Chapter 11: Constitutional Law

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PART II

Public Law

CHAPTER 11

Constitutional Law

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§11.1. Commission on constitutional revision. The Constitution of Massachusetts, adopted in 1780, is the oldest written organic law extant. Over the years, however, it has been amended some 89 times, and some of the amendments have been themselves amendments, or even re-amendments, of earlier amendments. In consequence, the reader must wade through a tangled mass of verbiage before he is able to determine what is the presently operative language of the instrument. The Constitutional Convention of 1917 undertook a rearrangement of the Constitution, and its recommendation was accepted by popular vote, but an advisory opinion1 and a decision2 of the Supreme Judicial Court rendered the rearrangement nugatory.

In addition to being a cumbersome document, the Constitution contains a number of obsolete provisions, is cast, in part, in unnecessarily archaic language, has at least one probably unconstitutional section,3 and spouts anachronistic rhetoric.4

In 1962, the legislature established a special Commission to make an investigation and study relative to the need for amendment, revision, or simplification of the Constitution.5 The Commission was composed of three senators, five representatives, and eight persons appointed by the Governor. The Commission members were unpaid,

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§11.1. 1 Opinion of the Justices, 233 Mass. 603, 125 N.E. 849 (1920).
3 Mass. Const., Declaration of Rights, Art. IV: "The people . . . shall exercise and enjoy every power, jurisdiction and right which is not, or may not hereafter, be by them expressly delegated to the United States . . . " (emphasis supplied). See McCulloch v. Maryland, 4 Wheat. 316, 4 L. Ed. 579 (U.S. 1819).
4 These matters are catalogued in Shanley, The Problem of Simplifying the Massachusetts Constitution (Bureau of Government Research, University of Massachusetts, 1966).
5 Resolves of 1962, c. 88.
and there was an appropriation of $10,000 to cover Commission expenses for the five years of its existence.

Under the practice which has developed in such mixed commissions, the chairmanship was taken by the senior senator. The Commission held several meetings, and it listened to presentations of views on several pending constitutional amendments. It retained as counsel an attorney well versed in state government and constitutional law, but he was able to serve only on a limited, part-time basis. Counsel gave the Commission a measure of direction by apportioning among the active members (the legislator-members for the most part attended the meetings only sporadically) areas of individual research into currently proposed constitutional amendments, while he prepared a foundation for an overall revision or simplification by revising and updating, with the cooperation of Samuel Eliot Morison, the history of the Constitution which the latter had prepared for the Constitutional Convention of 1917.

In March, 1963, the Commission issued its initial report, which consisted mainly of monographs, euphemistically designated subcommittee reports, prepared by Commission members on the subjects of pending proposed amendments, and an appendix, the revised and updated history of the Constitution. The legislature did not order the report printed, and its only publication was a limited mimeographed edition, issued by the Commission.

The original chairman failed of re-election to the Senate in November, 1962, and he retired from the Commission. In accordance with protocol, he was succeeded by the senior senator. During 1963 and 1964 a few desultory meetings of the Commission were held, but the only tangible outgrowth of the Commission's existence was a poll, taken by mail, indicating approval or disapproval by Commission members of proposed constitutional amendments passed by joint sessions of the legislature and subject to popular referendum in the election of November, 1964. The results of the poll were published by the Secretary of the Commonwealth as a part of his pamphlet of information to voters.6

The Commission met in November, and again in December, 1965. The members present (less than a quorum) tentatively drafted proposed amendments looking to accommodation of the right of free petition to the promotion of legislative efficiency. Looking, however, to the overall problem of constitutional revision or simplification, the members concluded that as structured by its enabling legislation, the Commission did not have adequate resources for the detailed research and drafting necessarily entailed in a project of revision or simplification. Suggested recruitment of volunteer researchers has not materialized, and the Commission did not meet in 1966. The Commission is scheduled to go out of existence on March 22, 1967.

While the Commission has not made, and likely will not make

significant progress towards the attainment of its statutory goal, its experience may well serve to focus sympathetic attention upon proposals for continuing constitutional revision commissions.⁷ It would doubtless be the better part of wisdom to have such a Commission broadly based, as is the present Commission, which contains legislators, persons who have been elected to executive office, and private citizens. It would also probably be desirable for members to serve without compensation, as do the the present members. But it is highly important that the Commission be adequately financed, so that it can have the assistance of a competent, permanent, full-time director, with a sufficient research and secretarial staff. A Commission so constructed would be in excellent position to advise the legislature or constitutional convention in their dealings with constitutional amendment or revision, and to inform the electorate in referenda upon such matters.

§11.2. Obscenity: Retroactive application of constitutional doctrine. A year ago the Supreme Judicial Court held¹ that the book, Memoirs of a Woman of Pleasure, by John Cleland (popularly known by its subtitle, “Adventures of Fanny Hill”), was obscene within the meaning of the statute² which is held to cover “all material that is obscene in the constitutional sense.”³ All of the justices agreed that the book fell within the so-called Roth⁴ criterion in that (a) the dominant theme of the material taken as whole appeals to a prurient interest in sex, and (b) it is patently offensive because it affronts contemporary community standards relating to the description or representation of sexual matters. The Court, however, divided over the issue whether the book had “redeeming social importance.” The majority refused to equate “minimal literary value” with the requisite “social importance.”

During the 1966 Survey year the Massachusetts decision was reversed by the Supreme Court of the United States.⁵ There was no opinion of the Court. Instead, Justice Brennan wrote an opinion for himself, Chief Justice Warren and Justice Fortas. Justice Douglas wrote a concurring opinion, and Justices Black and Stewart concurred for reasons set forth in their dissenting opinions in companion cases.⁶ The remaining three Justices dissented in three separate opinions.

² G.L., c. 272, §§28C, 28E, 28F.
Justice Brennan's opinion would base reversal on the ground that a court may not measure degrees of social value in determining whether a publication is constitutionally obscene. Borrowing from a generalization in his opinion of the Court in Roth, he wrote: "A book cannot be proscribed unless it is found to be utterly without redeeming social value. This is so even though the book is found to possess the requisite prurient appeal and to be patently offensive." Thus, he concluded, it was error to base condemnation of the book on the ground that it has some, but not enough, social value. (Justice Clark, in dissent, pointed out that the trial court specifically found that the book is utterly without redeeming social importance, and that its finding was not overturned on appeal. The point is of doubtful merit, since the statute provides for an in rem proceeding in equity against the book. It is settled equity practice that a trial judge's findings are subject to de novo appraisal on appeal, and it is quite irrelevant that the reviewing court failed, for the wrong reason, to exercise its powers of revision.)

Justices Black and Douglas concurred in the result, basically upon the ground that the Constitution will not tolerate any limitation upon publication, and Justice Stewart concurred on the ground that the book does not constitute "hard core pornography" (an undefined term) which alone, he said, can be suppressed.

While "Fanny Hill" was pending in the Supreme Court, the Supreme Judicial Court heard argument in another obscenity case, a proceeding against "Naked Lunch," by William Burroughs. The book consists of an unrelieved flow of indecently vulgar language, representing the paranoid ravings of a narcotics addict. After argument, the case was held under advisement, in the expectation of "clarification" of the applicable law by the United States Supreme Court.

After the decision in "Fanny Hill" and the companion cases in the Supreme Court, a divided Supreme Judicial Court decided that "Naked Lunch" was not obscene. Assuming, without articulation of the point, that the prurient-interest-in-sex test was satisfied because the book "may appeal to the prurient interest of deviants and those curious about deviants," and observing that it is "grossly offensive," the Court addressed itself to the question of redeeming social value. As to this, the majority, in a per curiam opinion said:

7 354 U.S. 476, 484, 77 Sup. Ct. 1304, 1309, 1 L. Ed. 2d 1498, 1507 (1957). The language there was: "But implicit in the history of the First Amendment is the rejection of obscenity as utterly without redeeming social importance."

8 383 U.S. 413, 419, 86 Sup. Ct. 975, 978, 16 L. Ed. 2d 1, 6 (1966) (emphasis in original).

9 Id. at 443, 86 Sup. Ct. at 990, 16 L. Ed. 2d at 19-20.

10 G.L., c. 272, §§28C, 28E, 28F.


14 Ibid.
. . . a substantial and intelligent group in the community believes the book to be of some literary significance. Although we are not bound by the opinions of others concerning the book, we cannot ignore the serious acceptance of it by so many persons in the literary community. Hence, we cannot say that "Naked Lunch" has no "redeeming social importance in the hands of those who publish or distribute it on the basis of that value." See the Memoirs case at p. 421.

Justices Reardon and Kirk sharply disagreed. They argued that the matter of redeeming social importance was one of fact, to be determined by the court on the basis of evidence (presumably, including the book itself). Accordingly, the argument continued, the trier of fact may make his own evaluation of the testimony of even expert witnesses both in the light of other evidence and of the testimony of each other.

This reasoning does not meet squarely what appears to be the point made by the majority. This is, that literary importance, or social value, is essentially a subjective thing, and the basic question of fact is, not whether the work has demonstrable artistic merit, but whether people whose opinions command respect, if not agreement, think it has such merit. Hopefully, the Supreme Court of the United States will, in time, supply guide lines to assist courts in fleshing the bones of the phrase, "redeeming social value."

Justice Reardon disagreed with his brethren on another point. The Supreme Court, in a case decided along with the Fanny Hill case, ruled that there might be a fourth ingredient of legal obscenity. Presenting or advertising a book in a manner pandering to prurient interest may be considered on the issue of obscenity. In the language of the United States Supreme Court:

Where an exploitation of interests in titillation by pornography is shown with respect to material lending itself to such exploitation through pervasive treatment or description of sexual matters, such evidence may support the determination that the material is obscene even though in other contexts the material would escape such condemnation.\(^15\)

In Fanny Hill, the United States Supreme Court did not consider this ingredient of obscenity, because the record was silent concerning the manner of advertising and distributing the book. Mr. Justice Brennan, however, took occasion to state that the decision in the case would not necessarily preclude a finding of obscenity of the book if it should be shown that the book was "commercially exploited for the sake of prurient appeal, to the exclusion of all other values."\(^16\)


\(^{16}\) 383 U.S. 413, 420, 86 Sup. Ct. 975, 978, 16 L. Ed. 2d 1, 7 (1966).
In *Naked Lunch*, all of the participating justices (Chief Justice Wilkins did not sit) were agreed that the book might well be found obscene in the event of a showing that the book is advertised or distributed in a manner to exploit it for the sake of its possible prurient appeal. The majority, however, made the qualification that the exploitation must be shown to take place after March 21, 1966, the date of the United States Supreme Court's announcement of the fourth ingredient of obscenity. Justice Reardon would reject the qualification. He felt that, particularly since the case was actually pending when the Supreme Court decisions came down, evidence of promotional activity prior to the date of the decisions was just as relevant as evidence of activity subsequent to that date.

This touches upon one of the most pressing issues current in the field of constitutional law. When a Court formulates a "new" rule of constitutional doctrine, to what extent is it "retroactive?" On the premise that the rule was always embedded in the Constitution and was simply "discovered" by the justices, logic would seem to dictate its applicability to past, as well as to future conduct. The premise of course, is debatable, and constitutional adjudication frequently involves more than logic.

 Courts have traditionally claimed power to rule, as a matter of policy, that a newly proclaimed doctrine will be applied prospectively only.\(^{17}\) The doctrine that an indigent defendant must be given equal access to a trial transcript for appeal purposes\(^ {18}\) was given retrospective application,\(^ {19}\) but the doctrine that a state conviction may not be founded on illegally obtained evidence\(^ {20}\) was given only limited retrospective application.\(^ {21}\) In turn, the doctrine that an arrested person must be warned in the police station of his right to counsel and his right to remain silent\(^ {22}\) was given no retrospective application beyond the cases in which the doctrine was announced.\(^ {23}\) These, and cases like them,\(^ {24}\) were cases in which newly announced doctrines enlarged individual rights. The problem of retroactivity in a case like *Naked Lunch* is complicated by the fact that the new doctrine announced in *Ginzburg* is restrictive of individual freedom, so that its retrospective application may have ex post facto overtones.


Finally, in this context, it is noteworthy that the legislature has included in its prohibition of distribution of literature to minors not only that which is obscene, but also that which is "harmful to minors."25 This is described as material which appeals predominantly to the prurient, shameful, or morbid interest of minors, is patently contrary to prevailing standards of adults in the community as to suitable material for minors, and is utterly without redeeming social importance for such minors. The italicized words (not so emphasized in the statute) suggest a number of constitutional problems, in addition to the general question of legislative power to establish different standards of obscenity for children and for adults.26

§11.3. Justiciability: Judicial abstention. In two cases decided during the 1966 Survey year the Supreme Judicial Court dealt with the question of justiciability of the issues sought to be presented.

Bane v. Superintendent of Boston State Hospital1 was a mandamus proceeding by one who had been involuntarily committed to the institution. The petitioner sought an order under which he would be permitted to examine and copy the institution's records of his admission and detention in 1963. The petition was drawn in reliance upon a statute2 which provided for judicial orders for inspection and copying of such records. A later statute,3 however, provided that a patient or his attorney would have no right to examine or copy records of a hospital or clinic under the control of the Department of Mental Health. The defendant institution was such a hospital. The petitioner contended that the latter amendment did not bar his right because it was enacted in violation of a Senate Rule forbidding the introduction of non-germane matter under color of an amendment to a pending bill. The Court refused to go into the merits of the contention, saying: "[T]he statute cannot be thus impugned in a court of law."4

The Court here seemed to have applied the salutary principle that one branch of the government must show a decent respect for the freedom of a co-ordinate branch to carry on its business. The point is well illustrated by Field v. Clark,5 cited by the Court in the Bane case. There, an Act of Congress was challenged on the ground, among others, that the bill had not received the requisite pluralities of affirmative votes in the two Houses. Its passage had been certified,


2 G.L., c. 111, §70, as amended by Acts of 1945, c. 291.
5 143 U.S. 649, 12 Sup. Ct. 495, 36 L. Ed. 294 (1892).
however, by the Speaker and the President of the Senate, and the
United States Supreme Court ruled that these certificates were con-
sclusive, and that it would not be proper judicial action to make an
independent determination of their accuracy. In the present case, the
Court seemed to say, in substance, that it is for the Senate, not the
courts, to make the final determination as to compliance with its rule
on the admissibility of a bill.

It should be noted, however, that there are limits to the deference
which the doctrine of judicial abstention requires to be paid to the co-
ordinate branches. This was exemplified in United States v. Smith,6
which involved an interpretation by the United States Senate of one
of its own rules. The Senate determined that, under its rules, it could
reconsider its approval of an executive nomination and reject the
nominee, even after it had notified the President of its approval, and
the President had completed the appointment. In a case brought by
the Senate to try the appointee's title to the office, the Court ruled that
it was not bound by the Senate's interpretation of the Senate rule, but
that it was free to make its own interpretation. This case is distin-
guishable, on several points, from the Bane case, but it is mentioned
as a caveat against a too-doctrinaire invocation of the doctrine of
judicial abstention from issues involving legislative procedure.

The other case holding that the tendered issue was non-justiciable
was United Kosher Butchers Association v. Associated Synagogues of
Greater Boston, Inc.7 The corporate plaintiff had been accepted in the
greater Boston area by most of the kosher meat stores and the gener-
ality of the consuming public desiring to purchase kosher meat and
poultry, as the authoritative certifier that "all the Kashruth require-
ments have been thoroughly observed." The plaintiff's certifications
were supervised by a respected rabbi. The defendant corporation, in
consultation with a group of orthodox rabbis, certified caterers in the
area as authentic purveyors of kosher food.

Beginning in 1960, the defendant refused to certify caterers who
bought kosher meat and poultry from meat stores certified by the
plaintiff unless the stores would submit to supervision by the defen-
dant's rabbinical committee. In consequence, so it was alleged, many
caterers withdrew their patronage from stores supervised by the
plaintiff, and some of the stores withdrew from the plaintiff's super-
vision. The plaintiff's bill charged that the defendant's conduct
constituted an illegal interference with the plaintiff's contractual
relations. The trial judge sustained a demurrer and, on his subsequent
report,8 the order was affirmed, with directions to dismiss the bill.

On the premise that civil courts are not competent to resolve issues
which are basically controversies over ecclesiastical law, the Supreme
Judicial Court declined to assume jurisdiction. While the plaintiff was

6 286 U.S. 6, 52 Sup. Ct. 475, 76 L. Ed. 954 (1932).
7 349 Mass. 595, 211 N.E.2d 332 (1965), also noted in §4.10 supra.
8 G.L., c. 214, §30.
faced with the alternatives of preservation or loss of materialistic, advantageous economic relations, the "central issue"9 was: Who, under Jewish law or practice, has authority to enforce Jewish dietary laws, to determine whether foods are kosher, and to determine the procedures for administration of the dietary laws? The plaintiff and the defendant each claimed such authority, independent of the other. These conflicting claims, the Court felt, may be resolved only by Jewish law, and such resolution must be made, if at all, elsewhere than in the civil court.

This decision, of course, carries constitutional overtones, but it is not based, at least expressly, upon constitutional imitations. The situation here was quite different from that in Kedroff v. St. Nicholas Cathedral,10 which invalidated a statute transferring jurisdiction of New York property of the Russian Orthodox Church from the Patriarch in Moscow to an Archbishop chosen by the Church's American hierarchy. This was held to be a violation of the First Amendment's emanation in the Fourteenth. The New York Court of Appeals, however, did not feel that this posed a barrier to arrival at the same result by judicial decree.11 The constitutional point remains open, since the United States Supreme Court denied a motion for leave to file a mandamus petition to compel the Court of Appeals to obey the Supreme Court's mandate in Kedroff.12

The decision in the present case does not necessarily mean that the civil courts in Massachusetts must eschew decision in all cases which involve resolution of issues of ecclesiastical law or custom. The Supreme Judicial Court has not hesitated to perform its function of determining the applicability of a statute13 or of a written instrument, such as a will,14 in which the relevant criterion of applicability is the status of an individual as a member of a religious body, a matter determined by church law or custom.

§11.4. Interstate commerce: State regulation. The Supreme Judicial Court was divided in a case involving the question of the scope of state power to regulate interstate commerce. Commonwealth v. New York Central Railroad Co.1 arised under the statute2 which makes it unlawful for a railroad train to obstruct a public way for more than five minutes at one time.

The railroad had, at its classification yard in Framingham, Massa-

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2 G.L., c. 160, §151.
chusetts, freight cars shipped in over its lines from Detroit and Flint, Michigan, and its practice was to move these cars, in trains of from five to fifty cars, from the classification yard to its own unloading yard or to the General Motors assembly plant, both in Framingham. The cars contained automobiles, some of which were consigned to the General Motors plant, the others to automobile dealers in the northeastern part of the United States. The train in the present case consisted of 33 cars, and it took seven minutes to cross a public way in Framingham. It was made to appear that reduction of the maximum train size to 15 or 20 cars (which, inferentially, would involve obstruction of public ways for less than five minutes) would result in "a much more inefficient and costlier operation." It was further made to appear that the present case was one of some 30 in which the railroad was charged with unlawful obstruction of the public ways in Framingham.

The first question considered by the Court was one of statutory interpretation, viz., whether the statute covered obstructions by moving trains, or only obstructions by standing trains. The majority ruled that obstruction by the defendant's moving train came within the meaning of the statute, and then went on to sustain the statute, so construed, as constitutionally valid. Justices Spalding and Cutter would interpret the statute as applicable only to obstructions caused by standing trains, as they felt that the interpretation of the majority would leave the statute unconstitutional as applied to obstructions caused by trains moving in interstate commerce, as, concededly, the defendant's trains were.

The division in the Court was focused upon a difference in the interpretation of Southern Pacific Co. v. Arizona, in which the Supreme Court of the United States invalidated a state train-length-limit law on the ground that it constituted an undue burden on interstate commerce. The majority distinguished Southern Pacific on the ground that the record there showed that the Arizona law operated to disrupt railroad operations all the way from Los Angeles to El Paso, whereas here the only impact of the statute upon the makeup of trains was strictly local. The minority argued that Southern Pacific governed, because the statute, as interpreted by the majority, would be as applicable to trains actually crossing state lines as to the local switching operation here involved. Further, the increased operational expense occasioned by application of the law is itself an unwarranted burden upon commerce.

The problem here is basically one which has been vexing judges for over a century. In Cooley v. Port Wardens of Philadelphia, the Supreme Court "solved" the problem that had been posed from the time Daniel Webster raised it in argument in Gibbons v. Ogden. Does the

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5 12 How. 299, 13 L. Ed. 996 (U.S. 1851).
6 9 Wheat. 1, 6 L. Ed. 23 (U.S. 1824).
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Commerce Clause, of its own force, Congress not having spoken, deprive the states of power to regulate commerce among the several states? The \emph{Cooley} response was: It all depends. Subjects of the commerce power which are national in nature, or which require uniform regulation, may be controlled by Congress alone, but matters of local concern are subject to state action until Congress intervenes.

This appealing apothegm has provided minimal assistance in the solution of concrete problems of regulation in a highly industrialized, complex society. The slow-down-trains-at-grade-crossing laws provide an illustration. In \emph{Southern Railway Co. v. King}, it was argued that such a law, as applied to a train moving in interstate commerce within the state, was unconstitutional on its face. The contention was rejected because the United States Supreme Court was not persuaded that the law was not an appropriate police regulation, imposed in the interest of public safety. Some time afterwards, however, the identical law was held invalid when it was made to appear on the record that there were 124 grade crossings along 123 miles of railroad line, and that compliance with the law by the railroad's interstate trains would require a train to take ten and one-half hours for a run scheduled for four hours and thirty minutes.

It is hardly practicable to decide in a vacuum whether a given law, in its operation, is essentially a local police regulation or a regulation of a subject national in scope. Ideally, when the issue comes up, there should be a fully developed factual record, bringing out, in a realistic way, the impacts the law in question actually has, both by burden upon those engaged in commerce, and by way of promotion of interests of genuinely local concern. This, of course, does not guarantee an unchallengeable resolution of the issue; the dissents in \emph{Southern Pacific} indicate that differences of result are to be anticipated even when all facts are before the courts, since the record in that case completely detailed the background and the practical operation of the law. The advantage of such a record, however, is that it affords a basis for the best considered judgment as to how the challenged law fits into the constitutional scheme of federalism. It is regrettable that the Supreme Judicial Court did not have the benefit of this type of record in the present case.

§11.5. Miscellaneous decisions. The dogma of non-delegability of legislative power has undergone further erosion. A year ago it was noted in these pages that the Supreme Judicial Court had given a sophisticated reaction to a contention, based upon the traditional doctrinaire formula, delegata potestas non potest delegari, that a grant of broad discretionary powers to the Massachusetts Bay Transportation

\footnotesize{7} U.S. Const. Art. I, §3, cl. 3.  
Authority was invalid. The Court realistically ruled that the Authority was properly given power adequate to the performance of the legitimate function of developing and maintaining a system of mass transportation, particularly when the enabling legislation provided safeguards against gross abuse of the granted power.² During the 1966 Survey year, the Court summarily dismissed another contention that legislative power had been unlawfully delegated.

It is settled Massachusetts law that land held for park purposes may be diverted to other purposes only by legislative permission.³ The Boston Board of Park Commissioners had statutory⁴ control of land in the Chestnut Hill Reservoir area held by the City of Boston for park purposes. A later statute⁵ authorized the Board to convey to the Metropolitan District Commission as much of this land as the city and the Commission might agree to be needed for “recreational” purposes. (It was proposed that the Commission erect an athletic plant for such events as high school track meets. It was assumed that such use of the land would not be for “park purposes”). The Park Board conveyed a parcel of land to the Commission, and a subsequent statute⁶ authorized construction of the athletic facility. In a taxpayers’ suit⁷ to enjoin use of the land for this purpose, the Court tersely rejected the argument that there was an improper delegation of the power to divert land from park to other uses.⁸ It was reasonably clear, argued the Court, that the Legislature had concluded that some of the “park” land could be spared for the “recreational” use, and “[T]he only authority delegated was the right to determine how much of that plot was actually necessary for the development of a center reasonably described in St. 1964, c. 441.”⁹

An interesting question of federalism was, at least tangentially, before the United States Court of Appeals for the First Circuit in Moran v. Bench.¹⁰ The United States Supreme Court has ruled that, for reasons of public policy, federal civil servants are not liable in damages for common law torts committed by them while acting within the scope of their official duties.¹¹ It is not clear to what extent, if at all, Massachusetts law accords such privilege to state employees.¹² It

⁵ Acts of 1959, c. 240.
⁶ Acts of 1964, c. 441.
⁷ As authorized by G.L., c. 29, §63.
⁹ Id. at 618, 215 N.E.2d at 766.
¹⁰ 353 F.2d 193 (1st Cir. 1965).
is, however, clear that state employees acting by virtue or under color of state law are liable in damages for statutory torts committed in violation of the Civil Rights Act. The plaintiff in the Moran case complained that the defendants, officials in the state Registry of Motor Vehicles, had improperly procured, first the suspension, and secondly the withholding of restoration of her motor vehicle operator's license. In opposition to a defense motion for summary judgment, the plaintiff set forth by affidavit that the defendants had "conspired" against her. The Court was of the opinion that this recital of a conclusion, without setting forth facts which would legally establish the existence of a conspiracy such as the statute condemned, was not an adequate way of charging invasion of a federal right. This is probably a sound decision, even on liberal standards of pleading, but is especially appropriate in a case such as the one before the Court, where the invocation of federal law in a field ordinarily covered by state law should be subjected to close scrutiny.

The Supreme Judicial Court seemingly checkmated a political ploy in Commissioner of Administration v. Kelley. The Reorganization Act of 1962, which became effective on January 3, 1963, abolished the Commission on Administration and Finance, and created in its stead the Executive Office for Administration and Finance. Prior to the effective date of the Act, Kelley had been Director of Personnel and Standardization in the Commission. The Reorganization Act created the office of Director of Personnel and Standardization in the Executive Office for Administration and Finance. The Director was to be appointed by the Commissioner, and was to be removable only for cause. The Supplemental Appropriation Act of 1963 provided that the person who was the incumbent Director of Personnel and Standardization on January 2, 1963, was to be deemed to have been transferred to the new Bureau of Personnel and was to continue in office until removed for cause. Kelley continued to perform the functions of the Director and to receive the salary for that office. The Commissioner desired to appoint another person as director but, since Kelley asserted that there was no vacancy in the office, the Commissioner brought suit against him for a declaratory judgment. Kelley


16 Acts of 1952, c. 757, amending several sections of G.L., c. 7.

17 G.L., c. 7, §5, as it stood prior to Acts of 1962, c. 757.


19 Ibid.

demurred to the bill, and the case was reported to the full bench on bill and demurrer.

One ground of demurrer was that there was no actual controversy between the parties. The Court pointed out, however, that the bill tendered the issue of the constitutionality of the Appropriation Act in the light of the separation-of-powers provision\(^\text{21}\) that, "the legislative department shall never exercise the executive . . . powers," and concluded that this constituted a present controversy over Kelley's title to the office. Because the case was up on demurrer, the Court abstained from going to the merits and deciding whether the Appropriation Act purported to "appoint" Kelley to the office and thus usurped a function of the executive department. The reader of the opinion, however, gets the distinct impression that, if the merits had been reached, they would have been resolved in favor of the plaintiff.

A year ago, the statute\(^\text{22}\) providing for summary suspension of state employees who are indicted for action constituting misconduct in office was construed to supersede the procedural provisions on suspensions and removals\(^\text{23}\) contained in the civil service laws.\(^\text{24}\) In *Reynolds v. Commissioner of Commerce and Development*\(^\text{25}\) an employee summarily suspended upon his indictment for larceny sought reinstatement (even though he had been convicted under the indictment) on the ground that the statute, as applied to him, was a law impairing the obligation of contract.\(^\text{26}\) He was a veteran with three years in the service of the Commonwealth, and would thus normally be entitled to notice, agency hearing, review by the Civil Service Commission, and judicial review as conditions of termination of his employment.\(^\text{27}\) The Court, however, assuming, arguendo, that these procedural rights were contractual in nature, pointed out that contractual rights are always subject to be frustrated by proper exercise of the police power. It went on to rule that the Legislature, even after the making of the "contract," could properly avoid "the inappropriate situation of having an official under indictment engaged in the duties of his office."\(^\text{28}\)

Another civil service case, *Luacaw v. Fire Commissioner of Boston*,\(^\text{29}\) presented a rather fine-spun theory of invasion of a constitutional right. After a hearing, notice of which was afterwards found to be defective in that it did not specify the disciplinary action contemplated,\(^\text{30}\) the Fire Commissioner discharged one of his fire-fighters.

\(^{21}\) Mass. Const., Declaration of Rights, Art. XXX.

\(^{22}\) G.L., c. 30, §59.

\(^{23}\) G.L., c. 31, §§43, 45.


\(^{27}\) G.L., c. 30, §9A which refers to G.L., c. 31, §§43, 45.


\(^{30}\) As required by G.L., c. 31, §43.
The latter applied for a hearing de novo before the Civil Service Commission. He did not, within the allotted time, file a complaint with the Commission under G.L., c. 31, §46A, alleging that the Fire Commissioner had failed to follow the statutory removal procedure. When the Civil Service Commission set the matter down for a hearing on the merits, the firefighter first obtained a continuance, and then declined to participate in the hearing, notifying the Commission that he proposed to proceed in the courts by mandamus. The Commission proceeded with the hearing. It is settled law that mandamus is an alternative remedy to a complaint under General Laws, Chapter 31, Section 46A, for vacating discharges on the ground of failure to follow statutory procedures. It is also settled, however, that invocation of the right to hearing on the merits before the Civil Service Commission under General Laws, Chapter 31, Section 43, constitutes a waiver of the right to bring mandamus. In consequence, the firefighter's petition for mandamus was dismissed. He appealed, contending that he had been denied due process of law. Without pausing to consider to what extent a firefighter is constitutionally entitled to the benefit of removal procedures, the Supreme Judicial Court rejected the contention, pointing out that the employee had had in fact an opportunity to be heard. This, of course, adequately answers the due process contention, even though the employee, perhaps inadvertently, waived his opportunity.

A unique constitutional theory was presented by the respondents in Town of Swampscott v. Remis. In 1961 the town meeting voted to take certain land by eminent domain under General Laws, Chapter 80A. The board of selectmen in 1964 adopted an order of intention to take, and subsequently, pursuant to the statute, filed in the Superior Court a petition to establish its right to take the land and to determine damages. The land owner, who remained in possession, opposed the petition on the ground that the statute, by failing to require payment of interest upon the award from the time of the order of intention to take to the time of entry of judgment of condemnation, did not provide just compensation. It was argued that the pendency of the condemnation proceeding made the property unmarketable and effectively prevented the making of profitable improvements, and that, therefore, compensation for these privations, at least in the form of interest upon the amount awarded, is constitutionally required.

It is well settled that the constitutional concept of just compensation is that the property owner is entitled to payment at the time his

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31 Ibid.
33 Beaumont v. Director of Hospitals, 338 Mass. 25, 153 N.E.2d 656 (1958). Somewhat anomalously, by the express provisions of G.L., c. 31, §46A, an application for hearing on the merits under Section 43 may be filed together with a complaint under Section 46A.
35 Pursuant to G.L., c. 80A §2.
36 Id. §4.
property is actually taken, and if he is not, in fact, paid until a later date, he is entitled to interest for the interval.\textsuperscript{38} But, until the public body takes possession or acquires title, the constitutions do not require the payment of compensation to the owner.\textsuperscript{39} In the language of Chief Justice Rugg: "The mere paper taking of land gives no right to damages."\textsuperscript{40} In the present case, the Court ruled that the asserted right to interest was unfounded. The owner is not considered entitled to compensation while he retains his ownership and possession. While the imminence of a taking limits the value of his rights, "[c]hanges in value due to these causes are no more than incidents of ownership in a jurisdiction such as ours where all land is subject to the exercise of the power of eminent domain."\textsuperscript{41}

\textsuperscript{38} "The true rule would be, as in the case of other purchases, that the price is due and ought to be paid, at the moment the purchase is made, when credit is not specially agreed upon. And if a pie-powder court could be called on the instant and on the spot, the true rule of justice for the public would be, to pay the compensation with one hand, whilst they apply the axe with the other; and this rule is departed from only because some time is necessary, by the forms of law, to conduct the inquiry, and this delay must be compensated by interest." Shaw, C.J., in Parks v. Boston, 15 Pick. 198, 208 (Mass. 1834). And see United States v. Creek Nation, 295 U.S. 103, 55 Sup. Ct. 681, 79 L. Ed. 1331 (1935).


\textsuperscript{40} Mayor & Aldermen of Taunton, Petitioners, 290 Mass. 118, 121, 194 N.E. 919, 920 (1935).