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Chapter 12: Constitutional Law

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CHAPTER 12

Constitutional Law

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§ 12.1. First Amendment Immunity from Liability — Free Exercise of Religion. Two lines of cases have emerged regarding the first amendment immunity for religious conduct. In cases involving disputes between adverse factions within a hierarchical church, the United States Supreme Court has held that the first amendment requires civil courts to defer to the decisions of the church hierarchy in matters of faith, doctrine, internal organization and discipline.[1] Such matters, the court has reasoned, are essentially ecclesiastical and inappropriate for judicial resolution.[2] In a separate line of cases involving claims of conscientious religious objection to state regulation, the Court has interpreted the free exercise clause to require a balancing of the competing interests of the state and the believer.[3] Declaring that state regulation which burdens the exercise of religious belief must be necessary to the achievements of a compelling state interest, the Court has set the balance in favor of the religious claimant.[4]

During the *Survey* year, in *Alberts v. Devine*, the Supreme Judicial Court held that a patient has a cause of action in tort against any person who violates or causes to be violated the duty of confidentiality owed to

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§ 12.1. [1] Jones v. Wolf, 443 U.S. 595 (1979) (court may not resolve church property dispute on basis of religious doctrine but may apply neutral principles of law); Serbian Orthodox Diocese v. Milivojevich, 426 U.S. 696 (1976) (court must defer to decision of hierarchy of Serbian Orthodox Church defrocking local bishop); Presbyterian Church v. Mary Elizabeth Blue Hall Memorial Presbyterian Church, 393 U.S. 440, 449 (1969) (property dispute between local church factions must be resolved "without reference to underlying controversies over religious doctrine").

[2] *See Presbyterian Church*, 393 U.S. at 449 (court resolution of ecclesiastical controversies may inhibit free development of religious doctrine).

[3] *See, e.g.*, Wisconsin v. Yoder, 406 U.S. 205, 235 (1972) ("sensitive and delicate task of weighing" state interest against claim of religious exemption from compulsory education requirements).

[4] *See* Sherbert v. Verner, 374 U.S. 398, 406 (1963) (compelling interest required to outweigh burden on free exercise of religion). *See also* Thomas v. Review Bd. of Indiana Empl. Sec. Div., 450 U.S. 707, 718 (1981) ("the state may justify an inroad on religious liberty by showing that it is the least restrictive means of achieving some compelling state interest").

the patient by a physician.[5] Because the patient in *Alberts* was a Methodist minister whose psychiatrist allegedly disclosed confidences to the minister's superiors, the Court was confronted with a claim of first amendment immunity. The Court rejected an argument that the inquiry by church officials was an ecclesiastical matter and applied the balancing test developed in the conscientious objection cases.[6] The Court concluded that the public interest in physician-patient confidentiality outweighed the burden on the exercise of religion occasioned by judicial scrutiny of the actions of church officials or the imposition of liability upon them.[7]

Until 1974, William E. Alberts was the minister of the Old West Church in Boston and a member of the Southern New England Conference of the United Methodist Church.[8] At some point during his tenure, Alberts sought treatment from a psychiatrist, Dr. Donald T. Devine.[9] In 1973 during an investigation of Alberts' fitness as a minister, two of Alberts' superiors in the Southern New England Conference, Edward G. Carroll and John E. Barclay, allegedly obtained confidential information from Dr. Devine and communicated that information to other officials in the conference.[10] Alberts was not reappointed to his position at the Old West Church.[11] He later filed suit against his psychiatrist and his religious superiors for the violation of the duty of confidentiality.[12]

Carroll and Barclay filed motions to dismiss and for summary judgment asserting that their investigation and report of Alberts' fitness were internal church matters protected by the first amendment.[13] They also filed a motion for protective order to limit discovery and disclosure of actions they took as representatives of the Methodist Church.[14] The trial judge

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[5] 395 Mass. 59, 479 N.E.2d 113 (1985). The Court qualified its holding to the extent that the duty of confidentiality is not violated if the patient consents or if there exists a serious danger to the patient or others. *Id.* at 75, 479 N.E.2d at 124. To establish liability against one who induces the violation of confidentiality, the plaintiff must show that the defendant knew of the physician-patient relationship, intended to induce the disclosures and did not reasonably believe that the doctor could disclose the information without violating the duty of confidentiality. *Id.* at 70–71, 479 N.E.2d at 121.

[6] *See, e.g., Yoder*, 406 U.S. at 215 ("only those interests of the highest order and those not otherwise served can overbalance legitimate claims to the free exercise of religion").

[7] *Alberts*, 395 Mass. at 74, 479 N.E.2d at 123.

[8] *Id.* at 61, 479 N.E.2d at 116.

[9] *Id.*

[10] *Id.*

[11] *Id.* at 61–62, 479 N.E.2d at 116.

[12] *Id.*

[13] *Id.* Alberts also moved to amend his complaint to add a count for invasion of privacy, which the court denied.

[14] *Id.* at 62–63, 479 N.E.2d at 116–17.

granted the motions and entered judgment for Carroll and Barclay.[15] She denied the psychiatrist's motion to dismiss. The court then reported four questions to the Appeals Court concerning the validity of the plaintiff's cause of action and the effect of the religion clauses of the first amendment.[16] The Supreme Judicial Court transferred the case to its own docket and considered the questions as applied to all of the defendants.[17]

On appeal, Carroll and Barclay argued that they were entitled to judgment because a rule of the Book of Discipline of the Methodist Church required them to obtain information concerning the mental and emotional condition of a minister.[18] First, because they were following internal church rules regarding the selection of a minister, they argued that the church autonomy precedents precluded a court from inquiring into the dispute.[19] Secondly, because their investigation of Alberts was motivated by religious doctrine, they claimed that judicial inquiry or the imposition of liability would unduly burden their free exercise of religion.[20]

The Supreme Judicial Court conceded that the first amendment prohibits judicial inquiry into internal church disputes of an ecclesiastical nature.[21] Thus the Court suggested that a civil court may not resolve a dispute about whether a person is qualified to be a minister.[22] However, the Court characterized the question in *Alberts* more narrowly as whether a church rule granted church officers the right to intrude upon the con-

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[15] *Id.* at 63, 479 N.E.2d at 117.

[16] *Id. See* MASS. R. CIV. P. 64, 365 Mass. 931 (1974). The reported questions were: (1) Whether disclosure of confidential medical information by a psychiatrist of a former patient constitutes a cognizable cause of action within the Commonwealth of Massachusetts; (2) Whether a cause of action for invasion of privacy existed within the Commonwealth of Massachusetts prior to July 1, 1974; (3) Whether the actions of the defendants Barclay and Carroll are within the ambit of the privileges and immunites granted by the first and fourteenth amendments of the United States Constitution; and (4) Whether the judge properly invoked the first amendment in entering the protective order for defendants Barclay and Carroll. The Supreme Judicial Court answered reported question number one "yes." Because the cause of action for violation of the duty of confidentiality permitted recovery, the Court did not answer reported question number two. 395 Mass. at 70, 479 N.E.2d at 121.

[17] 395 Mass. at 65, 479 N.E.2d at 118. Because the trial court had entered judgment for defendants Barclay and Carroll, the reporting mechanism did not technically apply to the plaintiff's claims against them, but only as to defendant Devine. Because all of the parties relied upon the reporting vehicle of review, the Court considered the question as applicable to the claims against all of the defendants.

[18] 395 Mass. at 72, 479 N.E.2d at 122.

[19] *Id.*

[20] *Id.* at 73, 479 N.E.2d at 123.

[21] *Id.* at 72, 479 N.E.2d at 122.

[22] *Id.* at 72–73, 479 N.E.2d at 122.

fidential relationship of a minister with his physician.[23] That question was for the Court, open to judicial consideration.[24]

Even assuming that the first amendment prohibits inquiry into whether there existed a valid church rule giving Carroll and Barclay a right to seek information from the psychiatrist, the Court stated that such a rule would not provide absolute protection against tort liability.[25] Conduct motivated by religious belief, the Court noted, is subject to regulation if the state's interest is sufficiently compelling to outweigh the burden on the exercise of religion.[26] The Court found that imposing liability upon church officials who were following church doctrine would constitute a burden on the exercise of religious belief.[27] Thus it applied the balancing test focusing upon two factors. First, the Court emphasized the strong public interest in promoting full, frank and candid discussion within the physician-patient relationship.[28] Second, though recognizing that the church has a significant interest in evaluating the fitness of its ministers, the Court pointed out that sources of information other than the psychiatrist were available.[29] Because the state's interest was compelling and the burden on religious belief minor, the Court concluded that neither the imposition of liability, nor the necessary judicial inquiry into church processes violated the free exercise clause.[30] For the same reasons, the Court held that the trial court was wrong to limit discovery into church proceedings.[31]

Finally, the Court considered whether the discovery process into internal church matters would violate the establishment clause.[32] Although administrative entanglement between government and church raises establishment clause concerns, the Court held that the limited intrusion of

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[23] *Id.* at 73, 479 N.E.2d at 122.

[24] *Id.* In Madsen v. Erwin, 395 Mass. 715, 481 N.E.2d 1160 (1985), the Court held that the decision of the Christian Science Monitor to fire a reporter because she was a homosexual was an ecclesiastical matter requiring the Court to defer to the church. 395 Mass. at 722–23, 481 N.E.2d at 1165. In *Madsen*, Justice O'Connor disagreed that the decision was a religious one immune from judicial scrutiny. 395 Mass. at 732, 481 N.E.2d at 1170 (O'Connor, J., concurring in part, dissenting in part).

[25] *Alberts*, 395 Mass. at 73, 479 N.E.2d at 122.

[26] *Id.* at 74, 479 N.E.2d at 123.

[27] *Id.*

[28] *Id.* In the first part of the opinion the *Alberts* Court held that there exists a common law tort cause of action for the violation of the physician's duty of confidentiality because of the strong public policy in favor of confidentiality. 395 at 65–69, 479 N.E.2d at 118–20.

[29] *Alberts*, 395 Mass. at 74, 479 N.E.2d at 123.

[30] *Id.*

[31] *Id.*

[32] *Id.* at 75, 479 N.E.2d at 123. *See* Lemon v. Kurtzman, 403 U.S. 602, 612–13 (1971)(establishing three-part test in establishment clause cases in part proscribing "excessive government entanglement with religion").

discovery in a tort action is not the kind of ongoing surveillance of the church condemned as excessive under the establishment clause.[33]

The Supreme Judicial Court was correct to reject the claim of first amendment immunity in *Alberts*, but its application of the balancing test under the free exercise clause appears to be somewhat inconsistent with recent United States Supreme Court decisions. In *Thomas v. Review Board of the Indiana Employment Security Division*, the Supreme Court held that not only must the state's interest be compelling, but also that the state regulation must be the least restrictive means of accomplishing that interest.[34] This strict means scrutiny requires the court to examine whether the state's interest can be achieved while recognizing an exemption for the religiously-motivated conduct.[35] Two factors support the *Alberts* Court's conclusion that an exemption was unwarranted. First, the means by which a minister's superiors investigated his fitness implicates the church's interest in autonomy rather than the individual exercise of religious conscience. Secondly, the rule of tort liability established in *Alberts* does not significantly intrude on the church's freedom to select its ministers. Because the church's interest is institutional and the burden minor, the refusal by the *Alberts* Court to recognize an exemption for church officials was appropriate.

§ 12.2. First Amendment Immunity — Deference to Internal Church Decisions. In a series of decisions involving disputes between adverse factions of a hierarchical church, the United States Supreme Court has held that the first amendment requires civil courts to defer to decisions of the church hierarchy in matters of faith, doctrine, internal organization and discipline.[1] The Supreme Court has not applied this principle of

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[33] *Alberts*, 395 Mass. at 75, 479 N.E.2d at 123.

[34] 450 U.S. 707, 718 (1981). *See generally*, Seeburger, "Public Policy Against Religion: Doubting *Thomas*," 11 PEPPERDINE L. REV. 311 (characterizing least restrictive alternative test of *Thomas* as too strict in that it fails to allow for weighing relative importance of burdened religious activity). *But see* Callahan v. Woods, 736 F.2d 1269, 1273 (9th Cir. 1984)(impact of statute is factor to be used in applying compelling interest test).

[35] *See* U.S. v. Lee, 455 U.S. 252, 259 (1982)(final inquiry in free exercise analysis is whether accommodating the religious belief will unduly interfere with achievement of government's interest).

§ 12.2. [1] *See* Jones v. Wolf, 443 U.S. 595 (1979) (court may not resolve church property dispute on basis of religious doctrine but may apply neutral principles of law); Serbian Orthodox Diocese v. Milivojevich, 426 U.S. 696 (1976) (court must defer to decision of hierarchy of Serbian Orthodox Church defrocking local bishop); Presbyterian Church v. Mary Elizabeth Blue Hall Memorial Presbyterian Church, 393 U.S. 440, 449 (1969) (property dispute between local church factions must be resolved "without reference to underlying controversies over religious doctrine"); Kedroff v. Saint Nicholas Cathedral, 363 U.S. 190 (1960) (canon law right of North American archbishop of Russian Orthodox Church to use of cathedral in New York City is ecclesiastical matter subject to strict deference by court).

absolute deference to a case involving government regulation of employment relations in church organizations.[2] Lower courts considering the application of the deference principle in employment cases have limited it to disputes involving ministers or employees in important ecclesiastical positions.[3] In the two cases involving church employees fired because of their sexual preference, the courts held that church officials were immune from liability under the free exercise clause, but they relied upon a balancing approach rather than the deference principle.[4]

During the *Survey* year, in *Madsen v. Erwin*,[5] the Supreme Judicial Court held that the decision by the Christian Science Monitor to fire a reporter because she was a homosexual was entitled to absolute first amendment protection.[6] In reaching its decision, the Court relied upon a broad principle of deference to internal church decisions rather that the free exercise clause balancing test which it had applied in *Alberts v. Devine*.[7]

Cf. Watson v. Jones, 80 U.S. (13 Wall.) 679 (1871) (as matter of federal common law civil court may not review Presbyterian Church decision as to which local church faction represented true church).

[2] *Cf.* Ohio Civil Rights Comm'n v. Dayton Christian School, ___ U.S. ___, 106 S. Ct. 2718, 91 L. Ed. 2d 512 (1986) (requiring court to abstain pending state administrative proceedings involving claim of employment discrimination by religious school); NLRB v. Catholic Bishop of Chicago, 440 U.S. 490 (1979) (avoiding religion clause issue by deciding on statutory grounds that Catholic high schools were not subject to jurisdiction of National Labor Relations Board).

[3] *See* Rayburn v. General Conf. of Seventh-Day Adventists, 772 F.2d 1164, 1168 (4th Cir. 1985) (church interest in autonomy in decision to deny to woman a pastoral position outweighed state interest in equal opportunity under Title VII); E.E.O.C. v. Pacific Press Pub. Ass'n., 676 F.2d 1272, 1278 (9th Cir. 1982) (application of Title VII to editorial secretary of religiously-affiliated publisher does not violate first amendment); E.E.O.C. v. Southwestern Baptist Theological Seminary, 651 F.2d 277, 286 (5th Cir. 1981) (application of Title VII to seminary faculty and support staff not engaged in traditionally religious activities does not violate free exercise clause) *cert. denied* 456 U.S. 905 (1982); E.E.O.C. v. Mississippi College, 626 F.2d 477, 489 (5th Cir. 1980) (application of Title VII to position of professor in psychology department at Baptist college does not violate first amendment). *But see* Maguire v. Marquette Univ., 627 F. Supp. 1499, (E.D. Wis. 1986) (interpreting Title VII to exempt religious university as to hiring for position of theology professor); McClure v. Salvation Army, 460 F.2d 553, 560 (5th Cir. 1972) (Title VII interpreted to exempt employment relationship between Salvation Army church and its officers who are ministers).

[4] Walker v. First Presbyterian Church, 22 Fair Empl. Prac. Cases 762 (Calif. Super. Ct. 1980) (ordinance proscribing sexual preference discrimination does not outweigh free exercise burden upon religion in case of discharge of member of church's worship team) Lewis ex rel. Murphy v. Buchanan, 21 Fair Empl. Prac. Cases 696 (Minn. Dist. Ct. 1979) (refusal of church to hire gay music teacher at parochial school protected by free exercise clause).

[5] 395 Mass. 715, 481 N.E.2d 1160 (1985).

[6] *Id.* at 723, 481 N.E.2d at 1165.

[7] 395 Mass. 59, 73, 479 N.E.2d 113, 123 (1985). In *Alberts*, the Court held that imposing

The Christian Science Monitor is an international daily newspaper affiliated with the First Church of Christ Scientist.[8] The church has a policy of hiring only church members as employees in all of its activities.[9] Christine Madsen had worked for several years as an editor and reporter for the Monitor until 1981 when rumors that she was a lesbian came to the attention of her superiors.[10] When she admitted to them that she was a lesbian and refused to seek spiritual healing, Ms. Madsen was fired.[11] She filed suit in superior court against officials of the newspaper and the church alleging that the decision to fire her for being a homosexual was a breach of her employment contract and constituted illegal discrimination under state and federal law.[12] The defendants moved for summary judgment asserting that their actions were privileged under the religion clauses of the first amendment.[13] The trial court denied the motion and the defendants sought an interlocutory appeal.[14] The Supreme Judicial Court transferred the case to its own motion.

The Court began its analysis of the religious freedom issue by examining the nature of the decision to fire Madsen.[15] Based upon the summary judgment evidence, the Court concluded that the operation of the Monitor was a religious activity of the Christian Science Church and thus considered employees of the newspaper to be employees of the church.[16] Because homosexuality is a sin under Christian Science doctrine, the decision to fire Madsen, the Court reasoned, was a religious one.[17] Thus,

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liability upon a Methodist minister's superiors for violating his confidential relationship with his psychiatrist did not violate the first amendment. See § 12.1 of this chapter.

[8] *Madsen,* 395 Mass. at 720, 481 N.E.2d at 1163.

[9] *Id.*

[10] *Id.* at 718, 481 N.E.2d at 1162.

[11] *Id.*

[12] *Id.* at 716–17, 481 N.E.2d at 1161. The plaintiff alleged several causes of action arising out of the decision to fire her for homosexuality including wrongful discharge, breach of contract, violation of the state and federal constitutions, and deprivation of civil rights under M.G.L. c.122 §§ 11H and 11I. The Court affirmed the entry of summary judgment as to these claims. Madsen also asserted tort claims of defamation, interference with advantageous relations, invasion of privacy, intentional infliction of emotional distress, and interference with her employment contract. Because these claims sounded in tort the Court directed that she be allowed to replead those claims consistent with the principles set out in its opinion. 395 Mass. at 727, 481 N.E.2d at 1167.

[13] *Madsen,* 395 Mass. at 717, 481 N.E.2d at 1161. The defendants moved to dismiss the plaintiff's claims and in the alternative for summary judgment. They argued on appeal that the litigation threatened their rights under the free exercise clause and the establishment clause. *Id.* at 718, 481 N.E.2d at 1162.

[14] *See* Appeals Court Rules No. 2:01, 3 Mass. App. 805 (1975) (practice before single justice of Appeals Court).

[15] *Madsen,* 395 Mass. at 719–22, 481 N.E.2d at 1163–64.

[16] *Id.* at 723, 481 N.E.2d at 1164.

[17] *Id.* at 722–23, 481 N.E.2d at 1164.

the Court characterized the decision as an internal ecclesiastical matter requiring the Court to defer to the decision of the church hierarchy.[18]

Grounding its decision in the free exercise clause, the Court indicated that judicial intervention into the decision to fire a homosexual employee would undermine religious freedom in two ways. First, drawing upon the precedents upholding such firings, the Court emphasized that imposing liability upon church officials for discriminating on the basis of sexual preference would penalize them for their exercise of religious belief.[19] Secondly, because the church employees carry out the religious mission of the church, government regulations of the employment relationship would deprive the church of the undivided loyalty owed by its employees and undermine the freedom of the church as a religious institution.[20] Therefore, the Court held that none of the plaintiff's claims based upon an alleged right against sexual preference discrimination could be applied to the church or its agents.[21]

Only after deciding the constitutional issue did the Court consider whether state or federal law gave rise to a cause of action for sexual preference discrimination. Finding no support for Ms. Madsen's claims under the state or federal constitution or statutes or the principles of contract law, the Court held that summary judgment was proper.[22]

Dissenting in part, Justice O'Connor criticized the majority for reaching out to decide the constitutional issue in view of the fact that the plaintiff

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[18] *Id.* The Court relied upon Serbian E. Orthodox Diocese, *supra* note 1, and United Kosher Butchers Ass'n v. Associated Synagogues of Greater Boston, Inc., 349 Mass. 595, 598–99, 211 N.E.2d 332, 334 (1965). In *United Kosher*, the Court held that a dispute between two associations over the right to certify whether food was kosher was an ecclesiastical matter immune from judicial scrutiny. 349 Mass. at 598, 211 N.E.2d at 334. *But cf.* Gray v. Christian Soc., 137 Mass. 329, 331 (1884) (deprivation of membership in a church without a hearing properly resolved by court).

[19] *Madsen*, 395 Mass. at 723, 481 N.E.2d 1165.

[20] *Id.* The Court quoted extensively from Laycock, "Towards a General Theory of the Religion Clauses: The Case of Church Labor Relations and the Right to Church Autonomy," 81 COLUM. L. REV. 1373 (1979). Professor Laycock argues that the free exercise clause protects not only individual freedom of religious belief but also the autonomy of religious organizations and proposes a balancing test be used in cases involving regulation of the church-employee relationship. But see Lupu, "Keeping the Faith: Religion, Equality and Speech in the U.S. Constitution," 18 CONN. L. REV. 739, 765–67 (1986) (rejecting institutional claims to free exercise exemptions).

[21] *Madsen*, 395 Mass. at 724, 481 N.E.2d at 1166. The Court distinguished Tony and Susan Alamo Foundation v. Secretary of Labor, 471 U.S. 290 (1985) in which the Supreme Court held that application of the Fair Labor Standards Act to the commercial activities of a religious organization did not violate the free exercise clause, finding no burden upon the exercise of religion. 471 U.S. at 303. The Court in *Alamo Foundation* used the free exercise balancing approach rather than principles of church autonomy to resolve the issue.

[22] *Madsen*, 395 Mass. at 725–26, 481 N.E.2d at 1166.

had stated no claim arising under state or federal law.[23] He also disagreed with the majority's resolution of the first amendment issue, reasoning that the question whether the church had a right to fire a homosexual employee for violating church doctrine was not an internal ecclesiastical dispute calling for absolute deference.[24] Rather, Justice O'Connor viewed it as an issue appropriate for judicial resolution to be determined by a balancing of the interests of church and state.[25]

The result in *Madsen* is not controversial. As Justice O'Connor insisted, Madsen had no right under state or federal law to be free from sexual preference discrimination. But the Court's insistence upon strict deference to the church's decision to fire Madsen stretches the principle of church autonomy beyond the precedents and the logic underlying them. The church autonomy cases have established a principle of judicial deference to internal ecclesiastical decisions.[26] But the crucial factor in deciding whether the question is ecclesiastical is the nature of the underlying dispute and not the motivation of church officials.[27] A civil court may not decide what is the true doctrine of a church, nor which local faction more truly represents church principles.[28] Such decisions necessarily involve how a church defines and organizes itself and are thus "quintessentially religious" issues.[29] For the same reason, a court must defer to the church's choice of its ministers.[30] But the concern for religious freedom underlying the church autonomy cases does not have the same force when applied to decisions involving lay employees. This is especially true when the employee's duties are entirely secular. Although Madsen worked for the Christian Science Church in the sense that the Monitor is affiliated with the church, she was not involved in the church's

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[23] *Id.* at 727–28, 481 N.E.2d at 1167–68. (O'Connor J., concurring in part, dissenting in part.) Justice O'Connor dissented from that part of the Court's decision allowing the plaintiff to replead her tort claims. Justice O'Connor would have affirmed the dismissal of these claims as well as the entry of summary judgment. *Id.* at 736, 481 N.E.2d at 1172.

[24] *Madsen*, 395 Mass. at 732, 481 N.E.2d at 1170.

[25] *Id.* at 733, 481 N.E.2d at 1170–71. *See* Wisconsin v. Yoder, 406 U.S. 205, 215–19 (1972) (state's interest in compulsory education beyond eighth grade did not outweigh free exercise rights of Amish parents to keep children free of corrupting influences). *See also Alberts v. Devine*, 395 Mass. 59, 479 N.E.2d 113 (1985), *supra* at note 7.

[26] *See supra* note 1 and accompanying text.

[27] *See* Rayburn v. General Conf. of Seventh-Day Adventists, 772 F.2d 1164, 1169 (4th Cir. 1985) (" . . . in quintessentially religious matters the free exercise clause protects the act of decision rather than the motivation behind it.").

[28] Presbyterian Church v. Mary Elizabeth Blue Hall Memorial Presbyterian Church, 393 U.S. 440 (1969).

[29] *See* Serbian Orthodox Diocese v. Milivojevich, 426 U.S. 696, 720 (1976).

[30] *See* McClure v. Salvation Army, 460 F.2d 553, 560 (5th Cir.) *cert. denied*, as untimely filed, 409 U.S. 896 (1972) (emphasizing deference to church's autonomy in interpreting Title VII to exempt church-minister relationship).

ecclesiastical mission. Because the decision to fire a homosexual employee does not implicate the values underlying the principle of church autonomy, it is not entitled to absolute deference.

The fact that Madsen's superiors were motivated by their belief that homosexuality is a sin does not provide a sufficient reason to apply a principle of absolute deference. The Court was not called upon to decide whether homosexuality violated Christian Science doctrine. At best such religiously motivated conduct should be weighed against the competing state interests under the balancing test employed in *Alberts v. Devine*.[31]

Although the *Madsen* Court appeared to establish a broad rule of deference to church organizations to determine the spiritual suitability of its employees, the structures of its opinion may support a narrower interpretation.[32] After setting out the autonomy principle requiring judicial deference, the Court measured the potential burden of imposing liability upon church officials for exercising their religious belief. Finally, the Court examined whether the plaintiff had stated a cause of action arising out of state or federal law. Because there was no articulated governmental interest in protecting against sexual preference discrimination, the Court was correct to enter judgment for the defendant. Viewed as a balancing of the interests under the free exercise clause, the opinion in *Madsen* is consistent with *Alberts v. Devine* and the principles underlying the free exercise clause.

§ 12.3. Right to Travel. The equal protection clause of the fourteenth amendment has been held to protect against classifications which burden the right to travel from one state to another to establish residence.[1] Neither the United States Supreme Court nor the Supreme Judicial Court has decided whether there is a parallel right to migrate within a state.[2] During the *Survey* year, however, the Supreme Judicial Court considered whether an asserted right to intrastate travel was violated by a statute providing a real estate tax abatement only to those elderly homeowners

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[31] 395 Mass. 59, 479 N.E.2d 113 (1985).

[32] Two commentators have interpreted *Madsen* as a conscientious objection case. Laycock, "A Survey of Religious Liberty in the United States," 47 OHIO ST. L.J. 409, 433 n.142 (1986); Note, "Equal Employment or Excessive Entanglement? The Application of Employment Discrimination Statutes to Religiously Affiliated Organizations," 18 CONN. L. REV. 581, 603–04 (1986).

§ 12.3. [1] *See, e.g.*, Attorney General of New York v. Soto–Lopez, ___ U.S. ___, 106 S. Ct. 2317, 90 L.Ed.2d 899 (1986) and Shapiro v. Thompson, 394 U.S. 618 (1969).

[2] *See* Memorial Hospital v. Maricopa County, 415 U.S. 250, 255–56 (1974). *See also* Milton v. Civil Service Commission, 365 Mass. 368, 371 n.2, 312 N.E.2d 188, 191 n.2 (1974) (assuming "arguendo" that right to intrastate travel is protected right).

who had owned and occupied the same residence for at least ten years.[3] In *Lee v. Commissioner of Revenue*, the Court held that, if a right to intrastate travel existed, the statute's ten–year occupancy requirement did not penalize the exercise of that right and was a rational means of promoting legitimate state interests.[4]

During the 1970's real estate values in Massachusetts increased dramatically causing higher property assessments and increased taxes.[5] In 1981, the Massachusetts legislature enacted a statute allowing local communities to grant a tax abatement to certain classes of homeowners, including persons with limited assets over seventy years of age who had owned and occupied the same residence for ten years.[6] John and Catherine Lee had owned their home in Springfield from 1943 to 1977, when they sold it to their son and purchased a smaller home in the same city.[7] In 1982, the Lees applied for a real estate tax abatement pursuant to the statute, but it was denied solely because they did not satisfy the ten–year occupancy requirement.[8]

The Lees filed a class action[9] in superior court alleging that the occupancy requirement violated their right to travel under the federal constitution.[10] The trial judge found that the denial of the tax abatement would have a significant impact on the Lee's ability to obtain the necessities of life and subjected the statute's occupancy requirement to strict judicial scrutiny.[11] Because the court determined that there was no compelling

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[3] Lee v. Commissioner of Revenue, 395 Mass. 527, 481 N.E.2d 183 (1985).

[4] *Id.*

[5] *Id.* at 532, 481 N.E.2d at 187.

[6] G.L. c.59, seventeenth C. The statute allows cities and towns to accept the tax abatement and provides in pertinent part:

> Seventeenth C Real Estate, to the taxable valuation of two thousand dollars or the sum of one hundred and seventy–five dollars, whichever would result in an abatement of the greater amount of actual taxes due, . . . or a person or persons over the age of seventy who has owned and occupied it as a domicile for not less than ten years; provided that the whole estate, real and personal, of such . . . person . . . does not exceed in value the sum of forty thousand dollars . . . exclusive of the first sixty thousand dollars in value of real estate occupied by such person as his domicile.

G.L. c.59, § 5, seventeenth C.

[7] 385 Mass. at 528, 481 N.E.2d at 185.

[8] *Id.* at 529, 481 N.E.2d at 185.

[9] *Id.* at 528, 481 N.E. 2d at 184

[10] The plaintiffs argued on appeal that the statute also violated the Massachusetts constitution but did not discuss the state constitutional principles separately and the Supreme Judicial Court did not consider the state constitutional claim. *See* MASS. R. APP. PRO. 16(a)(4) (Appellate Court need not consider arguments not made in brief). *See also* Atterberry v. Police Commissioner of Boston, 392 Mass. 550, 555, 417 N.E.2d 150, 153 (1984) (refusing to consider state right to travel argument referred to only once in appellant brief).

[11] 395 Mass. at 529, 481 N.E.2d at 185.

interest to support the requirement, it declared the ten–year requirement unconstitutional.[12] The Commissioner of Revenue appealed, and the Supreme Judicial Court transferred the case on its own motion.[13]

The plaintiffs in *Lee* asserted a right to intrastate travel and the Supreme Judicial Court assumed "for the purposes of discussion" that the federal constitution protects such a right.[14] Noting that the right to travel has most often been considered as an aspect of equal protection, the Court applied an equal protection analysis.[15]

The United States Supreme Court has held that durational residency requirements which penalize the exercise of the right to interstate travel must satisfy strict scrutiny.[16] When the state temporarily deprives a new resident of a basic benefit accorded other citizens, the residency requirement must be necessary to the achievement of a compelling interest.[17] Nondurational residency requirements which deny equal benefits to newer residents based upon their date of arrival have also been condemned because they tend to create permanent fixed classes of citizens.[18]

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[12] *Id.*

[13] *Id.* at 528, 481 N.E.2d at 185.

[14] 395 Mass. at 527, 481 N.E.2d at 185.

[15] *Id.* The Court noted that if the right to travel derives from the privilege and immunities clause of article IV, the right to intrastate travel would not exist. *Id.* at n.6. *See* Zobel v. Williams, 457 U.S. 55, 71–81 (1982) (O'Connor, J., concurring).

[16] *See* Memorial Hospital v. Maricopa County, 415 U.S. 250, 257 (1974) (applying strict scrutiny to one–year county residence requirement for receipt of free non–emergency medical care at county hospital); Dunn v. Blumstein, 405 U.S. 330, 338 (one–year state residency requirement to vote); Shapiro v. Thompson, 394 U.S. 618, 634 (1969) (one–year state residency requirement for receipt of welfare benefits). *But see* Sosna v. Iowa, 419 U.S. 343, 406–409 (no application of strict scrutiny to one–year residency requirement to file divorce petition). The denial of less important state benefits may not constitute a penalty on the exercise of the right to travel. Starns v. Malkerson, 326 F. Supp. 234, 238 (1970) aff'd mem. 401 U.S. 985 (1971) (denial of in–state tuition not a penalty on exercise of right to travel).

[17] Durational residency requirements have been distinguished from bona fide residence requirements. *See* Martinez v. Bynum, 461 U.S. 321–33 (1983) (upholding Texas requirement of bona fide residence for receipt of tuition–free public education). *Cf.* Vlandis v. Kline, 412 U.S. 441, 453 (permanent irrebuttable presumption of nonresidence of state university students who were nonresidents at time of application violates due process clause).

[18] *See* Attorney General of New York v. Soto–Lopez, __ U.S. __, 106 S. Ct. 2314, 2323, 90 L. Ed. 2d 899, 908–09 (1986) (plurality opinion) (strict scrutiny applied to New York civil service veteran preference for New York residents at time of entry into service); *See also* Hooper v. Bernalillo County Assessor, 472 U.S. 612, 623, 105 S. Ct. 2862, 2869, 86 L. Ed. 2d 487, 497 (striking down under rational basis standard statute limiting real estate exemption to Vietnam veterans residing in New Mexico prior to May, 1976) and Zobel v. Williams, 457 U.S. 55, 65 (1982) (striking down under rational basis standard Alaska dividend program providing differential benefit to state residents on basis of number of years of residence). *Cf.* Williams v. Vermont, 472 U.S. 14, 26, 105 S. Ct. 2465, 2474, 86

Because only those residency classifications which penalize the exercise of the right to travel are subjected to strict scrutiny, the Court began its analysis by asking whether the denial of a tax abatement was so significant as to be deemed a penalty.[19] The Court reviewed the precedents by focusing upon the nature of the deprivation.[20] The Court noted that statutes requiring new residents to wait one year to receive welfare benefits[21] or free non–emergency medical care[22] were held to have penalized new residents for exercising their right to travel, but residency periods involving less serious deprivations such as lower tuition rates at state universities[23] or lower mooring rates at public harbors[24] were upheld under the deferential rational basis standard. The Court disagreed with the trial court's conclusion that the denial of the tax abatement had a significant impact upon the necessities of life and found no significant effect on the right to travel.[25] The Court emphasized that states are traditionally accorded broad discretion in developing and implementing taxing programs.[26] Nor did the statute interfere with the right to interstate travel.[27] Finally, the Court noted that the plaintiffs were not part of the class of persons subject to prejudice in the political process warranting increased judicial protection.[28] Therefore, the Court applied the minimum rationality standard of review and held that the ten–year occupancy requirement was a rational means of furthering legitimate state interests.[29]

In applying the rational basis standard, the Court emphasized that the

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L.Ed.2d 11, 22 (striking down state program crediting automobile sales or use tax paid out of state but limiting credit to Vermont residents at time tax was paid).

[19] 395 Mass. at 527, 481 N.E.2d at 185. *See supra* note 14. *See also* Milton v. Civil Service Commission, 365 Mass. 368, 372, 312 N.E.2d 188, 192 (1974) (one–year municipal residency requirement for application to police force not a penalty on exercise of right to travel). *But see* Fiorentino v. Probate Court, 365 Mass. 13, 19, 310 N.E.2d 112, 117 (1974) (two–year residency requirement to bring divorce action subjected to strict scrutiny as penalty on right to travel).

[20] *Lee*, 395 Mass. at 530–31, 481 N.E.2d at 186.

[21] Shapiro v. Thompson, 394 U.S. 618, 634 (1969).

[22] Memorial Hospital v. Maricopa County, 415 U.S. 250, 257 (1974).

[23] Sturgis v. Washington, 368 F. Supp. 38, 41 (W.D. Wash.) *aff'd mem.*, 414 U.S. 1057 (1973); Starns v. Malkerson, 326 F. Supp. 234, 238 (D. Minn. 1970), *aff'd mem.*, 401 U.S. 985 (1971).

[24] Hawaii Boating Association v. Water Transp. Facilities, 651 F.2d 661, 665 (9th Cir. 1981).

[25] 395 Mass. at 532, 481 N.E.2d at 187.

[26] *Id.*

[27] *Id.* Thus the Court suggests that the right to intrastate travel differs from the right to interstate migration. *See* Zobel v. Williams, 457 U.S. 55, 67 (1982) (Brennan, J., concurring).

[28] 395 Mass. at 532, 481 N.E.2d at 187. The Court did not consider the plaintiffs to be part of a "discrete and insular minority" which might justify increased scrutiny. U.S. v. Carolene Products Co., 304 U.S. 144, 152–53 n.4 (1938).

[29] 395 Mass. at 532, 481 N.E.2d at 187.

classes created by the statute were not similarly situated.[30] Thus the legislature could have decided that elderly persons who sold their homes during a period of escalating values would have realized the increase in value, unlike those who decided to keep their homes.[31] Because the statute reflected relevant pre-existing differences between two groups of elderly homeowners, the Court held that it was not irrational.[32] Finally, the Court distinguished the occupancy requirement from fixed–date residency requirements which create permanent classes of citizens based upon the date of migration, because once the occupancy period has elapsed the homeowner will be entitled to equal enjoyment of the benefit.[33]

In several respects the *Lee* case does not fit easily within the right to travel precedents. For instance, a ten-year occupancy requirement is quite unlike a waiting period of one year or less typically at issue in the durational residency cases.[34] However, the requirement does not permanently exclude the more recent migrant from the equal enjoyment of a state benefit as in the fixed–date residency cases.[35] Finally, *Lee* involves a claimed right of intrastate rather than interstate migration.

The Supreme Judicial Court was careful not to explicitly recognize a right to intrastate migration.[36] The Supreme Court precedents suggest that the right to interstate migration derives from the structure of the federal constitution, the purpose of which was to forge one nation from a loose confederation of states.[37] Because the residency cases were decided under the equal protection clause, they also may be seen as establishing a principle of equality of citizenship between newer and older residents of a state.[38] That principle is not implicated where the state

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[30] *Id.* at 533, 481 N.E.2d at 187.

[31] *Id.*

[32] *Id.*

[33] 395 Mass. at 534, 481 N.E.2d at 188.

[34] *See supra* note 16.

[35] *See supra* note 18.

[36] 395 Mass. at 529, 481 N.E.2d at 185. In both *Lee* and *Milton v. Civil Service Commission*, 365 Mass. 368, 371 n.2, 312 N.E.2d 188, 191 n.2 (1974), the Court examined the burden imposed upon the asserted right to intrastate travel under the minimum equal protection standard and thus did not confront the issue directly.

[37] *See* Zobel v. Williams, 457 U.S. 55, 67 (1982) (Brennan, J., concurring) (characterizing right to travel as synonymous with federal interest in free interstate migration). *See also* Attorney General of New York v. Soto–Lopez, __ U.S. __, 106 S. Ct. 2317, 2323, 90 L. Ed. 2d 899, 909 (1986).

[38] *See* Zobel v. Williams, 457 U.S. 55, 70 (1982) (Brennan, J., concurring) ("In short, as much as the right to travel, equality of citizenship is the essence of our Republic"). *See generally*, Cohen, "Equal Treatment for Newcomers: The Core of Meaning of National and State Citizenship," 1 CONST. COMMENTARY 9 (1984) (rejecting penalty rationale and arguing for principle of equality of citizenship applicable to all residency cases).

does not discriminate against interstate migrants. On the other hand, some courts have characterized the right to travel as a liberty interest in personal mobility and have concluded that there is a correlative fundamental right to intrastate travel.[39] When viewed as an aspect of personal liberty, the right to change one's residence should not be confined to interstate migration, but because there is less likelihood of discrimination against established residents than against new arrivals, the two rights may not be coextensive. *Lee* supports the argument that the federal constitution guarantees a right to intrastate migration, but the Supreme Judicial Court suggested that it may be constitutionally different than the right to interstate migration.[40]

Assuming the existence of a right to intrastate migration, the *Lee* Court treated the ten–year occupancy requirement as any other durational residency requirement. However, the length of the waiting period should be relevant to the issue of whether it penalizes the exercise of the right.[41] Logically a ten–year requirement for a tax abatement may be more likely to discourage a change of residence than a one–year waiting period for a more significant benefit. This is especially true where the benefit is available only to elderly persons. In that sense, it is analogous to a permanent deprivation. The *Lee* Court did not consider the duration of the requirement, but simply concluded that the denial of the benefit by its nature did not significantly affect the right to travel.[42] Nor did the Court analyze the significance of the benefit to the affected class. The denial of a tax abatement to elderly persons whose assets do not exceed $40,000 could be considered significant.

In essence, the *Lee* Court held that the state could make it easier for certain elderly persons to keep their homes even if its program might indirectly inhibit others from moving. The Court relied upon the legislative assumption that those who sold their homes within the ten years

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[39] *See* Bruno v. Civil Service Comm. of City of Bridgeport, 472 A.2d 328 (Conn. 1984) (right to intrastate travel violated by one–year residency requirement for eligibility for position of city recreation director). *See also*, King v. New Rochelle Mun. Housing Auth., 442 F.2d 646, 648 (1971) ("It would be meaningless to describe the right to travel between states as a fundamental precept of personal liberty and not to acknowledge a correlative constitutional right to travel within a state"). *But, cf.*, Philadelphia Lodge No. 5 v. City of Philadelphia, 599 F. Supp. 254, 258 (E.D. Pa. 1984) (right to travel protects citizens traveling from state to state not a police officer on disability desiring to leave his residence and move about freely).

[40] 395 Mass. at 532, 481 N.E.2d at 187 (stating that statute "does not interfere with vitality of the principle of free interstate migration)" (quoting Zobel v. Williams, 457 U.S. 55, 67 (1982)).

[41] *See* Attorney General of New York v. Soto–Lopez, __ U.S. __, 106 S.Ct. 2317, 2324, 90 L. Ed. 2d 899, 909 (permanent nature of deprivation relevant to issue of whether it penalizes exercise of right to travel).

[42] 395 Mass. at 532, 481 N.E.2d at 187.

would have realized the increase in value. But the purchase of a new home in the same escalating housing market in a different neighborhood or a different city may well have required the spending of the profit. If there exists a right to free intrastate migration, the statute at issue in *Lee* unduly burdened that right.

§ 12.4. Procedural Due Process. The due process clause of the fourteenth amendment guarantees that a person will not be deprived of life, liberty or property without some adequate procedure to insure that the deprivation is warranted.[1] In most cases, due process requires a meaningful opportunity to be heard prior to the deprivation.[2] However, in cases where a pre-deprivation hearing is not possible or practicable, adequate post-deprivation procedures may satisfy the requirements of due process.[3] In *Parratt v. Taylor*, prison officials negligently deprived an inmate of a hobby kit he had sent for, and the inmate sued alleging that the failure to provide him with a pre-deprivation hearing violated the due process clause.[4] The United States Supreme Court considered a pre-deprivation hearing to have been impossible because the acts of the prison officials were unauthorized and random.[5] Because state law provided the inmate with an adequate remedy, the Court held that there had been no due process violation.[6] The Supreme Court has extended the reasoning of *Parratt* in a case involving the intentional deprivation of property resulting from the random and unauthorized acts of state officials.[7] The Supreme Court has not decided whether the *Parratt* rationale applies to deprivation of life or liberty, and the lower courts are in some disagreement. Some, relying on Justice Blackmun's concurring opinion in *Parratt*, have distinguished intrusions upon liberty from mere property

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§ 12.4. [1] U.S. CONST. AMEND. XIV.

[2] *See, e.g.*, Cleveland Bd. of Education v. Loudermill, 470 U.S. 532, ("some kind of hearing" required prior to termination of public employee who has property interest in continued employment). *See also* Logan v. Zimmerman Brush Co., 455 U.S. 422, 437 (1982) (due process requires opportunity for hearing at a meaningful time and in a meaningful manner).

[3] *See* Ingraham v. Wright, 430 U.S. 651, 675 (1977) (prior hearing for infliction of corporal punishment on junior high school students not required by due process clause where adequate post-deprivation remedy exists under state law).

[4] 451 U.S. 527 (1981). In *Parratt*, the Supreme Court also stated that the negligent conduct of prison officials was a deprivation of the inmate's property interest. The Court overruled that part of *Parratt* in Daniels v. Williams, 106 S. Ct. 662, 663, 88 L. Ed. 2d 662, 666 (1986).

[5] 451 U.S. at 541.

[6] *Id.* at 544.

[7] *See* Hudson v. Palmer, 468 U.S. 517, 533–36 (random and unauthorized shakedown of prison inmates call does not violate due process where state remedies are adequate).

deprivations.[8] Others, citing the Supreme Court's opinion in *Ingraham v. Wright*,[9] have applied the reasoning of *Parratt* focusing or whether the deprivation resulted from random unauthorized acts or established state procedures.[10]

During the *Survey* year, in *Temple v. Marlborough Division of the District Court*, the Supreme Judicial Court held that the failure of court officials to follow statutory procedures prior to the involuntary commitment of the plaintiff did not violate the due process clause where an adequate post-commitment remedy was available under state law.[11] In so holding, the Court adopted the *Parratt* line of reasoning.[12]

In August, 1980, Richard Temple's father applied in the district court for a warrant of apprehension seeking to have his son committed for psychiatric care and protection.[13] Upon issuance of the warrant, the Marlborough police took Temple into custody and brought him to the Marlborough District Court, where he was interviewed by a court psychiatrist.[14] After the interview, the district court ordered that Temple be

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[8] *See, e.g.*, Voutour v. Vitale, 761 F.2d 812, 826 (1st Cir. 1985) (Bownes, J., concurring) (arguing that life and liberty are such that post–deprivation remedies are insufficient protection); Conway v. Village of Mt. Kisco, 758 F.2d 46, 48 (2d Cir. 1985) (*Parratt* doctrine not applicable to liberty deprivation arising out of alleged malicious prosecution by local authorities); Wakinekona v. Olim, 664 F.2d 708, 715 (9th Cir. 1981) (liberty deprivation in prison transfer). *See also* Note, "Defining the Parameters of Section 1983: Parratt v. Taylor," 23 B.C.L. REV. 1218 (1982) (arguing that *Parratt* should not apply to life or liberty deprivations).

[9] 430 U.S. 651 (1977). *See supra* note 3.

[10] *See, e.g.*, Burch v. Apalachee Community Health Services, 804 F.2d 1549, 1554–56 (11th Cir. 1986) (*Parratt* applies to deprivation of liberty); Wilson v. Beebe, 770 F.2d 578, 584 (6th Cir. 1985) (en banc) (same); Thibodeaux v. Bordelon, 740 F.2d 329, 339 (5th Cir. 1984) (same). *See also* Note, "Due Process Application of the *Parratt* Doctrine to Random and Unauthorized Deprivations of Life and Liberty," 52 FORDHAM L. REV. 887 (1984).

[11] 395 Mass. 117, 479 N.E.2d 137 (1985).

[12] *Id.* at 126, 479 N.E.2d at 143.

[13] *Id.* at 120, 479 N.E.2d at 140. G.L. c.123, § 12(e) provides:

> Any person may make application to a district court justice for a ten-day commitment to a facility of a mentally ill person, whom the failure to confine would cause a likelihood of serious harm. After hearing such evidence as he may consider sufficient, a district court justice may issue a warrant for the apprehension and appearance before him of the allegedly mentally ill person, if in his judgment the condition or conduct of such person makes such action necessary or proper. Following apprehension, the court shall have the person examined by a physician designated to have the authority to admit to a facility in accordance with the regulations of the department. If said physician reports that failure to hospitalize the person would create a likelihood of serious harm by reason of mental illness, the Court may order the person committed to a facility for a period not to exceed ten days, but the superintendent may discharge him at any time within that ten day period.

G.L. c.123, § 12(e).

[14] 395 Mass. at 121, 479 N.E.2d at 140.

committed to a hospital for a period of ten days, after which he was released.[15]

In 1983, Temple filed suit in superior court under 42 U.S.C. section 1983[16] against the district court judge, the court psychiatrist and several other state officials alleging that they had violated his rights under the fourth and fourteenth amendments.[17] He claimed in part that the psychiatrist and the judge had deprived him of his liberty without due process by failing to follow the requirements of the commitment statute.[18] Specifically, he alleged that he was not advised of his right to counsel, nor offered the opportunity to agree to a voluntary commitment.[19] The defendants filed a motion to dismiss asserting in part that the court officials were immune from suit.[20] The trial court dismissed the plaintiff's claims as to all defendants.[21] The plaintiff appealed and the Supreme Judicial Court transferred the case to its docket.[22]

The central issue on appeal was whether to apply the rationale of *Parratt* to a case involving the deprivation of a liberty interest.[23] Reviewing the *Parratt* reasoning, the *Temple* Court stated that when state officials have failed to follow established procedures "the state action is not necessarily complete,"[24] and state remedies for the deprivation of property may be sufficient to satisfy due process.[25] The Court found no reason to apply a different rule when the state has deprived a person of a liberty interest.[26] In support of its conclusion the Court cited *Ingraham v.*

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[15] *Id.*

[16] *Id.* at 119, 479 N.E.2d at 139. Section 1983 provides a federal cause of action for the violation of constitutional or federal statutory rights against any person acting under color of state law.

[17] 395 Mass. at 119, 479 N.E.2d at 139–40. In addition to the district judge and court psychiatrist, the defendants included two court clerks, the hospital to which the plaintiff was committed, the Commissioner of Mental Health, and the Governor. The hospital was not a party to the motion to dismiss filed by the other defendants nor to the appeal. The Court affirmed the granting of the motion to dismiss as to the court clerks because they are absolutely immune from suit when acting at the judge's direction. *Id.* at 133, 479 N.E.2d at 147. The Court also affirmed the dismissal as to the Governor and Commissioner of Mental Health in that there was no evidence connecting them with the events alleged by the plaintiff. *Id.* at 134, 479 N.E.2d at 148.

[18] 395 Mass. at 126, 479 N.E.2d at 143. *See* G.L. c.123, § 12.

[19] 395 Mass. at 127, 479 N.E.2d at 144. *See* G.L. c.123, §§ 10(a) and 12(c).

[20] 395 Mass. at 119 n.3, 479 N.E.2d at 139 n.3.

[21] *Id.* at 119, 479 N.E.2d at 139.

[22] *Id.*

[23] *Id.* at 124, 479 N.E.2d at 139.

[24] *Id.* at 123, 479 N.E.2d at 142 (quoting Parratt v. Taylor, 451 U.S. 527, 542 (1981) (quoting Bonner v. Coughlin, 517 F.2d 1311, 1319 (7th Cir. 1975), *modified en banc*, 545 F.2d 565 (7th Cir. 1976), *cert. denied*, 435 U.S. 932 (1978)).

[25] *Id.* at 126, 479 N.E.2d at 143.

[26] 430 U.S. 651, 682 (1977).

Wright, in which the Supreme Court held that a hearing after the infliction of corporal punishment upon high school students satisfied due process because post–deprivation remedies were adequate.[27] Therefore, the Supreme Judicial Court concluded that it is not the nature of the interest which determines whether a post–deprivation procedure is consistent with due process. Rather it is "whether the state was in a position to provide pre–deprivation process and whether it supplies adequate post–deprivation process."[28] Because the alleged acts of the judge and psychiatrist were in violation of statutory procedures, the Court considered pre-deprivation process to have been impossible.[29] Therefore, the Court proceeded to examine the adequacy of post–deprivation remedies available to the plaintiff.

The Court found that the appeals process or state habeas corpus were adequate mechanisms for the plaintiff to have questioned the legality of his commitment.[30] Furthermore, the fact that they were no longer available did not mean that they were not adequate post-deprivation remedies satisfying due process. Although his confinement had ended, the Court suggested that a Rule 60(b) motion would still lie within the discretion of the trial court to relieve the plaintiff of the stigma of having been admitted involuntarily.[31] The more difficult question for the Court was whether a state damage action was an adequate remedy available to the plaintiff.[32] The plaintiff argued that a state tort action for damages was not adequate if he was unable to recover because the officials were immune from liability under state law. The Court held that the adequacy issue is not contingent upon whether the plaintiff is entitled to an actual recovery of damages, but rather whether state law provides an opportunity for a hearing on the issue.[33] Thus, although the judge was immune from liability

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[27] 395 Mass. at 125, 479 N.E.2d at 143.

[28] *Id.* at 127–28, 479 N.E.2d at 144.

[29] *Id.* at 127, 479 N.E.2d at 144.

[30] *Id.* at 133, 479 N.E.2d at 147. Rule 60(b) provides the Court with broad discretion to relieve a party from a final judgment or order under appropriate circumstances. MASS. R. CIV. PRO. 60(b), 365 Mass. 828 (1974). *See* Parrell v. Keenan, 389 Mass. 809, 452 N.E.2d 506, 512 (1983) (rule gives court power to vacate judgment "whenever such action is appropriate to accomplish justice") (quoting Klapprott v. United States, 335 U.S. 601, 615 (1949)).

[31] 395 Mass. at 126, 479 N.E.2d at 143.

[32] *Id.* at 128–29, 479 N.E.2d at 145. *See* Daniels v. Williams, 720 F.2d 792, 797 (4th Cir. 1983) (due process satisfied by hearing before tribunal with power to grant remedy) *aff'd on other grounds*, 106 S. Ct. 662 (1986).

[33] 395 Mass. at 129, 479 N.E.2d at 145. *See* Joyce v. Hickey, 337 Mass. 118, 121–22 (absolute immunity for judges acting in exercise of jurisdiction vested by law). The Court suggested that the psychiatrist may be liable for damages if he violated the provisions of the commitment statute. 395 Mass. at 129, 479 N.E.2d at 145. *See* G.L. c.123, § 22 (immunity from damage suits if acting pursuant to the statute).

under the doctrine of judicial immunity, the state remedy was adequate and the *Parratt* test was satisfied.[34] The Court further noted that state law provided no greater immunity than was available under federal law.

Having decided that the *Parratt* doctrine warranted a dismissal of the plaintiff's procedural due process claims, the Court considered two substantive constitutional claims raised by the plaintiff.[35] First, because the alleged conduct of the defendants was not so egregious as to "shock the conscience of the Court," the Court held that the alleged violations of the commitment statute did not rise to the level of a violation of substantive due process.[36] Finally, the Court rejected the plaintiff's fourth amendment claim because there were no facts to suggest that his apprehension was unlawful or that his temporary commitment was unreasonable.[37] The Court therefore held that the dismissal of all federal claims against the defendants was proper.

The *Parratt* doctrine was born of the concern that every tort claim against a person acting under color of state law would become a federal cause of action under 42 U.S.C. section 1983 for the violation of due process.[38] *Parratt* and its progeny can be read to limit procedural due process claims to those in which established state procedures fail to provide adequate protection or, if state procedures are violated, where the state post–deprivation remedy is deemed inadequate.[39] The Supreme Judicial Court was correct in holding that the *Parratt* rationale applies to

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[34] 395 Mass. at 130–31, 479 N.E.2d at 146. The *Parratt* doctrine applies to alleged violations of procedural due process not to violations of substantive constitutional rights. *See* Daniels v. Williams, 720 F.2d 792, 796 (4th Cir. 1983), *aff'd en banc*, 748 F.2d 229 (1984) (*Parratt* applies to negligent deprivation of liberty interest but not to violations of substantive constitutional rights), *aff'd on other grounds*, 106 S. Ct. 662 (1986) (negligence insufficient to support due process claim under 42 U.S.C. § 1983).

[35] 395 Mass. at 130–31, 479 N.E.2d at 146. *See* Rochin v. California, 342 U.S. 165, 169–173 (1952) (state criminal procedures which "shock the conscience" violate substantive protection of due process clause).

[36] *Id.* at 131, 479 N.E.2d at 146. The Court reasoned that the initial seizure of the plaintiff was proper because it was based upon a warrant. The ten-day commitment was not unreasonable in view of its purpose to prevent serious harm to the plaintiff or others. *Id.*

[37] 395 Mass. at 132, 479 N.E.2d at 147. The Court also considered the plaintiff's claims under state law and found the judge absolutely immune from suit. *See* DeLoach v. Tracy, 352 Mass. 135, 136, 223 N.E.2d 918, 919 (1967) (absolute immunity when judge is acting within his jurisdiction). The Court reversed the dismissal of the state claim against the psychiatrist under G.L. c.123, § 22 because the extent of his immunity under the statute involved factual determinations. 395 Mass. at 132, 479 N.E.2d at 147. The Court affirmed the dismissal of the claims against the other defendants. *Id.* at 133, 479 N.E.2d at 147–148.

[38] *See* Paul v. Davis, 424 U.S. 693, 701 (1976) (expressing concern that broad reading of due process clause would make fourteenth amendment "a front of tort law to be superimposed upon whatever systems may already be administered by the States").

[39] *See* Logan v. Zimmerman Brush Co., 455 U.S. 422, 435–36 (1982) (*Parratt* does not apply when deprivation results from application of "established state procedure").

a deprivation of liberty as well as property. There is no constitutional difference between liberty and property interests where state officials violate state procedures in a random and unauthorized manner.[40] The important inquiry, as the *Temple* Court recognized, is not the nature of the interest but whether the pre–deprivation due process was impossible or impracticable.[41] The Supreme Judicial Court held that because state officials allegedly ignored state procedures, pre–deprivation process was impossible.[42] However, Professor Blum has suggested that not all violations of state procedure should warrant the application of the *Parratt* doctrine.[43] Where those responsible for providing pre–deprivation protection have intentionally violated state procedures and the requirements of due process, the deprivation should not be viewed as random and unauthorized.[44] Because the judge and the psychiatrist in *Temple* were responsible for providing due process protection in the commitment proceedings, the Court should have distinguished the case from *Parratt*.[45]

In deciding whether the state remedy was adequate the Supreme Judicial Court focused on the opportunity to be heard rather than whether damages would be available in fact under state law.[46] The fact that the recovery might be barred by the doctrine of judicial immunity under state law, the *Temple* Court concluded, did not make the state remedy inadequate.[47] Although most lower courts have reached a similar conclusion, it has been argued that the state remedy is meaningless if it is not in fact available.[48] However, the adequacy problem is not as serious where the

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[40] This does not mean that the nature of the interest is irrelevant in deciding what process is "due." *See* Matthews v. Eldridge, 424 U.S. 319, 335 (1976) (private interest affected is part of procedural due process balancing test). But where the state could not have provided pre-deprivation process because the acts of state officials were random and unauthorized, the nature of the interest is not determinative. *See* Burch v. Apalachee Community Mental Health Services, 804 F.2d 1549, 1554–55 (1986) (no difference in relevant importance of rights guaranteed under due process clause).

[41] 395 Mass. at 125, 479 N.E.2d at 143.

[42] *Id.* at 128, 479 N.E.2d at 144.

[43] Blum, "Applying the *Parratt/Hudson* Doctrine: Defining the Scope of the *Logan* Established State Procedure Exception and Determining the Adequacy of State Post-Deprivation Remedies," 13 HASTINGS CONST. L.Q. 695 (1986) (hereinafter cited as Applying *Parratt*).

[44] *See* Blum, Applying *Parratt*, *supra* note 43 at 713. (criticizing *Temple* because defendant judge and psychiatrist were responsible for providing due process in commitment proceedings.)

[45] *Id.*

[46] 395 Mass. at 128, 479 N.E.2d at 145.

[47] *Id.* at 129, 479 N.E.2d at 145.

[48] *See* Rittenhouse v. Dekalb County, 764 F.2d 1451, 1457–59 (11th Cir. 1985), *cert. denied*, __ U.S. __, 106 S. Ct. 1193, 89 L. Ed. 2d 308 (1986) (state immunity does not make state remedy inadequate under *Parratt*). *But see* Davidson v. Canon, __U.S. __, 106 S. Ct. 668, 676, 88 L.Ed.2d 677, 689 (1986) (Blackmun, J., dissenting) ("conduct that is wrongful

federal claim would be foreclosed by a similar doctrine of immunity.[49] Although the Supreme Judicial Court indicated that the plaintiff would also be barred under federal law by the judicial immunity doctrine, that fact did not appear to be relevant to its determination of adequacy.[50]

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under § 1983 surely cannot be immunized by state law"). *See generally*, Note, "Parratt v. Taylor Revisited: Defining the Adequate Remedy Requirement," 65 B.U.L.REV. 607 (1985) (hereinafter referred to as *Parratt* Revisited) (arguing for strict adequacy requirement).

[49] *Parratt* Revisited, *supra* note 48, at 638.

[50] 395 Mass. at 129, 479 N.E.2d at 145.