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Chapter 9: Constitutional Law

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CHAPTER 9

Constitutional Law

WILLIAM T. CORBETT*

§ 9.1. Due Process — Eighth Amendment — Obligation to Provide and Pay for Medical Attention for Pre-Trial Detainee. In *Estelle v. Gamble*,¹ the United States Supreme Court ruled that the eighth amendment's prohibition against cruel and unusual punishment² is violated by "deliberate indifference to serious medical needs of prisoners."³ In reaching this holding, the *Estelle* Court observed that incarceration deprives prisoners of the ability to provide themselves with basic necessities.⁴ Under *Estelle*, the responsibility of maintaining the well-being of prisoners, therefore, shifts to the state.⁵ The *Estelle* decision did not, however, clearly establish whether pre-trial detention as well as post-conviction imprisonment implicates the state's eighth amendment responsibility to provide medical care to prisoners. *Estelle* also did not address the issue of whether the duty of a state to provide medical care for prisoners also includes the obligation to pay for such care.

During the *Survey* year in *Massachusetts General Hospital v. City of Revere*⁶ the Supreme Judicial Court considered some of the issues left open by the *Estelle* decision. Specifically, the Court examined the obligation of a municipality to provide and pay for medical treatment for a pre-trial detainee. The Supreme Judicial Court concluded that a municipality is obligated under the eighth amendment to the federal constitution to both provide and pay for necessary medical attention while the injured person is a pre-trial detainee.⁷ On a writ of certiorari, however, the United

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¹ § 9.1. ¹ 429 U.S. 97 (1976).

² The eighth amendment provides, "Excessive bail shall not be required, nor excessive fines imposed, nor cruel and unusual punishments inflicted." U.S. CONST. amend. VIII. The eighth amendment is applicable to the states through the due process clause of the fourteenth amendment. *Robinson v. California*, 370 U.S. 660 (1962).

³ 429 U.S. 97, 104 (1976).

⁴ *Id.* at 103-04.

⁵ *See id.* The *Estelle* Court held that a prisoner's allegation that prison officials were intentionally indifferent to his medical needs states a cause of action under 42 U.S.C. § 1983. *Id.* at 105.

⁶ 385 Mass. 772, 434 N.E.2d 185 (1982).

⁷ *Id.* at 776-79, 434 N.E.2d at 188-89.

States Supreme Court reversed, ruling that the Massachusetts Court had over-extended the reasoning of the *Estelle* decision.⁸

On September 20, 1978, officers of the Revere Police Department responded to a suspected breaking and entering.⁹ At the scene, the officers observed William Kivlin fleeing with a suitcase and pillowcase in hand.¹⁰ When exhortations and a warning shot fired by one of the officers failed to halt the fleeing Kivlin, an officer shot and wounded him.¹¹ Kivlin was taken by ambulance to Massachusetts General Hospital ("MGH") where he remained hospitalized for nine days.¹² He then was released into the custody of the Revere Police Department and taken to Chelsea District Court for a probable cause determination.¹³ The court immediately granted a continuance and released Mr. Kivlin on his own recognizance.¹⁴

On October 18, 1978, MGH sent a bill in the amount of \$7,948.50 to the Revere Chief of Police for services rendered by the hospital during Kivlin's nine day stay.¹⁵ The chief disclaimed any responsibility for the bill by promptly notifying the hospital that Revere had no procedure for making such payment.¹⁶ Several days later, Mr. Kivlin was admitted again to MGH.¹⁷ He underwent surgery and remained hospitalized for approximately two weeks. The bill for this second stay amounted to \$5,360.14.¹⁸

MGH initiated suit against Revere in the Boston Municipal Court Department seeking to recover the full amount of its costs for both of Kivlin's hospital visits.¹⁹ Revere filed a third party complaint against Kivlin and the Commonwealth.²⁰ MGH moved for summary judgment.²¹ The case was referred to a special master who recommended denial of MGH's motion, dismissal of Revere's third party complaint, and judgment in favor of Revere.²² The superior court adopted those recommendations.²³ MGH appealed and the Supreme Judicial Court transferred the case to its own docket.²⁴

⁸ *City of Revere v. Massachusetts General Hospital*, 103 S. Ct. 2979 (1983).

⁹ 385 Mass. at 772, 434 N.E.2d at 185.

¹⁰ *Id.* at 773, 434 N.E.2d at 186.

¹¹ *Id.*

¹² *Id.*

¹³ *Id.*

¹⁴ *Id.*

¹⁵ *Id.* at 773 n.1, 434 N.E.2d at 186 n.1.

¹⁶ *Id.* at 773, 434 N.E.2d at 186.

¹⁷ *Id.* The record did not reveal the nature of this second hospitalization or whether it was related to the original injury. *Id.* at 773 n.4, 434 N.E.2d at 186 n.4.

¹⁸ *Id.* at 773 n.5, 434 N.E.2d at 186 n.5.

¹⁹ *Id.* at 773-74, 434 N.E.2d at 186.

²⁰ *Id.* at 774, 434 N.E.2d at 186.

²¹ *Id.*

²² *Id.*

²³ *Id.*

²⁴ *Id.*

In support of its contention that Revere was obligated to pay for the medical services provided Kivlin, MGH relied on contract principles and on the eighth amendment to the federal constitution.²⁵ MGH's eighth amendment claim was premised on *Estelle v. Gamble*,²⁶ a decision where the United States Supreme Court held that the eighth amendment obligates government "to provide medical care for those whom it is punishing by incarceration."²⁷ Revere asserted that the principle of *Estelle* was inapplicable because Kivlin had not in fact been incarcerated prior to being taken to MGH.²⁸

Although the Supreme Judicial Court rejected MGH's contract argument,²⁹ it found some merit in the hospital's eighth amendment conten-

²⁵ *Id.* No claim was made by MGH, or considered *sua sponte* by the court, that Revere's action violated the Massachusetts Constitution.

²⁶ 429 U.S. 97 (1976).

²⁷ *Id.* at 103. See *supra* notes 1-5 and accompanying text.

²⁸ 385 Mass. at 777, 434 N.E.2d at 188. Kivlin was not arraigned until after he was discharged from his initial stay at MGH. *Id.* at 773, 434 N.E.2d at 186.

²⁹ *Id.* at 774, 434 N.E.2d at 186. MGH asserted that it was entitled to recover pursuant to either an implied contract, or, in the absence of a contract, quantum meruit. *Id.* at 774, 776, 434 N.E.2d at 186-87; cf. *Lord v. Winchester*, 355 Mass. 788, 789, 244 N.E.2d 730, 731 (1969). The Court noted that a city can enter into a valid contract only when it has both the authority to do so and the contract is executed by a duly authorized agent of the city. 385 Mass. at 774-75, 434 N.E.2d at 186-87. Although G.L. c. 40, § 4 permits a municipality to contract for health services, it limits those who can so contract on behalf of a municipality to "the board of health or any legally constituted board performing the powers and duties of a board of health." G.L. c. 40, § 4. The police, clearly not an analogue to a board of health, therefore lacked any statutory authority to contract for Kivlin's care. 385 Mass. at 774-75, 434 N.E.2d at 187. Such authority also was not provided by common law. Indeed, the authority for a municipality to contract is solely a creature of statute. *Id.* at 775, 434 N.E.2d at 187 (citing *Urban Transportation, Inc. v. Boston*, 373 Mass. 693, 696, 369 N.E.2d 1135, 1137 (1977); *Kimball Co. v. Medford*, 340 Mass. 727, 729, 166 N.E.2d 708, 709 (1960)).

Apart from a general lack of authority, the Court further noted that only a duly authorized agent of the city can execute a contract on behalf of a city. 385 Mass. at 775, 434 N.E.2d at 187. G.L. c. 41, § 98 describes in detail the powers of police. The power to contract is not among them.

Other impediments to a valid contract also existed. 385 Mass. at 775, 434 N.E.2d at 187. For example, any contract a municipality makes in excess of \$2,000 must be in writing. G.L. c. 43, § 29. Except in compelling situations, a municipal department cannot spend above its appropriated amount. G.L. c. 44, § 31. Even assuming that the situation in this case can be considered compelling, a two thirds vote of the city council would have been necessary to validate the expenditure. *Id.* Parties contracting with municipalities are deemed to have constructive notice of these limitations. See *Duff v. Southbridge*, 325 Mass. 224, 228, 90 N.E.2d 12, 15 (1950); *Adalian Bros. v. Boston*, 323 Mass. 629, 631, 84 N.E.2d 35, 37 (1949).

With regard to its quantum meruit argument, MGH was equally unsuccessful. As noted by the Court, "[w]here a contract is illegal by reason of failure to comply with statutory requisites, we will not allow recovery based on quantum meruit Mistake, even if mutual, as to the authority or power of a municipality to contract, is not the type of mistake which will allow recovery in quantum meruit." 385 Mass. at 776, 434 N.E.2d at 187 (citing

tion.³⁰ The Court rejected Revere's attempt to distinguish *Estelle* based on the lack of actual incarceration prior to the medical treatment.³¹ According to the Court, actual prior incarceration is not required to trigger the eighth amendment; rather, the test is whether "the prisoner . . . by reason of the deprivation of his liberty [is unable] to care for himself."³² Identifying factors necessary to constitute an arrest, at least for purposes of the fourth and fifth amendment,³³ the Court concluded that, certainly by the time the bullet penetrated Kivlin's body, the Revere Police Department had effectuated his arrest.³⁴ The Court ruled that because Kivlin was then in police custody, and thus deprived of his liberty, Revere was obligated to provide him with medical care.³⁵ Furthermore, the Court decided, Revere also had the duty to pay for such medical attention.³⁶ In the Court's view, requiring payment by the municipality was the only way to safeguard the detainee's right to medical care.³⁷ The Court observed that a lack of appropriated funds would provide no defense for the government because inadequate funding cannot excuse a violation of constitutional rights.³⁸

The Court expressly limited Revere's obligation, however, to Kivlin's first stay at MGH.³⁹ Regarding Kivlin's second visit to the hospital, the Court explained that once Kivlin was released on his own recognizance, he was no longer unable to provide for his own medical needs due to any

Lowell v. Massachusetts Bonding & Ins. Co., 313 Mass. 257, 272, 47 N.E.2d 265, 275 (1943); Fluet v. McCabe, 299 Mass. 173, 178, 12 N.E. 89, 93 (1938)).

³⁰ 385 Mass. at 774, 779-80, 434 N.E.2d at 186, 189-90.

³¹ *Id.* at 777, 434 N.E.2d at 188.

³² *Id.* (quoting *Estelle v. Gamble*, 429 U.S. 97, 104 (1976), quoting *Spicer v. Williamson*, 191 N.C. 487, 490, 132 S.E. 291, 293 (1926)).

³³ *Id.* at 778, 434 N.E.2d at 188. To constitute an arrest, according to the Court, three elements must be present:

[1] there must be an actual or constructive seizure or detention of the person, [2] performed with the intention to effect an arrest, and [3] so understood by the person detained . . . [T]he test must not be what the defendant . . . thought, but what a reasonable man, innocent of any crime would have thought had he been in the defendant's shoes.

Id. at 778, 434 N.E.2d at 188-89 (citing *Hicks v. United States*, 382 F.2d 158, 161 (D.C. Cir. 1967), quoting from *Jenkins v. United States*, 161 F.2d 99, 101 (10th Cir. 1949) and *United States v. McKethan*, 247 F. Supp. 324, 328 (D. D.C. 1965)).

³⁴ *Id.* at 778, 434 N.E.2d at 189.

³⁵ *Id.* Indeed, the Court observed that Revere's custody of Kivlin was such that had Kivlin refused to submit to medical treatment he could have been compelled to do so. *Id.* at 778 n.9, 434 N.E.2d at 189 n.9 (citing *Commissioner of Correction v. Myers*, 379 Mass. 255, 263-64, 399 N.E.2d 452, 545-56 (1979)).

³⁶ 385 Mass. at 774, 779, 434 N.E.2d at 186, 189.

³⁷ *Id.* at 779, 434 N.E.2d at 189.

³⁸ *Id.*

³⁹ *Id.* at 779-80, 434 N.E.2d at 189.

restriction on his liberty.⁴⁰ Therefore, the Court reasoned, Revere had no constitutional obligation to provide or pay for medical treatment for Kivlin at the time of his second stay at MGH.⁴¹

MGH petitioned the United States Supreme Court for certiorari.⁴² Because of a desire to clarify governmental responsibility in such cases and because of the Supreme Judicial Court's "rather novel eighth amendment approach,"⁴³ certiorari was granted.⁴⁴ After disposing of two threshold questions,⁴⁵ the United States Supreme Court addressed the issue of whether the federal constitution imposes on government the obligation to provide and pay for medical services for a pre-trial detainee such as Kivlin.⁴⁶ In discussing that question, the Supreme Court summarily rejected the Supreme Judicial Court's eighth amendment analysis.⁴⁷ With regard to providing medical care to pre-trial detainees, the Supreme Court noted that the government certainly does have such an obligation, but that duty arises under the due process clause of the fourteenth amendment rather than under the eighth amendment.⁴⁸ Indeed, the Su-

⁴⁰ *Id.* at 780, 434 N.E.2d at 189.

⁴¹ *Id.*

⁴² See *City of Revere v. Massachusetts General Hospital*, 103 S. Ct. 2979 (1983).

⁴³ 103 S. Ct. 2979, 2982 (1983).

⁴⁴ 103 S. Ct. 48 (1982).

⁴⁵ MGH argued that the Supreme Court lacked jurisdiction on the ground that the Supreme Judicial Court's decision rested on an adequate and independent state ground. 103 S. Ct. at 2982. The Supreme Court rejected this assertion noting that the Supreme Judicial Court had indicated clearly that Massachusetts contract law provided no basis for recovery. *Id.*; see *supra* note 21. Furthermore, the Supreme Court observed, no claim for relief had been grounded on the Commonwealth's own constitution. 103 S. Ct. at 2982. In fact, the Supreme Judicial Court's decision rested wholly on the eighth amendment.

The Supreme Court also considered whether MGH had standing to raise the eighth amendment question. 103 S. Ct. at 2982. Concluding that it did, the Supreme Court said:

[W]e could not resolve the question whether MGH has third party standing without addressing the constitutional issue. 'To a significant degree, the case is in the class of those where standing and the merits are inextricably intertwined,' [quoting *Holtzman v. Schlesinger*, 414 U.S. 1315, 1319 (1973) (Douglas, J. in chambers)]. Both the standing question and the merits depend in part on whether injured suspects will be deprived of their constitutional right to necessary medical care unless the governmental entity is required to pay hospitals for their services.

103 S. Ct. at 2982 n.5.

⁴⁶ *Id.* at 2983.

⁴⁷ *Id.*

⁴⁸ *Id.* The Supreme Court was unwilling to specify the scope of a municipality's due process obligation to pre-trial detainees. *Id.* It did note, however, that "[w]hatever the standard may be, Revere fulfilled its constitutional obligation by seeing that Kivlin was taken promptly to a hospital that provided the treatment necessary for his injury." *Id.*

In *Ingraham v. Wright* public school students asserted that corporal punishment inflicted by school officials deprived them of rights guaranteed under the eighth and fourteenth amendment. 430 U.S. 651, 653 (1977). The Supreme Court noted that the eighth amendment

preme Court observed, the eighth amendment had no application whatsoever to the case before it.⁴⁹ The focal point of the eighth amendment is, of course, the form and severity of punishment.⁵⁰ The right to punish, however, does not accrue to the state until after there has been a formal adjudication of guilt.⁵¹ Because Kivlin had not been adjudged guilty prior to his hospitalization, the Supreme Court continued, the eighth amendment had not yet been implicated.⁵² If Kivlin's guilt had already been established, the Supreme Court noted, then the eighth amendment would have been the source of Revere's obligation to provide him medical care.⁵³ With regard to the obligation to pay for such medical care, the

has no application outside of the criminal arena. *Id.* at 664. Moreover, the *Ingraham* Court observed, its protections arise only after there has been a formal adjudication of guilt. *Id.* at 671 n.40. The *Ingraham* Court further noted, however, that corporal punishment administered in the public school system does implicate a liberty interest protected by the fourteenth amendment. *Id.* at 672.

U.S. CONST. amend. XIV provides in part: "[N]or shall any state deprive any person of life, liberty, or property, without due process of law."

⁴⁹ 103 S. Ct. at 2983.

⁵⁰ *Id.* As explained by the Supreme Court in *Estelle v. Gamble*, the eighth amendment was initially designed to prohibit torture or other forms of barbarism. 429 U.S. 97, 102 (1976) (citing Granucci, *Nor Cruel and Unusual Punishment Inflicted: The Original Meaning*, 57 CALIF. L. REV. 839, 842 (1969)). Thus, punishments such as burning at the stake, crucifixion, quartering, the rack and thumb screw were clearly prohibited. In re Kemmler, 136 U.S. 436, 446 (1890); see *Furman v. Georgia*, 408 U.S. 238, 330 (1972) (Marshall, J., concurring); B. SCHWARTZ, *CONSTITUTIONAL LAW* 301-02 (2d ed. 1979). Over the years, however, the eighth amendment's proscription has broadened beyond physical torture. *Estelle v. Gamble*, 429 U.S. 97, 102 (1976) (citing *Gregg v. Georgia*, 428 U.S. 153, 171 (1976)); *Trop v. Dulles*, 356 U.S. 86, 100-01 (1958); *Weems v. United States*, 217 U.S. 349, 373 (1910). Thus, punishments which, measured by contemporary standards, are "so degrading that [they do] not accord with the dignity of man," are prohibited. B. SCHWARTZ, *supra*, at 303 (citing *Gregg v. Georgia*, 428 U.S. 153, 173 (1976); *Estelle v. Gamble*, 429 U.S. 97, 102 (1976)). In addition, punishments which are grossly disproportionate to the offense, *Gregg v. Georgia*, 428 U.S. 153, 173 (1976), or which punish the status of addiction, *Robinson v. California*, 370 U.S. 660, 667 (1962), or which "involve the unnecessary and wanton infliction of pain" *Gregg v. Georgia*, 428 U.S. 153, 173 (1976), are repugnant to the eighth amendment. See also *Ingraham v. Wright*, 430 U.S. 651, 666-67 (1977).

⁵¹ 103 S. Ct. at 2983 (citing *Ingraham v. Wright*, 430 U.S. 651, 671-72, n.40 (1977)); see *Bell v. Wolfish*, 441 U.S. 520, 535, n.16 (1979). As stated by the Supreme Court in *Ingraham v. Wright*:

Eighth Amendment scrutiny is appropriate only after the state has complied with the constitutional guarantees traditionally associated with criminal prosecutions. . . . As these cases demonstrate, the state does not acquire the power to punish with which the Eighth Amendment is concerned until after it has secured a formal adjudication of guilt in accordance with due process of law. Where the state seeks to impose punishment without such adjudication, the pertinent constitutional guarantee is the Due Process Clause of the Fourteenth Amendment.

430 U.S. 651, 671 n.40 (1977).

⁵² 103 S. Ct. at 2983.

⁵³ *Id.* at 2983-84.

United States Supreme Court, unlike the Supreme Judicial Court, drew a clear distinction between the duty to provide medical care and the responsibility for paying the provider of that care.⁵⁴ The federal constitution, according to the Supreme Court, only imposes a duty to provide the treatment.⁵⁵ The manner in which the state governmental entity allocates the cost of that treatment between itself and the provider, the Supreme Court stated, simply is not a federal constitutional question; rather, it is an issue of state law.⁵⁶ Therefore, because the Supreme Judicial Court had improperly concluded that the federal constitution required a municipality to pay for the medical care of a pre-trial detainee, an error compounded by the fact that the Court inaccurately grounded that conclusion on the eighth amendment, the United States Supreme Court reversed the judgment.⁵⁷

§ 9.2. First Amendment — Establishment of Religion — School Prayer. During the *Survey* year in *Opinion of Justices to the House of Representatives*¹ the Supreme Judicial Court once again considered the constitutionality of a public school prayer law.² House Bill No. 1454, then pending before the General Court, was introduced to amend chapter 71, section 1A of the General Laws by deleting the existing language³ and replacing it

⁵⁴ *Id.* at 2983. In fact, the Supreme Court pointed out several ways in which a municipality might satisfy its obligation of providing care without financially reimbursing the provider. *Id.* at 2983-84. “The governmental entity also may be able to satisfy its duty by operating its own hospital, or, possibly by imposing on the willingness of hospitals and physicians to treat the sick regardless of the individual patient’s ability to repay.” *Id.* at 2984. In addition, the hospital already may be under an obligation to provide medical care if that hospital is receiving federal grant money under the Hill-Burton Act. 42 U.S.C. § 291(c)(e) (1976). And, indeed, G.L. c. 111, § 70E(k) provides: “Every patient . . . shall have the right: . . . to prompt life saving treatment in an emergency without discrimination on account of economic status or source of payment. . . .”

⁵⁵ 103 S. Ct. at 2984.

⁵⁶ *Id.*

⁵⁷ *Id.*

§ 9.2. ¹ 387 Mass. 1201, 440 N.E.2d 1159 (1982).

² Over the past twenty years the Court has considered several cases concerning the constitutionality of school prayer exercises. *See, e.g.*, *Kent v. Commissioner of Education*, 380 Mass. 234, 402 N.E.2d 1340 (1980); *Commissioner of Education v. School Committee of Leyden*, 358 Mass. 776, 267 N.E.2d 226 (1976); *Attorney General v. School Committee of North Brookfield*, 347 Mass. 775, 199 N.E.2d 553 (1964); *Waite v. School Committee of Newton*, 348 Mass. 767, 202 N.E.2d 297 (1964); *cf. Colo v. Treasurer and Receiver General*, 378 Mass. 550, 392 N.E.2d 1195 (1979).

³ Section 1A of chapter 71 was added to the General Laws by chapter 130 of the Acts of 1966. The Legislature added this provision in response to the Supreme Judicial Court’s decision in *Attorney General v. School Comm. of North Brookfield*, 347 Mass. 775, 199 N.E.2d 553 (1964), declaring chapter 71, section 31 of the General Laws, which required Bible reading in public schools, to be unconstitutional. Section 1A remained unchanged until

with the following:

Section 1A. At the commencement of the first class of each day in all grades in all public schools the teacher in charge of the room in which each class is held shall announce that a period of voluntary prayer or meditation may be offered by a student volunteer not to exceed one minute in duration.

Section B. Such prayer shall not establish a religion in Public Schools, just as the prayer by the Chaplains of the Senate and the House of Representatives and the Crier of the Supreme Court does not establish [a] religion in our government.⁴

The House of Representatives requested the Justices to advise it⁵ as to the bill's constitutionality under article II, part I of the Massachusetts Constitution,⁶ and under the first and fourteenth amendments⁷ of the United

the Legislature in chapter 621 of the Acts of 1973 amended it by adding the words "or prayer" so that section 1A then read as follows:

At the commencement of the first class of each day in all grades in all public schools the teacher in charge of the room in which each such class is held shall announce that a period of silence not to exceed one minute in duration shall be observed for meditation or prayer, and during any such period silence shall be maintained and no activities engaged in.

The constitutionality of the enactment, as then amended, was affirmed by a three judge panel in the United States District Court for the District of Massachusetts in *Gaines v. Anderson*, 421 F. Supp. 337 (D. Mass. 1976). See *infra* notes 29-43 and accompanying text.

Subsequently, the Legislature in chapter 692 of the Acts of 1979 deleted the phrase "silence not to exceed one minute in duration shall be observed for meditation and prayer" and replaced it with "prayer may be offered by a student volunteer." Chapter 692 also replaced the phrase "silence shall be maintained and no activities engaged in" with "an excusal provision will be allowed for those students who do not wish to participate." It was this version of section 1A, as amended by chapter 692, that was at issue in *Kent v. Commissioner of Education*, 380 Mass. 235, 402 N.E.2d 1340 (1980). The *Kent* Court concluded that section 1A violated the first amendment. In response to *Kent*, the Legislature amended section 1A in Chapter 144 of the Acts of 1980 by restoring the former language which the federal district court in *Gaines* had approved. House Bill No. 1454 would have amended the now existing version of section 1A in essence by permitting oral recitation of prayer.

⁴ See 387 Mass. at 1201-02, 440 N.E.2d at 1160.

⁵ MASS. CONST. part II, ch. 3, art. 2 provides: "Each branch of the legislature, as well as the governor or the council, shall have the authority to require the opinion of the justices of the Supreme Judicial Court, upon important questions of law, and upon solemn occasions." The purpose behind this provision "is to enable the Justices to give such advice to the Legislature, the Governor, and the Council as would be necessary to enable these departments to perform their duties in a manner consistent with our constitution." Answer of the Justices, 373 Mass. 898, 901, 367 N.E.2d 793, 795 (1977).

⁶ MASS. CONST. part I, art. II provides:

It is the right as well as the duty of all men in society, publicly, and at stated seasons to worship the SUPREME BEING, the great Creator and Preserver of the universe. And no subject shall be hurt, molested, or restrained, in his person, liberty, or estate, for worshipping GOD in the manner and season most agreeable to the dictates of his own conscience; or for his religious profession or sentiments; provided he doth not disturb the public peace, or obstruct others in their religious worship.

⁷ U.S. CONST. amend. I provides in part: "Congress shall make no law respecting an

States Constitution.⁸

At the outset the Court indicated that it would examine the bill initially in light of the first amendment, because if the proposed law violated that provision examination under the cognate provision of the Commonwealth's constitution would be unnecessary.⁹ Indeed, a majority of the

establishment of religion, or prohibiting the free exercise thereof" The free exercise and establishment clauses address distinct forms of governmental curtailment of individual religious freedom. The establishment clause removes "all legislative power respecting religious belief or the expression thereof." *Schempp v. School District of Abington*, 374 U.S. 203, 222 (1963). "The Establishment Clause, unlike the Free Exercise Clause, does not depend upon any showing of direct governmental compulsion and is violated by the enactment of laws which establish an official religion whether those laws operate directly to coerce non-observing individuals or not." *Engle v. Vitale*, 370 U.S. 421, 430-31 (1962). The free exercise clause, on the other hand, "recognizes the value of religious training, teaching and observance and, more particularly, the right of every person to freely choose his own course with reference thereto, free of any compulsion from the state." *Schempp v. School District of Abington*, 374 U.S. 203, 222 (1962). The Supreme Court in *Schempp* further stated:

The Free Exercise Clause withdraws from legislative power, state and federal, the exertion of any restraint on the free exercise of religion. Its purpose is to secure religious liberty in the individual by prohibiting any invasions thereof by civil authority. Hence it is necessary in a free exercise case for one to show the coercive effect of the enactment as it operates against him in the practice of his religion. The distinction between the two clauses is apparent — a violation of the Free Exercise Clause is predicated on coercion while the Establishment Clause violation need not be so attended.

Id. at 222-23.

U.S. CONST. amend. XIV, § 1 provides in part: "[N]or shall any state deprive any person of life, liberty, or property, without due process of law" The first amendment is applicable to the states through the due process clause of the fourteenth amendment. *Cantwell v. Connecticut*, 310 U.S. 296, 303 (1940); *Gitlow v. New York*, 268 U.S. 652, 666 (1925).

⁸ The actual questions presented to the Court by the House of Representatives were as follows:

1. Would the enactment of said bill which allows voluntary permissible prayer and meditation in the public schools of the Commonwealth be constitutional under Article II of Part I. of the Constitution of the Commonwealth?
2. Would the enactment of said bill which allows voluntary permissible prayer and meditation in the public schools of the Commonwealth be constitutional under the First and Fourteenth Amendment of the United States Constitution?

⁹ 387 Mass. at 1202, 440 N.E.2d at 1160. The Court, citing *Moe v. Secretary of Administration and Finance*, 1981 Mass. Adv. Sh. 464, 417 N.E.2d 387, noted that rendering an opinion on the state constitutional question would be meaningless if House Bill No. 1454 violated the federal constitution. This conclusion is apparently based on the supremacy clause of the federal constitution. That clause reads: "This Constitution . . . shall be the supreme Law of the Land; and the Judges in every State shall be bound thereby, any Thing in the Constitution or Laws of any State to the Contrary notwithstanding." U.S. CONST. art. VI, cl. 2. The Court's citation of *Moe* is interesting because *Moe* did not involve

Court concluded that House Bill No. 1454 would, if enacted, establish a religion in violation of the first amendment; consequently, the Court did not discuss the viability of the legislation under article II, part I.¹⁰ The Court did state, however, that the criteria established by the United States Supreme Court for adjudicating first amendment claims are "equally appropriate" for judging claims under analogous sections of the Massachusetts Constitution, thereby suggesting that the standards under the federal and state provisions are precisely the same.¹¹

In its analysis of the federal constitutional issue, the Court relied heavily on its recent and principal school prayer decision, *Kent v. Commissioner of Education*,¹² in which it concluded that a prior version of chapter 71, section 1A violated the establishment clause of the first amendment.¹³ When the Court compared the language in House Bill No.

a situation where the Court, after finding a Massachusetts statute in violation of the federal constitution, refused to address a state constitutional issue. Rather, the Court in *Moe* held that the so-called Doyle-Flynn amendment, which limited public funding of abortions only to those necessary to save the life of the mother, was unconstitutional under the due process guarantees of the Massachusetts Declaration of Rights. 1981 Mass. Adv. Sh. at 480, 417 N.E.2d at 397. The *Moe* Court reached this result despite the fact that the United States Supreme Court had previously upheld virtually identical restrictions regarding the funding of abortions passed by the United States Congress and by another state legislature. See *Harris v. McRae*, 448 U.S. 597 (1980); *Williams v. Zbaraj*, 448 U.S. 358 (1980). *Moe* therefore demonstrates that an individual may receive more protection under a state constitution than under the cognate provision of the federal counterpart. See Wilkins, *Judicial Treatment of the Massachusetts Declaration of Rights in Relation to Cognate Provisions of the United States Constitution*, 14 SUFFOLK U. L. REV. 887 (1980).

With regard to this supremacy clause question, reference should also be made to *Widmar v. Vincent*, 454 U.S. 263 (1981). In *Widmar*, a state university adopted a regulation prohibiting use of its facilities for religious purposes. *Id.* at 265. The facilities were otherwise available to registered student groups. *Id.* A student religious organization, deprived of the use of university meeting rooms, argued that this deprivation violated the first and fourteenth amendments. *Id.* at 266. The university asserted that its regulation was required by the establishment clause of the first amendment and also by a cognate provision of the state constitution. *Id.* at 270, 275. The Supreme Court struck down the regulation on the grounds that it implicated first amendment free speech and association rights. *Id.* at 273 n.13, 277. The Supreme Court further demonstrated that the regulation did not run afoul of the establishment clause. *Id.* at 271-73. With regard to the state constitutional issue, the Supreme Court noted that the state court had not ruled whether such a regulation would violate the state constitution. *Id.* at 275. Therefore, the Supreme Court refused to determine how the state court would decide that issue. *Id.* The Supreme Court went on to note "[i]t is also unnecessary for us to decide whether, under the Supremacy Clause, a state interest, derived from its own constitution, could ever outweigh free speech rights protected by the First Amendment." *Id.* at 275-76.

¹⁰ 387 Mass. at 1207, 440 N.E.2d at 1163.

¹¹ *Id.* at 1202, 440 N.E.2d at 1160 (quoting *Colo. v. Treasurer and Receiver General*, 378 Mass. 550, 558, 392 N.E.2d 1195, 1200 (1979)).

¹² 380 Mass. 235, 402 N.E.2d 1349 (1980).

¹³ *Id.* at 245, 402 N.E.2d at 1345. The version of section 1A examined in *Kent* read as follows:

1454 with the version of section 1A which it had examined in *Kent*, it found no significant difference.¹⁴ The version of section 1A examined in *Kent* had provided that a student volunteer could offer a period of prayer.¹⁵ House Bill No. 1454, on the other hand, permitted a student volunteer to offer a period of prayer or meditation.¹⁶ The Court, however, considered the addition of the words “or meditation” in House Bill No. 1454 to be of no constitutional significance. The Court explained that even though prayer was not the exclusive aim of House Bill 1454, it nevertheless contemplated that, at least on some occasions, prayer would be offered.¹⁷ The Court considered this element of the proposed legislation sufficient to invoke the establishment clause, stating that the “United States Supreme Court . . . has consistently held that the Establishment Clause withdraws all legislative power respecting religious belief or the expression thereof.”¹⁸

As in *Kent*, the Court applied the criteria for adjudicating freedom of religion claims which the Supreme Court established in *School District of Abington Township v. Schempp*.¹⁹ The *Schempp* test provides that if either the purpose or principal effect of the legislation is to advance or inhibit religion, then the enactment is beyond the scope of legislative power.²⁰ In other words, in order to withstand scrutiny under the establishment clause, “there must be a secular legislative purpose and a primary effect that neither advances nor inhibits religion.”²¹ According to the Supreme Judicial Court, the purpose of House Bill No. 1454 was to

At the commencement of the first class of each day in all grades in all public schools the teacher in charge of the room in which each such class is held shall announce that a period of prayer may be offered by a student volunteer, and during any such period an excusal provision will be allowed for those students who do not wish to participate.

¹⁴ 387 Mass. 1204, 440 N.E.2d at 1161.

¹⁵ *Id.*

¹⁶ *Id.*

¹⁷ *Id.*

¹⁸ *Id.* (quoting *School District of Abington v. Schempp*, 374 U.S. 203, 222 (1963)).

¹⁹ 374 U.S. 203 (1963). In *Schempp* the Supreme Court struck down, as violative of the establishment clause, state laws requiring reading of the Bible in the public schools.

²⁰ *Id.* at 222.

²¹ *Id.* Later Supreme Court establishment clause cases have recognized a third prong to the test, namely, avoidance of “excessive government entanglement with religion.” *Widmar v. Vincent*, 454 U.S. 264, 271 (1981); *Lemon v. Kurtzman*, 403 U.S. 602, 612-13 (1971). In *Colo v. Treasurer and Receiver General*, the Supreme Judicial Court stated “indeed, there is a ‘significant fourth factor’ implicit in the analysis [that] the [United States Supreme] Court has undertaken — that is, whether the challenged practice has a ‘divisive political potential.’ ” 378 Mass. 550, 558, 392 N.E.2d 1195, 1200 (1979) (quoting *Meek v. Pittenger*, 421 U.S. 349, 374 (1975) (Brennan, J., concurring in part and dissenting in part)). In *Opinion of the Justices*, the Court only referred to the first two prongs of the test. 387 Mass. at 1205, 440 N.E.2d at 1161.

encourage the recitation of prayer and its primary effect was to return prayer,²² necessarily a religious exercise,²³ to the classroom.²⁴ As stated by the Court, both in this case and in *Kent*, "it [would be] more than a strain to argue that religion [was] not being advanced"²⁵

Although a majority of the Court found House Bill No. 1454 constitutionally offensive after examining the purpose and primary effect of the proposed legislation,²⁶ perhaps the majority should have explained more clearly why the presence of the phrase "or meditation" apparently had no impact.²⁷ As noted above, that phrase indicated clearly that prayer was not the only aim of the bill.²⁸ In *Gaines v. Anderson*²⁹ a three judge panel of the United States District Court for the District of Massachusetts examined, and upheld, an earlier version of chapter 71, section 1A of the General Laws which provided that "a period of silence . . . shall be observed for meditation or prayer"³⁰ In analyzing that version of section 1A³¹ the *Gaines* court examined independently the words "meditation" and "or prayer." Meditation, the district court noted, unlike

²² 387 Mass. at 1206, 440 N.E.2d at 1162.

²³ *Id.* In *Gaines v. Anderson*, 421 F. Supp. 337, 343 (D. Mass. 1976) the federal district court noted that prayer usually "has a specially religious meaning." In *Kent v. Commissioner of Education*, 380 Mass. 235, 238, 402 N.E.2d 1240, 1341-42 (1980), the Supreme Judicial Court referred to prayer as a serious invocation of the deity, an exercise which is intrinsically religious. This is so even when the aim of the prayer is secular. As noted in *Kent*:

The question is not what a suppliant asks but to whom he addresses his supplication. The religious aspect is evident where the prayer is sectarian, or devotional without being sectarian; it seems to us not less evident when the suppliant seeks a secular result for he is still addressing himself to the Deity, to Whom he often also offers praise and thanks.

380 Mass. at 242, 402 N.E.2d at 134+.

²⁴ 387 Mass. at 1205, 440 N.E.2d at 1162.

²⁵ *Id.* (quoting *Kent v. Commissioner of Education*, 380 Mass. 235, 243, 402 N.E.2d at 1340, 1345 (1980)).

²⁶ 387 Mass. at 1205, 440 N.E.2d at 1162.

²⁷ In *Gaines v. Anderson*, 421 F. Supp. 337 (D. Mass. 1976) the federal district court analyzed, in detail, a prior version of chapter 71, section 1A which contained the words "meditation or prayer." The only reference to *Gaines* in *Opinion of the Justices* is in a footnote. 387 Mass. at 1204 n.3, 440 N.E.2d at 1161 n.3.

²⁸ See *supra* notes 15-17 and accompanying text.

²⁹ 421 F. Supp. 337 (D. Mass. 1976).

³⁰ *Id.* at 346.

³¹ G.L. c. 71, § 1A, as examined in *Gaines*, provided:

At the commencement of the first class of each day in all grades in all public schools the teacher in charge of the room in which each such class is held shall announce that a period of silence not to exceed one minute in duration shall be observed for meditation and during any such period silence shall be maintained and no activities engaged in.

prayer, is secular.³² Providing students with an opportunity to meditate, the district court continued, was consistent with a secular goal of public education, namely, that of “encourag[ing] students to turn their minds silently toward serious thoughts and values.”³³ Prayer, on the other hand, the district court observed, has a peculiarly religious connotation.³⁴ The court in *Gaines* concluded that the Commonwealth was making available to students an opportunity to engage in prayer, albeit silent prayer.³⁵ Nevertheless, the district court upheld the enactment.³⁶ In examining the history connected with the addition of the words “or prayer” to section 1A, the *Gaines* court considered it significant that the legislature used the word “or” and not “and.”³⁷ According to the district court, intentional use of the disjunctive “indicat[ed] a legislative sensitivity to the First Amendment’s mandate to take a neutral position that neither encourages nor discourages prayer.”³⁸ The effect of the statute, as determined in *Gaines*, was to “accommodate students who desire to use the minute of silence for prayer or religious meditation, and also other students who prefer to reflect upon secular matters.”³⁹

Both the version of section 1A examined in *Gaines* and House Bill No. 1454 used the words “prayer or meditation.”⁴⁰ The former statute was upheld, however, while the latter was found constitutionally defective.⁴¹ It is difficult to reconcile these two seemingly contradictory results. One possible distinction is that the prayer permitted under the *Gaines* version of 1A is silent while the invocations contemplated under House Bill No. 1454 would be oral. This difference, however, does not provide an adequate basis for distinguishing the views of the Supreme Judicial Court

³² *Id.* at 342. “Used in its ordinary sense, ‘meditation’ connotes serious reflection or contemplation as a subject which may be religious, irreligious or nonreligious.” *Id.*

³³ 421 F. Supp. at 342.

³⁴ *Id.* at 343.

³⁵ *Id.* at 344-45.

³⁶ *Id.* at 346.

³⁷ Chapter 621 of the Acts of 1973 inserted the words “or prayer.” The bill as originally drafted used the words “and prayer.” See House Bill No. 4890 (1973). The bill’s sponsor, however, later amended it by deleting “and” and inserting “or.” 421 F. Supp. at 343. The federal district court felt that this action evidenced the neutrality required of the state by the establishment clause. *Id.* The only act commanded by the state pursuant to section 1A according to the *Gaines* court was that the students remain quiet for a minute during which they could pray or meditate. The district court found it significant that “there [was] no command that they meditate or pray.” *Id.* at 344.

³⁸ 421 F. Supp. at 343.

³⁹ *Id.*

⁴⁰ See *supra* text accompanying note 4 and note 31.

⁴¹ Compare *supra* notes 29-39 and accompanying text with notes 9-25 and accompanying text.

from those of the federal district court in *Gaines*. As noted in *Gaines*, “if the amendment here [which permits silent prayer] has the purpose or primary effect of encouraging the religious activity of prayer the statute would be rendered unconstitutional.”⁴² Conversely, not every oral recitation of prayer sanctioned by the state is unconstitutional.⁴³ The element of silence, therefore, cannot be the sole distinguishing feature. Perhaps a secular purpose and primary effect that neither discourages nor advances religion is merely easier to ascertain when the prayer authorized by the state must be done in silence. Certainly, it would have been helpful if the Supreme Judicial Court had more carefully distinguished House Bill No. 1454 from the version of section 1A examined in *Gaines*.

The Court also commented on Section B of House Bill No. 1454.⁴⁴ As noted above, Section B analogized school prayer exercises to legislative prayer exercises, and concluded that because the latter does not offend the constitution, neither does the former.⁴⁵ The Court was quick to point out that this provision violated the principle of separation of powers.⁴⁶ Citing *Marbury v. Madison*,⁴⁷ the majority noted that it is the duty of the judiciary, and not the legislature, to determine when legislation contravenes the Constitution.⁴⁸ Moreover, the court reasoned, the attempt to equate the two forms of prayer exercise was unsound.⁴⁹

The analogy of the two prayer exercises in Bill No. 1454 was an obvious reference to *Colo v. Treasurer and Receiver General*.⁵⁰ In *Colo* the Supreme Judicial Court held that a Massachusetts statute which permitted public funds to be used to pay the salaries of Senate and House of Representatives chaplains violated neither the Massachusetts nor the

⁴² 421 F. Supp. at 343.

⁴³ See, e.g., *Colo v. Treasurer and Receiver General*, 378 Mass. 550, 392 N.E.2d 1195 (1979) (legislative prayer exercises offered by legislative chaplains prior to each day’s session do not violate establishment clause.)

⁴⁴ 387 Mass. at 1205-06, 440 N.E.2d at 1162. For the text of Section B see *supra* text accompanying note 4.

⁴⁵ See *supra* text accompanying note 4.

⁴⁶ *Id.* at 1206, 440 N.E.2d at 1162. The principle of separation of powers is embodied in MASS. CONST. part I, art. XXX which 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.

⁴⁷ 5 U.S. (1 Cranch) 137, 178 (1803).

⁴⁸ 387 Mass. at 1206, 440 N.E.2d at 1162.

⁴⁹ *Id.*

⁵⁰ 378 Mass. 550, 392 N.E.2d 1195 (1979).

federal constitutions.⁵¹ Further, albeit in dicta, the *Colo* Court indicated that the chaplains' practice of offering invocations prior to each day's legislative session was constitutional.⁵² In explaining why this practice was permissible, the *Colo* Court sought to distinguish it from public school prayer exercises.⁵³ As justification for its rejection of the analogy between school and legislative prayer exercises contained in House Bill No. 1454, the Court quoted the following passage from its *Colo* decision:

The State, by incorporating religious exercises into the context of a compulsory school day, lends at least implicit support to the notion that children should be indoctrinated to accept religion. The purpose of school is to teach impressionable children, many of whom, because of their ages, cannot be expected to comprehend that school sponsored prayers are not necessarily 'lessons' to be learned like other aspects of the school programs By contrast, mature legislators may reasonably be assumed to have fully formed their own religious beliefs or non beliefs. The provision of a ceremonial moment of meditation at the opening of the legislative session is unlikely to advance religious belief either among the legislators or their constituency, even if it does give recognition to the traditional place that prayer has occupied in such a ritual for two centuries.⁵⁴

Despite the extensive quotation from *Colo*, it would have been helpful if the majority isolated and elaborated on the factors that permit prayer to be recited in the legislative context yet forbid it in the schoolroom. This is particularly so since the two dissenting justices predicated their dissent on the constitutionality of legislative prayer exercises under *Colo*.⁵⁵ For example, the significance of the potential for prayer to be confused with the usual curriculum, and thus viewed as mandatory by students, is unclear. Indeed, in *Kent* the parties stipulated that this risk was not even an issue.⁵⁶ Furthermore, assuming that prayer is indeed more ceremonial in the legislative context than in the classroom, such a distinction is of dubious value in deciding the constitutional issue presented by public prayer. Regardless of the setting and the degree of ceremony or ritual, prayer is an innately religious act.⁵⁷ Another question left unanswered is the significance, if any, of age, particularly in light of the fact that the prohibition of school prayer affects high school as well as grade school students. The Court's argument regarding the impressionability of students is much less persuasive at the secondary school level.

⁵¹ *Id.* at 561, 392 N.E.2d at 1201. G.L. c. 3, § 14 provides that "the chaplain of the senate and the chaplain of the house of representatives shall each receive such salary as may be established by the [respective] committee[s] on rules"

⁵² 378 Mass. at 558-60, 392 N.E.2d at 1200-01.

⁵³ *Id.* at 559, 392 N.E.2d at 1200.

⁵⁴ 387 Mass. at 1206, 440 N.E.2d at 1162 (quoting *Colo v. Treasurer and Receiver General*, 378 Mass. 550, 553, 392 N.E.2d 1195, 1197 (1978)).

⁵⁵ *Id.* at 1207-08, 440 N.E.2d at 1163.

⁵⁶ 380 Mass. at 238, 402 N.E.2d at 1341.

⁵⁷ See *supra* note 23.

Dissenting Justices Nolan and Lynch asserted that *Colo* was indistinguishable from the case before the Court and, indeed, that it supported a conclusion that House Bill No. 1454 was constitutional.⁵⁸ Quoting from *Colo*, Justice Nolan stated:

There is no evidence that a great degree of government entanglement with religion is occasioned by the employment of legislative chaplains, [substitute "student volunteers"]. The prayers offered are brief, the content unsupervised by the state, and attendance completely voluntary. There is no evidence that the State has become embroiled in any difficult decisions about which religions are to be represented or what sorts of invocation are to be offered.⁵⁹

Just as it would have aided analysis if the majority articulated more definitively the factors distinguishing legislative prayer and school prayer, it would have been helpful if Justice Nolan explained why *Kent*⁶⁰ was not the controlling decision, and further, what impact a favorable decision in this case would have had on *Kent*.

§ 9.3. Governor's Authority to Recall General Court — Political Question Doctrine. On November 2, 1982, Massachusetts voters approved a legislative amendment¹ to their constitution authorizing the General Court to reinstate capital punishment as a criminal sanction in the Commonwealth.²

⁵⁸ 387 Mass. at 1207-08, 440 N.E.2d at 1163.

⁵⁹ *Id.*

⁶⁰ 380 Mass. 234, 402 N.E.2d 1340 (1980). See *supra* notes 12-15 and accompanying text.

§ 9.3. ¹ Article 48 of the Massachusetts Constitution notes a distinction between legislative and initiative amendments to the constitution. It provides: "a proposal for amendment to the constitution introduced into the General Court by initiative petition shall be designated an initiative amendment, and an amendment introduced by a member of either house shall be designated a legislative substitute or a legislative amendment." MASS. CONST. art. 48, The Initiative, part IV, § 1.

Article 48, which was added to the constitution in 1918, provides generally for procedures surrounding the initiative and the referendum. These are defined as follows:

Legislative power shall continue to be vested in the General Court; but the people reserve to themselves the popular initiative, which is the power of a specified number of voters to submit constitutional amendments and laws to the people for approval or rejection; and the popular referendum, which is the power of a specified number of voters to submit laws, enacted by the General Court, to the people for their ratification or rejection.

MASS. CONST. art. 48, part I, Definition.

² MASS. CONST. art. 116. Article 116 amended article 26 of the Declaration of Rights by adding the last two sentences. Article 26 now reads as follows:

No magistrate or court of law, shall demand excessive bail or sureties, impose excessive fines, or inflict cruel or unusual punishments. No provision of the Constitution, however, shall be construed as prohibiting the imposition of the punishment of death. The General Court may, for the purpose of protecting the general welfare of the citizens, authorize the imposition of the punishment of death by the courts of law having jurisdiction of crimes subject to the punishment of death.

A prerequisite to the electorate's consideration of this amendment, however, was approval by a majority of two successive joint sessions of the Legislature. In *Backman v. Secretary of the Commonwealth*³ the Supreme Judicial Court examined the validity of the method used by Governor King to convene the General Court into joint constitutional session to consider the capital punishment amendment. Additionally, the Court in *Backman* discussed the application of the federal political question doctrine to Massachusetts jurisprudence.⁴

The Massachusetts Constitution requires that before a proposed legislative amendment to the constitution can be submitted to the people at the general election, it must be approved at two successive terms of the General Court, by a majority of the members of that body, meeting in joint session.⁵ In May 1980, the Senate and House of Representatives assembled in joint session to consider, among other items, the proposed capital punishment amendment.⁶ On July 2, 1980, the General Court adjourned prior to taking final action on this amendment.⁷ Three days later, Governor King, acting at the request of the Legislature and with the advice and consent of the Executive Council, prorogued the General Court until "the day preceding the first Wednesday of January, 1981."⁸ On September 10, 1980, Governor King notified the Executive Council that he wished to convene the General Court into joint session so that it might resume

MASS. CONST. part I, art. 26. In 1980, prior to the amendment of article 26, the Supreme Judicial Court concluded that the death penalty violated that article's prohibition against cruel and unusual punishment. *District Attorney for Suffolk District v. Watson*, 381 Mass. 648, 671, 411 N.E.2d 1274, 1283 (1980).

³ 387 Mass. 549, 441 N.E.2d 523 (1982).

⁴ *Id.* at 554-55, 441 N.E.2d at 526-27.

⁵ MASS. CONST. art. 48, The Initiative, part IV, § 4. Section 4 provides that: "[a]t such joint session a legislative amendment receiving the affirmative votes for a majority of all the members elected, or an initiative amendment receiving the affirmative votes of not less than one-fourth of all the members elected, shall be referred to the next General Court." *Id.*

Section 5 of part IV provides:

If in the next General Court a legislative amendment shall again be agreed to in joint session by a majority of all the members elected . . . such fact shall be certified by the clerk of such joint session to the secretary of the commonwealth, who shall submit the amendment to the people at the next state election. Such amendment shall become part of the constitution if approved . . .

MASS. CONST. art. 48, The Initiative, part IV, § 5.

⁶ 387 Mass. at 551, 441 N.E.2d at 524.

⁷ *Id.*

⁸ *Id.* The Governor, in essence, prorogued the General Court through the remainder of its regular session. The constitution provides that "[t]he General Court shall assemble every year on the first Wednesday in January." MASS. CONST. art. 64, § 3. In addition, the constitution also provides that the General Court's year shall begin on the first Wednesday of January. MASS. CONST. art. 10. See *infra* note 55.

deliberation on the capital punishment amendment.⁹ One week later, the Executive Council consented to the Governor's request.¹⁰ The Governor thereupon issued a proclamation calling "the members of the General Court . . . to assemble . . . September 18, 1980 . . . in continuance of joint constitutional session, which adjourned on July 2, 1980, to the end that final action may be taken upon all proposals for Constitutional Amendments properly before it."¹¹

Shortly after the General Court convened, Senator Jack Backman raised a point of order challenging the Governor's authority to directly reconvene the Legislature after its adjournment and subsequent prorogation.¹² The President of the Senate ruled Senator Backman's challenge out of order.¹³ Shortly thereafter the Senator initiated an action in the Supreme Judicial Court.¹⁴ Because the proposed amendment had yet to be approved by two terms of the General Court, as required under the constitution,¹⁵ the Supreme Judicial Court took no action on the merits at that time.¹⁶ The amendment subsequently received a favorable vote from a majority of the members of the General Court both at the September 1980 joint session and at a joint session convened in May of 1982.¹⁷ On August 4, 1982, the Court heard arguments on the case and two days later, having found no impropriety in the manner in which the General Court convened in September 1980, ruled that the capital punishment amendment should be submitted to the people.¹⁸ On November 1, 1982, the Court issued its written opinion.

Senator Backman argued that Governor King was without authority to convene the General Court into joint session without first assembling it as a legislature.¹⁹ The first affirmation of the proposed amendment by the members of the General Court was therefore defective, the Senator as-

⁹ 387 Mass. at 551, 441 N.E.2d at 525.

¹⁰ *Id.*

¹¹ *Id.* The proclamation also made reference to the Governor's power to recall the General Court after it has been prorogued. This power is contained in MASS. CONST. part II, ch. 2, § 1, art. 5.

¹² 387 Mass. at 552, 441 N.E.2d at 526. Senator Backman also raised a second point of order with respect to the Governor's proclamation. *Id.* at 553, 441 N.E.2d at 526. He argued that the Governor violated the principle of separation of powers in that his proclamation restricted legislative action to consideration of proposed constitutional amendments. *Id.* Because the Legislature never endeavored to transact any other business, the court refused to consider this issue. *Id.*

¹³ *Id.* at 552, 441 N.E.2d at 526.

¹⁴ *Id.* at 553, 441 N.E.2d at 526. Presumably Senator Backman was seeking declaratory relief. See G.L. c. 231A, § 1 (authorizing the Supreme Judicial Court to issue declaratory judgments).

¹⁵ MASS. CONST. art. 48, The Initiative, part IV, §§ 4, 5. See *supra* note 5.

¹⁶ 387 Mass. at 553, 441 N.E.2d at 526.

¹⁷ *Id.*

¹⁸ *Id.* at 550, 441 N.E.2d at 524.

¹⁹ *Id.* at 550, 552, 441 N.E.2d at 525, 526.

serted, and consequently the amendment could not properly be submitted to the people at the November 2 election.²⁰ Although article V of the Massachusetts Constitution permits the Governor to recall the legislature “sooner than the time to which it may be . . . prorogued, if the Welfare of the Commonwealth shall [so] require,”²¹ that provision, according to Senator Backman, contemplates a recall of the General Court as a legislature.²² The Senator argued that article V does not authorize the Governor to convene the General Court into joint session, and indeed, it does not even address the question of joint session.²³ Senator Backman observed that a separate provision in the constitution does speak specifically to that issue.²⁴ He noted that article 48, as amended by article 81, provides that “if the two houses fail to agree upon a time for holding any joint session . . . or fail to continue the same from time to time until final action has been taken upon all amendments pending, the Governor shall call such joint session or continuance thereof.”²⁵ This provision, Senator Backman maintained, presupposes that both houses already are assembled as a legislature prior to being convened into joint session.²⁶

The Secretary of the Commonwealth, on the other hand, urged the Court not to review the matter at all on the ground that it involved a political question.²⁷ The Court’s opinion does not detail the precise arguments

²⁰ *Id.* at 550, 441 N.E.2d at 525; *see* MASS. CONST. art. 48, The Initiative, part IV, § 5. *See supra* note 5.

²¹ MASS. CONST. part 2, ch. 5, § 1, art. V. Article V provides in part:

The Governor, with advice of Council, shall have full power and authority, during the Session of the General Court to adjourn or prorogue the same to any time the two houses shall desire; . . . and, in the recess of the said Court, to prorogue the same from time to time, not exceeding ninety days in any one recess; and to call it together sooner than the time to which it may be adjourned or prorogued if the welfare of the Commonwealth shall require the same

Id.

²² 387 Mass. at 550, 555, 441 N.E.2d at 525, 527.

²³ *Id.*

²⁴ *See* MASS. CONST. art. 81, § 1. Section 2, which amended art. 48, The Initiative, part IV, § 2, provides in pertinent part:

[I]n case of a proposal for amendment introduced into the general court by a member of either house, consideration thereof in joint session is called for by vote of either house, such proposal shall, not later than the second Wednesday in May, be laid before a joint session of the two houses, at which the president of the senate shall preside; and if the two houses fail to agree upon a time for holding any joint session hereby required, or fail to continue the same from time to time until final action has been taken upon all amendments pending, the Governor shall call such joint session or continuance thereof.

Id.

²⁵ *Id.*

²⁶ 387 Mass. at 550, 555, 441 N.E.2d at 525, 527.

²⁷ *Id.* at 354, 441 N.E.2d at 526. *See infra* note 28 (discussion of the political question doctrine as articulated by the federal courts). The Secretary argued, in the alternative, that

advanced in support of this assertion.²⁸ Perhaps, however, the Secretary

the General Court convened itself. *Id.* at 556, 441 N.E.2d at 528. Presumably the Secretary was referring to the General Court's power to self assembly contained in article 10 of the Massachusetts Constitution. See *infra* note 55. The Supreme Judicial Court indicated, however, that the General Court had not properly convened itself. 387 Mass. at 556, 441 N.E.2d at 528 (citing *Opinion of the Justices*, 303 Mass. 664, 675, 22 N.E.2d 261, 269 (1939); *Opinion of the Justices*, 294 Mass. 623, 626-27, 3 N.E.2d 218, 220-21 (1936)). See *infra* note 54.

²⁸ See 387 Mass. at 554, 441 N.E.2d at 526-27. Although the political question doctrine is well established in the federal courts, the ingredients of the doctrine are not always apparent. There are, however, three fairly distinct strands of that doctrine. The most prominent among them is the so-called commitment strand, see G. GUNTHER, CONSTITUTIONAL LAW — CASES AND MATERIALS 449-50, 1688-90 (10th ed. 1979), which provides that a court may refuse to review a case where it perceives that the constitution envisions resolution of the issue by a branch other than the judiciary. See *Baker v. Carr*, 369 U.S. 186, 217 (1962). The second strand emphasizes the court's competence, or more aptly, the lack thereof, to adjudicate that particular type of question. The third strand of the doctrine is grounded on judicial discretion. Some issues may be excessively controversial, or may result in difficulties of enforcement of judgment, or may result in different pronouncements by different branches of the government so as to warrant the court to decline review. See G. GUNTHER, *supra*, at 1688-89. It has been suggested that the first strand presents the only legitimate reason for a court to refuse to adjudicate a case. Weschler, *Toward Neutral Principles of Constitutional Law*, 73 HARV. L. REV. 1, 7, 9 (1963). Certainly it would seem that if the Constitution envisions resolution of an issue by the legislature or executive, then, pursuant to the separation of powers doctrine, the court ought not to review it.

One of the political question cases cited by the *Backman* majority, *Baker v. Carr*, contains a good description of the ingredients of a political question. As noted by Justice Brennan:

It is apparent that several formulations which vary slightly according to the settings in which the questions arise may describe a political question, although each has one or more elements which identify it as essentially a function of the separation of powers. Prominent on the surface of any case held to involve a political question is found a textually demonstrable constitutional commitment of the issue to a coordinate political department; or a lack of judicially discoverable and manageable standards for resolving it; or the impossibility of deciding without an initial policy determination of a kind clearly for nonjudicial discretion; or the impossibility of a court's undertaking independent resolution without expressing lack of the respect due coordinate branches of government; or an unusual need for unquestioning adherence to a political decision already made; or the potentiality of embarrassment for multifarious pronouncements by various departments on one question.

369 U.S. 186, 217 (1962). In *Baker v. Carr* the Supreme Court considered whether the issue of state legislative reapportionment was justiciable, that is, whether it constituted a political question. *Id.* at 209. The State argued that the issue implicated the Guaranty Clause of the federal Constitution, and was therefore a political question. The Supreme Court responded:

We hold that the claim pleaded here neither rests upon nor implicates the Guaranty Clause and that its justiciability is therefore not foreclosed by our decisions of cases involving that clause To show why we reject the argument based on the Guaranty Clause, we must examine the authorities under it That review reveals that in the Guaranty Clause cases and in other "political questions" cases, it is the relationship between the judiciary and the coordinate branches of the Federal Gov-

contended that the state constitution envisioned that the manner in which the houses are assembled into joint session was an issue for the Governor alone to resolve, or, alternatively, for the Governor and the General Court to resolve in concert.²⁹ The Court, however, declined the Secretary's invitation, noting that it has consistently refused to incorporate the political question doctrine into Massachusetts jurisprudence.³⁰

ernment, and not the federal judiciary's relationship to the States, which gives rise to the "political question."

Id. at 209-10.

In addition to *Baker v. Carr*, the *Backman* majority cited two other United States Supreme Court decisions which addressed the political question doctrine. In *Powell v. McCormack* the Supreme Court determined that Congressman Adam Clayton Powell had been improperly excluded from the House of Representatives after his constituents duly elected him. 395 U.S. 486, 489 (1969). Powell was excluded pursuant to a House Resolution which was predicated on improprieties which Powell committed during a prior term of Congress. *Id.* at 490-93. The Supreme Court was urged not to review the case on the ground, that it involved a political question, namely, that the House should be the body to decide what persons were qualified to be members. *Id.* at 518-20. The Supreme Court concluded that the question was justiciable and that, at most, the Constitution committed to the House the duty to determine whether the person met the article I, section 5 standing qualifications of age, residency, and citizenship. *Id.* at 548. Because the House committee investigating the matter had concluded that Powell satisfied these qualifications, the Supreme Court concluded that it was improper to deny him his seat. *Id.* at 492, 550.

The majority in *Backman* also cited *Goldwater v. Carter* to support its position that it did not have a political question before it. 387 Mass. at 554, 441 N.E.2d at 526. In *Goldwater v. Carter* a majority of the Supreme Court agreed that it should not decide whether the President, acting without the advice and consent of Congress, could terminate a treaty. 444 U.S. 996, 997, 1006 (1979). Only four of the justices, however, so ruled on grounds of the political question doctrine. *Id.* at 1002-06.

Another political question case not noted by the majority, but commented on by Justice Liacos in dissent, is *United States v. Nixon*, 387 Mass. at 558, 441 N.E.2d at 529 (Liacos, J., dissenting). In that case, President Nixon argued that the determination of the existence of executive privilege was an issue to be decided by the executive and not by the courts. 418 U.S. 683, 693, 783 (1974). The Supreme Court disagreed. *Id.* at 704-05. It concluded that, with the possible exception of national security matters, there is no absolute executive privilege. *Id.* at 706.

Certainly these cases suggest, as both the majority and dissent noted in the instant case, that the political question doctrine is on the decline. See Henken, *Is There a "Political Question Doctrine?"*, 85 YALE L.J. 597, 597-617 (1976); see generally J. NOWAK, R. ROTUNDA & J. YOUNG, CONSTITUTIONAL LAW 109-20 (2d ed. 1983); B. SCHWARTZ, CONSTITUTIONAL LAW 40-43 (1979).

²⁹ Presumably the basis for the Secretary's assertion was that the manner in which the Governor should assemble the General Court into joint session after it has been prorogued is a question not to be resolved by the courts, as envisioned by the commitment strand of the political question doctrine. See *supra* note 28 (discussing political question doctrine).

³⁰ 387 Mass. at 554, 441 N.E.2d at 526-27. See *supra* note 28. As examples of Massachusetts decisions refusing to apply the political question doctrine the court cited *Moe v. Secretary of Administration and Finance*, 382 Mass. 629, 417 N.E.2d 387 (1981) and *Colo v. Treasurer and Receiver General*, 378 Mass. 550, 392 N.E.2d 1195 (1979). In *Moe* the

Although the court formally refused to treat the *Backman* case as nonjusticiable, its degree of review appears minimal. For example, the majority stated:

We conclude that there is no explicit or necessarily implicit constitutional provision directing the manner in which the Governor shall call the General Court into joint session and that, in the circumstances, where the members of the General Court in joint session accepted the Governor's call and the joint session acted on various matters, this court should not disturb the procedure adopted by the Governor and accepted by the Legislature.³¹

In these circumstances, mindful of the principle of separation of powers so carefully stated in art[icle] 30 of the Declaration of Rights, this court should not infer specific constitutional procedures that the executive and legislative branches of government must follow. No constitutional require-

Supreme Judicial Court considered whether the so-called Doyle-Flynn amendments, which limited public funding of abortions to those necessary to save the life of the mother, violated the Massachusetts Declaration of Rights. 382 Mass. at 646, 417 N.E.2d at 397. The Secretary of Administration and Finance argued that the Court lacked subject matter jurisdiction. The Secretary contended that because the Doyle-Flynn amendments were appropriation measures, adjudication of the case would implicate the separation of powers and political question doctrines. *Id.* The Court rejected this argument for several reasons. First, the legislature already had appropriated the funds, and therefore the Court itself appropriated nothing. Second, regardless of how the Court resolved the issue, its action would not cause any additional expenditures; indeed, a decision striking down the legislation conceivably would result in fewer 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 641-42, 417 N.E.2d at 395. It is interesting to note that neither the Secretary nor the Court distinguished jurisdiction from justiciability. Rather, the Secretary argued that because the question was political, the court lacked subject matter jurisdiction. *Id.* at 641, 417 N.E.2d at 395. The United States Supreme Court, however, has stated:

As we pointed out in *Baker v. Carr*, 369 U.S. 186, 198 (1962), there is a significant difference between determining whether a federal court has jurisdiction of the subject matter and determining whether a cause over which a court has subject matter jurisdiction is "justiciable." . . . [T]he doctrine of separation of powers is more properly considered in determining whether the case is "justiciable."

Powell v. McCormack, 395 U.S. 486, 512 (1969). In *Powell* the Supreme Court again noted that the political question doctrine is really one aspect of the larger separation of powers principle. *Id.* at 518.

The *Backman* court also cited *Colo v. Treasurer and Receiver General* as an example of a case rejecting application of the political question doctrine. 387 Mass. at 554, 441 N.E.2d at 526-27. In *Colo* the Supreme Judicial Court considered whether a statute which authorized use of public funds to pay salaries of legislative chaplains violated the establishment clause of the first amendment. 378 Mass. 550, 558, 392 N.E.2d 1195, 1200 (1979). Because the Massachusetts Constitution permits the Legislature to adopt its own rules of procedure, and because the Treasurer and Receiver General assumed that the hiring of a chaplain was an internal procedure, the defendant contended that the case was nonjusticiable. *Id.* at 553, 392 N.E.2d at 1197. The Court rejected this argument, noting that it was the duty of the judiciary to determine whether a particular action conflicted with the constitution. *Id.*

³¹ 387 Mass. at 550-51, 441 N.E.2d at 525.

ment was violated. The Governor and the General Court could have reasonably concluded that the General Court had been properly recalled and called into joint constitutional session.³²

Indeed, Justice Liacos, in dissent, commented: “[T]he approach taken [by the majority] is reminiscent of [the] . . . approach” taken by the federal courts in a political question case.³³

Although the Court refused to find the manner in which the General Court reconvened defective,³⁴ the reasoning behind its decision is not clear. Perhaps it was because the Court concluded that the constitution in fact authorizes the Governor to reassemble the General Court into joint session without first convening it as a legislature. While silent as to method and time, the constitution certainly empowers the Governor to convene both houses into joint session.³⁵ The Court itself stated that the constitution contains no “explicit or necessarily implicit . . . provision directing the manner in which the Governor shall call the General Court into joint session.”³⁶

Alternatively, it is possible that the reason the Court upheld the procedure was its conclusion that the Governor, for all intents and purposes, issued two proclamations, each predicated on a clearly conferred constitutional power.³⁷ As noted by the Court:

Although the plaintiff argues that his challenge is not merely one of form, the fact remains that his challenge would lose its force if the Governor had issued two proclamations — one recalling the General Court and the second calling the General Court into joint constitutional session. We believe that the two steps can appropriately be carried out in one document.³⁸

The likelihood that this reasoning formed the basis for the Court’s decision is diminished, however, by another portion of the opinion where the majority stated that Senator Backman “neither argues nor concedes the point that, after prorogation of the General Court, the Governor lacked constitutional authority to recall the General Court and then to call a joint constitutional session. We do not pass on [that] point.³⁹ The Court later commented that if the question were presented as to “whether, after prorogation of the Legislature, the Governor had the power to recall it and then convene a joint constitutional session, we would treat that question as one appropriate for consideration in a law suit . . . challenging any purported final action of the recommended joint session.”⁴⁰

³² *Id.* at 555, 441 N.E.2d at 527.

³³ *Id.* at 557, 441 N.E.2d at 528 (Liacos, J., dissenting).

³⁴ *Id.* at 555-56, 441 N.E.2d at 527.

³⁵ See MASS. CONST. art. 81, amending MASS. CONST. art. 48, The Initiative, part IV, § 2.

See *supra* note 24.

³⁶ 387 Mass. at 550, 441 N.E.2d at 525.

³⁷ *Id.* at 555, 441 N.E.2d at 527.

³⁸ *Id.* at 555-56, 441 N.E.2d at 527.

³⁹ *Id.* at 552, 441 N.E.2d at 526.

⁴⁰ *Id.* at 555, 441 N.E.2d at 527.

Finally, it is possible the court's reason for upholding the Governor's action was really grounded on a combination of factors — namely, the lack of specificity in the constitution regarding the manner in which the General Court, after prorogation, is to be assembled into joint session, and the assumption by both the General Court and the Governor that the General Court had been properly recalled. As noted above, the majority on two occasions referred to the General Court's acquiescence in the matter.⁴¹ This last suggestion seems to supply the best answer. The constitution explicitly allows the Governor to recall the General Court and to assemble both houses into joint session.⁴² It is simply unclear how that undeniably permissible end is to be accomplished subsequent to the legislature's prorogation. The Governor's proclamation cited his authority to recall both houses,⁴³ and both the Governor and the General Court, as a body, apparently believed that the recall had been achieved properly.⁴⁴ Aware of these factors, and mindful of the separation of powers principle,⁴⁵ the Court itself seemed willing to defer to the judgment of the Governor and the General Court.⁴⁶ Of course, if that in fact is an accurate explanation of the Court's decision, then the case does resemble a political question case. The minimal review exercised by the *Backman* court is surprising in light of statements in prior Supreme Judicial Court decisions suggesting that the amendment process calls for careful scrutiny.⁴⁷ Indeed, Justice Liacos was particularly critical of the majority for approaching the case in this manner which, in his perception, was clearly at odds with the manner in which the Court had analyzed prior proposed constitutional amendment cases.⁴⁸

⁴¹ *Id.* at 550-51, 555, 441 N.E.2d at 525, 527. See *supra* text accompanying notes 31 and 32.

⁴² MASS. CONST. part II, ch. 2, § 1, art. 5. Article 5 authorizes the Governor to recall the General Court after it has been prorogued. See *supra* note 21. Article 81 authorizes the Governor to convene the General Court into joint constitutional session. MASS. CONST. art. 81, amending MASS. CONST. art. 48, The Initiative, part IV, § 2. See *supra* note 24.

⁴³ 387 Mass. at 551 n.3, 441 N.E.2d at 525 n.3. The proclamation referred to the Governor's authority conferred under MASS. CONST. part II, ch. 2, § 1, art. 5. See *supra* notes 11 and 21.

⁴⁴ 387 Mass. at 555, 441 N.E.2d at 527.

⁴⁵ MASS. CONST. part I, art. 30. Article 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.

⁴⁶ 387 Mass. 550, 555-56, 441 N.E.2d at 525, 527.

⁴⁷ See, e.g., *Sears v. Treasurer and Receiver General*, 327 Mass. 310, 98 N.E.2d 621 (1951); *Bowe v. Secretary of the Commonwealth*, 320 Mass. 230, 69 N.E.2d 115 (1949).

⁴⁸ 387 Mass. at 556-57, 559-61, 441 N.E.2d at 528, 529 (Liacos, J., dissenting). The case which Justice Liacos primarily relied upon for his assertion that the amendment process

In his dissent Justice Liacos stated that the majority should have focused its attention squarely on the issue of whether the Governor can directly reconvene the General Court into joint session after prorogation.⁴⁹ According to Justice Liacos, that the “Governor and the General Court could have reasonably concluded that the Legislature had been properly reconvened . . . into joint constitutional session”⁵⁰ or that the Legislature “acquiesced” to the Governor’s action, is irrelevant.⁵¹ Rather, Justice Liacos stated, the court had a duty to scrutinize carefully the amendment process in order to assure that it was accomplished pursuant to a clearly conferred constitutional grant of power.⁵² Quoting from a prior case construing article 48, as amended by article 81, Justice Liacos noted:

Since the people have themselves adopted the constitution with its amendments for their government, they are bound by the provisions and conditions which they themselves have placed in it, and when they seek to enact laws by direct popular vote they must do so in strict compliance with those provisions and conditions. . . . Failure to comply will mean no valid law has been enacted, no matter how great the popular majority may have been in its favor. Only by preserving this fundamental principle can constitutional government be preserved and orderly progress assured.⁵³

Moreover, Justice Liacos continued, that the Legislature believed itself to be properly reconvened is meaningless.⁵⁴ The Legislature can only be convened in a manner authorized by the constitution.⁵⁵ In *Opinion of the*

should be carefully scrutinized is *Sears v. Treasurer and Receiver General*, 327 Mass. 310, 98 N.E.2d 621 (1951). *Sears* was concerned with whether an initiative law, as contrasted with an initiative amendment, had been adopted consistently with the requirement of article 48, The Initiative, part II, section 3, as amended by article 74. The Court noted that prior to the adoption of article 48 in 1918, the power to enact laws resided solely with the legislature. 327 Mass. at 320, 98 N.E.2d at 629. Article 48, however, enabled the people to play a direct role in enacting legislation, provided that the legislation was enacted “in a carefully prescribed manner and with certain precisely defined safeguards” *Id.* The *Sears* Court noted that “[i]t would be astonishing and intolerable if the safeguards so carefully inserted in Art. 48 could be disregarded without consequences by individual state officers and so in effect turned into mere admonitions and recommendations. The Constitution is not ordinarily treated in that manner.” *Id.* at 321-22, 98 N.E.2d at 629. See *infra* notes 52 and 53 and accompanying text.

⁴⁹ 387 Mass. at 556, 441 N.E.2d at 528 (Liacos, J., dissenting).

⁵⁰ *Id.* at 555, 441 N.E.2d at 527.

⁵¹ *Id.* at 561, 441 N.E.2d at 530.

⁵² *Id.*

⁵³ *Id.* at 559, 441 N.E.2d at 528 (quoting *Sears v. Treasurer and Receiver General*, 327 Mass. 310, 320-21, 98 N.E.2d 621, 629 (1951)).

⁵⁴ *Id.* at 561, 441 N.E.2d at 530.

⁵⁵ *Opinion of the Justices*, 294 Mass. 623, 626, 3 N.E.2d 218, 220 (1936). In that case the Court observed that the constitution recognizes three different methods for convening the General Court: 1) by constitutional mandate that it assemble at a specified time during the year; 2) by directive from the Governor, with the advice and consent of the Executive Council, that it assemble because the welfare of the state so requires it; 3) by the power of self-assembly. *Id.* at 625, 3 N.E.2d at 220.

With regard to the first method, several provisions of the constitution are implicated. Section 3 of article 64 provides that “[t]he General Court shall assemble every year on the first Wednesday in January.” MASS. CONST. art. 64, § 3. Part I, chapter 1, section 1, article 1, provides:

The department of legislation shall be formed by two branches, a Senate and House of representatives: each of which shall have a negative on the other. The legislative body shall assemble every year [on the last Wednesday in May, and at such other times as they shall judge necessary; and shall dissolve and be dissolved on the day next preceding the said last Wednesday in May;] and shall be styled, The GENERAL COURT OF MASSACHUSETTS.

MASS. CONST. part I, ch. 1, § 1, art. 1. In 1831 this provision was modified by article 10. Article 10 reads in pertinent part:

The political year shall begin on the First Wednesday of January instead of the last Wednesday of May, and the General Court shall assemble every year, on the said first Wednesday of January, and shall proceed at that Session to make all the elections, and do all the other acts which are by the Constitution required to be made and done at the Session which has heretofore commenced on the last Wednesday of May. And the General Court shall be dissolved on the day next preceding the first Wednesday of January, without any proclamation or other act of the Governor. But nothing herein contained shall prevent the General Court from assembling at such other times as they shall judge necessary, or when called together by the Governor.

MASS. CONST. art. 10.

With regard to the second method, part 2, chapter 2, section 1, article 5 authorizes the Governor to recall the General Court after its adjournment or prorogation assuming that the Welfare of the Commonwealth requires that recall. See *supra* note 21.

With regard to the third method, that of self assembly pursuant to both article 10 and part I, chapter 1, section 1, article 1, notes to the debates of the 1863 constitutional convention indicate that this power of self assembly is a manifestation of the Legislature’s intended independence from the Governor. 3 Debates of the Constitutional Convention 666-67 (1853). See also Opinion of the Justices, 303 Mass. 664, 666, 22 N.E.2d 261, 263 (1939); Opinion of the Justices, 294 Mass. 623, 625-26, 3 N.E.2d 218, 220 (1936). This power of self-assembly may be provided for while the General Court is actually in session or subsequent to its adjournment or prorogation. In *Opinion of the Justices* the Court noted that the General Court, while in session, could determine that it would be necessary for it to reconvene at a time subsequent to its prorogation but before the expiration of its term. 294 Mass. at 626-27, 3 N.E.2d at 220-21. The Supreme Judicial Court emphasized, however, that for the General Court to validly exercise its power of self-assembly, the members of the General Court, as such, would have to be accorded an opportunity to express their opinion as to the need for the special session. *Id.* This, according to the court, could be accomplished by resolution or rule. *Id.* at 627, 3 N.E.2d at 221. The presiding officers of both houses, however, could not, *sua sponte*, make that determination. *Id.* In a subsequent advisory opinion, the Court expanded its prior ruling so as to permit the General Court to make the decision regarding self-assembly at a time when it was not in session. Opinion of the Justices, 303 Mass. 664, 674, 22 N.E.2d 261, 269 (1936). The Court again cautioned, however, that “[a]n essential feature of [self assembly] . . . is that every member of each branch of the General Court shall have a reasonable opportunity to express in an orderly manner his opinion as to the necessity for a special session on a specified date.” *Id.* at 675, 22 N.E.2d at 269.

The above cited provisions of the constitution, of course, pertain to convening the General Court. Of additional relevance, perhaps, are other provisions regarding prorogation, recess, and adjournment of the General Court. Part II, chapter 2, section 1, article 5 authorizes the Governor, with the consent of the Executive Council, to prorogue the General Court “to any time the two houses shall desire.” MASS. CONST. part II, ch. 2, § 1, art. 5. See *supra* note 21.

Justices,⁵⁶ the Supreme Judicial Court noted that the constitution recognizes three different methods by which the General Court can convene: “(1)[A] constitutional mandate to assemble on a specified date each year, (2) authority in the Governor with advice of the council to call it into session at other times, and (3) power in itself to assemble at other times upon judging that course to be necessary.”⁵⁷ The Legislature can accomplish self assembly, therefore, only “according to law.”⁵⁸ As construed by Justice Liacos, the General Court, as a body, must affirmatively decide that it is necessary to convene.⁵⁹ Presiding officers from each house, for example, cannot, *sua sponte*, make that determination.⁶⁰ In this case, therefore, because the General Court had not determined as a body that it was necessary to reconvene, whether it had been properly recalled turned on whether the Governor alone possessed the power to assemble. According to Justice Liacos, however, article 48, as amended by article 81, the provision which empowers the Governor to convene the General Court into joint session, presupposes that the General Court already is in session as a legislature.⁶¹ Because the General Court had not been properly convened, Justice Liacos reasoned, its favorable vote on the capital punishment amendment was invalid.⁶² Justice Liacos therefore concluded that the amendment had not received favorable votes from a majority of the members at two different terms of the General Court and thus should not have been submitted to the people.⁶³

Of course, this is precisely what happened in *Backman*. On July 2, 1980, the two houses, then in joint constitutional session, adjourned. 387 Mass. at 551, 441 N.E.2d at 525. On July 5, 1980, at the request of the General Court, the Governor prorogued the two houses until the final day of the annual session. *Id.*

With regard to recess, Article 102 provides that “[t]he General Court, by concurrent vote of the two houses, may take a recess or recesses amounting to not more than thirty days.” MASS. CONST. art. 102.

With regard to adjournments the constitution provides: “The Senate shall have the power to adjourn themselves, provided such adjournments do not exceed two days at a time.” MASS. CONST. part II, ch. 1, § 2, art. 6. “The House of Representatives shall have the power to adjourn themselves; provided such adjournment shall not exceed two days at a time.” MASS. CONST. part II, ch. 1, § 3, art. 8.

⁵⁶ 294 Mass. 623, 3 N.E.2d 218 (1936).

⁵⁷ *Id.* at 625, 3 N.E.2d at 220.

⁵⁸ *Id.* at 626, 3 N.E.2d at 220.

⁵⁹ 387 Mass. at 560, 441 N.E.2d at 530. *See also* Opinion of the Justices, 303 Mass. 664, 675, 22 N.E.2d 261, 269 (1939); Opinion of the Justices, 294 Mass. 623, 626, 3 N.E.2d 218, 220 (1936).

⁶⁰ 387 Mass. at 560, 441 N.E.2d at 530. *See* Opinion of the Justices, 294 Mass. 623, 627, 3 N.E.2d 218, 220 (1936).

⁶¹ 387 Mass. at 561, 441 N.E.2d at 530 (Liacos, J., dissenting). *See supra* note 21.

⁶² *Id.* at 562, 441 N.E.2d at 531.

⁶³ *Id.*

