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# Chapter 7: Constitutional Law

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*CHAPTER 7*

# Constitutional Law

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§7.1. **Introduction.** During the *Survey* period, the United States Supreme Court examined the constitutionality of a number of well-publicized Massachusetts statutes. Among these were the veterans preference law for state employment,[1] parental consent requirements in connection with a minor's abortion decision,[2] and the statute requiring the administration of a breathalyzer test to a motorist arrested for driving under the influence of liquor.[3] In addition, the Supreme Judicial Court of Massachusetts considered constitutional issues related to municipal restrictions on tenant evictions from apartments converted into condominium units[4] and from mobile home parks,[5] the scope of a municipality's rights of free expression,[6] and state-ordered medical treatment.[7] This chapter will focus on the federal and state constitutional issues in these and in other significant cases.

It is noteworthy that during the *Survey* period, the Supreme Judicial Court has given increasing attention to provisions of the Massachusetts Constitution in deciding cases in which the parties have argued both federal and state constitutional bases for their positions. The Supreme Judicial Court has not generally accepted the invitation of certain justices of the United States Supreme Court to utilize state constitutional

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§7.1. [1] Personnel Administrator of Massachusetts v. Feeney, 442 U.S. 256 (1979), discussed at § 3 *infra*.

[2] Bellotti v. Baird, 443 U.S. 622 (1979), discussed at § 4 *infra*.

[3] Mackey v. Montrym, 443 U.S. 1 (1979), discussed at § 7 *infra*.

[4] Grace v. Town of Brookline, 1979 Mass. Adv. Sh. 2257, 399 N.E.2d 1038, discussed at § 2 *infra*.

[5] Newell v. Rent Board of Peabody, 1979 Mass. Adv. Sh. 1713, 392 N.E.2d 837, discussed at § 2 *infra*.

[6] Anderson v. City of Boston, 1979 Mass. Adv. Sh. 2297, 380 N.E.2d 629, discussed at § 2 *infra*.

[7] Custody of a Minor, 1978 Mass. Adv. Sh. 2002, 379 N.E.2d 1053, and Commissioner of Correction v. Meyers, 1979 Mass. Adv. Sh. 2523, 399 N.E.2d 452, discussed at § 5 *infra*.

provisions to grant more protection to individuals than that accorded by the Supreme Court under the federal constitution.[8] In recent years, however, the Supreme Judicial Court has focused in more depth on state constitutional law. With the knowledge that a decision based on state constitutional grounds will be insulated from federal court review,[9] the Supreme Judicial Court has breathed new life into state constitutional provisions that have been little used in the past. Therefore, this chapter will also highlight such provisions of the Massachusetts Constitution.

**§7.2. Economic Regulation—Substantive Due Process.** In three major cases the Supreme Judicial Court upheld the government's right to regulate private enterprise in areas affecting housing and public health. Two cases [1] dealing with the sensitive issue of municipal regulation of rents and tenant eviction raised issues of federal due process and equal protection [2] as well as cognate state constitutional issues. The third

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[8] In the context of criminal procedures, Justice Brennan, joined by Justice Marshall, has noted:

> In light of today's erosion of *Miranda* standards [Miranda v. Arizona, 384 U.S. 436 (1966)] as a matter of federal constitutional law, it is appropriate to observe that no State is precluded by the decision from adhering to higher standards under state law. Each State has power to impose higher standards governing police practices under state law than is required by the Federal Constitution.

Michigan v. Mosley, 423 U.S. 96, 120 (1975) (Brennan, J., dissenting) (citations omitted). *See also* Note, *Stepping into the Breach: Basing Defendants' Rights on State Rather than Federal Law,* 15 AM. CRIM. L. REV. 339 (1978); L. TRIBE, AMERICAN CONSTITUTIONAL LAW §§ 3-4 (1978); Daughtrey, *State Court Activism and Other Symptoms of the New Federalism,* 45 TENN. L. REV. 731 (1978); Douglas, *State Judicial Activism—The New Role for State Bills of Rights,* 12 SUFFOLK U.L. REV. 1123 (1978); Brennan, *State Constitutions and the Protection of Individual Rights,* 90 HARV. L. REV. 489 (1977); Cronin, *Constitutional Law,* 1976 ANN. SURV. MASS. LAW § 13.5, at 428 n.269.

For a recent instance where the Supreme Judicial Court interpreted a state constitutional provision to accord more protection to criminal defendants than is required by the United States Constitution, see Commonwealth v. Soares, 1979 Mass. Adv. Sh. 593, 627, 387 N.E.2d 499, 516 *cert. denied,* 444 U.S. 881 (1980). The Court held that the use of peremptory challenges in criminal cases to exclude prospective jurors from petit juries based solely on their race violates art. 12 of the Declaration of Rights. *Cf.* Swain v. Alabama, 380 U.S. 202 (1965).

[9] *See* references in Cronin, *Constitutional Law,* 1976 ANN. SURV. MASS. LAW § 13.5, at 428 n.269. Of course, a claim that a state constitutional interpretation conflicts with the federal constitution is a federal question which may be heard in a federal forum. *See* U.S. CONST. art. VI (supremacy clause).

§7.2. [1] Grace v. Town of Brookline, 1979 Mass. Adv. Sh. 2257, 399 N.E.2d 1038; Newell v. Rent Board of Peabody, 1979 Mass. Adv. Sh. 1713, 392 N.E.2d 837.

[2] Federal constitutional attacks on state economic regulations are often two-pronged, based on both due process and equal protection grounds. At least in the area of economic regulations, there is a blurring of these two concepts. The constitutional standard used in analyzing each issue is basically the same: is there a rational connection between a legitimate legislative objective and the means by which the objective is achieved? *See, e.g.,* San Antonio Independent School Dist. v. Rodriguez, 411 U.S. 1, 55 (1973). In fact, given current interpretation of the due

case, dealing with state food-labeling regulations,[3] raised not only due process issues but also issues concerning the commerce clause and federal preemption. In all three cases, the Court had little trouble disposing of the constitutional attacks.

The common law notion that a landowner's right to do as he or she pleases with his or her property [4] has been considerably qualified during the twentieth century as state legislatures have become increasingly involved in regulating and controlling the broad prerogatives of landowners.[5] Recent housing shortages have given rise to municipal restrictions both on rent increases [6] and on a landlord's ability to evict a tenant.[7] In addition, the growing dissatisfaction of apartment owners

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process clause of the fourteenth amendment, one could argue that the equal protection clause itself is superfluous. In the area of "federal action," the Supreme Court has held that, while the fifth amendment has no equal protection clause, its due process clause has equal protection overtones. *See, e.g.*, Karst, *The Fifth Amendment's Guarantee of Equal Protection*, 55 N.C. L. REV. 541 (1977); Examining Bd. of Engineers, Architects & Surveyors v. DeOtero, 426 U.S. 572, 601 (1976); Buckley v. Valeo, 424 U.S. 1, 93 (1976); Bolling v. Sharpe, 347 U.S. 497, 499 (1954).

[3] Grocery Mfrs. of America, Inc. v. Dep't of Public Health, 1979 Mass. Adv. Sh. 2991, 393 N.E.2d 881.

[4] "A man has a right to do what he wants on his own land." J. BEUSCHER, R. WRIGHT, & M. GITELMAN, CASES AND MATERIALS ON LAND USE 1 (2d ed. 1976) (quoting Blackstone). Again quoting Blackstone: "So great, moreover, is the regard of the law for private property, that it will not authorize the least violation of it; *no, not even for the general good* of the whole community." *Id.* (emphasis in original).

[5] The growth in the use of the zoning power for land use control stems in part from the seminal United States Supreme Court decision in Euclid v. Ambler Realty Co., 272 U.S. 365 (1926), upholding against a due process and equal protection attack a municipal plan which set up use limitations and districts.

[6] Although federal controls on rents can be traced back to the 1940s and World War II, the primary controls on rents have come from municipal level, generally through state enabling legislation granting local communities the power to enact controls. *See* C. BERGER, CASES AND MATERIALS ON HOUSING 737-38 (1973). Massachusetts controls on rent may be traced back to 1920. *See* Bloom & Newman, *Rent Control*, 1974 ANN. SURV. MASS. LAW § 19.1. In 1970, the Massachusetts legislature passed enabling legislation authorizing cities and towns with populations of 50,000 or more to control rents and evictions. Acts of 1970, c. 842. For a history of rent control in Massachusetts, see Gleason, Kerr, & Martin, *State and Local Government*, 1971 ANN. SURV. MASS. LAW §§ 15.12 & 15.13.

[7] Many of the statutory restrictions in recent years seem to be based as much on a recognition of "consumers' rights" as on a legislative response to the housing shortage. For example, in 1973 Massachusetts forbade the use of self-help by a landlord in order to evict a tenant and required judicial process (summary process) to be used in all non-voluntary evictions. G.L. c. 184, § 18, as amended by Acts of 1973, c. 778. By statute "retaliatory eviction" is a defense to a summary process action. G.L. c. 239, § 2A; *see also* G.L. c. 186, § 18. In addition, a court may allow a tenant to remain in the premises for six months, "as the court may deem just and reasonable," even though the landlord has complied with all statutes regarding eviction. G.L. c. 239, § 9. These statutes seem as much a result of a legislative reaction to the inequality of bargaining power between landlord and tenant as a recognition of the housing shortage.

with rent control, particularly during a period of increasingly scarce energy supplies has encouraged large-scale conversions of existing apartments into condominiums [8] in certain localities. This *Survey* year witnessed what is likely to be only the beginning salvo, albeit unsuccessful, by landlords against such restrictions, as the Supreme Judicial Court in *Grace v. Town of Brookline* [9] upheld the town of Brookline's temporary condominium eviction ban and in *Newell v. Rent Board of Peabody* [10] upheld a much broader restriction on tenant evictions, one unlimited in duration.

These decisions are best viewed against the background of the legislative response to the housing shortage and the judicial support of that legislation. In 1970, the legislature enacted both a general rent control enabling statute for towns with populations of 50,000 or more [11] and a special enabling statute for the town of Brookline.[12] This rent control legislation set up a mechanism to determine the maximum permissible rent for a covered unit and permitted municipalities to restrict tenant evictions. In addition, the general legislation exempted, and the special legislation permitted Brookline to exempt, owner occupied two and three family dwellings from the controls. In 1971, pursuant to the general legislation, Brookline and other towns and cities adopted rent control provisions. They also placed restrictions on evictions. Brookline, for instance, forbade evictions unless the landlord had first obtained from the rent control board a certificate of eviction, which would issue only if certain specified conditions had been met.

In 1971, landlords from Brookline and other communities attacked both the general and special legislation and the local implementation acts on grounds of federal due process and equal protection. In *Marshal House, Inc. v. Rent Control Board of Brookline*,[13] the Supreme Judicial Court sustained the validity of the legislation and the local ordinances. In particular, the Court held that the methods of fixing rent ceilings [14]

[8] Condominiums are regulated by statute in Massachusetts. *See* G.L. c. 183A.

[9] 1979 Mass. Adv. Sh. 2257, 399 N.E.2d 1038.

[10] 1979 Mass. Adv. Sh. 1713, 392 N.E.2d 837.

[11] Acts of 1970, c. 842.

[12] Acts of 1970, c. 843. Prior to the 1970 acts, Brookline had enacted a by-law controlling rents, but it was struck down for lack of state enabling legislation. Marshal House v. Rent Control Bd. of Brookline, 357 Mass. 709, 260 N.E.2d 200 (1970). For a discussion of the first *Marshal House* case, see Garrity, *Poverty Law*, 1970 ANN. SURV. MASS. LAW § 10.5. Brookline generally regulated rents and evictions under c. 842 from 1970 until 1975 and under c. 843 since 1976. *See* 1979 Mass. Adv. Sh. at 2258-59, 399 N.E.2d at 1039-40.

[13] 358 Mass. 686, 266 N.E.2d 876 (1971), the second *Marshal House* case. See note 12 *supra*.

[14] The legislation included a provision for a "rollback" in rent to the amount charged six months before the town's acceptance of the enabling act. 358 Mass. at 700, 266 N.E.2d at 886.

and the standards for adjusting rent ceilings did not violate the due process clause; that the exemption of certain owner-occupied housing did not create an unreasonable classification among landowners in the state; and that the special treatment of Brookline landlords also did not violate the equal protection clause.[15] More important than these particular holdings, however, was the hands-off standard of review that the Court adopted with respect to constitutional attacks on legislation aimed at reducing the housing shortage:

> It is established that every presumption is to be indulged in favor of the validity of a legislative enactment. A classification contained therein should be struck down by the courts only when it is "arbitrary" and has no "fair and substantial relation to the object of the legislation." Nor is it necessary for the legislature to make explicit findings to support its enactments; as long as there are possible findings which the Legislature could reasonably have made in the legitimate exercise of the police power its acts will be upheld.[16]

The legislation and the local enactments thus withstood the constitutional attacks in *Marshal House*. Eight years later, the Court again applied this hand-off, "rational-relation" standard of review to sustain local restrictions on condominium conversions and rent control of mobile homes.

Having won the *Marshal House* battle earlier in the decade, the town of Brookline responded in kind to condominium conversion, a phenomenon of the late 1970s which exacerbated the housing shortage that the 1970 rent controls were meant to alleviate. Until 1978, Brookline's bylaws did not particularly single out condominium conversion as a prime cause of its housing problems. Where a covered apartment unit had

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[15] *Id.* at 694-95, 266 N.E.2d at 882-83. Substantive due process review of economic legislation is likewise characterized by extreme judicial deference to legislative judgment. In the economic area (where personal liberties are not involved), the United States Supreme Court has indicated that a legislative enactment will not be held unconstitutional if any set of facts can be conceived which justifies the legislative decision. *See, e.g.*, Williamson v. Lee Optical Co., 348 U.S. 483 (1955); Day-Brite Lighting, Inc. v. Missouri, 342 U.S. 421 (1952). For a more recent pronouncement, see Exxon Corp. v. Governor of Maryland, 437 U.S. 117 (1978), in which the Court rejected a substantive due process attack on a Maryland law prohibiting producers or refiners of petroleum from operating retail gas stations. Writing for the Court, Justice Stevens summarily disposed of the substantive due process attack in one short paragraph:

> Appellants' substantive due process argument requires little discussion. The evidence presented by the refiners may cast some doubt on the wisdom of the statute, but it is, by now, absolutely clear that the Due Process Clause does not empower the judiciary to sit as a "superlegislature to weigh the wisdom of legislation . . . ."

*Id.* at 124 (footnote and citation omitted). Compare the "rebirth" of substantive due process in the area of privacy and the family unit, *infra* note 45.

[16] 358 Mass. at 695-96, 266 N.E.2d at 883.

been converted into a condominium, a landlord could obtain a certificate of eviction from the rent control board if the landlord or his immediate family intended to occupy the unit or if "just cause" existed.[17] As a result of 1978 amendments to the by-law, however, a condominium developer could not obtain a certificate of eviction to eject a tenant already residing in a rent controlled unit. A *purchaser* of a condominium unit who intended to occupy the unit, on the other hand, could still seek a certificate of eviction in order to eject a tenant in possession at the time of purchase. The amended by-law, however, provided for a mandatory six-month stay of issuance of the certificate, a stay which could be extended for an additional six months in case of hardship.[18] *Grace v. Town of Brookline* presented to the Court a challenge to the constitutionality of this by-law, which absolutely prevented a condominium developer from evicting a tenant in possession and which restricted a condominium purchaser's ability to obtain occupancy of a unit from a tenant in possession at the time of the purchase for six to twelve months.[19]

The plaintiffs in *Grace* were a condominium developer and a prospective purchaser of a condominium unit, neither of whom could immediately obtain certificates of eviction.[20] The plaintiffs sought both injunctive and declaratory relief. After resolving a number of statutory issues,[21] the Court addressed the plaintiffs' due process contention that the by-law amendments constituted a taking of their property without just compensation. They claimed that "the amendments transfer the right to possess from the owner to the tenant and compel the condominium owner to become a landlord." [22] Citing cases that have upheld rent

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[17] Art. XXXVIII, § 9(a), of Brookline by-laws, enacted under Acts of 1970, c. 843, as described in 1979 Mass. Adv. Sh. at 2259-60, 399 N.E.2d at 1040.

[18] *Id.* at 2261, 399 N.E.2d at 1040.

[19] In May of 1979, the Brookline town meeting voted to prohibit the issuance of a certificate of eviction against a tenant who had possessed a unit continuously from a date prior to the recording of the master condominium deed. *Id.* at 2263 n.12, 399 N.E.2d at 1041-42 n.12. This amendment, in effect, permanently prevents condominium purchasers from evicting such tenants. Although the constitutionality of the May 1979 amendment was not before the Court in *Grace*, the validity of a permanent ban would be tested by the standards articulated in Newell v. Rent Bd. of Peabody, 1979 Mass. Adv. Sh. 1713, 392 N.E.2d 837. See text accompanying notes 32-42 *infra*.

[20] 1979 Mass. Adv. Sh. at 2261-62, 399 N.E.2d at 1041.

[21] *Id.* at 2264-71, 399 N.E.2d at 1042-45. Plaintiffs unsuccessfully argued that the by-law provisions exceeded the scope of, and were in conflict with, both the rent control enabling legislation and G.L. c. 239, §§ 9-11, dealing with discretionary stays of eviction, and that the provisions conflicted with the purpose of the general condominium statute, chapter 183A. *Id.*

[22] *Id.* at 2271, 399 N.E.2d at 1045.

control statutes during times of public emergency,[23] the Court reaffirmed that such controls were within the police power of the state. The Court recognized that the government's police power was limited and that at some point the character of the taking would be such that the eminent domain clause of the fourteenth amendment would be implicated, thereby requiring that compensation be paid.[24] The Court found, however, that the Brookline amendments did not so significantly intrude upon the landowners' property rights as to constitute an eminent domain taking.[25] The Court remarked that "they merely limit the property owners' right to remove units from the rental market, by *delaying* recovery for personal occupancy. . . . The period of delay required by these amendments does not render the provisions confiscatory." [26] The Court also pointed out that during the stay period, the owner would still receive rent payments from the tenant.[27]

The plaintiffs also mounted an equal protection challenge to the amendments, arguing that Brookline had created an unjustifiable classification based on form of ownership.[28] The amendments, they claimed, treated condominium landowners differently from all other landowners by subjecting them alone to restrictions on their right to evict tenants.[29]

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[23] The Court cited Bowles v. Willingham, 321 U.S. 503 (1944); Edgar A. Levy Leasing Co. v. Siegel, 258 U.S. 242 (1922); Marcus Brown Holding Co. v. Feldman, 256 U.S. 170 (1921); Block v. Hirsh, 256 U.S. 135 (1921); and Marshal House, Inc. v. Rent Control Bd. of Brookline, 358 Mass. 686, 266 N.E.2d 876 (1971).

[24] 1979 Mass. Adv. Sh. at 2272, 399 N.E.2d at 1045. In Davidson v. Commonwealth, 1979 Mass. App. Ct. Adv. Sh. 2103, 2111, 395 N.E.2d 1314, 1318, the Appeals Court explained the difference between a non-compensable exercise of the state's police power and a compensable exercise of the eminent domain power:

> The essential distinction between an exercise of the State's eminent domain power which is compensable and an exercise of the police power which is not is that in the exercise of eminent domain a property interest is taken from the owner and applied to the public use because such use is beneficial to the public, while in the exercise of the police power an owner's property interest is restricted or infringed upon to prevent its use in a manner detrimental to the public interest.

*Id.* (citations omitted).

[25] 1979 Mass. Adv. Sh. at 2273, 399 N.E.2d at 1045-46.

[26] 1979 Mass. Adv. Sh. at 2273, 399 N.E.2d at 1046 (emphasis added). The Court's choice of the word "delay" is significant in assessing the constitutionality of the 1979 Brookline by-law amendment permanently banning tenant evictions from units converted into condominiums. See note 19 *supra*. If the housing shortage were to continue for an extended period of time, it could be argued that the longer period of delay entitles the owner to compensation for the "taking." See discussion of the "permanent" eviction ban upheld in *Newell* in text at notes 32-42 *infra*.

[27] *Id.*

[28] *Id.*

[29] The equal protection clause serves as a restraint against government's ability to draw lines or to classify. Since all legislation is in a sense line-drawing, the command of the equal protection clause, at least in the area where important or fundamental rights are not involved, is to classify reasonably. As Professor Tribe

Utilizing traditional "first-level" equal protection review as it had done in *Marshal House*, the Court concluded that the town reasonably could have viewed condominium conversion as a hindrance to the effectiveness of rent control.[30] Thus, having found a rational basis for the town's classification, the Court held that the amendments did not violate the equal protection clause.[31]

Unlike *Grace*, which upheld temporary condominium eviction restrictions, *Newell v. Rent Board of Peabody* [32] presented for review a municipal enactment that controlled rents and prohibited evictions in mobile homes but contained no time limitation. Owners of mobile home parks had attacked both the special state enabling act [33] permitting the ordinance and the ordinance itself, not only on federal due process and equal protection grounds, but also on the basis of articles 1 [34] and 10 [35] of the Massachusetts Constitution.[36]

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has noted, a statute can deny equality both by treating similarly situated persons differently or by failing to treat differently persons not similarly situated. L. TRIBE, AMERICAN CONSTITUTIONAL LAW § 16-1 (1978) [hereinafter cited as TRIBE].

[30] By the end of the 1970s the Supreme Court had clearly recognized three levels, or tiers, of equal protection review. The first level, dealing with statutory classifications in the economic and business area, requires minimal judicial scrutiny and the least amount of state justification in order for a court to uphold the statute. So "toothless" is this approach that a court should sustain the statute if it can *conceive* of a rational state objective behind it. *See, e.g.*, McGowan v. Maryland, 366 U.S. 420 (1961). This is the standard of review adopted by the Supreme Judicial Court in these cases, since neither a suspect class nor fundamental right was involved.

[31] 1979 Mass. Adv. Sh. at 2274-76, 399 N.E.2d at 1046-47.

[32] 1979 Mass. Adv. Sh. 1713, 392 N.E.2d 837.

[33] Acts of 1976, c. 131, adding the special act, recited that the legislature had found that a housing emergency existed in Peabody, caused by "excessive, abnormally high and unwarranted rental increases imposed by some owners of mobile home parks located therein." *Id.*

[34] Article 1 of the Declaration of Rights of the Massachusetts Constitution reads:

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

[35] Article 10 of the Declaration of Rights of the Massachusetts Constitution reads in part:

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

Without clearly explaining its reasoning, the Court summarily rejected plaintiffs' state and federal due process arguments and blurred the state due process analysis with that of the federal.[37] Writing for the Court, Justice Wilkins stated that the lack of a time limitation in the Peabody rent regulation and eviction ban was inconsequential and did not amount to a taking without just compensation.[38] "[A] provision for 'self-destruction' is not a constitutionally required element of a rent control statute or regulation."[39] The Court did indicate, however, that the constitutionality of the restrictions would depend upon the existence of a housing emergency and that "[t]he continuing existence of an emergency is a question that may be presented for further consideration, not only to the Legislature and the city, but also to the courts."[40] The plaintiffs also argued, as did the plaintiffs in *Grace*, that the Peabody enactment violated both federal and state equal protection provisions by treating mobile home park owners differently from other landowners.[41] Again using a rational basis equal protection standard, the Court upheld the restrictions on the basis that the legislature could reasonably have found that a housing emergency existed in Peabody and that the owners of mobile home parks were causing that problem.[42]

Both of the housing cases[43] dealing with rent and eviction controls are consistent with the contemporary judicial reluctance to interfere

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erty of any individual should be appropriated to public uses, he shall receive a reasonable compensation therefor.

[36] The Court rejected an argument that the special act had not been passed in accordance with the Home Rule Amendment, article 89 of the amendments to the Massachusetts Constitution. 1979 Mass. Adv. Sh. at 1716-18, 392 N.E.2d at 839-40.

[37] *Id.* at 1719-20, 392 N.E.2d at 840. The Supreme Judicial Court recently noted that state and federal due process analysis in the economic area is essentially the same:

> While the State and Federal standards are phrased in virtually identical terms, we have noted that "[t]he Constitution of a State may guard more jealously against the exercise of the State's police power." . . . As a result, we have occasionally been less willing than the Federal courts to ascribe to the Legislature speculative and implausible ends, or to find rational the nexus said to exist between a plausible end and the chosen statutory means.
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> Any difference between the two constitutional standards in the area of economic regulation, however, is narrow. See, e.g., our comment regarding the applicability of a district [sic] State "due process" standard to the alteration of preexisting common law effected by the original "no fault" insurance legislation.

Blue Hills Cemetery, Inc. v. Board of Registration, 1979 Mass. Adv. Sh. 2647, 2652 n.8, 398 N.E.2d 471, 475 n.8 (citations omitted).

[38] 1979 Mass. Adv. Sh. at 1719-20, 392 N.E.2d at 840.

[39] *Id.* at 1719-20, 392 N.E.2d at 840.

[40] *Id.* at 1719, 392 N.E.2d at 840.

[41] *Id.* at 1720, 399 N.E.2d at 840-41.

[42] *Id.* at 1720, 399 N.E.2d at 841.

[43] A third case during the *Survey* period also dealt with the housing shortage but in another context. In Massachusetts Home Mortgage Finance Agency v. New

with economic and social legislation. Substantive due process, judicial review of the wisdom and efficacy of economic legislation,[44] is still a stepchild of the law,[45] whether based on federal or state constitutional provisions.

In *Grocery Manufacturers of America v. Department of Public Health*,[46] the plaintiffs challenged an "open-date" food labeling regulation promulgated by the Massachusetts Department of Public Health. They attacked the regulation not only on due process grounds but also on the ground that state regulation in this area conflicted with the power given to Congress under article I, section 8, of the Constitution to regulate interstate commerce.[47] The regulation requires that food products sold in packaged form must indicate either the "last date of use"[48] or a "pull date"[49] for the food product. Although the regulation applies to both perishable[50] and non-perishable[51] food products, plaintiffs attacked the regulation only insofar as it applied to non-perishables.

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England Merchants Nat'l Bank of Boston, 1978 Mass. Adv. Sh. 2909, 382 N.E.2d 1084, the Court approved the use of state money to make mortgage loans available to persons of low and moderate income.

44 See note 15 *supra*.

45 Despite the negative image of an activist court reviewing the wisdom of economic legislation, which the term substantive due process evokes, *see, e.g.*, Lochner v. New York, 198 U.S. 45 (1905), substantive due process is alive and well in the areas of personal and sexual privacy and family autonomy. The United States Supreme Court has recognized that the liberty component of the due process clause protects personal privacy and requires a strong state showing before the government can intrude in this area. *See, e.g.*, Zablocki v. Redhail, 434 U.S. 374 (1978) (sounding in both substantive due process and equal protection); Moore v. City of East Cleveland, 431 U.S. 494 (1977); Whalen v. Roe, 429 U.S. 589 (1977); Roe v. Wade, 410 U.S. 113 (1973); Griswold v. Connecticut, 381 U.S. 479 (1965). The Supreme Judicial Court during the *Survey* year recognized the legitimacy of federal substantive due process in the area of family autonomy in cases dealing with involuntary termination of parental rights. *See, e.g.*, Custody of a Minor, 1979 Mass. Adv. Sh. 1117, 389 N.E.2d 68; Department of Public Welfare v. J.K.B., 1979 Mass. Adv. Sh. 2202, 393 N.E.2d 406.

46 1979 Mass. Adv. Sh. at 2291, 393 N.E.2d at 881.

47 *Id.* at 2293, 393 N.E.2d at 885. The case points out that insofar as the regulation applies to both perishable and non-perishable food products, Massachusetts is again in the forefront of protecting consumer interests. *Id.* at 2295, 393 N.E.2d at 886.

48 Section 101.19(a)(2) of the Massachusetts Register defines "last date of use" as "that date beyond which the product may not be fit for consumption. In establishing the last date of use, the manufacturer shall assume that the product will be stored under those conditions recommended for storage of the product on the label . . . ." *Id.* at 2311, 393 N.E.2d at 892-93.

49 Section 101.19(a)(5) of the Massachusetts Register defines "pull-date" as the date after which the product may not be of the quality which the manufacturer represents it to be." *Id.*

50 " 'Perishable Food' means food that has a shelf life of 60 days or less after manufacture." Section 101.19(a)(4). *Id.*

51 " 'Non-perishable food' means food that has shelf life of more than 60 days after manufacture." Section 101.19(a)(3). *Id.*

By statement of facts filed with the Supreme Judicial Court,[52] the parties agreed that food products deteriorate with age because of handling conditions and the environment in which they may be stored. Through testing and other procedures, manufacturers have been able to determine the period of time in which their products may not be of the expected quality at the time of consumption.[53] Despite this ability and despite substantial consumer interest in open-date labeling, the Court noted that "open-date labeling is not required for non-perishable foods anywhere else in the country." [54]

After upholding the Department of Public Health's authority to promulgate the regulation,[55] the Court then addressed the argument that the regulation unconstitutionally burdened interstate commerce. This argument presented a classic issue of federalism: the extent to which the power given to Congress to regulate interstate commerce allows state regulation of goods in interstate commerce. The United States Supreme Court has held that Congress's constitutionally enumerate power to regulate interstate commerce is not exclusive and does not in and of itself act to divest the states of power to legislate in areas also dealing with interstate commerce.[56] The Court has indicated that in the absence of an actual exercise of congressional power under the commerce clause local regulation that burdens interstate commerce is valid as long as the state interest in regulation outweighs any need for national uniformity [57] and as long as the regulation affects both intrastate and interstate commerce equally.[58] Hence, the Supreme Judicial Court examined the plaintiffs' commerce clause argument by determining whether the burden which the regulation imposed on interstate commerce was "clearly excessive in relation to the putative local benefits" [59] of the regulation. The Court held that the plaintiffs failed to

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[52] Plaintiffs filed this action for declaratory relief directly in the Supreme Judicial Court pursuant to G.L. c. 231A, § 1. *Id.* at 2291, 393 N.E.2d at 884.

[53] *Id.* at 2294-95, 393 N.E.2d at 886.

[54] *Id.* at 2295, 393 N.E.2d at 886.

[55] The Court held that G.L. c. 94, § 192, which permitted regulation of the sale of misbranded foods, was broad enough to allow regulation of omissions of fact. Hence, the agency could regulate misbranding and labeling of items to ensure that they would be of the quality which they are implicitly represented to be by their presence on the shelvs. *Id.* at 2295-98, 393 N.E.2d at 886-87.

[56] *See, e.g.*, Cooley v. Board of Wardens, 53 U.S. 299 (1851).

[57] *See, e.g.*, Wabash, St. L. & Pac. Ry. v. Illinois, 118 U.S. 557 (1886), where the need for national uniformity on railroad rates was found to prevent local rate legislation, even though Congress had not legislated national uniform rates.

[58] *See, e.g.*, South Carolina State Highway Dep't v. Barnwell Bros., Inc., 303 U.S. 177 (1938).

[59] 1979 Mass. Adv. Sh. at 2304, 393 N.E.2d at 889 (quoting Pike v. Bruce Church, Inc., 397 U.S. 137, 142 (1970)). *See also* Raymond Motor Transportation, Inc. v. Rice, 434 U.S. 429 (1978). In an 1978 case, the United States Su-

meet their burden of proving that the regulation burdened interstate commerce "and certainly did not demonstrate any excessive burden." [60]

The plaintiffs in *Grocery Manufacturers* unsuccessfully advanced several other constitutional arguments against the validity of the regulation. First, they claimed that federal law had preempted the entire area. Hence, the state regulation had to fall by virtue of the supremacy clause of article VI of the Constitution.[61] The Court determined that resolution of this issue, like the earlier commerce clause issue, required a balancing of state and federal interests. Finding no federal legislation specifically or impliedly forbidding or preempting state regulation of product labeling,[62] the Supreme Judicial Court considered whether there was any conflict between the Massachusetts regulation and the goals of the federal Food, Drug and Cosmetic Act [63] and the regulations thereunder. The Court observed:

> The typical preemption case involves State and Federal regulation of the same subject. In such a case, "[t]he criterion for determining whether state and federal laws are so inconsistent that the state law must give way is . . . whether, under the circumstances of the particular case, [the State's] law stands as an obstacle to the accomplishment and execution of the full purposes and objectives of Congress.[64]

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preme Court asked whether a state regulation "is basically a protectionist measure, or whether it can fairly be viewed as a law directed to legitimate local concerns, with effects upon interstate commerce that are only incidental." City of Philadelphia v. New Jersey, 437 U.S. 617, 624 (1978).

[60] 1979 Mass. Adv. Sh. at 2304, 393 N.E.2d at 889. In another case during the *Survey* period, the Supreme Judicial Court responded to an argument that a state restriction on automobile franchising violated the commerce clause. "The plaintiffs do not come near a demonstration that the statute will result in any lessening of the flow of automobiles into the Commonwealth, or in reduced sales here, or in an adverse influence on any other aspect of interstate economic activity." Tober Foreign Motors, Inc. v. Reiter Oldsmobile, Inc., 1978 Mass. Adv. Sh. 2468, 2478, 381 N.E.2d 908, 914.

[61] The supremacy clause establishes the basis of federal supremacy in the context of our two-sovereign system of government: "This Constitution, and the laws of the United States which shall be made in pursuance thereof . . . shall be the supreme law of the land." U.S. CONST. art. VI, § 2.

[62] Federal preemption may be found by virtue of the existence of a comprehensive congressional regulatory scheme, even though Congress has not specifically forbidden state regulation. In such a case, the Court may infer that Congress must have intended to preempt local regulation by the comprehensive nature of the federal legislation. *See, e.g.*, Burbank v. Lockheed Air Terminal, Inc., 411 U.S. 624 (1973) (pervasive nature of federal legislation regulating aircraft noise held to preempt, by implication, local noise regulations).

[63] 21 U.S.C. § 301 *et seq.* (1976).

[64] 1979 Mass. Adv. Sh. at 2305, 393 N.E.2d at 890 (citing Jones v. Rath Packing Co., 430 U.S. 519, 526 (1977)).

The Court ruled that the plaintiffs were unable to demonstrate any such conflict.[65] Second, plaintiffs argued that the Massachusetts regulation violated the fourteenth amendment and article 10 of the Massachusetts Constitution by imposing criminal sanctions without giving fair notice of what conduct is forbidden.[66] The Court, in rejecting this argument, indicated that any imprecision is cured by the regulation's "substantial deference to the manufacturer's judgment concerning the date to be disclosed."[67] Finally, the Court addressed what appears to have been a substantive due process attack on the regulation, although never labeled as such. "There is no merit to the . . . [plaintiffs'] argument that the regulation is invalid because it does not bear a real and substantial relation to the public, health, safety, morals or some other phase of the general welfare. . . . All rational presumptions are to be made in favor of the validity of the regulation."[68] The Court thereby once again rejected a substantive due process attack on economic legislation and adopted an attitude of deference to the legislative judgment.[69]

Thus *Grace, Newell,* and *Grocery Manufacturers,* dealing with both housing and product merchandising legislation, reveal that the Supreme Judicial Court has acknowledged the presumptive validity of economic legislation as a matter of federal constitutional law. These decisions also indicate that the Court has construed the Massachusetts Constitution to afford no greater protection than the federal Constitution. In this area, although litigants have heeded the United States Supreme Court's call to proceed under state constitutions,[70] this approach in Massachusetts has resulted in no greater constitutional protections in the substantive due process area.

**§7.3. Sex Discrimination—Veterans Preference—Tenancy by the Entirety.** Unlike other areas of constitutional law, the issue of sex discrimination in Massachusetts has been addressed during the *Survey* year

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[65] 1979 Mass. Adv. Sh. at 2304, 393 N.E.2d at 890. The Court noted that the Massachusetts regulation itself acknowledged specific instances of preemption by Congress by virtue of the Federal Meat Inspection Act and the Poultry Products Inspection Act, 21 U.S.C. §§ 453(e)-(f), 601(j) (1976), which deal with the dating of meat food products and poultry products. The Court did not discuss the scope of such preemptions.

[66] *See, e.g.,* Papachristou v. Jacksonville, 405 U.S. 156 (1972).

[67] 1979 Mass. Adv. Sh. at 2309, 393 N.E.2d at 892.

[68] *Id.* at 2309-10, 393 N.E.2d at 892 (citations omitted).

[69] In *Tober Foreign Motors, Inc.,* 1978 Mass. Adv. Sh. 2468, 381 N.E.2d 908, the Court rejected a substantive due process attack on the franchising statute as follows: "[W]e need do no more in respect to any general due process contentions of a substantive character than to refer to . . . the grounds or reasoning on which the Legislature may be taken to have gone when it initiated [the statute]." *Id.* at 2487, 381 N.E.2d at 918.

[70] See § 1 *supra.*

both in the legislature and in the courts. Progress was made in the laborious legislative task of conforming Massachusetts statutes to the mandates of the Massachusetts Equal Rights Amendment.[1] In the judicial forum, the United States Supreme Court decision of *Personnel Administrator of Massachusetts v. Feeney*,[2] dealing with the constitutionality of the Massachusetts veterans preference law,[3] underscored the difficulties facing a plaintiff who relies upon federal equal protection principles to attack sex discrimination. Where a sex-neutral statute has a disproportionate adverse impact upon women, as the Massachusetts veterans preference law did, the plaintiff must prove that the statute is the product of a discriminatory, sex-based legislative purpose or policy.

The Massachusetts Equal Rights Amendment (hereafter ERA),[4] ratified in 1976 and amending article 1 of the Massachusetts Declaration of Rights, provides that "[e]quality under the law shall not be denied or abridged because of sex, race, color, creed or national origin."[5] In two opinions[6] during the year following ratification, the Supreme Judicial Court made it clear that the ERA would have profound impact on Massachusetts law. These early interpretations indicated that the ERA had at least made sex a "suspect" class requiring a compelling state interest to uphold a legislative classification based on sex. In *Opinion of the Justices*,[7] for instance, the Court stated:

> We believe that the application of the strict scrutiny-compelling State interest test is required in assessing any governmental classi-

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§7.3. [1] For an analysis of necessary statutory changes in Massachusetts, written just prior to the ratification of the ERA, see SPECIAL STUDY COMMISSION ON THE EQUAL RIGHTS AMENDMENT, FIRST INTERIM REPORT, Senate Doc. No. 1689 (1976). The legislative problems created by an ERA do not require simply that statutes be made "sex-neutral," *i.e.*, that the legislature need only strike the word "woman" or "wife" from a statute and replace it with the word "person" or "spouse." The more difficult task requires examination of the substantive provisions themselves.

> [E]ach substantive provision must be scrutinized to determine whether it should be repealed, because it is archaic or places an unfair burden on one sex that should not or cannot be extended to the other, or whether it should be extended to cover both sexes in an otherwise undisturbed form. When neither of these solutions seems appropriate, the law must be recast in order to reflect a new perspective of sex equality and to promote desirable social policy goals.

B. BROWN, A. FREEDMAN, H. KATZ & A. PRICE, WOMEN'S RIGHTS AND THE LAW 41-42 [hereinafter cited as BROWN].

[2] 442 U.S. 256 (1979).

[3] G.L. c. 31, § 23, *recodified as* G.L. c. 31, § 26.

[4] MASS. CONST., art. of amend. 106.

[5] *Id.*

[6] Commonwealth v. King, 1977 Mass. Adv. Sh. 2636, 372 N.E.2d 196, and Opinion of the Justices to the House of Representatives, 1977 Mass. Adv. Sh. 2728, 371 N.E.2d 426.

[7] See note 6 *supra*.

> fication based solely on sex. Our State equal rights amendment was adopted at a time when equal protection principles under State and Federal Constitutions required a level of judicial scrutiny greater than the rational basis test but less than the strict scrutiny test. To use a standard in applying the Commonwealth's equal rights amendment which requires any less than the strict scrutiny test would negate the purpose of the equal rights amendment and the intention of the people in adopting it.[8]

Thus the Court early made it clear that the commonwealth's ERA would be strictly construed.

In a 1979 opinion, *Attorney General v. Massachusetts Interscholastic Athletic Association, Inc.*,[9] the Court reaffirmed its commitment to equal rights under Massachusetts law. It indicated that the ERA, like the equal protection clause of the fourteenth amendment, protects males as well as females from sex discrimination.[10] At issue was the validity

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[8] 1977 Mass. Adv. Sh. at 2732-33, 371 N.E.2d at 428 (citation omitted). In the earlier case of Commonwealth v. King, 1977 Mass. Adv. Sh. 2636, 372 N.E.2d 196, the Court's precise language was that the "degree of scrutiny must be *at least* as strict as the scrutiny required by the Fourteenth Amendment for racial classifications." *Id.* at 2655, 372 N.E.2d at 206 (emphasis added). The use of the language "at least" raises the question whether the Massachusetts ERA may be interpreted to do more than make sex suspect.

In some states with an equal rights amendment, the courts have required a showing even stronger than the compelling state interest test to sustain a legislative sex classification. *See, e.g.*, Rand v. Rand, 374 A.2d 900, 903 (Md. App. 1977) (requiring an overriding compelling state interest). Given the few classifications that have survived United States Supreme Court application of the compelling state interest test under the equal protection clause, it is likely that little short of physiological differences between men and women will meet the "overriding compelling state interest test." The *Rand* decision provides an excellent survey of the differing interpretations that state courts have given to state ERAs. They range from Virginia, which has equated its constitutional prohibition against sex discrimination with the equal protection clause of the fourteenth amendment (in essence, making the state provision superfluous), to the almost absolute interpretation of Pennsylvania that sex, in and of itself, can never be a basis for a legislative classification. *Id.* at 903-04. It could be argued, however, that even under the Pennsylvania analysis, the legislature could enact a rape statute applicable to women only without violating the ERA on the ground that physiological rather than sex differences are the basis for the classification.

It seems possible, therefore, that the Supreme Judicial Court, by its carefully chosen language in the *Opinion of the Justices*, has left the door open for a Massachusetts ERA standard stricter than strict scrutiny. Of course, it may be some time before the Court has occasion to reach this issue since few sex classifications will ever survive the strict scrutiny test, thus making it unnecessary for the Court to reach the question of the applicability of a stricter standard.

[9] 1979 Mass. Adv. Sh. 1584, 393 N.E.2d 284.

[10] *See, e.g.*, Craig v. Boren, 429 U.S. 190 (1976), in which the United States Supreme Court held that an Oklahoma statute prohibiting the sale of 3.2 percent beer to males under age 21, but to females only under age 18, denied males between the ages of 18 and 20 equal protection.

of a rule of the Massachusetts Interscholastic Athletic Association (MIAA), which regulates competitive sports in public secondary schools in Massachusetts, that boys could not participate on a girls' athletic team.[11] The Attorney General contended that the rule violated the Massachusetts ERA.[12]

The Court first sounded a familiar theme in equal protection analysis by citing its earlier *Opinion of the Justices.*[13] In this opinion the Court indicated that a proposed bill prohibiting girls from participating with boys in football and wrestling teams would violate the state ERA, since such an absolute "prohibition of all females from voluntary participation in a particular sport under every possible circumstance serves no compelling state interest."[14] It then articulated the appropriate standard under the ERA for deciding the constitutionality of the classification set out in the MIAA rules. A classification based on sex must be justified by a "demonstrably compelling interest"[15] and must be narrowly drawn to correspond to the objectives of the statute.

The defendants first argued that the MIAA rule imposed no stigma on boys because it sought to protect girls' athletic programs in public schools, lest girls be outnumbered on girls' teams by boys.[16] This purported justification required the Court to enter the thicket of "benign discrimination" and to identify the appropriate ERA test for discrimination said to favor a "historically oppressed class."[17] The rule sought to give girls' teams an advantage in order to remedy the years of neglect in comparison with the treatment given boys' teams. In resolving the

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[11] 1979 Mass. Adv. Sh. at 1588, 393 N.E.2d at 28. A 1976 amendment to MIAA rules provided that "a student could not be barred from competing for a place on a team because of sex unless the school provided a 'separate but equal' team." *Id.* (footnote omitted). Because of concern over welfare and safety issues, the MIAA amended the rule, effective in 1978, to forbid boys from playing on girls' teams and to allow girls to play on boys' teams in the event the school did not otherwise offer the particular sport for girls. *Id.* at 1589, 393 N.E.2d at 287.

[12] *Id.* at 1585, 393 N.E.2d at 285-86. The plaintiffs also argued that the rule violated G.L. c. 76, § 5, which forbids discrimination in public schools on the basis of race, color, sex, religion, and national orgin. The Court assumed that the statute was equivalent to the later-enacted ERA and that a violation of the ERA was also a violation of the statute. 1979 Mass. Adv. Sh. at 1585 n.5, 1596, 393 N.E.2d at 286 n.5.

[13] See note 6 *supra.*

[14] 1979 Mass. Adv. Sh. at 1592, 393 N.E.2d at 289 (quoting 1977 Mass. Adv. Sh. at 2736, 371 N.E.2d at 430). The flaw in such a statute rests in its all-encompassing provisions, which fail to account for individual differences that may make the application of the rule inappropriate. The issue may be viewed as one of whether the sex-centered generalization which underlies such legislation "actually comported with fact." Craig v. Boren, 429 U.S. 190 (1976).

[15] 1979 Mass. Adv. Sh. at 1597, 393 N.E.2d at 291.

[16] *Id.* at 1596, 393 N.E.2d at 291.

[17] *Id.* at 1597, 393 N.E.2d at 291.

ERA issue of "benign discrimination," the Court, citing *Regents of the University of California v. Bakke*,[18] concluded that the Supreme Court would require an "exceedingly persuasive" justification to uphold a sex classification against an equal protection attack, whether characterized as benign or not.[19] Since the Massachusetts standard, however, was to be formulated under the state ERA and not simply under "a general equal protection guarantee," [20] the Court concluded that "[u]nder ERA it is especially fitting and, we think, required, that any purported justification for a classification based on sex, even one claimed to involve 'affirmative action,' should be weighed with great care." [21] Although the Court did not specifically so indicate, it would appear that under the ERA, benign sex discrimination is subject to strict scrutiny.[22]

The Court also rejected a second argument that the rule did not classify on the basis of sex but rather only on the basis of physical ability.[23] Instead, it examined the defendants' argument that the rule

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[18] 438 U.S. 265 (1978). There was no majority opinion in *Bakke*. Five members of the Court (Justices Brennan, White, Marshall, Blackmun, and Powell), however, took the position that race could constitutionally be used as a factor in college admissions but that an inflexible minority admissions program setting aside a specific number of seats for minorities was improper.

[19] 1979 Mass. Adv. Sh. at 1599, 393 N.E.2d at 292. Since sex is not subject to strict equal protection review, this approach is best categorized as "middle-tier" review. The Court also cited Orr v. Orr, 440 U.S. 268 (1979), where the Supreme Court rejected the argument that Alabama's alimony-for-women-only statute was remedial. "[E]ven statutes purportedly designed to compensate for and ameliorate the effects of past discrimination must be carefully tailored. Where . . . the State's compensatory and ameliorative purposes are as well served by a gender-neutral classification as one that gender classifies and therefore carries with it the baggage of sexual stereotypes, the State cannot be permitted to classify on the basis of sex." 440 U.S. at 283. *See generally* Ginsburg, *Some Thoughts on Benign Classification in the Context of Sex*, 10 CONN. L. REV. 813 (1978).

[20] 1979 Mass. Adv. Sh. at 1600, 393 N.E.2d at 292.

[21] *Id.* at 1600-01, 393 N.E.2d at 292-93.

[22] The Court noted that other less restrictive approaches could have been adopted instead of the broad approach of the rule:

> Use of standards focusing on height, weight, or skill rather than solely on gender represents one such approach . . . . Admission could perhaps be regulated by handicapping in a sport like golf. On another level also, lesser measures than complete exclusion suggest themselves. Where boys' teams were not feasible, admission of boys to girls' teams could be limited, not to exceed reasonable numbers. In particular situations, rotating systems might be adopted by which qualified boys were admitted but only a certain number could play in a given game.

*Id.* at 1606, 393 N.E.2d at 295. This "less restrictive alternative" test is typically reserved for strict scrutiny equal protection review.

[23] Such a generalization would be overbroad: "No doubt biological circumstance does contribute to some overall male advantages. But we think the differences are not so clear or uniform as to justify a rule in which sex is sought to be used as a kind of 'proxy' for a functional classification." 1979 Mass. Adv. Sh. at 1601, 393 N.E.2d at 293 (citation omitted).

served to provide safety for students engaged in competitive sports.[24] The Court found no basis for the proposition that a girl is susceptible to injury when playing on a team with boys, other than the stereotype that females are inferior to males. The Court also implied that even if a correlation could be shown between injuries to girls and participation by boys on girls' teams, less drastic solutions, such as providing more protective equipment, should be considered before exclusion would be permitted. Even if exclusion were permitted at some point, the MIAA's wholesale exclusion of boys from all girls' teams regardless of a showing of increased risk to girls in each sports, would be unconstitutionally overbroad.[25] Hence, the Court found that the MIAA rule violated the Massachusetts ERA.

The implications of the ERA were also considered on the legislative front. Chapter 727 of the Acts of 1979 signaled the end to the uncertainty surrounding the tenancy by the entirety caused by the adoption of the Massachusetts ERA.[26] At common law, in a tenancy by the entirety a husband and wife had an undivided interest in the property,[27] but the husband was entitled to exclusive possession, control, and income from the property.[28] The wife's interest in the tenancy in fact was much more in the nature of a future interest by which she would acquire ownership if she survived her husband.[29] The hus-

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[24] *Id.* at 1603-04, 393 N.E.2d at 293-94.

[25] *Id.* at 1604, 393 N.E.2d at 294.

[26] Approved on November 13, 1979, chapter 727 became effective 90 days thereafter. Chapter 727 amends G.L. c. 209, § 1, by adding the following:

> The real and personal property of any person shall, upon marriage, remain the separate property of such person, and a married person may receive, receipt for, hold, manage and dispose of property, real and personal, in the same manner as if such person were sole. A husband and wife shall be equally entitled to the rents, products, income or profits and to the control, management and possession of property held by them as tenants by the entirety.
>
> The interest of a debtor spouse in property held as tenants by the entirety shall not be subject to seizure or execution by a creditor of such debtor spouse so long as such property is the principal residence of the non-debtor spouse; provided, however, both spouses shall be liable jointly or severally for debts incurred on account of necessaries furnished to either spouse or to a member of their family.

[27] Two or more persons may also own property as joint tenants or tenants in common. For a general discussion of tenancy in common, joint tenancy, and tenancy by the entirety, see 28 MASSACHUSETTS PRACTICE, M. PARK & D. PARK, CONVEYANCING §§ 125-129 (1968).

[28] *See generally* Krokyn v. Krokyn, 1979 Mass. Adv. Sh. 1417, 1422-23, 390 N.E.2d 733, 736; Glendon, *Tenancy by the Entirety in Massachusetts,* 59 MASS. L.Q. 53 (1974) (hereinafter cited as Glendon).

[29] Glendon, *supra* note 28, at 56. In this regard, note the oft-repeated adage that in a marriage, husband and wife are one, and the husband is the one. *See* Huber, *Creditors' Rights in Tenancies by the Entireties,* 1 B.C. IND. & COM. L. REV. 197 (1960).

band's interest could be reached by a creditor, but the creditor would take subject to the wife's survivorship interest.[30] In contrast, in a joint tenancy, each joint tenant's interest is subject to attachment and execution,[31] and each joint tenant has an equal right to possession, control, and income. Hence, the tenancy by the entirety provided a married couple with substantial protection from creditors which the joint tenancy did not provide. This factor likely accounted for its widespread popularity, even during the movement toward equality of the sexes that marked the 1970s.

Although the constitutionality of the tenancy by the entirety had occasionally been attacked on fourteenth amendment equal protection grounds,[32] it was not until passage of the Massachusetts ERA in 1976 that the attack accelerated. Although the issue has not yet reached the Supreme Judicial Court,[33] various lower courts, state and federal, have grappled with the impact of the ERA on the tenancy by the entirety. The tenancy by the entirety generally has not fared well. For example, in 1978 a state superior court justice ruled that the ERA entitled a wife to a share, with her husband, of rents from commercial property held by them as tenants by the entirety, despite the common law rule that the husband alone was entitled to rents and profits.[34] A United States bank-

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[30] Glendon, *supra* note 28, at 57.

[31] *But see id.* at 58-59, discussing the disadvantages to the wife, particularly in the case of separation and divorce, that must be weighed against protection from creditors. A grant by a joint tenant to a third party, either voluntarily or involuntarily through levy and sale under execution, would create a tenancy in common. *See id.* at 56.

[32] In Klein v. Mayo, 367 F. Supp. 583 (D. Mass. 1973), *aff'd*, 416 U.S. 953 (1974), a three-judge district court rejected an estranged wife's equal protection attack against a Massachusetts statute which prevented a tenant by the entirety from seeking partition of the property. The court indicated that the statute reflected "the legitimate state interests in preserving the right of survivorship of each spouse during marriage . . ." and noted that the parties knowingly chose the tenancy by the entirety over the other available forms of joint ownership subject to partition. *Id.* at 585. In effect, *Klein* concluded that there was no sex discrimination, since neither husband nor wife could see partition of a tenancy by the entirety. *Id.* at 586. *See also* Glendon, *supra* note 28, at 58-59; Wheeler, *Domestic Relations*, 1974 ANN. SURV. MASS. LAW § 1.4, at 3-13.

In D'Ercole v. D'Ercole, 407 F. Supp. 1377 (D. Mass. 1976), the federal district court rejected a direct attack on the constitutionality of the tenancy by the entirety. Plaintiff wife, separated from her husband, filed an action under 42 U.S.C. § 1983, seeking declaratory and injunctive relief. *Id.* at 1379. While conceding that the common law tenancy by the entirety favored husbands over wives, the court denied relief on the basis that the commonwealth did not require a married couple to hold as tenants by the entirety but simply made the tenancy available as an option to be accepted or rejected as matter of choice. *Id.* at 1382.

[33] The Court expressly reserved the issue of the applicability of the ERA in Krokyn v. Krokyn, 1979 Mass. Adv. Sh. 1417, 1429-30, 390 N.E.2d 733, 738-39.

[34] McDougall v. S & S of N.E., Inc., Middlesex Super. Ct. No. 78-711 (1978).

ruptcy judge ruled that the Massachusetts tenancy by the entirety, insofar as it allows attachment of a husband's interest in the tenancy but not the wife's, discriminates against creditors of the wife in violation of the equal protection clause of the fourteenth amendment and the Massachusetts ERA.[35] Although the bankruptcy court decision was reversed on appeal to the United States District Court,[36] the district court opinion reflected equal protection notions of earlier federal cases dealing with the *federal* constitutionality of the tenancy rather than with the underlying goals of a state ERA.[37] Finally, however, the Massachusetts legislature's action has resolved many of these problems.

After undergoing a number of changes during its formative stages, the reform legislation was approved on November 13, 1979, as chapter 727 of the Acts of 1979, entitled "An Act Equalizing the Rights of Husband and Wife in Property Held as Tenants by the Entirety."[38] The legislation seems to combine many of the advantages of joint tenancy—equal rights of both spouses in "rents, products, income or profits and to the control, management and possession of property held by them as tenants by the entirety"[39]—and the advantage of the old tenancy by the entirety with respect to creditors:

> The interest of a debtor spouse in property held as tenants by the entirety shall not be subject to seizure or execution by a creditor of such debtor spouse so long as such property is the principal residence of the non-debtor spouse; provided, however, both spouses

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[35] In re Janis Ann Marie Harold, 3 Bankr. Ct. Dec. 1187 (1977). The issue came before the bankruptcy court by reason of a wife's bankruptcy petition in which she listed as exempt property her interest, as tenant by the entirety, in a residence with her husband. Federal law prior to the bankruptcy reform, effective October 1, 1979, allowed a bankrupt to exempt all property which creditors could not reach under state law. 11 U.S.C. § 110(a)(5), sec. 70(a)(5). The trustee in bankruptcy objected to the exemption, arguing that the Massachusetts rule constituted sex discrimination and filed a complaint to reach the interest claimed as exempt.

[36] The order of the bankruptcy court denying the bankrupt's motion to dismiss has been reversed on appeal. Harold v. Friedman, No. 78-484-S (D. Mass. Dec. 3, 1979). The district court judge noted that the wife had not fraudulently transferred her property from a form reachable by creditors into a tenancy by the entirety and that "the exclusion of the wife's creditors from the opportunity to reach the property did not result from the operation of any gender biased policy of the state but by choice of the bankrupt and her husband."

[37] *Compare Klein* and *D'Ercole, supra* note 32, *with* the philosophy of an ERA as expressed *supra,* note 1.

[38] See note 26 *supra.*

[39] Acts of 1979, c. 727. Partition is apparently still unavailable in the new tenancy by the entirety. Neither party to the new tenancy may defeat the other's survivorship rights. In a joint tenancy, survivorship may be defeated by either a voluntary or involuntary conveyance of one joint tenant. *See* Park, *The New Tenancy by the Entirety: More Questions than Answers,* 8 MASS. LAWYERS WEEKLY 367 (Dec. 24, 1979).

> shall be liable jointly or severally for debts incurred on account of necessaries furnished to either spouse or to a member of their family.[40]

In redefining the creditor's ability to reach the property, the legislature thus has chosen to give to the husband the protection enjoyed only by the wife, rather than eliminate this protection altogether,[41] an alternative it could have adopted.[42]

In contrast to the protection from sex discrimination afforded by the state constitution, the amount of protection available under the fourteenth amendment to the federal constitution is less clear. On the one hand, the United States Supreme Court in *Orr v. Orr*[43] condemned a

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40. Acts of 1979, c. 727. The new statute has also narrowed the protection from creditors which the old tenancy by the entirety offered to spouses. Protection is granted only in a principal residence held by the entirety, while the old tenancy had no such restriction.

41 This problem is a familiar theme in judicial opinions in which a statute has been declared unconstitutional under the equal protection clause. Should the inequality be judicially remedied by extending the benefit of the statute to the deprived class, or should it be remedied by eliminating the benefit to all? This issue should properly be addressed in terms of legislative intent. For example, in the 1979 case of Orr v. Orr, *supra* note 19, in which Alabama's alimony statute was held discriminatory, the Supreme Court simply reversed the lower court decision upholding the statute. Alabama courts would thereafter have to decide whether the legislative intent in Alabama generally was that needy *spouses* should receive alimony, and thus make alimony available to both husbands and wives, or whether the intent was that there should be no alimony unless it would be available to wives only. This decision is a question of state law, to be decided by the Alabama state courts. *See* Orr v. Orr *on remand*, 374 So. 2d 895 (Ala. Civ. App. 1979).

42 The legislature, in broadening the protection for husbands and wives in principal residences owned by them as tenants by the entirety, has failed to address the overlapping protection from creditors granted by the Massachusetts homestead exemption. *See* G.L. c. 188, § 1, as most recently amended by chapter 756 of the Acts of 1979:

> An estate of homestead to the extent of fifty thousand dollars in the land and buildings may be acquired pursuant to this chapter by an owner of a home, or one who rightfully possesses premises by lease or otherwise, who has a family and occupies or intends to occupy said home as a principal residence; and such estate shall be exempt from the laws of conveyance, descent and devise and from attachment, levy on execution and sale for the payment of his or her debts or legacies . . . .

Regrettably, the legislature apparently sees tenancy by the entirety and homestead as separate issues, whereas they both serve "at present to protect a certain economic base for family life." Glendon, *supra* note 28, at 61; *see generally* Vukowich, *Debtors' Exemption Rights*, 62 GEO. L.J. 779 (1974). Reform of the tenancy by the entirety in view of the Massachusetts ERA, without also considering the additional impact of the homestead exemption, has only created confusion. The astute homeowner may now hold property as both tenant by the entirety and also declare a homestead, since the homestead statute permits "a sole owner, joint tenant, tenant by the entirety or tenant in common" to acquire a homestead. G.L. c. 188, § 1.

43 444 U.S. 268 (1979). *Orr* was a 6-3 opinion, with Chief Justice Burger and Justices Powell and Rehnquist dissenting, not on the merits, but on jurisdictional

sex-based alimony statute which reflected outmoded, stereotypical, and paternalistic attitudes toward women.[44] On the other hand, during the *Survey* year, the Court in *Personnel Administrator of Massachusetts v. Feeney*[45] approved a statute which, while sex-neutral on its face was discriminatory in effect, thereby permitting a less obvious method of discrimination.

By statute, Massachusetts provides that veterans eligible for appointment to state civil service positions are given preference over non-veterans.[46] Helen B. Feeney, a non-veteran, brought suit in federal court under section 1983[47] against state officials, arguing that the statutory preference for veterans violated the equal protection clause. She maintained that its grant of an absolute lifetime preference to veterans "inevitably operate[d] to exclude women from consideration for the best Massachusetts civil service jobs."[48] On its face, the Massachusetts statute is sex-neutral, because the term "veteran" is defined as "any person,

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issues. If *Orr* had simply presented the constitutionality of the Alabama alimony statute without the jurisdictional problems, the majority likely would have been larger.

[44] Massachusetts alimony statutes are sex-neutral. G.L. c. 208, § 34, permits alimony for either spouse.

[45] 442 U.S. 256 (1979).

[46] G.L. c. 31, § 23, recodified, effective in 1979, as G.L. c. 31, § 26. The statute in effect at the time of the *Feeney* litigation stated:

> The names of persons who pass examination for appointment to any position classified under the civil service shall be placed upon the eligible lists in the following order: — (1) Disabled veterans . . . in the order of their respective standing; (2) veterans in the order of their respective standing; (3) persons described in section 23B [the widow or widowed mother of a veteran killed in action or who died from a service-connected disability incurred in wartime service and who has not remarried] in the order of their respective standing; (4) other applicants in the order of their respective standing. . . . A disabled veteran shall be retained in employment in preference to all other persons, including veterans.

442 U.S. at 263 n.10.

[47] 42 U.S.C. § 1983 reads in part:

> Every person who, under color of any statute, ordinance, regulation, custom, or usage of any State or Territory, subjects or causes to be subjected, any citizen of the United States or other persons within the jurisdiction thereof to the deprivation of any rights, privileges or immunities secured by the Constitution and laws, shall be liable to the person injured in an action of law, suit in equity, or other proper proceedings for redress.

One of the more frequently-used federal civil rights statutes for the vindication of individual rights against state interference, § 1983 has recently come under attack by those seeking to narrow the scope of federal court intervention in this area. *See, e.g.*, Chapman v. Houston Welfare Rights Org., 441 U.S. 600 (1979); Paul v. Davis, 424 U.S. 693 (1976). The 1980s may reveal a trend toward increasing reliance by litigants on state statutes to protect individual rights. *See, e.g.*, Acts of 1979, c. 801, *adding* G.L. c. 12, §§ 11H & 11I, entitled "An Act for the Protection of the Civil Rights of Persons in the Commonwealth."

[48] 442 U.S. at 259.

male or female . . . who . . . served in the army . . . [or] navy . . . of the United States. . . ." [49] A three-judge federal district court [50] found the Massachusetts statute unconstitutional, determining "that the absolute preference afforded by Massachusetts to veterans has a devastating impact upon the employment opportunities of women." [51] On appeal to the United States Supreme Court, the district court judgment was vacated.[52] The case was remanded for further consideration in light of the intervening Supreme Court decision in *Washington v. Davis*.[53] In *Davis*, the Court had held that a statute, neutral on its face but which had a disproportionately adverse impact on blacks, could not violate the equal protection clause unless the impact could be attributed, at least in part, to purposeful racial discrimination.[54] Upon remand, in a two-to-one decision, the district court once again concluded that the Massachusetts statute was unconstitutional "because it favor[ed] a class from which women have traditionally been excluded, and . . . the consequences of the Massachusetts absolute preference formula for the employment opportunities of women were too inevitable to have been 'unintended'." [55] Appeal was taken once again to the United States Supreme Court.

In a 7-2 opinion,[56] the Court reversed and upheld the statute. The Court first noted that the veterans preference statute does not classify by gender, but by status as a veteran, a neutral classification including both men and women.[57] The Court then considered whether the statute could be attributed to a state employment policy discriminatory toward women.[58] The Court found that the appellee failed to clear this hurdle

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[49] G.L. c. 4, § 7.

[50] 28 U.S.C. § 2281 provided that an action seeking injuctive relief against enforcement of state or federal statutes be heard by a special three-judge district court, with direct appellate review by the United States Supreme Court. With minor exceptions, Congress repealed the three-judge court statute in 1976, 90 Stat. 2119 (1976). Hence, such an action would now be heard by a single-judge district court, with normal appellate review in a court of appeals.

[51] 442 U.S. at 260.

[52] Massachusetts v. Feeney, 434 U.S. 884 (1976).

[53] 426 U.S. 229 (1977).

[54] *Id.* at 238-44.

[55] 442 U.S. at 260-61.

[56] Justice Stewart wrote for the majority. Justice Stevens concurred, joined by Justice White. Justices Brennan and Marshall dissented.

[57] *Id.* at 275. If the statute were "overtly or covertly designed to prefer males over females in public employment [it] would require an exceeding persuasive justification to withstand a constitutional challenge under the Equal Protection Clause of the Fourteenth Amendment." *Id.* at 273.

[58] In addition to relying upon Washington v. Davis, 426 U.S. 229 (1977), the Court also cited Village of Arlington Heights v. Metropolitan Hous. Dev. Corp., 429 U.S. 252 (1977). In *Arlington Heights* the Court held that the refusal of a town to rezone an area to accommodate multi-family dwelling units was not unconstitutional even though the zoning refusal would have a substantial impact

for two reasons. First, the Court accepted the district court's finding that the purpose of the statute was not discriminatory. It noted that he legislative goals were legitimate: "to reward veterans for the sacrifice of military service, to ease the transition from military to civilian life, to encourage patriotic service, and to attract loyal and well-disciplined people to civil service occupation." [59] Second, the Court rejected Feeney's argument, accepted by the district court, that only a less sweeping form of veterans preference would be constitutional.[60] It reasoned that if purposeful discrimination had been a contributing factor in the statutory scheme, the scope of the preference would be irrelevant. "Invidious discrimination does not become less so because the discrimination accomplished is of a lesser magnitude. Discriminatory intent is simply not amenable to calibration. It either is a factor that has influenced the legislative choice or it is not." [61] Accordingly, the Court found that the appellee failed to meet her burden, as established in *Washington v. Davis,* of demonstrating discriminatory intent.[62]

Clearly, the *Feeney* opinion indicates that the Supreme Court, by imposing upon plaintiffs difficult evidentiary burdens, will tolerate subtle forms of sex discrimination. Plaintiffs arguing discriminatory impact now must prove that a discriminatory intent shaped the development of a neutral statute, regardless of the impact of the statute upon a particular group.[63] Future development of protection against sex discrimination, then, will be left to the states, which are free to interpret their own state constitutions [64] to prevent such discrimination.

**§7.4. Abortion—The Rights of Minors.** During the *Survey* year the United States Supreme Court considered, for the second time,[1] the con-

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on racial minorities. The respondents had not yet proven that "discriminatory purpose was a motivating factor" in the zoning decision. *Id.* at 270.

[59] 442 U.S. at 265 (citation omitted).

[60] *Id.* at 276. In dissent, Justice Marshall, joined by Justice Brennan, noted the more limited alternatives that were available, such as "a point reference system . . . or an absolute preference for a limited duration. . . ." *Id.* at 287-88.

[61] *Id.* at 277.

[62] *Id.* at 280. Proper allocation of the burden of proof was one of the disagreements between the Court and the dissent. The dissent took the position that once a disproportionate impact on women was proven, as in the instant case, "the burden should rest on the State to establish that sex-based considerations played no part in the choice of the particular legislative scheme." *Id.* at 284. Under this view, the commonwealth had failed to meet its burden.

[63] *See generally* Fiss, *The Supreme Court, 1978 Term,* 93 HARV. L. REV. 1, 130-41 (1979).

[64] See § 1 *supra.*

§7.4. [1] Bellotti v. Baird, 443 U.S. 622 (1979). On the first occasion the Supreme Court avoided consideration of the merits. *See* Bellotti v. Baird, 428 U.S. 132 (1976).

stitutionality of the Massachusetts parental consent abortion statute, chapter 112, section 12S.[2] This statute requires parental or judicial consent before a nonemergency abortion may be performed on an unmarried minor.[3] Basing its opinion upon the 1973 landmark decisions of *Roe v. Wade* [4] and *Doe v. Bolton* [5] as further explicated in *Planned Parenthood*

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[2] G.L. c. 112, § 12S. Prior to 1977 this section was numbered 12P. C. 112, § 12S, read in relevant part:

(1) If the mother is less than eighteen years of age and has not married, the consent of both the mother and her parents is required. If one or both of the mother's parents refuse such consent, consent may be obtained by order of a judge of superior court for good cause shown, after such hearing as he deems necessary. Such a hearing will not require the appointment of a guardian for the mother.

If one of the parents has died or has deserted his or her family, consent by the remaining parent is sufficient. If both parents have died or have deserted their family, consent of the mother's guardian or other person having duties similar to a guardian, or any person who had assumed the care and custody of the mother is sufficient.

For a summary of the tangled history of the challenge to the Massachusetts abortion statute, see Berney & Buchbinder, *Constitutional Law*, 1975 ANN. SURV. MASS. LAW § 12.6, at 287-97; Ortwein, *Constitutional Law*, 1977 ANN. SURV. MASS. LAW § 10.4, at 177-224. Prior to the effective date of the act, the constitutionality of the statute was challenged in federal court by a pregnant, unmarried minor, a doctor, a clinic, and the clinic's director. A three-judge district court declared § 12S unconstitutional. Baird v. Bellotti, 393 F. Supp. 847 (D. Mass. 1975). On direct appeal, the United States Supreme Court vacated the judgment and remanded on the ground that the district court should have abstained from deciding the constitutional issues pending certification of issues of statutory construction to the Supreme Judicial Court. Bellotti v. Baird, 428 U.S. 132 (1976). After the Supreme Judicial Court answered the questions certified by the district court, Baird v. Attorney General, 371 Mass. 741, 360 N.E.2d 288 (1977), the district court stayed enforcement of the statute pending further proceedings. Baird v. Bellotti, 428 F. Supp. 854 (D. Mass. 1977). Subsequently, the district court once again declared the statute unconstitutional and enjoined enforcement. Baird v. Bellotti, 450 F. Supp. 997 (D. Mass. 1978). Upon direct appeal, the United States Supreme Court affirmed the district court's judgment that the statute unconstitutionally burdened the right of a minor to obtain an abortion. Bellotti v. Baird, 443 U.S. at 651.

[3] During the *Survey* year the judiciary considered abortion-related questions in other contexts. The Court of Appeals for the First Circuit upheld a Massachusetts clinic licensure statute. Baird v. Department of Public Health of the Comm. of Massachusetts, 599 F.2d 1098 (1st Cir. 1979). The district court had determined that the licensing provision unconstitutionally burdened the right of a woman to terminate her pregnancy during the first trimester without state interference. The court of appeals, however, held that the licensing provisions, which were applicable to all health care facilities, were on their face reasonable regulations that do not significantly interfere with the right to an abortion during the first trimester of pregnancy. *Id.* at 1102. See Roe v. Wade, 410 U.S. 113 (1973). In view of the United States Supreme Court plurality opinion in Bellotti v. Baird, 443 U.S. 622 (1979), decided within a month of the First Circuit *Baird* opinion, the analysis of the court of appeals is correct. The focus should be upon the extent to which the state has "unduly burden[ed] the right to seek an abortion." 442 U.S. at 640.

[4] 410 U.S. 113 (1973). Roe v. Wade did not recognize an absolute right to abortion on the part of the woman during the first and second trimesters. Although the fundamental right to abortion springs from the fourteenth amendment right

*of Central Missouri v. Danforth,*[6] the Supreme Court in *Bellotti v. Baird* [7] held that the Massachusetts statute unconstitutionally burdened the minor female's right to an abortion.[8]

In *Bellotti,* the Court, fragmenting 4-4-1, was unable to agree on a majority opinion, although eight justices agreed with the district court judgment that the Massachusetts statute was unconstitutional. Justice Powell wrote an opinion, joined by Chief Justice Burger and Justices Stewart and Rehnquist,[9] in which he set out guidelines by which a state may constitutionally legislate restrictions on a minor's ability to obtain an abortion. Justice Stevens wrote an opinion, joined by Justices Brennan, Marshall, and Blackmun, concurring only in the result. Justice Stevens viewed the Massachusetts statute as a more restrictive limitation on a minor's abortion decision than the Missouri statute of which the Court disapproved in *Danforth* and characterized the Powell opinion as advisory.[10] Justice White dissented.[11] Because the differences between these opinions bear potential significance for the future, the separate opinions deserve a closer analysis.

Justice Powell, after a brief reaffirmation of the now well-settled rule that children do not lose all constitutional rights simply because they are minors,[12] explained that such rights, nevertheless, must be balanced

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ling state interests "in preserving and protecting the health of the pregnant woman." *Id.* at 163. For example, the decision to terminate a pregnancy is that of the woman *and* her doctor. *Id.* at 163-64. *See* discussion of "right of personhood" in L. TRIBE, AMERICAN CONSTITUTIONAL LAW, § 15.10; *see generally* Note, *Restrictions on Women's Right to Abortion: Informed Consent, Spousal Consent, and Recordkeeping Provisions,* 5 WOMEN'S RIGHTS L. REP. 35 (1978).

5 410 U.S. 179 (1973).

6 428 U.S. 52 (1976). In *Danforth,* the Court declared unconstitutional Missouri's statutory scheme which, *inter alia,* required written consent of the husband of a married woman seeking an abortion and written consent of one parent of an unmarried minor seeking an abortion. The Court found both the spousal and parental consent requirements unconstitutional under Roe v. Wade because "the State does not have the constitutional authority to give a third party an *absolute,* and *possible arbitrary,* veto over the decision of the physician and his patient to terminate the patient's pregnancy, regardless of the reason for withholding the consent." *Id.* at 74 (emphasis added).

7 443 U.S. 622 (1979).

8 *Id.* at 651.

9 *Id.* at 624.

9 *Id.* at 624.

10 *Id.* at 656 n.4.

11 *Id.* at 656.

12 *See, e.g.,* Carey v. Population Services Int'l, 431 U.S. 678 (1977) (access to contraceptives); Goss v. Lopez, 419 U.S. 565 (1975) (public high school suspensions); Tinker v. Des Moines Independent Community School Dist., 393 U.S. 503 (1969) (freedom of expression); In re Gault, 387 U.S. 1 (1967) (juvenile delinquency proceedings); Brown v. Board of Educ., 347 U.S. 483 (1954) (racial discrimination in public schools).

against "the peculiar vulnerability of children; their inability to make critical decisions in an informed, mature manner; and the importance of the parental role in childrearing."[13] He noted that appropriate consideration of these factors may in certain instances result in application of the adult constitutional standard to minors, or conversely, in other instances, in the application of a lesser constitutional standard reflecting the special problems of minors.[14] Powell identified three interests which must properly be taken into account in order to determine the extent of constitutional protection accorded to minors: the interest of minors in exercising their rights; the state's interests in protecting the well-being of children—the *parens patriae* role of the state;[15] and the parents' interest in controlling and rearing their children.[16] Examining the state's *parens patriae* role, Powell observed that a state could restrict the actions of minors where those actions could produce serious detrimental consequences for the minors.[17] He noted, for instance, that in *Ginsberg v. New York*[18] the Court upheld a state ban on the sale of sexually oriented magazines to minors, even though their sale to adults would be constitutionally protected.[19] The ban was upheld because of New York's special interest in the well-being of children.[20] After noting the type of situation in which the state would legitimately restrict the activity of minors, Justice Powell surveyed cases which recognize the constitutional rights of

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[13] 443 U.S. at 634.

[14] *Id.* at 634-35. For example, Justice Powell noted that the due process requirement of proof beyond a reasonable doubt in criminal proceedings applies equally into juvenile delinquency proceedings, In re Winship, 397 U.S. 358 (1970), while the constitutional right of trial by jury in criminal cases does not, McKeiver v. Pennsylvania, 403 U.S. 528 (1971). *Id.*

[15] The *parens patriae* power has been defined as the "inherent power and authority of the state to exercise control over individuals who are deemed to lack capacity." Linn & Bowers, *The Historical Fallacies Behind Legal Prohibitions of Marriages Involving Mentally Retarded Persons—the Eternal Child Grows Up,* 13 GONZ L. REV. 625, 637 (1978).

16. 443 U.S. at 637. *See, e.g.,* Wisconsin v. Yoder, 406 U.S. 205 (1972); Pierce v. Society of Sisters, 268 U.S. 510 (1925). In Parham v. J.R., 442 U.S. 584 (1979), the Court relied on such cases in upholding Georgia's statutes that permit a parent to commit a child to a state mental institution without a prior adversary hearing. The Court assumed that the institutionalization process triggered due process liberty protection and held that the Georgia scheme provided all the process that was due. The Court noted that American constitutional law "historically has reflected Western Civilization concepts of the family as a unit with broad parental authority over minor children." *Id.* at 602. Inasmuch as Georgia had not given parents an absolute right to commit a minor child, since hospital staff were required to make an independent determination that the child was in need of commitment, the Georgia commitment process was held to satisfy the fourteenth amendment. *Id.* at 618-19.

[17] 443 U.S. at 634-35.

[18] 390 U.S. 629 (1968).

[19] 443 U.S. at 636.

[20] *Id.*

parents to guard their children both from governmental interference and from the potentially detrimental consequences of their own immature judgment.[21] In so doing he remarked that "[l]egal restrictions on minors, especially those supportive of the parental role, may be important to the child's chances for the full growth and maturity that make eventual participation in a free society meaningful and rewarding." [22]

Having examined the various societal and parental interests at stake, Justice Powell then examined the Massachusetts abortion statute in order to determine whether the requirement of parental or judicial consent in connection with a minor's abortion request unduly burdened the right to abortion as recognized in *Roe v. Wade*.[23] By focusing on the serious consequences of restricting a minor's ability to have an abortion, Justice Powell effectively distinguished other permissible parental consent requirements. He pointed out that, unlike a refusal of a parent to consent to the marriage of a child, a child's having an abortion would be irreversible once a certain stage of pregnancy was achieved.[24] He also noted that a minor mother would likely be less emotionally and financially able to care properly for a child.[25] Thus, Justice Powell concluded that since section 12S required parental notification and consultation prior to a minor's undergoing a nonemergency abortion and since the judge was free to deny a mature and well-informed minor permission to obtain an abortion, the statute was an impermissible restraint on the right to an abortion.[26]

Recognizing, nevertheless, the possibility that a pregnant minor could be unable to make a mature decision concerning an abortion, Powell proposed an alternative procedure which would permit parental input in the decision when necessary and at the same temper the absolute and possibly arbitrary parental veto power.[27]

> A pregnant minor is entitled in such a proceeding to show either: (1) that she is mature enough and well enough informed to make her abortion decision, in consultation with her physician, independently of her parents' wishes; or (2) that even if she is not able to

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21 *Id.* at 637-38.
22 *Id.* at 638-39.
23 *Id.* at 639.
24 *Id.* at 642.
25 *Id.*
26 *Id.* at 643.
27 *Id.* It is this aspect of the Powell opinion that prompted Justice Stevens to characterize it as advisory. *Id.* at n.32. Reacting to Justice Stevens's characterization of his opinion as advisory, Justice Powell viewed his opinion as an "attempt to provide some guidance as to how a State constitutionally may provide for adult involvement—either by parents or a state official such as judge—in the abortion decisions of minors." *Id.*

> make this decision independently, the desired abortion would be in her best interests.[28]

Without such a procedure, a defect analogous to the one condemned in the Missouri parental veto statute in *Danforth* would be present—a *per se* parental veto power over the woman's right to abortion, a power which even the state lacks. Justice Powell observed that

> many parents hold strong views on the subject of abortion, and young pregnant minors . . . are particularly vulnerable to their parents' efforts to obstruct both an abortion and their access to court. It would be unrealistic, therefore, to assume that the mere existence of a legal right to seek relief in superior court provides an effective avenue of relief for some of those who need it the most.[29]

In determining how a judge is to assess the minor's best interest, Justice Powell was cognizant of the interest that the parents of the minor may have. He indicated that at least where there has been an on-going family relationship [30] and the minor has been living with one of the parents, a judge would be permitted to conclude that it would be in the minor's best interest to require parental consultation prior to approving the abortion request. Under the Powell procedure, however, the minor must be able, if she so desires, to by-pass her parents completely and at least initiate a court proceeding without parental involvement.[31] In such a proceeding, if she is deemed mature, the court may not require parental involvement; if not mature, parents may become involved if the court determines it to be in her best interests.[32] Thus, the procedure recommended by Justice Powell would eliminate the absolute veto power of the pregnant minor's parents.

The concurring opinion of Justice Stevens took the position that the Massachusetts statute was unconstitutional under *Planned Parenthood,* even though it was in part more flexible than was the Missouri statute condemned in *Planned Parenthood.*[33] The Massachusetts statute provided for the alternative of judicial approval of the abortion after parental consent was refused, while Missouri had no comparable judicial

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[28] *Id.* at 643-44 (footnote omitted). Justice Powell indicated that the court hearing and any subsequent appeals should be handled expeditiously and anonymously. *Id.* at 644.

[29] *Id.* at 647.

[30] *Id.* at 648.

[31] *Id.*

[32] *Id.*

[33] In one respect, the Massachusetts statute was more burdensome. Missouri required consent of only one parent, while Massachusetts required consent of both. *Id.* at 654 (Stevens, J., concurring).

review procedure.[34] In Justice Stevens's view, however, this distinction did not save the Massachusetts statute. According to Justice Stevens, section 12S was as great an intrusion upon the minor's abortion decision as was the Missouri provision, since the decision of the Massachusetts judge as to whether an abortion is in the minor's best interests [35] "must necessarily reflect personal and societal values and mores." [36] Such an absolute judicial veto power was, according to Justice Stevens, "fundamentally at odds" with the two privacy interests [37] that he found reflected in the abortion cases—one's interest in non-disclosure of personal matters [38] and one's interest in making important personal decisions without the intruding presence of government.[39] The minor's interest in abortion would reflect both of these privacy interests—keeping confidential, the entire matter associated with her pregnancy, and her interest in deciding whether to terminate the pregnancy without a state-imposed parental consent requirement. Thus, since *Planned Parenthood* established that a statutory scheme vesting absolute veto power over a minor's abortion decision in third parties unconstitutionally burdened the minor's abortion, Justice Stevens believed that the Massachusetts statute, which he viewed as essentially absolute, should likewise be held unconstitutional.[40]

Justice Stevens concluded by taking issue with the scope of the Powell opinion.[41] He characterized Powell's proposal of alternative procedural guidelines as advisory in nature.[42] The Court, said Justice Stevens, should hold section 12S unconstitutional under *Planned Parenthood* without elaborating on the constitutional parameters which a state may impose on a minor's abortion decision and the extent of permissible parental consultation.[43]

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[34] *Id.*

[35] In its advisory opinion interpreting § 12S, the Supreme Judicial Court stated that the best interests standard should govern both the parents' decision to grant consent and a court's decision whether to grant consent in the event of parental refusal. Baird v. Attorney General, 371 Mass. 741, 747-48, 360 N.E.2d 288, 292-93.

[36] 443 U.S. at 655.

[37] The term privacy, as used by the Court to characterize a particular zone of interests protected by the due process clause from governmental interference, has various meanings. *See* Whalen v. Roe, 429 U.S. 589 (1977).

[38] For example, in Whalen v. Roe, the Court acknowledged that the growing phenomenon of governmental gathering and storage of information about individuals, fueled by the computer revolution, presented issues of constitutional dimension. After balancing the various interests involved, however, the *Whalen* court upheld New York requirements that physicians who prescribed certain drugs for patients must report the names and address of the patients to the state for recording in a centralized computer bank. 429 U.S. at 603-04.

[39] *See, e.g.*, Griswold v. Connecticut, 381 U.S. 479 (1965) (contraceptives), and Loving v. Virginia, 388 U.S. 1 (1967) (interracial marriage). 429 U.S. at 601 n.26.

[40] 443 U.S. at 656.

[41] *Id.*

[42] *Id.* at 656 n.4.

[43] *Id.*

In his dissent Justice White viewed the Court's decision as a broadening of the *Planned Parenthood* rule,[44] which had merely stated that vesting the abortion decision entirely with the minor's parents was unconstitutional. He claimed that the Court's holding in *Bellotti* makes unconstitutional in certain circumstances a requirement of notice to parents prior to their daughters obtaining an abortion.[45] Furthermore, he considered that the Court's opinion prevented parents who were opposed to the abortion from having a voice in the court decision concerning whether their daughter should have an abortion.[46]

The issue of minors' abortion rights will certainly return to the Court as soon as state legislatures redraft their abortion statutes, most likely in a form consistent with Justice Powell's suggestions. The Powell opinion, insofar as it seems to express the broadest view of permissible state regulation that will command the votes of a majority of the Court,[47] leaves open a number of policy questions which legislatures must face. The foremost of these will likely center on the proper role of the judicial system in the determination of whether the minor is sufficiently mature to make the abortion decision and if not, whether the abortion is in her best interests. Should a legislature grant the power to make these deter-

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[44] *Id.* at 657 (White, J., dissenting). By using the word "Court," Justice White apparently viewed the two other opinions filed in *Bellotti* as, at the minimum, proscribing absolute parental consent requirements and as limiting parental involvement in a child's abortion decision to the procedure described by Justice Powell. See text at note 27. Justice Rehnquist, while joining both the Court's judgment and the plurality opinion of Justice Powell, indicated considerable support for White's position. He stated in a separate concurring opinion: "At such time as this Court is willing to reconsider its earlier decision in [*Planned Parenthood*] in which I joined the dissenting opinon of Mr. Justce White, I shall be more than willing to participate in that task. But unless and until that time comes, literally thousands of judges cannot be left with nothing more than the guidance offered by a truly fragmented holding of this Court." *Id.* at 651-52 (Rehnquist, J., concurring).

[45] *Id.* at 657. Justice White also dissented in *Danforth*, joined by Chief Justice Burger and Justice Rehnquist. He expressed the view that a parental consent and consultation requirement was a reasonable method for a state "to protect children from their own immature and improvident decisions . . . ." 428 U.S. 52, 95 (White, J., dissenting).

[46] 433 U.S. at 657. Justice White's summary of the result of *Bellotti II* is imprecise. As Justice Stevens stated, concurring in the judgment, "[n]either *Danforth* nor this case determines the constitutionality of a statute which does no more than require notice to the parents, without affording them or any other third party an absolute veto." *Id.* at 654 n.1.

[47] If future cases involving state parental consent statutes meeting Justice Powell's requirements come before the Court, it is reasonable to anticipate that Justice White would join Justice Powell, Chief Justice Burger, and Justices Stewart and Rehnquist in upholding such a statute. Such a vote would be consistent with his position that a state may constitutionally enact parental consent requirements. Hence, the Powell plurality opinion, rather than the Stevens' opinion, appears to be the one that will shape the future law on a minor's right to abortion.

minations to a court of general jurisdiction, as was the case in section 12S? Alternatively, would a court that is more particularly oriented toward resolving issues involving minors and their best interests,[48] such as a family, juvenile, or probate court,[49] be the more appropriate forum? Should the legislature give these powers to a court at all, or should a less formal, more accessible non-judicial forum be chosen?[50]

In addition to the policy issues that it leaves unresolved, Justice Powell's "advisory" opinion itself poses another problem. In pursuit of guidance to legislatures as to the permissible scope of state regulation, Justice Powell has in effect drafted a model statute, one that will certainly be used not merely as a guide for legislation but as a model to be duplicated. Thus, there is a danger that the advantages of legislative creativity, reflected in the implementation by various states of differing and "experimental" procedures[51] for accommodating the just resolution of delicate and important issues in the life of a minor, may be stifled.

**§7.5. Right to Refuse Medical Treatment.** In 1977, the Supreme Judicial Court held in *Superintendent of Belchertown State School v. Saikewicz*[1] that both competent and incompetent adults have a constitutional

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[48] Family courts have long utilized the "best interests" formula in determining custody, visitation, and adoption questions involving children. In addition, most family courts have staff personnel—family service officers, probation officers, psychiatrists, etc.—to investigate facts relevant to the best interests of the child. Time factors, of course, would most likely require that a court-ordered investigation, which may be more through in a custody dispute, be limited in the case of an abortion decision. The difficulty is that while an erroneous custody decision can always be reviewed by the court, at least prospectively, and a change of custody ordered, an erroneous decision of a court not to allow an abortion, with the resultant birth of a child, cannot be remedied.

[49] In many states, family court judges are more accessible during evenings and weekends than judges of courts of general jurisdiction. The easy access to family court judges should be a factor that should weigh in favor of a legislative choice of a family court forum to decide such abortion issues involving minors.

[50] Justice Powell commented: "We do not suggest, however, that a State choosing to require parental consent could not delegate the alternative procedure to a juvenile court or an administrative agency or officer. Indeed, much can be said for employing procedures and a forum less formal than those associated with a court of general jurisdiction." 443 U.S. at 643 n.22. Justice Stevens beliveed that the court process might be inappropriate for resolution of the minor's abortion decision: "As a practical matter, I would suppose that the need to commence judicial proceedings in order to obtain a legal abortion would impose a burden at least as great as, and probably greater than, that imposed on the minor child by the need to obtain the consent of a parent." *Id.* at 655.

[51] As Justice Brandeis noted in an oft-quoted passage: "It is one of the happy incidents of the federal system that a single courageous State may, if its citizens choose, serve as a laboratory; and try novel social and economic experiments without risk to the rest of the country." New State Ice. Co. v. Liebmann, 285 U.S. 262, 311 (1932) (Brandeis, J., dissenting).

§7.5. [1] 373 Mass. 728, 370 N.E.2d 417 (1977).

right to refuse life-prolonging medical treatment absent state interests that may outweigh the individual interests in refusing such treatment. In *Saikewicz*, the Court indicated that in Massachusetts, the judiciary is a proper forum in which to determine whether an incompetent should receive treatment.[2] The Court rejected the approach of the New Jersey Supreme Court, which in the well-publicized *Quinlan*[3] case had left "the decision whether to continue artificial life support to the patient's guardian, family, attending doctors, and hospital 'ethics committee.'"[4] During the *Survey* year, the Supreme Judicial Court once again confronted the difficult legal and philosophical problems arising out of the medical treatment issue. In *Custody of a Minor*,[5] the Court examined the relationship between the parental prerogative to determine whether life-saving medical treatment will be provided for a child and the state interests in protecting the minor by requiring medical treatment over the parents' objections.[6] In *Commissioner of Corrections v. Myers*,[7] the Court focused upon a prisoner's interest in freedom of choice and the state's interest in compelling him to undergo life-saving medical treatment.[8]

In *Custody of a Minor*,[9] the child's physician [10] filed a care and protection petition pursuant to chapter 119, section 24,[11] in the juvenile session

[2] *Id.* at 756-59, 370 N.E.2d at 433-35.

[3] In re Quinlan, 70 N.J. 10, 355 A.2d 647 (1976).

[4] 373 Mass. at 758, 370 N.E.2d at 434.

[5] 1978 Mass. Adv. Sh. 2002, 379 N.E.2d at 1053.

[6] *Id.* at 2022, 379 N.E.2d at 1061.

[7] 1979 Mass. Adv. Sh. 2523, 399 N.E.2d 452.

[8] *Id.* at 2523-24, 399 N.E.2d at 453.

[9] The names of the parents and child were not disclosed in the opinion, in accordance with G.L. c. 119, § 38, which provides for the confidentiality of care and protection proceedings. This is the well-publicized Chad Green case.

[10] The case originally began in the probate court where the child's physician sought appointment as temporary guardian. 1978 Mass. Adv. Sh. at 2002, 379 N.E.2d at 1055.

[11] Chapter 119, § 24, permits juvenile courts and juvenile sessions of district courts

> upon the petition of any person alleging on behalf of a child under the age of eighteen years within the jurisdiction of said court that said child is without necessary and proper physical, educational or moral care and discipline, or is growing up under conditions or circumstances damaging to a child's sound character development, or who lacks proper attention of parent, guardian with care and custody, or custodian, and whose parents or guardian are unwilling, incompetent or unavailable to provide such care, may issue a precept to bring such child before said court, shall issue summonses to both parents of the child to show cause why the child should not be committed to the custody of the department or other appropriate order made. . . . If, after a recitation under oath by the petitioner of the facts of the condition of the child who is the subject of the petition, the court is satisfied that there is reasonable cause to believe that the child is suffering from serious abuse or neglect, or is in immediate danger of serious abuse or neglect, and that immediate removal of the child is necessary to protect the child from serious

of a district court requesting that legal custody [12] of the child, then age two, be vested in the Department of Public Welfare in order to provide chemotherapy treatment for the child's leukemia condition.[13] The district court dismissed the petition and the petitioner and the child's court-appointed attorney claimed a trial de novo in the superior court.[14] After a hearing, the judge ruled that chemotherapy treatment was necessary for the survival of the child and ordered that legal custody of the child be granted to the Department of Public Welfare to provide the treatment.[15] The parents, however, were to retain physical custody as long as they obeyed the court order.[16]

On appeal to the Supreme Judicial Court, the parents asserted that they had a constitutionally protected right to determine appropriate medical care for the child and to choose an alternative treatment to chemotherapy.[17] The Court refused to decide whether the state was constitutionally precluded from interfering with the parent's right to choose between various options of beneficial medical treatment for a child because the trial court found that "it was the parents' intention to disallow chemotherapy regardless of whether an alternative treatment program consistent with good medical practice could be found."[18] Hence, in the Court's view, the issue before it was whether, on the evidence, the superior court was correct in ordering the only treatment that could save the child's life, chemotherapy, despite the parental objections.[19]

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abuse or neglect, the court may issue an emergency order transferring custody of a child under this section to the department or to a licensed child care agency or individual described in clause (2) of section twenty-six. Said transfer of custody shall be for a period not exceeding seventy-two hours. Upon the entry of the order a date for a hearing on the extension of the order shall be set, which date shall fall within the seventy-two hour period.

*Id.*

[12] Custody is a fluid concept, referring to a variety of rights and duties. It may include such matters as with whom the child lives (physical custody) and who has the obligation to care for the child and make decisions concerning his or her education, religious training, and medical care (legal custody). One or both parents, a third party or a social service agency may be given rights in regard to one or a combination of such matters, or the parents may share them (joint custody). *See generally* H. CLARK, LAW OF DOMESTIC RELATIONS § 17.2 (1968).

[13] 1978 Mass. Adv. Sh. at 2003, 379 N.E.2d at 1055.

[14] *Id.* at 2003-04, 379 N.E.2d at 1055.

[15] *Id.* at 2004, 379 N.E.2d at 1055-56.

[16] *Id.* at 2004, 379 N.E.2d at 1056.

[17] *Id.* The parents also raised various procedural objections to the proceedings in the lower courts, all of which were unsuccessful. *Id.* at 2005, 379 N.E.2d at 1056.

[18] *Id.*

[19] *Id.* The evidence at trial revealed that chemotherapy was the only effective medical treatment for the disease which affected the child—acute lymphocytic leukemia, which, if untreated, would be fatal. *Id.* at 2006-07, 379 N.E.2d at 1057.

The Court noted that the question of whether and to what extent a state could order medical treatment for a child over parental objections, while one of first impression in the commonwealth, had been addressed by many other jurisdictions.[20] These jurisdictions decided the question by balancing three competing interests: (1) the "natural rights" of the parents, (2) the personal needs of the child, and (3) the responsibilities of the state.[21] After weighing these interests, these courts have uniformly permitted state intervention where the medical treatment sought was necessary to save the child's life.[22] The Supreme Judicial Court, adopting this interest-weighing approach, concluded that such a result was appropriate in this case.[23]

Focusing initially on parental rights, the Supreme Judicial Court recognized the primary right of parents "to raise their children according to the dictates of their own consciences."[24] It noted that courts have treated this parental prerogative with great deference.[25] The Court recognized, however, that parental rights are not absolute, but at some point must yield to the state interests in the well-being of children, especially when the child's survival is at stake.[26] It observed that under chapter 119, section 24,[27] a parent may be deprived of custody where the child has not received "necessary and proper physical care" and where the parents are "unwilling, incompetent, or unavailable to provide such care."[28] Given the trial court's findings that the child would die without chemotherapy treatment, that the risks of treatment were minimal, and that the parents had refused to allow continuation of the therapy, the Court concluded that the evidence supported the judge's finding that the parent's refusal to authorize chemotherapy constituted a failure to provide proper physical care.[29]

The Court then examined the second of the three interests relevant to the proper resolution of the issue, those of the child. In order to ascertain the actual needs of the child, the Court utilized the best interests

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[20] *Id.* at 2022, 379 N.E.2d at 1061. *See* cases cited at *id.* at 2022 n.8, 379 N.E.2d at 1062 n.8.

[21] *Id.* at 2022, 379 N.E.2d at 1061-62 (citing Note, *State Intrusion into Family Affairs: Justifications and Limitations*, 26 STAN. L. REV. 1383 (1974)).

[22] 1978 Mass. Adv. Sh. at 2022, 379 N.E.2d at 1062.

[23] *Id.*

[24] *Id.* at 2023, 379 N.E.2d at 1062. The Court seemed to have recognized a constitutional basis for this parental right. *Id.* (citing Quilloin v. Walcott, 434 U.S. 246 (1978); Smith v. Organization of Foster Families, 431 U.S. 816 (1977); Wisconsin v. Yoder, 406 U.S. 205 (1972)).

[25] 1978 Mass. Adv. Sh. at 2024, 379 N.E.2d at 1062.

[26] *Id.* at 2025, 379 N.E.2d at 1063.

[27] For the text of § 24 see note 11 *supra*.

[28] 1978 Mass. Adv. Sh. at 2026, 379 N.E.2d at 1063.

[29] *Id.* at 2027-28, 379 N.E.2d at 1063.

standard, which "requires a court to focus on the various factors unique to the situation of the individual for whom it must act." [30] Applying the best interests test, the Court found that the evidence before he trial judge amply supported the order requiring chemotherapy.[31]

Finally, the Court considered the interests of the state that would support court-ordered medical treatment over parental objection. It found that the state's interests in the welfare of children living within its borders, in the preservation of life, and in the ethical integrity of the medical profession all justified the judge's order.[32] Thus, the court concluded that the interests of the child and of the state outweighed the parental prerogative to select the medical treatment for their child.[33]

*Commissioner of Corrections v. Myers* [34] involved another disagreement concerning the right to refuse a specific medical treatment. In this case, the conflict arose between the state's prison authorities and a competent adult prisoner who declined to receive life-saving hemodialysis treatments for kidney disease.[35] The Commissioner of Corrections initiated proceedings in superior court to compel the defendant prisoner to undergo these treatments.[36] After an evidentiary hearing, the superior court judge found that without dialysis, Myers could survive no longer than fifteen days.[37] He also found that Myers's refusal of treatment was based neither on religious factors, nor on a desire to die.[38] Rather, the judge determined that his refusal was an expression of protest at having been incarcerated in a medium security rather than a minimum security prison.[39] He also found that the side effects of dialysis

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[30] *Id.* at 2033, 379 N.E.2d at 1065. The trial judge utilized the "substituted judgment" test, which requires that "a court acting on behalf on an incompetent person must first attempt to 'don the mental mantle' of that person. . . . [T]he doctrine . . . seeks to ensure that the personal decisions concerning the conduct of individual affairs remain, to the greatest extent possible, with the individual." *Id.* at 2032, 379 N.E.2d at 1065 (quoting *Saikewicz*, 373 Mass. 728, 370 N.E.2d 417). Although the Supreme Judicial Court phrased the appropriate test with regard to a child incompetent due to age, as that of the child's best interests, it indicated that the two tests were essentially the same. *Id.* at 2033, 379 N.E.2d at 1065.

[31] *Id.*

[32] *Id.* at 2035-37, 379 N.E.2d at 1066.

[33] *Id.* at 2037, 379 N.E.2d at 1067.

[34] 1979 Mass. Adv. Sh. 2523, 399 N.E.2d 452.

[35] *Id.* at 2525, 399 N.E.2d at 453. Hemodialysis is "a procedure whereby blood is pumped out of the body, cleansed of its toxins by a mechanical filtering process, and then returned to the body." *Id.* at 2525, 399 N.E.2d at 454.

[36] *Id.* at 2524, 399 N.E.2d at 453.

[37] *Id.* at 2525, 399 N.E.2d at 454.

[38] *Id.* at 2526, 399 N.E.2d at 454. The defendant believed that dialysis weakened him physically and thus "reduced his ability to defend himself against other inmates." *Id.*

[39] *Id.*

were not severe and, with regular dialysis and related medical treatment, Myers could lead a normal life.[40] After finding that coerced dialysis could be effectuated by "employing a combination of mechanical and human restraints," the judge ordered the treatment.[41] The trial judge reported the case to the Appeals Court, and the Supreme Judicial Court granted the plaintiff's application for direct appellate review.[42]

On appeal, Myers argued that court-ordered treatment violated his constitutional rights of privacy and bodily integrity.[43] Acknowledging the defendant's constitutional right to refuse treatment, the Court noted, however, that this right was not absolute, but was dependent on a balancing of the individual's interests against those of the state.[44] Referring to the four state interests recognized in *Saikewicz*,[45] the Court determined that only the state interests in preserving life and in maintaining the ethical standards of the medical profession were relevant.[46] Distinguishing Myers's situation from that posed in the *Saikewicz* case, where chemotherapy could only briefly prolong the patient's life, the Court determined that Myers could lead a normal and healthy life as long as dialysis and concomitant medications were administered.[47] The Court admitted that the complexities of dialysis and the excessive time burdens that treatment requires are significant intrusions on the individual's constitutionally protected right to bodily integrity.[48] The Court noted, however, that incarceration could impose limitations on those rights in

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[40] *Id.*

[41] *Id.* at 2526-27, 399 N.E.2d at 454-55.

[42] *Id.* at 2523, 399 N.E.2d at 453.

[43] *Id.* at 2524, 399 N.E.2d at 453. The defendant also argued that the issue was moot because he had in the interim received a kidney transplant, thereby making it unlikely that he would need dialysis in the future. Finding that the kidney transplant might prove unsuccessful and thus require future dialysis, the Court rejected the mootness claim. *Id.* at 2527, 399 N.E.2d at 455. In addition, it noted that the issue was one "of public importance, capable of repetition, yet evading review." *Id.* at 2528, 399 N.E.2d at 455.

[44] *Id.* at 2528, 399 N.E.2d at 455-56.

[45] See text at note 1 *supra*. The four interests identified by the *Saikewicz* Court were (1) the preservation of life, (2) the protection of the interests of innocent third parties, (3) the prevention of suicide, and (4) the maintenance of the integrity of the medical profession. 1979 Mass. Adv. Sh. at 2529, 399 N.E.2d at 456.

[46] *Id.* Because the defendant was unmarried and without dependents, and because his refusal of treatment could not be considered suicide, the Court considered the second and third factors irrelevant. *Id.*

[47] *Id.* at 2530, 399 N.E.2d at 456.

[48] *Id.* at 2531, 399 N.E.2d at 457. One may speculate whether the Court would consider financial considerations relevant to the decision. The Court may instinctively react negatively to a lower court decision allowing life-sustaining treatment to end because of the expense involved. The second state interest identified in *Saikewicz*, note 45 *supra*—the interests of family who may be financially dependent on the patient— could be used as a basis to end treatment in a case where continuation of treatment would constitute a severe economic strain on the family.

terms of the state's interest in the administration of its prison system.[49] In this instance, the Court concluded that the interest of the state should prevail.[50] Specifically, the Court accepted the Commissioner's position [51] that permitting Myers to die would create an intolerable prison atmosphere in which the credibility of prison administrators' commitment to inmate health would be seriously jeopardized and likely would cause other prisoners "to attempt similar forms of coercion in order to attain illegitimate ends." [52] Finally, the Court found that the state interest in fostering medical ethical standards weighed in favor of coerced dialysis treatment.[53] Testimony before the trial court had established that medical ethics require life-saving treatment under circumstances where regular treatment would result in a normal life for the patient.[54] Hence, the Court concluded that the superior court order that the Commissioner could compel forced treatment of Myers should be affirmed.[55]

**§7.6. First Amendment—Municipal Free Speech.** More frequent use of the public referendum process as a mechanism for determining public views on controversial issues has led to greater participation by corpo-

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[49] *Id.*

[50] *Id.* The Court characterized the relationship between the state and individual interests as "a very close balance of interests." *Id.*

[51] The following excerpts from the Commissioner's affidavit are relevant:

> In my opinion, to allow Myers, or other inmates in similar situations, to destroy themselves while in prison would create very serious practical problems in prison administration. . . . [I]t would be very difficult to make the prisoners, their families and the correction department staff understand that I had done everything legally possible to prevent a death of a prisoner in my charge. Faith in the correctional system's ability to protect inmates would be seriously undermined. More immediately, one could expect an explosive reaction by other inmates to the death and to the failure of the Commissioner to prevent it by simply releasing Myers to minimum security. In my opinion, such a reaction is much more likely in a situation where Myers is permitted to die, than where he is subjected to involuntary treatment to keep him alive.

*Id.* at 2535, 399 N.E.2d at 459.

[52] *Id.* at 2532, 399 N.E.2d at 457 (footnote omitted).

[53] *Id.*

[54] 1979 Mass. Adv. Sh. at 2532-33, 399 N.E.2d at 458.

[55] *Id.* at 2533, 399 N.E.2d at 458. A noteworthy statutory development in the field of patients' rights was the enactment in 1979 of the so-called "Patients' Bill of Rights." Acts of 1979, c. 214. The act permits a civil action for damages or other relief where patients in hospitals and in other health care facilities have been denied certain specified rights, including, "the right to freedom of choice in . . . [the] selection of a facility, or a physician or health service mode;" the right "to refuse to be examined, observed, or treated by students or any facility staff without jeopardizing access to psychiatric, psychological, or other medical care and attention;" the right "to refuse to serve as a research subject and to refuse any care or examination when the primary purpose is educational or informational rather than therapeutic;" the right "to privacy during medical treatment or other rendering of care within the capacity of the facility;" the right "to informed consent to the extent provided by law." *Id.*

rations in the referendum process.[1] Until recently, legislation in many states, including Massachusetts, limited corporate participation in the discussion of referenda issues to those issues directly related to the business of the corporation.[2] In the 1978 decision of *First National Bank v. Bellotti*,[3] however, the United States Supreme Court declared unconstitutional a Massachusetts statute mandating such a restriction.[4] During the *Survey* year, in *Anderson v. City of Boston*,[5] the Supreme Judicial Court, distinguishing the state's interest in regulating the speech of *business* corporations from its interest in regulating the speech of municipal corporations, upheld a statutory restriction on a municipality's expenditure of public funds to express its views on various referenda proposals.[6]

Because the Court in *Anderson* used *Bellotti* as a foundation for its decision, a brief review of the *Bellotti* opinion is helpful for a proper understanding of *Anderson*. At issue in *Bellotti* was the validity of chapter 55, section 8,[7] which prohibited banks and business corporations

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§7.6. [1] Although the General Court has the legislative power, article 48 of the amendments to the Massachusetts Constitution reserves to the people a modicum of legislative power through the "popular initiative" and the "popular referendum." Under the "popular initiative" procedure, "a specified number of voters" may submit to the legislature proposals for laws and constitutional amendments, with certain areas excepted. Under the "popular referendum" procedure, "a specified number of voters" is empowered to petition the Secretary of State to submit to the voters for their approval or rejection, again with certain exceptions, laws enacted by the legislature. MASS. CONST. art. amend. 48.

[2] *See, e.g.*, G.L. c. 55, § 8, *infra* note 7. Legislation restricting corporate political activity was in effect in 31 other states at the same time of the *Bellotti* decision. First Nat'l Bank v. Bellotti, 435 U.S. 765, 803 (1978) (White, J., dissenting).

[3] 435 U.S. 765 (1978). For an in-depth analysis of *Bellotti*, see Ortwein, *Constitutional Law*, 1977 ANN. SURV. MASS. LAW § 10.3, at 177-224. For analysis of both *Bellotti* and *Anderson*, see Ryan, *Municipal Free Speech: Banned in Boston?*, 47 FORDHAM L. REV. 1111 (1979).

[4] *Id.* at 768-69 n.2.

[5] 1978 Mass. Adv. Sh. 2297, 380 N.E.2d 629.

[6] *Id.* at 2313-14, 380 N.E.2d at 638.

[7] G.L. c. 55, § 8 reads in part:

> No corporation carrying on the business of a bank, trust, surety, indemnity, safe deposit, insurance, railroad, street railway, telegraph, telephone, gas, electric light, heat, power, canal, aqueduct, or water company, no company having the right to take land by eminent domain or to exercise franchises in public ways, granted by the commonwealth or by any county, city, or town, no trustee or trustees owning or holding the majority of the stock of such a corporation, no business corporation incorporated under the laws of or doing business in the commonwealth and no officer or agent acting in behalf of any corporation mentioned in this section, shall directly or indirectly give, pay, expend or contribute, or promise to give, pay, expend or contribute, any money or other valuable thing for the purpose of aiding, promoting or preventing the nomination or election of any person to public office, or aiding, promoting or antagonizing the interests of any political party, or influencing or affectig the vote on any questions, submitted to the voters, other than one materially af-

from making expenditures or contributions for the purpose of influencing the vote on referendum questions that did not "materially affect" the business, property, or assets of the corporation.[8] The statute further stipulated that a ballot question "solely concerning the taxation of the income, property or transactions of individuals shall [not] be deemed materially to affect the property, business or assets of the corporation."[9] The plaintiffs, two national banking associations and three business corporations, attacked the constitutionality of the statute, alleging that this prohibition impermissibly infringed upon their first amendment rights of free speech.[10] Distinguishing the first amendment rights of a natural person from the more limited rights of a corporation, the Supreme Judicial Court held that a corporation could claim first amendment protection for its political speech only where the issue at hand materially affected the corporation's business.[11]

On appeal, the United States Supreme Court reversed, holding that the Massachusetts restriction constituted "an impermissible legislative prohibition of speech."[12] The Court determined that the issue before it was not the nature of the speaker but the nature of the speech.[13] Had the speaker not been a corporation, the Court noted, it could not have been argued that the proposed speech lacked first amendment protection, since free speech on public issues is clearly "indispensable to decision making in a democracy."[14] The speaker's identity as a corporation is not enough to change this result. The Court emphasized that "[t]he inherent worth of the speech in terms of its capacity for informing the public" remains the same whether the source is an individual or a corporation.[15] The Court also noted the first amendment's role in protecting both the rights of the public to hear speech on matters of public concern and of citizens to speak on such matters.[16]

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fecting any of the property, business or assets of the corporation. No question submitted to the voters solely concerning the taxation of the income, property or transactions of individuals shall be deemed materially to affect the property, business or assets of the corporation . . . .

[8] *Id.*

[9] *Id.*

[10] 435 U.S. at 770.

[11] First Nat'l Bank v. Attorney General, 371 Mass. 773, 785, 359 N.E.2d 1262, 1270.

[12] 435 U.S. at 784 (1978).

[13] *Id.* at 776.

[14] *Id.* at 777. The extent to which corporate and individual first amendment rights are coextensive was an issue reserved by the Court. *Id.* at 777-78 n.13. For a general discussion of constitutional rights of corporations and *Bellotti*, see O'Kelley, *The Constitutional Rights of Corporations Revisited: Social and Political Expression and the Corporation after* First National Bank v. Bellotti, 67 GEO. L.J. 1346 (1979).

[15] 435 U.S. at 777.

[16] *Id.* at 783.

In reaching its decision the Court rejected two justifications advanced by the state for its prohibition of corporate speech. First, the state argued that corporate participation in the referendum process would exert undue influence on the eventual vote and thereby erode citizens' confidence in the democratic process.[17] Second, the state maintained that the restriction on speech was necessary to protect those shareholders whose views differed from those expressed by management on behalf of the corporation.[18] With respect to the first justification, the Court acknowledged the strong governmental interests in preservation of "the integrity of the electoral process."[19] It found no evidence in the record, however, that corporate involvement in the referendum process would have an "overwhelming or even significant" effect on a referendum issue.[20] Furthermore, noted the Court, "the concept that government may restrict the speech of some elements of society in order to enhance the relative voice of others is wholly foreign to the first amendment...."[21] With regard to the second justification, the Court found the statute so under-inclusive[22] and over-inclusive[23] that the purported

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[17] *Id.* at 789.

[18] *Id.* at 787.

[19] *Id.* at 788. The Court distinguished the situation of corporate speech in the context of a partisan candidate election, where spending limitations may serve to minimize the problem of corruption:

> [O]ur consideration of a corporation's right to speak on issues of general public interest implies no comparable right in the quite different context of participation in a political campaign for election to public office. Congress might well be able to demonstrate the existence of a danger of real or apparent corruption in independent expenditures by corporations to influence candidate elections.

*Id.* at n.26.

[20] *Id.* at 789. The state also argued that the corporate restriction encourages greater citizen participation in the process of lawmaking through the referendum process. The Court rejected the argument, emphasizing the need for diversity of views on public issues. *Id.* at 790, n.29.

[21] *Id.* at 790-91 (quoting Buckley v. Valeo, 424 U.S. 1, 48-49 (1976)). " [T]he fact that advocacy may persuade the electorate is hardly a reason to suppress it: The Constitution 'protects expression which is eloquent no less than that which is unconvincing.' "

[22] *Id.* at 793. The Court found the under-inclusiveness of the statute demonstrated by its failure to prohibit either corporate lobbying with respect to legislation or corporate speech on public issues not yet the subject of a referendum, even though both situations involve expenditure of corporate funds and expression of views with which some shareholders would likely disagree. In addition, the statutory reference to income taxation (see note 7 *supra*) suggested that the legislature's actual purpose was to silence corporations on the controversial issue of a graduated state income tax. Thus, it was not reflective of a legislative goal of protecting shareholders. *Id.*

[23] *Id.* at 794. The Court found the over-inclusiveness of the statute demonstrated by its prohibition of corporation advocacy on a referendum issue even in cases where the shareholders unanimously agreed upon such advocacy. *Id.* at 795 (citation omitted).

goal of protecting the corporate shareholder was illusory.[24] Hence, the Court concluded that the state had advanced no compelling state interest to justify the statute.[25]

It did not take long for the business community to take advantage of the opportunities afforded by *Bellotti.* Armed with the new decision, several large business corporations, including two of those involved in *Bellotti,*[26] organized a campaign against a proposed amendment to the state constitution which, they believed, would greatly increase the property tax burden shouldered by business. The amendment, popularly known as the classification amendment, was designed to reduce the adverse effect of one hundred percent property evaluation on homeowners and preserve their traditional tax advantage over businesses by amending the state constitution to allow property to be taxed at different percentages of the market value, depending upon how the property is used.[27] The mayor of Boston, arguing that *Bellotti* conferred upon municipal corporations the same first amendment rights as those given to business corporations, secured approval of an ordinance authorizing the expenditure of municipal funds to promote the passage of the amendment.[28] Eleven taxpayers challenged the expenditures in an action commenced directly in the Supreme Judicial Court.[29] Six days after oral argument, the Court issued an order enjoining the city from expending the appropriated funds and prohibiting the city from compelling municipal employees to spend working hours in aid of the city's quest for passage of the classification amendment.[30] The Court explained its reasoning in the subsequently issued *Anderson* opinion.

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[24] *Id.* at 793.

[25] *Id.* at 795.

[26] Wall Street J., Oct. 27, 1978, at 22, col. 3.

[27] For a description of the constitutional amendment, ratified on November 7, 1978, and associated legislation, see Opinion of the Justices, 1979 Mass. Adv. Sh. 1756, 393 N.E.2d 306 and Associated Indus. of Mass. v. Commissioner of Revenue, 1979 Mass. Adv. Sh. 2027, 393 N.E.2d 812. The classification amendment, which became article 112 of the amendments to the Massachusetts Constitution, gives the legislature the additional power to "classify real property according to its use in no more than four classes and assess, rate and tax such property differently in the classes so established, but proportionately in the same class, . . . except that reasonable exemptions may be granted." 1979 Mass. Adv. Sh. at 2028, 393 N.E.2d at 813. Prior to the amendment, the legislature could not tax classes of real property at different rates. *Id.*

[28] 1978 Mass. Adv. Sh. at 2299, 380 N.E.2d at 631. Pursuant to the ordinance, money was allocated towards the establishment of an office of public information on classification. Its purpose was to disseminate information to the public urging the adoption of the amendment and to assist in the organization of citizen volunteer groups supporting such a goal. The city also intended to provide office space and telephones to volunteers. *Id.*

[29] *See* G.L. c. 231A and c. 40, § 53.

[30] 1978 Mass. Adv. Sh. at 2301, 380 N.E.2d at 632.

In support of its issuance of the injunction, the Court noted initially that a municipality has no authority to appropriate funds to influence state referenda.[31] It reached this conclusion based upon its construction of the broad state election financing laws.[32] Under the commonwealth's home rule amendment,[33] a municipality may exercise by ordinance or by-law any power or function not inconsistent with laws enacted by the legislature under the powers reserved to it by the amendment.[34] The Court interpreted the comprehensive nature of chapter 55 and its election financing regulations as reflecting a legislative intention to reach all political contributions and expenditures within the commonwealth.[35] Hence, it concluded that any exercise of power by a municipality in this area would interfere with the legislative design and thereby violate the home rule amendment.[36] Consequently, the Court held that the state constitution and relevant statutes precluded the city from appropriating public funds for the purpose of influencing the referendum question.[37]

After concluding that the city lacked the authority to appropriate funds to influence the outcome of the referendum, the Court considered the city's argument that despite the legislative ban on corporate expenditures, the *Bellotti* decision established a municipality's constitutional right to speak on such matters.[38] The Court declined to consider the broad question of the scope of a municipality's first amendment rights.[39] Instead, the Court framed the issue as one of whether the commonwealth's denial of the city's right to expend funds in this manner abridged speech which the first amendment was designed to protect.[40] As did the Supreme Court in *Bellotti*, the Supreme Judicial Court decided the issue by balancing the interests involved.[41] In contrast to the decision of the *Bellotti* court, however, the Supreme Judicial Court found the state interests advanced sufficiently compelling to allow the

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[31] *Id.* at 2302, 380 N.E.2d at 632.

[32] *Id.*

[33] Mass. Const. amend. art. 89, § 6, reads in part:

> Any city or town may, by the adoption, amendment, or repeal of local ordinances or by-laws, exercise any power or function which the general court has power to confer upon it, which is not inconsistent with the constitution or laws enacted by the general court in conformity with [its] powers . . . .

[34] 1978 Mass. Adv. Sh. at 2304, 380 N.E.2d at 633.

[35] The Court viewed the absence of specific reference to a municipal corporation in the statute not as an indication of the legislature's intent to authorize expenditures by municipalities, but rather as an indication that "the Legislature did not even contemplate that such action could occur." *Id.* at 2306, 380 N.E.2d at 634.

[36] *Id.* at 2305, 380 N.E.2d at 633.

[37] *Id.* at 2302, 380 N.E.2d at 632.

[38] *Id.* at 2309, 380 N.E.2d at 635.

[39] *Id.* at 2313, 380 N.E.2d at 637-38.

[40] *Id.*

[41] *Id.* at 2313-14, 380 N.E.2d at 638.

restrictions on municipal speech to withstand strict scrutiny.[42] Citing article 9 of the Massachusetts Declaration of Rights,[43] the Court found that the state had a "compelling interest in assuring the fairness of elections and the appearance of fairness in the electoral process." [44] The Court also found that the state had a compelling interest "in assuring that a dissenting minority of taxpayers . . . [were] not compelled to finance" the expenditure of public funds for municipal advocacy with which they disagreeed.[45] Hence, the Court concluded that the commonwealth did demonstrate compelling interests justifying the legislative determination that neither the state not its political subdivisions should expend funds in order to participate as advocates in the referendum process.[46]

Having upheld the constitutionality of the restriction, the Court then turned to the issue of the relief to be granted.[47] The Court granted the plaintiffs' request for an order enjoining the city from expending funds for the purpose of influencing the vote on the classification amendment.[48] The order enjoined the city from using municipal telephones, printing materials, and facilities to promote the classification amendment, "at least unless each side were [sic] given equal representation and access." [49] The Court refused, however, to enjoin municipal employees from voluntary activity on behalf of the amendment during working hours, because there was little information in the record concerning the activities of city employees on behalf of the campaign.[50] Thus, the Court prudently avoided the troublesome issue of the extent to which "city employees may have certain rights of speech, even during working hours . . . ." [51]

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[42] *Id.*

[43] Mass. Const. art. 9 provides in part that "[a]ll elections ought to be free."

[44] *Id.* at 2315, 380 N.E.2d at 638. The Court also noted that the state constitution demands a fair referendum process by requiring the secretary of the commonwealth to send to the voters the full text of the referendum proposal, copies of both the majority and minority legislative committee reports, "a statement of the votes of the general court on the measure, and fair, concise summary of the measure . . . [and] other information and arguments for and against the measure." *Id.* at 2315-16, 380 N.E.2d at 638.

[45] *Id.* at 2318-19, 380 N.E.2d at 639.

[46] *Id.* at 2314-15, 380 N.E.2d at 637-38.

[47] *Id.* at 2320, 380 N.E.2d at 640.

[48] *Id.* at 2321, 380 N.E.2d at 640.

[49] *Id.* at 2323, 380 N.E.2d at 641.

[50] *Id.*

[51] *Id.* at 2322, 380 N.E.2d at 641. Aggrieved by the decision of the Supreme Judicial Court, the city sought a stay of the judgment from Justice Brennan in his capacity as Circuit Justice, pending disposition of its appeal to the United States Supreme Court. City of Boston v. Anderson, 439 U.S. 1389 (1978). Believing that the Court would hear the case, Justice Brennan issued a stay on October 20, 1978, *id.* at 1391, thereby enabling the city to spend the appropriated funds to

In analyzing the first amendment issue presented in *Anderson,* the Supreme Judicial Court implicitly accepted the language of *Bellotti* emphasizing the first amendment's purpose of promoting open and informed public discussion.[52] Clearly, the information sought to be conveyed by the city would have little difficulty satisfying such a standard. The validity of the distinction between speech by a private, rather than a municipal, corporation—a distinction which one may reasonably draw from *Anderson*—must rest on the degree of scrutiny given to the interests advanced for regulating the speech or on an assessment of the differing state interests in regulating municipal speech. The *Anderson* Court itself noted that the proffered state interests, although similar to those rejected by the Supreme Court in *Bellotti,* had to be evaluated in the context of a *municipal* expenditure of public funds to champion a cause supported by those in control of the municipal treasury.[53]

Traditionally, the first amendment has been viewed as the guardian of individual expression against governmental interference.[54] Whether the amendment also serves to grant government certain rights of expression has received little attention from the courts or commentators.[55] Those who have explored the area note that governmental speech, although an indispensable part of the system of communication, brings with it special problems requiring special protection.[56] As Professor Emerson has noted, governmental speech has the potential of becoming so pervasive that it may overpower critical and opposing views.[57] In addition, there is something inherently inappropriate about allowing a municipality, a mere creature of state law which draws its power from the people, to spend the people's money to tell the people how to vote.[58] The question remains, however, whether these potential problems are sufficient to distinguish municipal corporate speech from private corporate speech.

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support the referendum proposal until further order of the Supreme Court. Appellants moved thereafter before the full Court to vacate Justice Brennan's stay order, and with three justices dissenting, the motion was denied on November 6, 1978. City of Boston v. Anderson, 439 U.S. 951 (1978). Hence, the City of Boston was able to spend funds in support of the referendum question during the crucial pre-voting period. On January 8, 1979, after the referendum proposal had been approved by the voters, the Court dismissed the city's appeal for want of a substantial federal question. City of Boston v. Anderson, 439 U.S. 1060 (1979).

52 1978 Mass. Adv. Sh. at 2313, 380 N.E.2d at 637-38.

53 *Id.* at 2314-15, 380 N.E.2d at 638.

54 *See, e.g.,* Gitlow v. New York, 268 U.S. 652 (1925).

55 See generally 1978 Mass. Adv. Sh. at 2310-11 n.12, 380 N.E.2d at 635-36 n.12; Z. CHAFFEE, 2 GOVERNMENT AND MASS COMMUNICATION, at 723 (1947).

56 T.I. EMERSON, THE SYSTEM OF FREEDOM OF EXPRESSION, at 19 (1970).

57 *Id.* at 698.

58 *Id.*

Significantly, many of these fears were raised by the state and rejected by the Supreme Court in *Bellotti.* In *Bellotti* it was asserted that corporate speech would overwhelm the electorate, given the vast financial and persuasive powers of the modern corporation, and thereby diminish the citizens' confidence in the referendum process.[59] Unlike the *Anderson* Court, however, the United States Supreme Court considered such fears speculative unless supported by legislative findings or evidence in the record.[60] The Supreme Court also rejected the "highly paternalistic" [61] state interest of providing a balanced debate by suppressing what it believed was the more powerful corporate voice.[62] The Court placed with the people, and not the state, the responsibility for weighing the value of the competing arguments.[63] Regulating speech for the purported benefit of the people, according to the Supreme Court, actually serves to defeat the first amendment's goal of free flow of information.[64] Therefore, given the lack of evidence in *Anderson* that speech by the city of Boston would be so overpowering as to drown out speech in the private sector, the *Anderson* Court's conclusion that the public should only hear debate from private corporations and individuals is difficult to justify.[65]

Notwithstanding the weakness of the Supreme Judicial Court's analysis of the state's balanced debate argument, its analysis of the state's con-

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[59] 435 U.S. at 789.

[60] *Id.* In contrast, the *Anderson* Court noted that the statutory restriction "avoids the *possibility* of a babel of municipal huckstering . . . ." 1978 Mass. Adv. Sh. at 2317, 380 N.E.2d at 639 (emphasis added). The Supreme Judicial Court acknowledged that "[t]he facts in the record do not demonstrate that the city will abuse its alleged right of advocacy such as by issuing deceptive, vindictive, or coercive publications, nor does the record show that the city's publications would be monopolistic, or even domineering . . . ." *Id.* at 2318 n.18, 380 N.E.2d at 639 n.18.

[61] 435 U.S. at 791 n.31 (citation omitted).

[62] *Id.* at 789.

[63] *Id.* at 791.

[64] *Id.* at 792. The Court noted the state's contention "that the State's interest in sustaining the active role of the individual citizen is especially great with respect to referenda because they involve the direct participation of the people in the lawmaking process." The Court concluded, however, that "far from inviting greater restriction of speech, the direct participation of the people in a referendum, if anything, increases the need for 'the widest possible dissemination of information from diverse and antagonistic sources.'" *Id.* at 790 n.29 (citation omitted).

[65] A fair reading of *Anderson* suggests that the Supreme Judicial Court would not have considered the constitutional question had it not felt required to do so by the *Bellotti* decision. "[W]e suspect that the First Amendment has nothing to do with this intra-state question of the rights of a political subdivision to disregard the mandate of the supreme legislative authirity of the State . . . ." 1978 Mass. Adv. Sh. at 2313, 380 N.E.2d at 637. "By its terms and in its traditional applications, the First Amendment has nothing to do with a State's determination to refrain from speech on a given topic or topics and to bar its various subdivisions from expending funds in contravention of that determination." *Id.*

cern for views of dissenting citizens does lend support for the distinction between private and municipal corporations.[66] The *Anderson* Court viewed the 1977 United States Supreme Court decision of *Abood v. Detroit Board of Education*[67] as support for its decision in this regard.[68] In *Abood*, the Supreme Court held that a state may not compel non-union public employees to pay a service fee to the union where the fee was used to fund various ideological union expenditures with which the employees disagreed.[69] According to the *Anderson* Court, the expenditure of public funds by the city to influence the vote on a referendum issue presented an analogous problem: a dissenting minority of taxpayers was compelled to finance the expression of views with which they disagreed.[70] Because a refund, which had been required in *Abood*, would prove unwieldy in a taxpayer setting, the *Anderson* Court instead struck down the entire appropriation so that those who wished to make contributions would have to do so privately, rather than through the municipal entity.[71]

Since governmental speech generally need not be neutral,[72] it is inevitable that, given the varied roles of modern government, expenditures will be made and views advanced with which some taxpayers will disagree. *Bellotti* found the balance to be weighted in favor of the "open marketplace" of expression with regard to private corporations. *Anderson*, on the other hand, has identified and accepted in the case of municipal corporations a "controlled marketplace" from which the state may exclude the views of a municipal entity.[73]

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[66] *Id.* at 2319, 380 N.E.2d 639.

[67] 431 U.S. 209 (1977).

[68] 1978 Mass. Adv. Sh. at 2319, 380 N.E.2d at 640.

[69] 431 U.S. at 235-36.

[70] 1978 Mass. Adv. Sh. at 2319-20, 380 N.E.2d at 639-40.

[71] *Id.* at 2320 n.20, 380 N.E.2d at 640 n.20.

[72] As the Court noted in *Anderson*, "[T]here are a variety of instances in which government funds are used lawfully to express views and conclusions on matters of importance where various taxpayers may disagree with those views and conclusions. The Constitution of the United States, thus, does not forbid all government communications and publications which are not neutral and purely informative." *Id.* at 2312-13, 380 N.E.2d at 637. *See generally* L. TRIBE, AMERICAN CONSTITUTIONAL LAW § 12-4 (1978).

[73] *Compare* Professor Emerson's views on municipal expression, as described in 1978 Mass. Adv. Sh. at 2317 n.16, 380 N.E.2d at 639 n.16. Emerson argued that "government's right of expression should not extend to any sphere that is outside the governmental functions . . . ." For example, Emerson argued that a government could not spend funds in support of a candidate for office even though such speech would most certainly qualify as protected under the first amendment, since "it is not the function of the government to get itself reelected." *Id.* The Supreme Judicial Court commented that were it to apply Emerson's standard to the referendum issue, such partisan government expression on the referendum issue would likewise fall outside the ambits of a proper governmental function. *Id.*

**§7.7. Procedural Due Process—Motor Vehicle Regulations.** In *Mackey v. Montrym*,[1] the United States Supreme Court upheld the constitutionality of a Massachusetts statute [2] requiring automatic suspension of a driver's license upon a driver's refusal to take a breathalyzer test after being arrested for driving under the influence of liquor. Defendant Montrym was arrested for drunken driving and initially refused to take the breathalyzer test.[3] Shortly thereafter, after speaking with an attorney, Montrym changed his mind and requested the police to conduct the test.[4] The police refused his request.[5] As required by the statute, the officer filed a report of Montrym's refusal with the Registrar of Motor Vehicles, who subsequently revoked Montrym's license for ninety days.[6] After a state court dismissed the complaint brought against Montrym for driving under the influence of intoxicating liquor,[7] Montrym's attorney notified the Registrar of the dismissal and requested without success the return of Montrym's driving license.[8]

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§7.7. [1] 443 U.S. 1 (1979).

[2] G.L. c. 90, § 24(1)(f), provides that:

> Whoever operates a motor vehicle upon any [public] way . . . shall be deemed to have consented to submit to a chemical test or analysis of his breath in the event that he is arrested for operating a motor vehicle while under the influence of intoxicating liquor . . . . If the person arrested refuses to submit to such a test or analysis, after having been informed that his license . . . to operate motor vehicles . . . shall be suspended for a period of ninety days for such refusal, . . . the police officer before whom such refusal was made shall immediately prepare a written report of such refusal. Such written report of refusal shall be endorsed by a third person who shall have witnessed such refusal. . . . Each such report shall set forth the grounds of the officer's belief that the person arrested had been driving a motor vehicle . . . while under the influence of intoxicating liquor, and shall state that such person had refused to submit to such chemical test or analysis when requested by such police officer to do so. Each such report shall be endorsed by the police chief . . . and shall be sent forthwith to the registrar. Upon receipt of such report, the registrar shall suspend any license or permit to operate motor vehicles issued to such person . . . for a period of ninety days.

[3] 443 U.S. at 4.

[4] *Id.* at 5.

[5] The statute provides that once the breathalyzer test has been refused, the officer *shall* make a report to the Registrar. See note 2 *supra.*

[6] 443 U.S. at 6. The Court noted that the statute gives the Registrar no discretion to stay suspension of a license. *Id.* at 6. Hence, even though a state court had dismissed the complaint brought against Montrym on June 2, 1976, upon receipt of the officer's report, the Registrar formally suspended Montrym's license on June 7, 1976. See note 5 *infra.* The suspension notice informed Montrym of his right to appeal the suspension pursuant to c. 90, § 28. An appeal, however, does not stay the Registrar's ruling. 433 U.S. at 6 n.4.

[7] The Court and the dissent presumed that the "cryptic" dismissal order was based on the refusal of the police to administer a breathalyzer test to Montrym following his attempt to retract his initial refusal. *Id.* at 4, 23.

[8] *Id.* at 6. Following the dismissal of the complaint, Montrym's attorney initially requested the Registrar to stay the suspension of Montrym's license. Upon the subsequent suspension of Montrym's license, his attorney requested the Registrar

Montrym brought suit in federal district court,[9] alleging that the statute was unconstitutional for its failure to provide a hearing prior to the revocation of his license.[10] In the first of two opinions, a three-judge district court held the statute violative of the due process clause, permanently enjoined the Registrar from further enforcement of the statute, and directed him to return the license to Montrym.[11] On direct appeal,[12] the Supreme Court vacated the district court judgment and remanded with directions to reconsider in view of *Dixon v. Love*.[13] In *Love* the Court upheld an Illinois statute permitting summary revocation of a license upon conviction of three moving traffic violations within a one-year period.[14] On remand, the district court affirmed its earlier opinion, viewing *Love* as distinguishable from the case before it.[15]

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to return the license. Neither letter enclosed a certified copy of the state court's order of dismissal. According to the Court, "[h]ad Montrym enclosed a copy of the order dismissing the drunk-driving charge, the entire matter might well have been disposed of at that stage without more." *Id.* at 8.

[9] *Id.* Montrym chose to forgo the administrative hearing provided by c. 90, § 24(1)(9). *Id.* Section 24 provides that a person whose license has been suspended "shall be entitled to a hearing before the registrar . . . ." G.L. c. 90, § 24(1)(9). The parties stipulated that this hearing would be available as soon as the driver surrenders his license, 433 U.S. at 7-8 n.5. The hearing is limited to a determination of whether there was probable cause for the arrest, whether the person was arrested, and whether the person refused to take the breathalyzer test. "If after such hearing, the registrar finds on any one of the said issues in the negative, the registrar shall reinstate such license . . . ." G.L. c. 90, § 24(1)(9). Given the limited issues that may be raised at such a hearing, Montrym may have believed the hearing procedure to be futile.

[10] Montrym sought damages and both declaratory and injunctive relief. A temporary restraining order enjoining the license suspension was issued by a single federal judge, who also ordered the return of Montrym's license. A three-judge district court thereafter heard the merits. *Id.* at 8-9.

[11] Montrym v. Panora, 429 F. Supp. 393, 400 (D. Mass. 1977).

[12] Panora v. Mintrym, 434 U.S. 916 (1977).

[13] 431 U.S. 105 (1977).

[14] *Id.* at 108. The Illinois statute authorized the Secretary of State to revoke a driver's license without a hearing. Under the Illinois statute, the Secretary of State was authorized to suspend or revoke a driver's license without a preliminary hearing upon a showing by official records or other evidence that the driver's conduct fell into one of eighteen categories, one of which was that the driver had been repeatedly convicted of traffic violations. Pursuant to this provision, the Secretary issued a regulation mandating revocation in case where a driver's license had been suspended three times within a ten-year period. The statute further provided for immediate written notice of suspension or revocation to the driver and provided for the scheduling of an evidentiary hearing, to be held within twenty days after receipt of a written request. In a case of hardship, a restricted driving permit could be issued. ILL. REV. STAT. c. 95½, § 6-206(a)(2) (Smith-Hurd 1979).

[15] Montrym v. Panora, 438 F. Supp. 1157 (D. Mass. 1977). The Illinois driver in Dixon v. Love had already had the opportunity for a full judicial hearing in connection with each of the traffic convictions on which the revocation was based. Thus, the only question for the Court was the timing of the hearing. After considering the minimal risk of an erroneous revocation (based on the prior court convictions), the strong state interest in highway safety, and the nature of the

On appeal, the Supreme Court reversed. Employing a three-pronged balancing test [16] to determine whether due process required a hearing prior to suspension of the license,[17] the Court in a five-to-four decision concluded that *Love* controlled.[18] It upheld the Massachusetts statute, thereby permitting a summary suspension of the driver's license pending the outcome of a prompt post-suspension hearing.[19]

In analyzing the various interests involved,[20] the Court first addressed the effect of the deprivation on the individual. While acknowledging that a ninety-day loss of a license was not unsubstantial,[21] the Court nevertheless found that a ninety-day suspension was less burdensome than the one sanctioned in *Love*.[22] The Court noted that the Massachusetts statute minimized the delay inherent in the Illinois procedure upheld in *Love*.[23] A Massachusetts driver could obtain an immediate post-suspension hearing "simply by walking into one of the Registrar's local offices and requesting a hearing." [24]

Turning to the second factor relevant to determining whether the Massachusetts statute satisfied due process, the Court discussed the risk

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individual interest affected by the revocation, the Court held that a post-deprivation hearing was sufficient. 431 U.S. at 113-14.

[16] The test, as enunciated in Mathews v. Eldridge, 424 U.S. 319 (1976), required consideration of the following factors:

> First, the private interest that will be affected by the official action; second, the risk of an erroneous deprivation of such interest through the procedures used, and the probable value, if any, of additional or substitute procedural requirement would entail.

*Id.* at 335. The *Montrym* Court stated that:

> Both cases [*Dixon* and *Montrym*] involve the constitutionality of a statutory scheme for administrative suspension of a driver's license for statutorily defined cause without a pre-suspension hearing. In each, the sole question presented is the appropriate timing of the legal process due a licensee. And in both cases, that question must be determined by reference to the factors set forth in *Eldridge*.

443 U.S. at 11.

[17] Whether a driver's license is referred to as a "right" or a "privilege," it is a property interest that merits due process protection. Bell v. Burson, 402 U.S. 535, 539 (1971). *Montrym* addressed the issue of what process was due in connection with seizure of this property interest.

[18] 433 U.S. at 11.

[19] *Id.* at 19. The Court failed to address the question of whether, independent of the notice of suspension required by c. 90, § 24(1)(g), the constitution mandated *notice* of the right to an immediate hearing before the Registrar. *Id.* at 10 n.6.

[20] See note 16 *supra*.

[21] 433 U.S. at 12. The Court acknowledged that the state "will not be able to make a driver whole for any personal inconvenience and economic hardship suffered by reason of any delay in redressing an erroneous suspension through post-suspension review procedures." *Id.* at 11 (citing Dixon v. Love, 431 U.S. at 113).

[22] *Id.* at 11.

[23] *See* note 16 *supra*.

[24] 443 U.S. at 13.

of error inherent in the Massachusetts scheme.[25] Noting that the "Due Process Clause . . . does not mandate that all governmental decision-making comply with standards that assure perfect error-free determinations,"[26] the Court concluded that the risk of error inherent in the Massachusetts scheme was not sufficiently great to require a hearing prior to suspension.[27] In arriving at this conclusion the Court placed particular emphasis on the ability of a police officer to identify a driver operating under the influence and on the requirement that the refusal to take the breathalyzer be witnessed by two police officers.[28] The Court stressed the Registrar's obligation to review the police report for errors prior to suspension, and to ensure that all statutory requirements have been met.[29]

Addressing the governmental interests at stake,[30] the Court concluded that, as in *Love*, the state's interest in preserving the safety of its highways fully supported adoption of summary procedures.[31] It found that summary procedures not only deterred drunken driving, but also contributed to highway safety by removing drunk drivers from the highways. The Court noted further that the procedures helped the state obtain needed evidence by encouraging drivers to take the breathalyzer

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[25] See note 16 *supra.*

[26] 433 U.S. at 13. (citation omitted). The Court commented that

> when prompt post-deprivation review is available for correction of administrative error, we have generally required no more than that the pre-deprivation procedures used be designed to provide a reasonable reliable basis for concluding that the facts justifying the official action are as a responsible governmental official warrants them to be.

*Id.* (citations omitted).

[27] *Id.* at 14.

[28] *Id.* The Court noted that the trained and experienced police officer making the arrest and reporting the refusal to submit to a breathalyzer would have little occasion to misrepresent the "historical facts." *Id.*

[29] *Id.* at 16.

[30] Recognition of the governmental interests involved is the third prong of the *Eldridge* test. See note 16 *supra.*

[31] *Id.* at 19. The interest in public safety, according to the Court, distinguished this case from Bell v. Burson, 402 U.S. 535 (1971), on which the district court relied. *Id.* In Bell, the Court struck down a Georgia statute which required suspension of an uninsured motorist's motor vehicle registration and driver's license if the driver was involved in an accident and failed to post security to cover the amount of the damages claimed. Although an administrative hearing was held prior to the suspension, the statute excluded consideration if the motorist's fault in the accident. The Supreme Court held that due process prohibited the state from eliminating consideration of liability in the prior hearing where "the statutory scheme makes liability an important factor in the State's determination to suspend a license." 402 U.S. at 541. In analyzing *Bell*, the Court in *Love* emphasized the important public interest in preserving safety of the roads and highways. In contrast, in *Bell* the " 'only purpose' of the Georgia statute . . . was 'to obtain security from which to pay any judgments against the licensee resulting from the accident.' " 431 U.S. at 114 (quoting Bell v. Burson 402 U.S. at 540).

test.[32] According to the Court, these interests were not undercut by the state's decision not to suspend the licenses of those drivers who chose to take, and who failed, the breathalyzer test.[33] The Court also noted the state's strong interest in avoiding the fiscal and administrative burdens associated with providing a pre-suspension hearing.[34] The Court concluded that these interests outweighed those advanced by Montrym and justified summary suspension of Montrym's license pending a post-suspension hearing.[35]

The dissenting opinion, which paid much greater attention to past precedents and to the facts, argued that the failure of the state to afford Montrym an opportunity to be heard prior to suspension of his license "offends the concept of basic fairness that underlies the constitutional due process guarantee."[36] The dissenters maintained that case law established "a presumptive requirement of notice and a meaningful opportunity to be heard *before* the State acts finally to deprive a person of his property."[37] The dissent insisted that the need for a pre-deprivation hearing was increased where, as under the Massachusetts statute, a wrongful suspension could only be shortened but not undone.[38] Furthermore, the dissenters maintained that the Court's decision in *Love* did not create an exception to the presumption in favor of prior hearings.[39] The dissent also contended that the state's interest in protecting

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[32] 433 U.S. at 18. The Court said the availability of a "presuspension hearing would substantially undermine the state interest in public safety by giving drivers significant incentive to refuse the breathalyzer test . . ." and would lead to more hearings from which would in turn "impose a substantial fiscal and administrative burden on the Commonwealth." *Id.*

[33] *Id.* at 19. "A state plainly has the right to offer incentives for taking a test that provides the most reliable form of evidence of intoxication for use in subsequent proceedings. . . . "[T]he Commonwealth is not required by the Due Process Clause to adopt an 'all or nothing' approach . . ." to the drunk driving problem. *Id.*

[34] *Id.* at 18.

[35] *Id.* at 19.

[36] *Id.* at 21.

[37] *Id.* at 20. The dissent cited Memphis Light, Gas, & Water Div. v. Craft, 436 U.S. 1, 16, 19 (1978); Fuentes v. Shevin, 407 U.S. 67, 82 (1972); Bell v. Burson, 402 U.S. 535, 542; Boddie v. Connecticut, 401 U.S. 371, 378 (1971); Mullane v. Central Hanover Trust Co., 339 U.S. 306, 313 (1950).

[38] 443 U.S. at 21. "[W]hen adjudicative facts are involved, when no valid governmental interest would demonstrably be disserved by delay, and when full retroactive relief cannot be provided, an after-the-fact evidentiary hearing on a critical issue is not constitutionally sufficient." *Id.* 21-22.

[39] *Id.* at 22. The dissent distinguished *Love*, where the suspension was based on records of traffic convictions, from the factual issues involved in the encounter between the police and the driver in *Montrym*. The driver in *Love* had already been convicted of three traffic violations. Thus, he in fact had had a pre-suspension hearing in which the relevant facts could be contested. Montrym, on the other hand, had no pre-suspension hearing in which to contest the assertions of the police.

the public from unsafe drivers would not be hampered by the delay necessitated by a prior hearing.[40] The purported interest in summary removal of drunken drivers from the road was belied by the state's refusal to exclude from the road those drivers who took the breathalyzer test and failed.[41] The summary suspension procedure, rather, was "obviously premised not on intoxication, but on noncooperation with the police." [42]

Finally, the dissent questioned the sufficiency of the post-suspension hearing afforded by the statute.[43] It pointed out that the suspension notice sent to a driver failed to mention the opportunity of a hearing before the Registrar.[44] It noted further that the post-suspension hearing before the Registrar was an illusory protection, because the Registrar lacked authority to review any legal issue in the dispute.[45] Hence, the dissent concluded that the post-deprivation hearing provided in the commonwealth's summary suspension statute was constitutionally insufficient.[46]

The constitutionality of another motor vehicle statute, which raised due process issues similar to those in *Montrym,* was presented to the Massachusetts Appeals Court in *Bane v. City of Boston.*[47] In *Bane,* plaintiff challenged the validity of Boston's "tow and hold" law, which authorized the police to tow vehicles with five or more outstanding parking tickets and to hold those vehicles until the tickets were paid or bond was posted.[48] Bane claimed that the seizure of his car pursuant

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*Id.* Accordingly, the dissent suggested that the case was more closely analogous to Bell v. Burson, which required a pre-suspension hearing on all statutory conditions precedent to suspension. *Id.* at 23. See note 31 *supra.*

[40] *Id.* at 27. The dissent rejected as a justification the administrative costs that would result from a pre-suspension hearing requirement. It pointed out that the Court has routinely noted that the fourteenth amendment "recognizes higher values than 'speed and efficiency.'" *Id.* (citation omitted).

[41] *Id.* at 26.

[42] *Id.*

[43] See note 9 *supra.*

[44] 443 U.S. at 27 n.4. See note 9 *supra.* The dissent speculated that Montrym may not have sought a hearing before the Registrar simply because he was unaware that he had such a right. The dissent noted that "notice of a procedural right is itself integral to due process." *Id.* at 27-28 (citing Memphis Light, Gas & Water Div. v. Craft, 436 U.S. 1, 13-15 (1978)).

[45] 443 U.S. at 27-29.

[46] *Id.* at 21-22.

[47] 1979 Mass. App. Ct. Adv. Sh. 2116, 396 N.E.2d 155. The suit sought declaratory relief pursuant to G.L. c. 231A.

[48] Acts of 1929, c. 263, § 2, *as amended* through Acts of 1973, c. 253, BOSTON, MASS., CODE c. 9, § 210 (1975) provides:

> [A] motor vehicle may in any calendar year, if in such year and in the calendar year immediately preceding five or more notices in the aggregate have been affixed to said vehicle as provided in said section twenty C [G.L. c. 90]

to the statute violated the due process clause insofar as it failed to afford him notice and hearing prior to seizure.[49] Relying on the interpretation of the statute given by a federal district court in *Bricker v. Craven*,[50] the Appeals Court rejected plaintiff's contention. In *Bricker*, the court had concluded that the statute was supported by a sufficient governmental interest, "that the procedure was reasonable with a factual basis supporting the action, and that a judicial hearing prior to a *final* deprivation of property was available."[51] The court rejected plaintiff's contention that *Bricker* had overstated the governmental interest in alleviating traffic problems and in ensuring payment of parking fines.[52]

Thus, during the *Survey* year, courts rejected two due process challenges to Massachusetts statutes permitting the summary seizure of a motorist's property. In *Mackey v. Montrym*, the United States Supreme Court upheld the Massachusetts statute mandating summary suspension of a driver's license when the driver has refused to take a breathalyzer test following his arrest for drunken driving. In *Bane v. City of Boston* the Massachusetts Appeals Court upheld Boston's "tow and hold" law, which permits the police to tow vehicles with five or more outstanding parking tickets. Both of these decisions assure that law enforcement agencies will be permitted to effect certain summary seizures of a motorist's property as a method of enforcing motor vehicle regulations.

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and have not been disposed of, be removed to, and stored in, a convenient place in the city until all charges lawfully imposed for such removal and storage have been paid and due notice has been received that either the fines provided in such notices have been paid or security for the payment thereof has been deposited.

[49] 1979 Mass. App. Ct. Adv. Sh. at 2120-21, 396 N.E.2d at 157.

[50] 391 F. Supp. 601 (D. Mass. 1975).

[51] *Id.* at 1979 Mass. App. Ct. Adv. Sh. at 2119-20, 396 N.E.2d at 157 (emphasis added).

[52] *Id.* at 2120, 396 N.E.2d at 157.