

**“JOHN ADAMS MADE ME DO IT”*:
JUDICIAL FEDERALISM,
JUDICIAL CHAUVINISM, AND ARTICLE 14
OF MASSACHUSETTS’
DECLARATION OF RIGHTS****

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“[T]he most important thing about a judge is his philosophy; and if it be dangerous for him to have one, it is at all events less dangerous than the self-deception of having none.”¹

INTRODUCTION

“The question of whether, and under what circumstances, it is legitimate for state courts to reach conclusions under their state constitutions that are more protective of rights than United States Supreme Court decisions is one of the most important questions of American constitutional federalism.”² Whether and when a state’s constitution permits, indeed requires, departure from decisions of the United States Supreme Court lies at the heart of every judicial federalism debate.³

If a state court chooses to depart from United States Supreme Court jurisprudence, what is the basis for departure? Is

* Commonwealth v. Gonsalves, 711 N.E.2d 108, 123 (Mass. 1999) (Fried, J., dissenting).

** The Declaration of Rights consists of thirty articles set forth in Part 1 of the Massachusetts Constitution. MASS. CONST. pt. 1, arts. 1-30.

*** Justice of the Massachusetts Appeals Court. I owe much to the research assistance of my former law clerk, Christopher Lindstrom, Esquire, now of Nutter McLennan & Fish, LLP, 155 Seaport Boulevard, Boston, Massachusetts, and to Maggi Farrell, Esquire, of Boston for her thoughtful comments.

¹ Paul A. Freund, *Social Justice and the Law*, in SOCIAL JUSTICE 93, 110 (Richard B. Brandt ed., 1962).

² Robert F. Williams, *In the Glare of the Supreme Court: Continuing Methodology and Legitimacy Problems in Independent State Constitutional Rights Adjudication*, 72 NOTRE DAME L. REV. 1015, 1018 (1997).

³ Judicial federalism has an inherent “one way” structural limitation. Any state variation must afford greater, not fewer, rights because the United States Constitution is the law of the land, binding on all.

the divergence a principled application of concepts of federalism by the third branch of government? Or is it idiosyncratic choice motivated by disagreement with federal law? Does the decision exemplify judicial federalism or judicial chauvinism⁴?

Most would agree that “it is not a good thing for judges to make law according to their personal prejudices, philosophies and predilections.”⁵ As a discipline against surrender to that temptation, legal and judicial scholars have suggested various methodologies for state constitutional adjudication. Commentators inquire whether a state court’s resort to, and interpretation of, its constitution is in lockstep with that of the United States Supreme Court,⁶ relies on a primary source approach,⁷ an interstitial approach,⁸ or is an expression of dual sovereignty.⁹ Like-

⁴ “Chauvinism: excessive devotion to any cause, esp. zealous and belligerent patriotism or blind enthusiasm for military glory.” WEBSTER’S ENCYCLOPEDIA UNABRIDGED DICTIONARY OF THE ENGLISH LANGUAGE (1989). As used herein, “judicial chauvinism” refers to unreasoned reliance by a state court on its own constitution rather than the United States Constitution as the basis for its decision.

⁵ EDWARD F. HENNESSEY, JUDGES MAKING LAW, at ix (1994).

⁶ The lockstep model generally follows United States Supreme Court statements of federal law when confronting a state constitutional challenge. Lockstepping itself comes in a variety of forms, encompassing “unreflective adoption” of federal law (applying federal analysis without acknowledging the possibility of a different outcome), “reflective adoption” (acknowledging and considering the possibility of a different outcome), and “prospective lockstepping” (announcing that federal and state interpretations will be the same in future cases as well as current). See Robert F. Williams, *State Courts Adopting Federal Constitutional Doctrine: Case-By-Case Adoptionism or Prospective Lockstepping?*, 46 WM. & MARY L. REV. 1499, 1505-09 (2005).

⁷ The primary source, or self-reliant approach, looks to the state constitution, not its federal counterpart, as the primary and independent source of rights. The primacy approach posits that the state court should base its decision on federal law only if a result grounded in state law falls below the standards of the Federal Constitution. See Robert A. Marangola, *Independent State Constitutional Adjudication in Massachusetts: 1988-1998*, 61 ALB. L. REV. 1625, 1629-31 (1998).

⁸ The interstitial, or supplemental, approach looks to federal constitutional principles first, deeming Supreme Court decisions presumptively valid and persuasive guidance even before considering the state constitution. *Id.* at 1630-31. Resort to the state constitution arises only if the federal interpretation is unclear or the federal claim fails. *Id.* at 1631. Under the interstitial model, once the court identifies reasons to diverge, the final question is how to proceed in elaborating the contours of a state constitutional doctrine—reactively (simply tinkering with available federal doctrine) or employing a more self-reliant approach (building independent state constitutional doctrine without reference to the federal doctrine). *Developments in the Law—The Interpretation of State Constitutional Rights*, 95 HARV. L. REV. 1324, 1358 (1982).

⁹ “The dual reliance or dual sovereignty method is one in which . . . the state court looks to both federal and state constitutional law in reviewing a case, even if the court

wise, judicial opinions limn the principles that underlie the determination to construe the state's constitution as affording rights and liberties beyond those guaranteed by the United States Supreme Court.¹⁰

Critics of methodologies that accept the federal rule as the norm challenge the assumption that the Federal Constitution can "somehow authoritatively set the meaning for similar provisions of state constitutions."¹¹ Is not a state judge's view as to what is "reasonable" just as valid as that of a United States Supreme Court Justice—particularly in the judge's own state? "[I]f there are divergent results in federal and state courts, why is one body of law less principled than another? Why should state courts not examine a federal decision to determine whether it is sufficiently persuasive to warrant adoption into state law?"¹² "A state high court has the duty, in interpreting the supreme law of the state, to adopt a reasoned interpretation of its own constitution despite what the United States Supreme Court has said when interpreting a different constitution under different institutional circumstances."¹³ Especially is this true in Massachusetts, where Article 14 (hereinafter art. 14) of the Declaration of Rights served as the model for the Fourth Amendment to the United States Constitution.

Among the first proponents of resort to state constitutional principles in Massachusetts was Justice Herbert P. Wilkins of the Supreme Judicial Court (SJC). In Justice Wilkins' view, the mere fact that the drafters of the United States Constitution chose to replicate the words of the Massachusetts Declaration of

decides the case solely on state constitutional grounds." Marangola, *supra* note 7, at 1631.

¹⁰ See, for example, the primacy or "first things first" approach espoused by Judge Hans A. Linde of the Oregon Supreme Court, or the criteria/categorical analysis undertaken by Justice Handler in *State v. Williams*, 459 A.2d 641 (N.J. 1983), and *State v. Hunt*, 450 A.2d. 952, 965-67 (N.J. 1982) (Handler, J., concurring). The criteria method posits that state constitutional interpretation should only diverge from its federal counterpart for specific reasons, including textual and structural differences, legislative history, preexisting state law, matters of particular state interest or local concern, state traditions, and distinctive attitudes of the state's citizenry. *Hunt*, 450 A.2d at 965-67.

¹¹ *Williams*, *supra* note 2, at 1046.

¹² Shirley S. Abrahamson, *Criminal Law and State Constitutions: The Emergence of State Constitutional Law*, 63 TEX. L. REV. 1141, 1180 (1985).

¹³ *Williams*, *supra* note 2, at 1048.

Rights does not require Massachusetts, when interpreting its constitution, to walk in lockstep with the Supreme Court's interpretation of the Federal Constitution.¹⁴ "Such a view abdicates to the Court in Washington the responsibility of defining what is constitutionally proper; and, as the lack of unanimity on that Court shows, the determination of what is constitutionally appropriate often differs among reasonable people."¹⁵

Part I of this article focuses on the common constitutional DNA in art. 14 of the Massachusetts Declaration of Rights and the Fourth Amendment to the United States Constitution, the early development of the exclusionary rule, and the constitutionalization of criminal procedure in state criminal prosecutions. Part II explores *Commonwealth v. Upton*,¹⁶ the landmark decision of judicial federalism in Massachusetts' law of search and seizure. Part III examines two cases, *Commonwealth v. Gonsalves*¹⁷ and *Commonwealth v. Rodriguez*,¹⁸ as exemplifying the debate whether invocation of art. 14 is a pure policy judgment or a principled application of the SJC's independent authority to analyze its own state's constitution. Part IV surveys several Massachusetts search and seizure decisions to demonstrate that the SJC's methodology for applying state constitutional principles is far from uniform.¹⁹ Part V posits that the methodological label for assessing the resort to state constitutional principles is less important than whether the resulting decision is faithful to the manner in which judges should decide cases and make law.

¹⁴ Herbert P. Wilkins, *Judicial Treatment of the Massachusetts Declaration of Rights in Relation to Cognate Provisions of the United States Constitution, A Comparative Constitutional Analysis*, 14 SUFFOLK U. L. REV. 887, 921 (1980).

¹⁵ *Id.*

¹⁶ 476 N.E.2d 548 (Mass. 1985).

¹⁷ 711 N.E.2d 108 (Mass. 1999).

¹⁸ 722 N.E.2d 429 (Mass. 2000).

¹⁹ Roderick L. Ireland, *How We Do It In Massachusetts: An Overview of How the Massachusetts Supreme Judicial Court Has Interpreted its State Constitution to Address Contemporary Legal Issues*, 38 VAL. U. L. REV. 405, 409 (2004). "[T]he SJC has blended methodologies such as textual analysis, history, common law, structural differences, and comparison to other states." *Id.* "The loudest dissents have arisen when the SJC has attempted to determine constitutional 'standards of decency' for controversial issues." *Id.* at 418.

PART I: COMMON CONSTITUTIONAL DNA

A. *A Brief History Lesson*

The common provenance of art. 14 of the Massachusetts Declaration of Rights²⁰ and the Fourth Amendment to the United States Constitution²¹ bears on their scope. Each derives from the epochal argument of James Otis opposing the issuance of writs of assistance, a form of general warrants that authorized customs officers to enter and search buildings for smuggled goods. Otis considered the writ of assistance the “worst instrument of arbitrary power, the most destructive of English liberty and the fundamental principles of the constitution, that ever was found in an English law book”²² because it placed the liberty of every man in the hands of every petty officer. John Adams enshrined Otis’ defense of privacy in the constitutional prohibition against unreasonable search and seizure—first in art. 14 of the Massachusetts Declaration of Rights (1780), and then in the Fourth Amendment to the United States Constitution (1791).²³

²⁰ Art. 14 states:

Every subject has a right to be secure from all unreasonable searches, and seizures, of his person, his houses, his papers, and all his possessions. All warrants, therefore, are contrary to this right, if the cause or foundation of them be not previously supported by oath or affirmation; and if the order in the warrant to a civil officer, to make search in suspected places, or to arrest one or more suspected persons, or to seize their property, be not accompanied with a special designation of the persons or objects of search, arrest, or seizure; and no warrant ought to be issued but in cases, and with the formalities prescribed by the laws.

MASS. CONST. Pt. 1, art. 14.

²¹ The Fourth Amendment states:

The right of the people to be secure in their persons, houses, papers, and effects, against unreasonable searches and seizures, shall not be violated, and no Warrants shall issue, but upon probable cause, supported by Oath or affirmation, and particularly describing the place to be searched, and the persons or things to be seized.

U.S. CONST. amend. IV.

²² See 2 LEGAL PAPERS OF JOHN ADAMS 140 (L. Kinvin Wroth & Hiller B. Zobel eds., 1965). See also *Jenkins v. Chief Justice of Dist. Court Dep’t*, 619 N.E.2d 324, 330 (Mass. 1993).

²³ See *Harris v. United States*, 331 U.S. 145, 157-58 (1947).

B. One Hundred and Seventy-Five Inglorious Years

For over 175 years, the common lineage of the Fourth Amendment and art. 14 was little more than an historical oddity. The United States Supreme Court and the Massachusetts Supreme Judicial Court took occasional note of the shared ancestry when interpreting their respective constitutions, but to little effect.

Of art. 14, the SJC observed: “With the fresh recollection of those stirring discussions [respecting the writs of assistance], and of the revolution which followed them, the article in the Bill of Rights, respecting searches and seizures, was framed and adopted.”²⁴

Similarly, the United States Supreme Court remarked: “The Fourth Amendment . . . derives from the similar provision in the first Massachusetts Constitution [art. 14 of the Declaration of Rights]. We may therefore look to the construction which the early Massachusetts Court placed upon the progenitor of the Fourth Amendment. . . .”²⁵

The development of the exclusionary rule as a deterrent to violations of the Fourth Amendment or art. 14 did not occur for well over a century. Moreover, the exclusionary rule initially arose in Massachusetts solely as a result of a federal, not state, constitutional mandate.

*C. Development of Massachusetts’ Exclusionary Rule:
From “Three Blind Mice” to Commonwealth v. Upton*

Prior to *Mapp v. Ohio*,²⁶ the exclusion of illegally seized evidence in state prosecutions was not viewed as required by either the Fourth Amendment or art. 14. Indeed, in *Commonwealth v. Dana*,²⁷ which involved a prosecution for violation of a statute prohibiting lotteries, the SJC concluded that the use of illegally seized evidence in state prosecutions was consonant with art. 14. In admitting the offending lottery ticket and other unlaw-

²⁴ *Commonwealth v. Dana*, 43 Mass. 329, 336 (1841).

²⁵ *Harris*, 331 U.S. at 161 (quoting *Dana*, 43 Mass. at 336).

²⁶ 367 U.S. 643 (1961).

²⁷ 43 Mass. 329 (1841).

fully seized evidence, the SJC declared that it simply should not concern itself with how papers offered in evidence were obtained:

Admitting that the lottery tickets and materials were illegally seized, still this is no legal objection to the admission of them in evidence. If the search warrant were illegal, or if the officer serving the warrant exceeded his authority, the party on whose complaint the warrant issued, or the officer, would be responsible for the wrong done; but this is no good reason for excluding the papers seized as evidence if they were pertinent to the issue, as they unquestionably were. When papers are offered in evidence, the court can take no notice how they were obtained, whether lawfully or unlawfully²⁸

Even as the United States Supreme Court began to develop a federal exclusionary rule for Fourth Amendment violations, the SJC continued to apply the no-exclusion principle of *Dana* in all manner of cases, including first degree murder prosecutions.²⁹ Thus, in *Commonwealth v. Wilkins*,³⁰ the SJC admitted the challenged evidence notwithstanding the unlawful manner of its seizure.³¹ Because the Fourth Amendment as yet had no applicability in state prosecutions, the SJC, as ultimate arbiter of the protections to be afforded in state prosecutions, was free to admit such evidence.

D. The Revolution of Mapp v. Ohio: A Merger of Federal Fourth Amendment Exclusionary Principles and State Prosecutions

The Warren Court's decision in *Mapp v. Ohio*³² heralded the federal constitutionalization of criminal procedure. Overruling *Wolf v. Colorado*,³³ *Mapp* extended Fourth Amendment protections (and the exclusionary rule) to state prosecutions as part of Fourteenth Amendment due process. No longer were states free to ignore the legality of a search and seizure in their criminal

²⁸ *Id.* at 337.

²⁹ *Commonwealth v. Wilkins*, 138 N.E. 11, 12 (Mass. 1923).

³⁰ *Id.*

³¹ *Id.*

³² 367 U.S. 643 (1961).

³³ 338 U.S. 25 (1947).

prosecutions. *Mapp* established a floor below which states must not fall in protecting the rights of their citizens, and provided a full fledged exclusionary rule for state violations of the Fourth Amendment.³⁴

1. The Warren Court Expansion

On the heels of *Mapp* followed a number of cases that extended other significant federal constitutional protections (under the Fifth and Sixth Amendments) to state criminal prosecutions: *Gideon v. Wainwright*³⁵ (providing indigents the right to trial counsel in felony cases); *Douglas v. California*³⁶ (providing indigents the right to counsel on appeal); *Escobedo v. Illinois*³⁷ (refusing request for lawyer during interrogation violates Sixth Amendment right to counsel); *Miranda v. Arizona*³⁸ (imposing requirements on custodial interrogations under Fifth Amendment); *Argersinger v. Hamlin*³⁹ (extending right to counsel to any offense, whether petty, misdemeanor, or felony); *Faretta v. California*⁴⁰ (guaranteeing criminal defendant right to self-representation under Sixth Amendment).

2. The Burger/Rehnquist Retrenchment

In law, as in physics, every action produces an equal and opposite reaction. Just as Franklin Delano Roosevelt's court-packing proposal emerged in response to the United States Supreme Court's consistent obstruction of needed social legislation,⁴¹ the Warren Court's constitutionalization of criminal pro-

³⁴ Viewed in broader scale, *Mapp* was part of the larger jurisprudential revolution that began in the United States in the 1930s and extended to all aspects of American life—economic, religious, educational and sexual. For example, no longer were states free to refuse to pay minimum wages mandated by the federal government, see *West Coast Hotel v. Parrish*, 300 U.S. 379 (1937), or to maintain segregated, but equal, education, see *Brown v. Board of Education*, 347 U.S. 483 (1954).

³⁵ 372 U.S. 335 (1963).

³⁶ 372 U.S. 353 (1963).

³⁷ 378 U.S. 478 (1964).

³⁸ 384 U.S. 436 (1966).

³⁹ 407 U.S. 25 (1972).

⁴⁰ 422 U.S. 806 (1975).

⁴¹ See, e.g., *Lochner v. New York*, 198 U.S. 45 (1905), and its progeny, in which the Supreme Court invoked substantive due process to invalidate the legislation. Such deci-

cedure evoked a call for retrenchment and for “strict construction.”⁴² “In response, there emerged a number of closely divided decisions of the United States Supreme Court, such as *Harris v. New York*,⁴³ that answered the call for retrenchment.”⁴⁴

3. Response to the Burger/Rehnquist Retrenchment: The Call for a New Judicial Federalism

While the Warren Court expanded the measure of federal protection for individual rights, there was little need for litigants to rest their claims, or judges their decisions, on state constitutional grounds. However, as the Burger/Rehnquist retrenchment proceeded, Justice William Brennan argued that the trend of recent Supreme Court civil liberties decisions

sions were widely criticized as an impermissible judicial intrusion into legislative value judgments. The furor abated when *West Coast Hotel v. Parrish*, 300 U.S. 379 (1937), and *NLRB v. Jones & Loughlin Steel Corporation*, 301 U.S. 1 (1937), brought an end to “Lochnerism” and ushered in an era of self-imposed restraint by the Supreme Court in its constitutional review of acts of Congress and the state legislatures.

⁴² The tension extended beyond the criminal law to issues such as abortion rights and rights of sexual equality.

⁴³ 401 U.S. 222 (1971).

⁴⁴ In the wake of *Harris* followed numerous other cases that adopted a narrower constitutional view. *See, e.g.*, *United States v. Patane*, 542 U.S. 630 (2004) (failing to give required *Miranda* warnings does not require suppression of fruits of unwarned, but voluntary, statements); *McNeil v. Wisconsin*, 501 U.S. 171 (1991) (holding Sixth Amendment right to counsel “offense-specific”); *California v. Hodari D.*, 499 U.S. 621 (1991) (rejecting *Mendenhall* “free to leave standard” for determining stop in the constitutional sense and substituting “application of physical force” or “show of authority to which subject yields”); *New York v. Harris*, 495 U.S. 14 (1990) (stating exclusionary rule does not bar use of defendant’s statements made outside of home even though taken after arrest inside home in violation of *Payton* rule); *Michigan Dep’t of State Police v. Sitz*, 496 U.S. 444 (1990) (concluding use of highway sobriety checkpoints does not violate Fourth Amendment); *Moran v. Burbine*, 475 U.S. 412 (1986) (holding that, under Fifth and Sixth Amendments, there is no duty to inform suspect of attorneys’ efforts to render legal services when suspect had not personally requested representation); *United States v. Leon*, 468 U.S. 897 (1984) (upholding “good faith” exception to exclusionary rule for reasonable reliance on search warrant later found unsupported by probable cause); *Illinois v. Gates*, 462 U.S. 213 (1983) (rejecting *Aguilar-Spinelli* standard for determination of probable cause and imposing “totality of the circumstances” test); *South Dakota v. Opperman*, 428 U.S. 364 (1976) (permitting warrantless inventory search of closed glove compartment in motor vehicle impounded for traffic violation); *United States v. Edwards*, 415 U.S. 800 (1974) (upholding warrantless seizure of clothing from arrestee ten hours after arrest); *Harris v. New York*, 401 U.S. 222 (1971) (holding statements given in violation of *Miranda* requirement inadmissible in case-in-chief, but admissible to impeach credibility).

should prompt a reappraisal of that strategy.⁴⁵ In what has been described as the “Magna Carta of state constitutional law,”⁴⁶ Justice Brennan opined that state constitutions have been, and continue to be, a source for greater protections than the United States Supreme Court has held are available under the Federal Bill of Rights.

[S]tate courts no less than federal are and ought to be guardians of our liberty. . . . [S]tate courts cannot rest when they have afforded their citizens the full protection of the federal constitution. State constitutions, too, are a font of individual liberties, their protections often extending beyond those required by the Supreme Court’s interpretation of federal law.⁴⁷

PART II: JUDICIAL FEDERALISM IN MASSACHUSETTS:
INVOCATION OF ARTICLE 14 AS A SOURCE OF GREATER RIGHTS
THAN THOSE AFFORDED BY THE UNITED STATES CONSTITUTION

In response to Justice Brennan’s clarion call, many states, including Massachusetts, began looking to their state constitutions as a source of rights greater than those afforded by the Federal Constitution.

A. *Early Ancestors*

Resort to state constitutional principles was not entirely novel in Massachusetts. As early as 1805, in *Mountfort v. Hall*,⁴⁸ “the power and duty of the court to declare laws unconstitutional was acknowledged, indeed assumed.”⁴⁹ Similarly, in *Fisher v. McGirr*,⁵⁰ the SJC concluded that a statute authorizing

⁴⁵ See William J. Brennan, Jr., *State Constitutions and The Protection of Individual Rights*, 90 HARV. L. REV. 489 (1977).

⁴⁶ Stewart G. Pollock, *State Constitutions as Separate Sources of Fundamental Rights*, 35 RUTGERS L. REV. 707, 716 (1983).

⁴⁷ Brennan, *supra* note 45, at 491.

⁴⁸ 1 Mass. (1 Will.) 443, 454 (1805).

⁴⁹ Wilkins, *supra* note 14, at 890.

⁵⁰ 67 Mass. (1 Gray) 1 (1854). *Fisher* involved an action for damages against a constable who, pursuant to a search warrant issued by a justice of the peace, entered Fisher’s residence and seized “one half barrel of cherry brandy, one demijohn of brandy, one jug of New England rum, one bottle of New England rum, one bottle of gin and one bottle of brandy.” *Id.* at 3 n.1.

the issuance of a search warrant was “contrary to the Declaration of Rights and the constitution of this Commonwealth”⁵¹ because it authorized a general warrant.⁵²

B. Modern Developments

The watershed case for the invocation of state constitutional principles to the law of search and seizure in Massachusetts is *Commonwealth v. Upton*,⁵³ decided in 1985. At issue was the lawfulness of a search of Upton’s mother’s residence and an adjacent motor home pursuant to a search warrant.

1. *Upton I*

In its first pass at the issue in 1983, a majority of the SJC held that “under controlling principles announced by the Supreme Court of the United States, the search was unreasonable in violation of the Fourth Amendment to the Constitution of the United States because there was no demonstrated probable cause to issue the search warrant.”⁵⁴ The “controlling principles” to which the opinion referred was the majority’s view that *Illinois v. Gates*⁵⁵ did not represent a departure from the two pronged *Aguilar-Spinelli*⁵⁶ standard⁵⁷ for determining probable

⁵¹ *Id.* at 22.

⁵² *Id.* at 29. “The measures authorized and directed by this act, are in violation of the principle and spirit of the article respecting general warrants and unreasonable searches.” *Id.* The warrant violated the provisions against general warrants because it was not particular and left to the discretion of the searching officer to decide what was intended for sale and what was not. *Id.* at 30.

⁵³ 476 N.E.2d 548 (1985).

⁵⁴ *Commonwealth v. Upton (Upton I)*, 458 N.E.2d 717, 718 (Mass. 1983), *rev’d*, 466 U.S. 727 (1984). As discussed below, dissenting Justices Lynch and Nolan chided the majority for misreading *Gates* and foreshadowed their resistance to construing either MASS. GEN. LAWS. ch. 276, § 2B (setting forth search warrant requirements) or art. 14 as commanding a different result from the United States Supreme Court’s interpretation. *Id.* at 727-28 (Lynch, J., dissenting).

⁵⁵ 462 U.S. 213 (1983).

⁵⁶ *Aguilar v. Texas*, 378 U.S. 108 (1964), *abrogated by Illinois v. Gates*, 462 U.S. 213 (1983); *Spinelli v. United States*, 393 U.S. 410 (1969), *abrogated by Illinois v. Gates*, 462 U.S. 213 (1983).

⁵⁷ The *Aguilar-Spinelli* standard looks to both the basis of knowledge and the veracity of the information on which probable cause is based.

cause.⁵⁸ Dismissing the “totality of the circumstances test” of *Gates* as “standardless,”⁵⁹ the SJC majority declared that “[u]ntil advised to the contrary, we believe the *Gates* opinion should not be read as permitting such a radical result.”⁶⁰

In consequence, the majority concluded, the *Aguilar-Spinelli* standard should continue to control the probable cause determination.⁶¹

Were the SJC majority’s disdain for a “totality of the circumstances” test not sufficiently clear,⁶² it left no room for doubt:

If we have correctly construed the significance of *Illinois v. Gates*, the Fourth Amendment standards for determining probable cause to issue a search warrant have not been made so much less clear and so relaxed as to compel us to try our hand at a definition of standards under art. 14. If we have mis-assessed the consequences of the *Gates* opinion and in fact the *Gates* standard proves to be unacceptably shapeless and permissive, this court may have to define the protections guaranteed to the people against unreasonable searches and seizures by art. 14, and the consequences of the violation of those protections.⁶³

Two dissenting justices disagreed with the majority’s reading of *Gates* and its suggestion that the search warrant statute⁶⁴ or art. 14 might afford greater protections than the Fourth

⁵⁸ “It is not clear that the *Gates* opinion has announced a significant change in the appropriate Fourth Amendment treatment of applications for search warrants.” *Upton I*, 458 N.E.2d at 720.

⁵⁹ *See id.*

⁶⁰ *Id.* at 723.

⁶¹ *Id.* at 717.

⁶² The SJC majority derisively proclaimed that the United States Supreme Court’s description of the *Gates* test as “flexible” and “easily applied” treated the test as if it were “some commercial product.” *Id.* at 720.

⁶³ *Id.* at 724. In a footnote, the majority recognized that a statutory rather than a constitutional basis might also exist for concluding that the search warrant was invalid as a matter of state law. *Id.* at 724 n.10 (“We need not decide here whether the warrant requirements of G. L. c. 276, § 2B, impose a stricter standard for the issuance of a search warrant than the Fourth Amendment or art. 14.”).

⁶⁴ MASS. GEN. LAWS ch. 276, § 2B (2004).

Amendment.⁶⁵ While acknowledging that past decisions had foreshadowed possible differences between art. 14 and the Fourth Amendment, the dissent concluded that “this hypothetical situation has not yet arisen” because where “other provisions of the Massachusetts Constitution have been interpreted to afford greater protection than the United States Constitution . . . , each area has been characterized by a significant divergence between the language and construction of the respective Federal and State provisions.”⁶⁶

2. The Supreme Court’s Response and *Upton II*

The Supreme Court’s rebuke of the SJC followed quickly. In *Massachusetts v. Upton*,⁶⁷ the Supreme Court advised the SJC that the test for measuring probable cause under *Gates* was indeed “totality of the circumstances.”⁶⁸

On remand, the SJC proceeded to consider the defendant’s *state law* challenges: (1) “whether probable cause to issue a search warrant should be determined by a stricter standard in this Commonwealth than under the Fourth Amendment” and (2) “whether evidence seized without probable cause may nevertheless be admitted against a defendant.”⁶⁹ The SJC could well have decided *Upton II* solely on statutory grounds and concluded that the affidavit in support of the search warrant application did not establish probable cause under the search warrant statute without constitutionalizing the meaning of probable cause for purposes of art. 14. Instead, the majority em-

⁶⁵ *Upton I*, 458 N.E.2d at 727 (Lynch, J., dissenting)

The language of the Fourth Amendment to the United States Constitution has been commonly thought of as paralleling that of art. 14, and indeed the structure of the latter has been viewed as occupying an important role in the drafting of the Fourth Amendment. There appears to be no logical basis, and no support in the case law, for interpreting the term “cause” in art. 14 differently from the “probable cause” requirement of the Fourth Amendment.

Id. (citations omitted).

⁶⁶ *Id.* at 728 n.1.

⁶⁷ 466 U.S. 727 (1984).

⁶⁸ *Id.* at 732.

⁶⁹ *Commonwealth v. Upton (Upton II)*, 476 N.E.2d 548, 550 (Mass. 1985).

ployed a constitutional Trojan horse—looking to art. 14 to provide the meaning of “probable cause” for purposes of the search warrant statute while simultaneously declining to impose a constitutional or common law exclusionary rule.⁷⁰

The majority began by considering whether an exclusionary rule applies at all to searches that violate art. 14.⁷¹ However, rather than deciding whether to prohibit the admission of illegally seized evidence as a matter of constitutional or common law, the majority decided that the search warrant statute provides a *statutory prohibition* against the admission of evidence seized pursuant to a search warrant issued without probable cause.⁷² From this predicate determination that the *statute* warranted suppression, the majority then proceeded to consider the standard for determining probable cause under the statute.⁷³

Noting the obvious impossibility that the statute, enacted prior to promulgation of the *Aguilar* and *Spinelli* decisions,⁷⁴ could have intended to incorporate the standards of those decisions, the majority held that the search warrant statute “does not establish any standard for the determination of probable cause, although it does prescribe in general terms the form and content of applications for search warrants.”⁷⁵ Then, rather than interpreting what “probable cause” meant for statutory purposes, the majority turned to “consider what standard art. 14 of the Declaration of Rights of the Constitution of the Commonwealth prescribes for determining the existence of probable cause.”⁷⁶ As justification for diverging from Fourth Amendment interpretation, the majority looked to *history and parentage*,⁷⁷

⁷⁰ *Id.* at 548.

⁷¹ *Id.* at 550.

⁷² *Id.* at 553-54.

⁷³ *Id.*

⁷⁴ See *supra* note 56. The search warrant statute was enacted in 1964. MASS. GEN. LAWS ch. 276, § 2B (2004).

⁷⁵ *Upton II*, 476 N.E.2d at 553.

⁷⁶ *Id.* at 554.

⁷⁷ *Id.* at 555. “The Constitution of the Commonwealth preceded and is independent of the Constitution of the United States. In fact, portions of the Constitution of the United States are based on provisions in the Constitution of the Commonwealth, and this has

precedent,⁷⁸ *decisions of sister states*, and *the commentary of recognized experts*⁷⁹ to arrive at the conclusion that art. 14 provides more substantive protection to criminal defendants than the “unacceptably shapeless and permissive” totality of the circumstances test of the Fourth Amendment for determining probable cause.⁸⁰ Thus was born judicial federalism in Massachusetts: art. 14 may afford greater protections against unreasonable searches and seizures than the Fourth Amendment.⁸¹

PART III: *COMMONWEALTH V. GONSALVES* AND
COMMONWEALTH V. RODRIGUEZ: THE DEBATE IN MICROCOSM

Subsequent to *Upton II*, the SJC held that art. 14 afforded greater protections than the Fourth Amendment in a variety of circumstances. *Commonwealth v. Gonsalves*⁸² and *Commonwealth v. Rodriguez*⁸³ exemplify the ongoing debate over whether such invocations of art. 14 are a principled application of the SJC’s independent authority to analyze its own state constitution or a pure policy judgment.

A. *Commonwealth v. Gonsalves*

The majority and dissenting opinions in *Gonsalves* illustrate that whether a state court’s resort to its own constitution

been thought to be particularly true of the relationship between the Fourth Amendment and art. 14.” *Id.*

⁷⁸ *Id.* In examining the occasions where it had reached different results under the state constitution from those dictated by the Federal Constitution, the majority observed that some of the divergences could be explained by differences in language and some by “differences of opinion concerning the application of similar constitutional principles.” *Id.*

⁷⁹ *Id.* at 557. Examining the decisions of sister states and the commentary of recognized experts, the majority noted that sister states that have embraced the *Gates* standard have failed to pay “particular attention to the independent role State courts should play in interpreting State constitutional provisions.” *Id.* at 557 n.10.

⁸⁰ *Id.* at 556. The dissent of Justices Lynch and Nolan offered a succinct critique. “I find nothing in the Massachusetts Declaration of Rights or G. L. c. 276, § 2B, that mandates a stricter standard for determining whether probable cause exists than is found in the United States Constitution.” *Id.* at 560 (Lynch, J., dissenting).

⁸¹ *Id.*

⁸² 711 N.E.2d 108 (Mass. 1999).

⁸³ 722 N.E.2d 429 (Mass. 2000).

is described as judicial federalism or judicial chauvinism depends in large measure on how the question is framed.⁸⁴ The *Gonsalves* majority concluded that art. 14 provides greater protections to drivers and passengers than the Fourth Amendment, and that Massachusetts should depart from the Supreme Court's decisions in *Pennsylvania v. Mimms*⁸⁵ and *Maryland v. Wilson*,⁸⁶ which permit automatic exit orders to drivers and passengers.⁸⁷ Under art. 14 there must be either a particularized reasonable suspicion of a crime or an apprehension of danger to support an exit order to a driver or a passenger.⁸⁸

The majority's rationale for departing from federal principles looked to logic,⁸⁹ the decisions of sister states,⁹⁰ and histo-

⁸⁴ *Gonsalves*, 711 N.E.2d at 108, 116; *see supra* notes 3-4.

⁸⁵ 434 U.S. 106, 111 (1977).

⁸⁶ 519 U.S. 408, 415 (1997).

⁸⁷ *Gonsalves*, 711 N.E.2d at 115.

⁸⁸ *Id.* at 112-13.

⁸⁹ The majority reasoned that because traffic stops and frisks are non-minimal intrusions that invite discriminatory, random, unequal, and arbitrary enforcement, they require justification. *Id.* at 112. Absent justification, there is no basis to extend the intrusion or focus it elsewhere. *Id.* at 113. While recognizing the dangers posed by traffic stops and the need to protect against those dangers, the majority reasoned that such protection could be accommodated by requiring articulation of a reasonable basis for a stop and frisk. *Id.* at 112.

⁹⁰ The majority and dissent parsed the decisions of sister states differently. *Id.* at 114 & nn.7-10.

ry⁹¹ to arrive at a different balancing of interests from that of the United States Supreme Court and the dissent.⁹²

The sharply worded dissent of Justice Charles Fried criticized the majority for engaging in judicial chauvinism and making a pure policy judgment best undertaken by the legislature.⁹³ In Justice Fried's view, the differing policy judgments of the United States Supreme Court and the SJC majority posed a false choice.⁹⁴ By invoking art. 14 as the basis for the rule governing police conduct in traffic stops, the majority prevented the legislature from enacting protections more stringent than those called for by the United States Supreme Court.⁹⁵ The dissent

⁹¹ The majority claimed a primacy in interpretive right deriving from the fact that art. 14 was adopted in 1780, prior to the United States Constitution, in response to the abuses of governmental power and unlawful invasion of privacy inflicted on colonists by British officials:

That the drafters of the Fourth Amendment subsequently chose to replicate the words used in art. 14 cannot support a conclusion that we are compelled to act in lockstep with the United States Supreme Court when it interprets that amendment. Such a conclusion posits a serious misunderstanding of the authority of this court to interpret and enforce the various provisions of the Massachusetts Constitution, particularly those in the area of civil liberties. . . . The nature of federalism requires that State Supreme Courts and State Constitutions be strong and independent repositories of authority in order to protect the rights of their citizens.

Id. at 115.

⁹² *Id.* Justice Ireland's concurrence expresses a somewhat different view of the judicial federalism debate akin to that of Justice Stevens in *Massachusetts v. Upton*, 466 U.S. 727, 735 (1984). *Gonsalves*, 711 N.E.2d at 115-16 (Ireland, J., concurring). The "answer" to the question whether departure from federal precedent is judicial chauvinism or principled application depends on how you formulate the question. *Id.* at 115. "The right question . . . is not whether a state's guarantee is the same as or broader than its federal counterpart as interpreted by the Supreme Court. The right question is what the state's guarantee means and how it applies to the case at hand." *Id.* at 115-16 (quoting *Massachusetts v. Upton*, 466 U.S. 727, 738 (1984) (Stevens, J., concurring) (quoting Hans A. Linde, *E Pluribus—Constitutional Theory and State Courts*, 18 GA. L. REV. 165, 179 (1984))).

⁹³ *Gonsalves*, 711 N.E.2d at 116-24 (Fried, J., dissenting).

⁹⁴ *Id.* The dissent characterized the United States Supreme Court's bright-line rule for officers in the field as a "second-order balancing [of interests] that weighs the advantages of a myriad of complex individual determinations against the clarity of a readily understood and readily administered bright-line rule." *Id.* at 121. The dissent viewed the SJC's rationale as nothing more than a different balancing of those interests. *Id.*

⁹⁵ *Id.* at 122.

[T]he maxim in dubiis libertas [in uncertain things, freedom] cuts sharply against what the court does today. For the Supreme Court's rule leaves the Legislatures of this nation—which, after all, have the mandate, the experi-

characterized the majority's invocation of history ("John Adams made me do it"⁹⁶) not as constitutional compulsion but as judicial chauvinism motivated by preserving the "warmly contested decisions" of the Warren Court against the Burger and Rehnquist Court retrenchments.⁹⁷

B. Commonwealth v. Rodriguez

Following *Gonsalves*, in *Commonwealth v. Rodriguez*, the SJC considered whether a drug interdiction roadblock was an unconstitutional search and seizure.⁹⁸ Relying solely on art. 14, the SJC ruled that a roadblock to search for contraband, such as drugs, was prohibited.⁹⁹ More importantly, the majority announced a methodology of state constitutional primacy derived from text and history in considering challenges to the admissibility of evidence.¹⁰⁰ In the majority's view, resort to art. 14,

ence, and the means to make policy judgments—free to enact more stringent measures if they deem it appropriate. This court's action today removes that option from the Legislature. . . . Quite apart from the greater legitimacy of policy making by the Legislature, the Legislature has the means to gather the facts, to develop structured remedial systems, and the ability to reverse course if it makes a mistake. When we speak in the name of the Constitution, however, we purport to speak for the ages, and, absent a change of heart, only a constitutional amendment can reverse a mistaken course of decision.

Id. at 122-23 (Fried, J., dissenting).

⁹⁶ *Id.* at 123.

⁹⁷ *Id.*

[R]ather than engaging in judicial chauvinism we should ask: Is this decision wise, and—far more to the point—is there something in our Constitution that authorizes us to announce this anomalous rule and, by styling it a constitutional judgment, to put it beyond the reach of the ordinary processes of government?

Id.

⁹⁸ *Commonwealth v. Rodriguez*, 722 N.E.2d 429, 430 (Mass. 2000).

⁹⁹ *Id.*

¹⁰⁰ *Id.* at 434-35.

As a general rule in deciding such questions, we look first to any applicable statutes, then to our State Constitution (if argued separately), and only if necessary to the Federal Constitution. We have held that art. 14 may provide greater protection than the Fourth Amendment against searches and seizures. We determine that roadblocks for the purpose of searching for evidence of drug trafficking and other contraband violate art. 14. Therefore, we do not address the defendant's claim under the Federal Constitution.

rather than the Fourth Amendment,¹⁰¹ was warranted because roadblocks to interdict drugs and other contraband essentially give police the same powers over individuals in their automobiles as the writs of assistance granted British officials with respect to individuals in their homes.¹⁰² “Such a search is precisely what James Otis and John Adams sought to prevent by art. 14. “Those who do not remember the past are condemned to relive it.”¹⁰³ The SJC has honored the methodology of state constitutional primacy articulated in *Rodriguez* more in the breach than the observance. Both before and after *Rodriguez*, the SJC has employed all manner of methodologies to decide whether art. 14 provides greater protection than the Fourth Amendment.¹⁰⁴ In *Upton II*, the court declined an available statutory decisional basis and looked to art. 14 to give content to “probable cause” as

Id.

¹⁰¹ Before *Rodriguez*, the United States Supreme Court announced a similar prohibition under the Fourth Amendment. See *City of Indianapolis v. Edmond*, 531 U.S. 32 (2000). *Contra Illinois v. Lidster*, 540 U.S.419 (2004) (holding that highway checkpoint to obtain information regarding earlier hit-and-run accident does not violate Fourth Amendment).

¹⁰² See *Rodriguez*, 722 N.E.2d at 435.

Article 14 was drafted in response to the blanket search powers granted to the British by “writs of assistance.” British search policies generally are acknowledged to have spurred on revolutionary sentiment in colonial Massachusetts. Opposition to the search policies centered upon the use by British customs house officers of the writs of assistance, general warrants which allowed officers of the crown to search, at their will, wherever they suspected untaxed goods to be, and granted the officials the right of forcible entry. *Commonwealth v. Cundriff*, 382 Mass. 137, 143 (1980), *cert. denied*, 451 U.S. 973 (1981). See *Boyd v. United States*, 116 U.S. 616, 625 (1886). “The history should not require retelling. But old and established freedoms vanish when history is forgotten.” *Screws v. United States*, 325 U.S. 91, 120 (1945).

Rodriguez, 722 N.E.2d at 435.

¹⁰³ *Rodriguez*, 722 N.E.2d at 435 (quoting 1 GEORGE SANTAYANA, *THE LIFE OF REASON: OF THE PHASES OF HUMAN PROGRESS* 284 (1905)).

¹⁰⁴ See *Marangola*, *supra* note 7, at 1629-33 (relying most frequently on the primacy model, the SJC also utilizes the dual sovereignty and interstitial models, with individual justices employing lockstep methodology); see also *Ireland*, *supra* note 19, at 420 (“Although the SJC often interprets the Massachusetts State Constitution consistently with the United States Supreme Court’s interpretation of the Federal Constitution, it does not always do so. In those cases where the SJC does depart, it uses a variety of analytical methods to support its conclusion.”).

set forth in the statute.¹⁰⁵ Similarly, in *Commonwealth v. Macias*,¹⁰⁶ the SJC adopted a common law basis for affording greater protections than required by the Fourth Amendment in establishing the predicate for issuance of a no-knock search warrant (probable cause rather than reasonable belief).¹⁰⁷

PART IV: ARTICLE 14 JURISPRUDENCE AND THE PRIMACY MODEL:
AN INCONSISTENT METHODOLOGY

Even a cursory survey of representative search and seizure decisions illustrates that the SJC is not consistent in looking first to statutory grounds for resolution. Nor does it always look last to the United States Constitution. Indeed, if the case allows, the SJC will sometimes decline to decide whether art. 14 affords greater rights than the Fourth Amendment as, for example, when it concludes that a particular police action would not even satisfy the Fourth Amendment.

¹⁰⁵ *Commonwealth v. Upton*, 476 N.E.2d 548 (Mass. 1985).

¹⁰⁶ 711 N.E.2d 130 (Mass. 1999).

¹⁰⁷ *Id.* at 131-34. *Macias* represents yet another analytical model which eschews constitutional application and looks to state common law, supervisory or rule-making powers, and rules of evidence as ways of affording greater rights to state citizens than are afforded by the Federal Constitution. *See, e.g.*, *Commonwealth v. DiGiambattista*, 813 N.E.2d 516, 528-35 (Mass. 2004) (holding common law rule entitled defendant to jury instruction regarding absence of electronic recording of custodial confession or statement); *Commonwealth v. Tavares*, 430 N.E.2d 1198, 1204-05 (Mass. 1982) (holding that common law rule of "humane practice" exceeds federal constitutional protections regarding voluntariness of confessions). Such non-constitutionally based approaches can be given prospective application only and are more easily modified than a declaration that the court is changing a constitutional interpretation. *See* Herbert P. Wilkins, *The State Constitution Matters*, BOSTON BAR JOURNAL, Nov.-Dec. 2000, at 14.

1. Reasonable Expectation of Privacy:

*Commonwealth v. Panetti*¹⁰⁸

Employing the primacy model,¹⁰⁹ a majority¹¹⁰ of the SJC concluded that “[w]hatever the Supreme Court of the United States might decide under the Fourth Amendment to the United States Constitution, we conclude that the search and seizure of the defendant’s conversations violated art. 14 of the Declaration of Rights of the Constitution of the Commonwealth.”¹¹¹

2. Warrantless Electronic Surveillance (One Party Consent):

*Commonwealth v. Blood*¹¹²

Looking to history and the intent of the Framers with respect to the breadth of privacy, and buttressed by decisions in sister states, the majority¹¹³ held that while satisfying the Massachusetts wiretap statute,¹¹⁴ the warrantless electronic interception of conversations held in a private home violated art. 14.¹¹⁵

¹⁰⁸ 547 N.E.2d 46 (Mass. 1989).

¹⁰⁹ See *supra* note 10.

¹¹⁰ The dissent of Justices Nolan and Lynch viewed the majority’s invocation of art. 14 as personal preference. “Equally gratuitous is the court’s conclusion, despite the absence of any authority, that seizure of the defendant’s conversation violated art. 14 of the Declaration of Rights of the Massachusetts Constitution. No authority is cited. No analysis is advanced to support this conclusion. It is simply a naked ipse dixit without logic.” *Panetti*, 547 N.E.2d at 49 (Nolan, J., dissenting).

¹¹¹ *Id.* at 48.

¹¹² 507 N.E.2d 1029 (Mass. 1987).

¹¹³ The dissent opined that the wiretap statute expresses a legislative judgment that “members of organized crime who converse about a designated offense do not have a reasonable expectation of privacy in that conversation. This is a sound judgment.” *Id.* at 1039 (Nolan, J., dissenting). In the view of the dissenting justices, the majority’s conclusion to the contrary was based on its own personal normative content. *Id.* at 1039-40.

¹¹⁴ MASS. GEN. LAWS ANN. ch. 272, § 99 (West 2007).

¹¹⁵ *Blood*, 507 N.E.2d at 1034.

Article 14, like the Fourth Amendment, was intended by its drafters not merely to protect the citizen against “the breaking of his doors, and the rummaging of his drawers,” . . . but also “to protect Americans in their beliefs, their thoughts, their emotions and their sensations” by conferring, “as against the government, the right to be let alone—the most comprehensive of rights and the right most valued by civilized men.”

3. Automatic Standing

Notwithstanding the United States Supreme Court's abandonment of automatic standing in *United States v. Salvucci*,¹¹⁶ a majority of the SJC concluded in *Commonwealth v. Amendola*¹¹⁷ that art. 14 provided more substantive protection than the Fourth Amendment. With little reasoned discussion, the majority stated that “[w]e consider this case an appropriate occasion to announce the adoption of the automatic standing rule under Article 14 of the Massachusetts Declaration of Rights.”¹¹⁸

4. Reasonable Suspicion for *Terry* Stop

In *Commonwealth v. Lyons*,¹¹⁹ the SJC declined to apply the Fourth Amendment “totality of the circumstances” test to the

Id. (citations omitted).

The vice of the consent exception is that it institutionalizes the historic danger that art. 14 was adopted to guard against. . . . [T]he consent exception puts the conversational liberty of every person in the hands of any officer lucky enough to find a consenting informant. What was intolerable in 1780 remains so today.

Id. at 1035.

The majority also noted that numerous commentators have criticized the ruling that warrantless surveillance with “one party consent” lies beyond the protections of the Fourth Amendment. *See id.* at 1032. *See also* *United States v. White*, 401 U.S. 745, 751 (1971).

¹¹⁶ 448 U.S. 83 (1980).

¹¹⁷ 550 N.E.2d 121, 125 (Mass. 1990).

¹¹⁸ *Id.* In dissent, Justices Nolan and Lynch criticized the majority's invocation of art. 14 as mere personal predilection:

[T]he language of art. 14 is substantially the same as the language of the Fourth Amendment to the United States Constitution from which the Federal rule of standing is derived. . . . It seems that, whenever we wish to expand the rights of defendants in criminal cases, we simply invoke the Massachusetts Constitution without so much as a plausible argument that the Massachusetts Constitution requires the expansion. The court decides on the result that it wants and simply declares, if the result sought is more favorable to a criminal defendant than Federal law permits, that the Massachusetts Constitution compels such a result without the faintest suggestion of authority either in the language of the Massachusetts Constitution or elsewhere. . . . Perhaps the court has silently adopted the view that, if we say something frequently enough, it must be so. Descartes postulated: Cogito, ergo sum [I think, therefore I am]. We dictate: Dicimus, ergo ita est [We say, therefore it is so].

Id. at 127 (Nolan, J., dissenting).

¹¹⁹ 564 N.E.2d 390, 392 (Mass. 1990).

determination of reasonable suspicion for a *Terry* stop.¹²⁰ Without specifically invoking art. 14, the *Lyons* majority concluded that the Massachusetts standard for measuring reasonable suspicion was based on “indicia of reliability” as measured by the informant’s basis of knowledge and veracity.¹²¹

5. Random Drug Testing of Police Officers

In *Guiney v. Police Commissioner of Boston*,¹²² a tenuous SJC majority¹²³ concluded that random urinalysis of Boston police officers pursuant to a Boston Police Department rule violated art. 14.¹²⁴

In the majority’s view,

“[T]he important constitutional right of privacy established by art. 14” should not be overruled by “abstract goals of safety and integrity . . . without any factual information in the record to demonstrate frequency of drug use by police officers or to demonstrate any connection between such use and grave harm to the force or public safety.”¹²⁵

¹²⁰ For a discussion of totality of circumstances, see *Alabama v. White*, 496 U.S. 325 (1990) and *Illinois v. Gates*, 462 U.S. 213 (1983).

¹²¹ See *Lyons*, 564 N.E.2d at 391-92. The dissent of Justice Nolan simply observed, “Once again, the court succeeds in imposing its own limitations on the power available to police officers to protect the public.” *Id.* at 394-95 (Nolan, J., dissenting).

¹²² 582 N.E.2d 523 (Mass. 1991).

¹²³ The concurring opinion of Justice Liacos emphasized his disagreement with the view that a “balancing” of public interests versus privacy interests had any place in determining the constitutionality of a search and seizure. *Id.* at 527 (Liacos, J., concurring). “Notwithstanding its allusion to the laws of physics, and their concomitant certainty and precision, a ‘balancing’ test subjects the constitutional right against unreasonable searches and seizures to a standard only slightly more enduring than the latest public opinion poll.” *Id.*

¹²⁴ In *Guiney v. Roache*, 873 F.2d 1557, 1558 (1st Cir.), *cert. denied*, 493 U.S. 963 (1989), a Fourth Amendment challenge to the Boston Police Department rule was upheld as permissible based on the United States Supreme Court’s opinion in *National Treasury Employees Union v. Von Raab*, 489 U.S. 656 (1989).

¹²⁵ *Guiney*, 582 N.E.2d at 525 (quoting *O’Connor v. Police Comm’r of Boston*, 557 N.E.2d 1146, 1151-52 (Mass. 1990) (Greaney, J., concurring)). The dissent of Justice Nolan argued that the similar language and history of art. 14 and the Fourth Amendment required the SJC to interpret art. 14 in the same manner as the United States Supreme Court interpreted the Fourth Amendment. See *id.* at 527-28.

6. A “Stop” as in the Constitutional Sense

In *Commonwealth v. Stoute*,¹²⁶ a unanimous SJC declined to adopt the Fourth Amendment standard for a “stop” enunciated in *California v. Hodari D*¹²⁷ (stating that a person has been seized for constitutional purposes when there has been an application of physical force or show of authority to which the subject yields). The SJC concluded that “art. 14 provides more substantive protection to a person than does the Fourth Amendment in defining the moment at which a person’s personal liberty has been significantly restrained by the police, so that he may be said to have been ‘seized’ within the meaning of art. 14.”¹²⁸ The opinion does not attempt to argue differences in text or history as basis for its conclusion. Rather, the court reasoned that Massachusetts had consistently applied the *Mendenhall*¹²⁹ standard,

Once again a majority of this court has found some hidden meaning within article 14 of the Massachusetts Declaration of Rights to deviate from a decision of the United States Supreme Court in a question concerning the Fourth Amendment to the United States Constitution. . . . What is of paramount concern today is that the majority opinion is totally devoid of any standard used to deviate from the position of the Supreme Court.

Id. at 527 (citations omitted).

Also conspicuous by its absence in the majority opinion is any reference to the history of art. 14. It is well-established that the Fourth Amendment derives from our own art. 14. It is also well-established that Massachusetts adopted art. 14, as a result of the colonists’ experiences with British officials, to protect the public from public officials. It is doubly ironic, therefore, that the majority today reaches a conclusion which not only is at odds with the Fourth Amendment but also undermines an effort by the public to protect itself once again from the abuses of public authorities.

Id. at 528 (citations omitted).

The separate dissent of Justice O’Connor has a different basis, criticizing the majority’s departure from stare decisis as effectively overruling *O’Connor v. Police Commissioner of Boston*, 557 N.E.2d 1146 (Mass. 1990), which upheld random drug testing of police cadets as permissible under art. 14 because of their consent to such a search. *See Guiney*, 528 N.E.2d at 529-32.

¹²⁶ 665 N.E.2d 93, 94-98 (Mass. 1996).

¹²⁷ 499 U.S. 621, 624 (1991).

¹²⁸ *Stoute*, 665 N.E.2d at 95.

¹²⁹ *Florida v. Royer*, 460 U.S. 491 (1983); *United States v. Mendenhall*, 446 U.S. 554 (1980). The *Mendenhall* standard provides that a stop occurs for constitutional purposes when, viewing the facts objectively, a reasonable person would not feel free to leave.

and that the *Hodari D.* decision “represents a revision of the United States Supreme Court’s definition of seizure, as well as a departure from that Court’s precedent.”¹³⁰ The SJC noted that, “It is by now firmly established that, in some circumstances, art. 14 affords greater protection against arbitrary government action than do the cognate provisions of the Fourth Amendment.”¹³¹

7. Inadvertence Requirement for Plain View Seizure

In *Commonwealth v. Balicki*,¹³² the SJC declined to eliminate the inadvertence requirement¹³³ from the plain view seizure exception for purposes of art. 14, as the United States Supreme Court had done for Fourth Amendment purposes in *Horton v. California*.¹³⁴ The majority noted that the Supreme Court originally required inadvertent seizure in *Coolidge v. New Hampshire*¹³⁵ before abandoning the requirement in *Horton*,¹³⁶ that Massachusetts courts had adopted an inadvertence requirement after *Coolidge*,¹³⁷ and that such a requirement “[c]ontinues to protect the possessory interests conferred on our citizens by art. 14.”¹³⁸

¹³⁰ *Stoute*, 665 N.E.2d at 96 (citation omitted).

¹³¹ *Id.* at 96 n.10 (quoting *Jenkins v. Chief Justice of the Dist. Court Dep’t.*, 619 N.E.2d 324, 330 n.16 (1993)).

¹³² 762 N.E.2d 290 (Mass. 2002).

¹³³ “Inadvertence” for purposes of the plain view seizure exception “means only that the police lacked probable cause to believe, prior to the search, that specific items would be discovered during the search.” *Id.* at 298. Without an inadvertence limitation, the “particularity requirement” of the Fourth Amendment and art. 14, which serves as a safeguard against general exploratory rummaging by the police, might otherwise be swallowed up by the exception. The particularity requirement “both defines and limits the scope of the search and seizure thereby protecting individuals from general searches, which was the vice of the pre-revolution writs of assistance.” *Id.* at 297 (citations and quotation omitted).

¹³⁴ 496 U.S. 128 (1990).

¹³⁵ 403 U.S. 443 (1971).

¹³⁶ *Balicki*, 762 N.E.2d at 297.

¹³⁷ *Id.* See *Commonwealth v. Santana*, 649 N.E.2d 717, 721 n.6 (Mass. 1995); *Commonwealth v. Sergienko*, 503 N.E.2d 1282, 1284 (Mass. 1987); *Commonwealth v. Cefalo*, 409 N.E.2d 719, 727 (Mass. 1980).

¹³⁸ *Balicki*, 762 N.E.2d at 298.

8. School Searches

Recently, in *Commonwealth v. Considine*,¹³⁹ a unanimous court concluded that the search of a hotel room occupied by three private high school students on a school-sponsored trip by private school officials and those acting with their consent was not state action for purposes of the Fourth Amendment or art. 14.¹⁴⁰ Thus, there need be no basis for the search comparable to that imposed on public school officials.¹⁴¹

Considine followed an interstitial¹⁴² rather than a primary source¹⁴³ methodology, looking first to Fourth Amendment principles, as embodied in *Rendell-Baker v. Kohn*,¹⁴⁴ to conclude that the search did not violate the Fourth Amendment. The art. 14 analysis consisted merely of the statement, "We conclude also that the search in the present case was not unlawful under art. 14 of the Declaration of Rights."¹⁴⁵

PART V: CONCLUSION

In the years since *Upton II*, the SJC has often recognized its authority and duty to interpret and enforce cognate provisions of the Massachusetts Constitution that afford greater protections than its federal counterpart.¹⁴⁶ Whether such forays in state constitutional interpretation represent judicial federalism or judicial chauvinism is not easily ascertainable. While a court must not announce constitutional principles lightly, neither should it shrink from doing so when required. "If we place too much reliance on Federal precedent we will render the State

¹³⁹ 860 N.E.2d 673 (Mass. 2007).

¹⁴⁰ *Id.* at 677-78.

¹⁴¹ See *New Jersey v. T.L.O.*, 469 U.S. 325, 336-37 (1985) (holding that public school officials searching students' persons and effects were acting as agents of the state and thus subject to the Fourth Amendment's exclusionary rule).

¹⁴² See *supra* note 8.

¹⁴³ See Marangola, *supra* note 7.

¹⁴⁴ 457 U.S. 830, 837-843 (1982).

¹⁴⁵ *Considine*, 860 N.E.2d at 677.

¹⁴⁶ See Herbert P. Wilkins, *Remarks of Chief Justice Herbert P. Wilkins to Students at New England School of Law on March 27, 1997*, 31 NEW ENG. L. REV. 1205, 1213 (1997).

rules a mere row of shadows; if we place too little, we will render State practice incoherent.”¹⁴⁷ Both judicial activism and judicial abdication pose real dangers: one seriously erodes the court’s institutional legitimacy and the other ignores the vital role that the judicial branch plays in protecting citizens from the tyranny of the majority and what “the home crowd wants.”

If a state court does decide to constitutionalize a principle or to depart from the United States Supreme Court’s articulation of a constitutional principle, on what basis should it make that decision? Is the decision required by the state constitution? How does the court divine such a requirement? While methodology supports intellectual discipline, consistency, and objectivity in analysis, the use of formulae obscures the constitutional principles and how those principles are developed.¹⁴⁸

Arriving at a coherent and principled state constitutional doctrine requires less focus on the methodology for departure and more on the manner in which judges should decide cases and make law. The legitimacy of each judicial decision, indeed a court’s institutional legitimacy, rests on the bedrock premise that a court is different from the legislature.¹⁴⁹ Courts are counter-majoritarian. By invoking the constitution, a court is able to thwart the will of the majority and insulate its decision from the reach of the legislature, and even from the people, absent a constitutional amendment.¹⁵⁰ The absence of reasoned explanation for invocation of the state constitution fuels the criticism that the state court’s departure is attributable more to a “visceral reaction to ideological trends in the United States Supreme Court”¹⁵¹ than to the unique language or historical origins of the state constitution; that departure from federal precedent is due

¹⁴⁷ *State v. Bradberry*, 522 A.2d 1380, 1389 (N.H. 1986) (Souter, J., concurring).

¹⁴⁸ See HENNESSEY, *supra* note 5, at 53.

¹⁴⁹ Indeed, in Massachusetts as in few other states, judges are not elected but appointed with life tenure.

¹⁵⁰ As Justice Fried observed, “When we speak in the name of the Constitution . . . we purport to speak for the ages and, absent a change of heart, only a constitutional amendment can reverse a mistaken course of decision.” *Commonwealth v. Gonsalves*, 711 N.E.2d 108, 122 (Mass. 1999) (Fried, J., dissenting).

¹⁵¹ See Abrahamson, *supra* note 12, at 1177 (quoting *State v. Davis*, 686 P.2d 1143, 1147 (Wash. 1984) (Durham, C.J., dissenting)).

to “ideology, not sound constitutional doctrine”;¹⁵² and that “the decision to rely or not to rely on a state constitution is an unprincipled, result-oriented decision.”¹⁵³ Moreover, when a court moves too far ahead or falls too far behind in recognizing and giving expression to the shared democratic values embodied in general constitutional principles, it undermines the legitimacy that permits the lawmaking power of the nonmajoritarian branch to be accommodated in a democracy.¹⁵⁴

The choice need not be between the Scylla of judicial abdication or the Charybdis of judicial activism. “With some informed attention to constitutional texts, history, and the lessons of federalism—aided by the insights of practicing and academic lawyers—state courts can and should have coherent, independent doctrines surrounding their state constitutional provisions.”¹⁵⁵ When deciding even an ordinary case, a court must articulate its rationale clearly. When it constitutionalizes a principle, a court’s obligation is even greater because it “speak[s] for the ages” and prevents the popularly elected legislature from acting.¹⁵⁶ What is there—in precedent, reason, logic, experience, and decisions from our sister states or evolving standards¹⁵⁷ that are commonly recognized and accepted as part of our shared democratic values—that requires imposing a constitutional mandate? What is there in the state’s constitution that dictates departure from that mandate as articulated by the United States Supreme Court?

¹⁵² Abrahamson, *supra* note 12, at 1178.

¹⁵³ Abrahamson, *supra* note 12, at 1179 n.153.

¹⁵⁴ Acceptance of the decision by the community “in the end is how and why judicial review is consistent with the theory and practice of political democracy.” ALEXANDER M. BICKEL, *THE LEAST DANGEROUS BRANCH* 258 (1962).

¹⁵⁵ Williams, *supra* note 2, at 1064 (footnote omitted).

¹⁵⁶ *Commonwealth v. Gonsalves*, 711 N.E.2d 108, 122 (Mass. 1999) (Fried, J., dissenting).

¹⁵⁷ It is in these forays that the court runs the greatest risk of being viewed as a “super-legislature.” See Ireland, *supra* note 19, at 418. “Yet the court cannot necessarily refuse such explorations; the constitution requires the court to ensure that each individual’s sovereign constitutional rights are protected, even if a decision will go against the weight of public opinion or will strike down an act of the legislature.” *Id.*

Even beyond restrained exercise, the awesome power of constitutional interpretation warrants convincing explanation. “For principled and persuasive decision-making it is important that the state court explain why the reasoning of the United States Supreme Court is or is not persuasive.”¹⁵⁸ Principled and persuasive decision-making requires articulation of what Professor Cass Sunstein has described as a “completely theorized justification” of the basis for the judicial exercise of interpretive judgment.¹⁵⁹ Such articulation not only makes manifest what led the court to conclude that a constitutional command has a particular meaning, it also encompasses “the rationale underlying a court’s explication of the doctrinal standards and rules with which a constitutional command will be applied in discrete cases.”¹⁶⁰ “To the extent a state court commits to articulating the rationale that supports its substantive disagreement with the result in a federal constitutional case concerning a parallel individual rights protection, the state decision will yield insights into how best to interpret and apply the constitutional provision in question—how best, that is, to reconcile an individual right with contrary majoritarian desires.”¹⁶¹ The decision must not merely invoke history and assert that “John Adams made me do it.” Rather, the decision must persuade that it springs from the basic constitutional principles on which reasonable people agree, not personal predilection.

¹⁵⁸ Abrahamson, *supra* note 12, at 1176.

¹⁵⁹ See CASS R. SUNSTEIN, ONE CASE AT A TIME: JUDICIAL MINIMALISM ON THE SUPREME COURT 7-9 (1999).

¹⁶⁰ Lawrence Friedman, *Reactive and Incompletely Theorized State Constitutional Decision-Making*, 77 MISS. L.J. 265, 267 (2007).

¹⁶¹ *Id.* at 298.