendment is incorporated into the fourteenth amendment. *See, e.g.,* Gitlow v. New York, 268 U.S. 652, 666 (1925).

§ 12.6. [1] 1981 Mass. Adv. Sh. 1052, 419 N.E.2d 1374.

[2] 29 U.S.C. §§ 1001 *et seq.* (Supp. IV 1976). ERISA was enacted partly because Congress believed that comprehensive and uniform regulations covering employee benefit plans were necessary due to the rapid increase in, and economic and social impact of, such programs. For a summary of Congressional findings and declaration of policy concerned with the legislation, *see* 29 U.S.C. § 1001(a)-(c) (1976).

[3] G.L. c. 151D, §§ 1 *et seq.* This version of the Act was added by the 1973 Mass. Acts c. 1169, § 1.

[4] 1981 Mass. Adv. Sh. at 1053, 419 N.E.2d at 1375.

G.L. c. 151D, § 11 provides in pertinent part:

> In addition to any other penalty or punishment otherwise prescribed by law any person or employee, and the president, secretary, and treasurer, or officers exercising corresponding functions, of a corporation which is an employer, who is party to an agreement to pay or provide the contributions or benefits covered by this chapter ... and who refuses or fails or neglects to pay such contributions or payments within thirty days after such payments are required to be made shall be punished by a fine of not more than five hundred dollars or by imprisonment in a jail or house of correction for not more than one year, or both.

[5] 29 U.S.C. § 1144(a) (Supp. IV 1976) provides:

> (a) Except as provided in subsection (b) of this section, the provisions of this subchapter and subchapter III of this chapter shall supersede any and all State laws insofar as they may now or hereafter relate to any employee benefit plan described in section 1003(a) of this title and not exempt under section 1003(b) of this title. This section shall take effect on January 1, 1975.

the case to the appeals court.[6] *Sua sponte,* the Supreme Judicial Court removed the case to its own docket.[7]

The Commonwealth argued that the doctrine of preemption was inapplicable because, in its opinion, no actual conflict existed between chapter 151D, section 11 and ERISA,[8] and moreover, that even if the preemption doctrine were initially applicable, section 11 constituted a "generally applicable criminal law" and therefore was within the exception provided for under 29 U.S.C. § 1144(b)(4).[9]

As noted by the Court, because the doctrine of preemption emanates from the supremacy clause of the federal constitution,[10] a court must set aside the state law where Congress, by using explicit language, has "unmistakably ... ordained"[11] that the federal legislation supercedes the state enactment.[12] Only when Congress has not been so unequivocal should the court decide whether application of the state law would frustrate the purpose of the federal law.[13] Here, the Court found the mandate of section 1144(a) explicit.[14] "Except as provided in subsection (b) ... the provision of (ERISA) shall supersede any and all state laws insofar as they may now or hereafter relate to any employee benefit plan ...."[15] In addition, ERISA's legislative history clearly indicated Congress' intent that the doctrine of preemption not be limited solely to those areas where an actual con-

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[6] 1981 Mass. Adv. Sh. at 1054, 419 N.E.2d at 1376. The trial judge reported the case pursuant to Mass. R. Crim. P. 34 which provides:

> If, prior to trial, or, with the consent of the defendant, after conviction of the defendant, a question of law arises which the trial judge determines is so important or doubtful as to require the decision of the Appeals Court, the judge may report the case so far as necessary to present the question of law arising therein. If the case is reported prior to trial, the case shall be continued for trial to await the decision of the Appeals Court.

[7] 1981 Mass. Adv. Sh. at 1054, 419 N.E.2d at 1376. G.L. c. 211A, § 12 provides that "[t]he supreme judicial court may order any matter, in whole or in part, or any issue therein, pending before the appeals court, transferred to the supreme judicial court for further proceedings."

[8] 1981 Mass. Adv. Sh. at 1055-56, 419 N.E.2d at 1376.

[9] *Id.* at 1057, 419 N.E.2d at 1377. 29 U.S.C. § 1144(b)(4) (1976 & Supp. 1980) provides that "[s]ubsection (a) of this section shall not apply to any generally applicable criminal law of a State." For a description of section 1144(a) *see supra* note 5.

[10] 1981 Mass. Adv. Sh. at 1056, 419 N.E.2d at 1377. U.S. Const. art. VI provides in pertinent part: "This Constitution, and the Laws of the United States which shall be made in pursuance thereof ... shall be the supreme law of the land...."

[11] 1981 Masss. Adv. Sh. at 1056, 419 N.E.2d at 1377 (*quoting* Chicago & N.W. Transp. Co. v. Kalo Buick & Tile Co., 450 U.S. 311, 317 (1981)).

[12] 1981 Mass. Adv. Sh. at 1055-56, 419 N.E.2d at 1377.

[13] *Id.* at 1055, 419 N.E.2d at 1377. As noted by the Court, the majority of the cases discussing the doctrine of preemption, including those cases cited by the Commonwealth, concerned legislation in which congressional intent to preempt was not immediately apparent. *Id.* at 1055 n.5, 419 N.E.2d at 1377 n.5 (citations omitted).

[14] 1981 Mass. Adv. Sh. at 1086, 419 N.E.2d at 1377.

[15] 29 U.S.C. § 1144(a) (Supp. IV 1976).

flict appeared but rather, that it be applied in its broadest possible sense.[16] Therefore, the only question remaining was whether section 11 was a "generally applicable criminal law" within the meaning of 29 U.S.C. § 1144(b)(4).[17]

According to Chief Justice Hennessey, section 11 was not "generally applicable" because prosecution under it was limited both in terms of the persons who could be charged and the circumstances under which they could be charged.[18] Only *employers* who failed, refused or neglected to make a required contribution to an *employee benefit plan* could violate section 11. In order for a law to be "generally applicable" the Court felt that it had to be directed against the population at large.[19] Therefore the Court concluded that 29 U.S.C. § 1144(a) preempted section 11 and thereby barred the Commonwealth from prosecuting under it.[20]

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[16] 1981 Mass. Adv. Sh. at 1056, 419 N.E.2d at 1377.

[17] *Id.* at 1057, 419 N.E.2d at 1377. For a description of section 1144(b)(4) *see supra* note 9.

[18] 1981 Mass. Adv. Sh. at 1057, 419 N.E.2d at 1377-78.

[19] *Id.* The Court concluded that only those criminal laws directed toward the public at large, such as larceny or embezzlement, as opposed to those laws specifically concerned with employees benefit plans, fell within the exemption. However, in Goldstein v. Mangano, 99 Misc.2d 523, 417 N.Y.S.2d 368 (1978), a civil court for Kings County concluded that prosecution under a statute very similar to section 11 was not barred under 29 U.S.C. § 1144(a). Because the statute affected all employees, that court felt that it was a criminal law of general application. *Id.* at 532, 417 N.Y.S.2d at 373.

[20] 1981 Mass. Adv. Sh. at 1058, 419 N.E.2d at 1378.