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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

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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

Honorable Roderick L. Ireland*

> *[S]tate courts cannot rest when they have afforded their citizens the full protections 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. The legal revolution which has brought federal law to the fore must not be allowed to inhibit the independent protective force of state law – for without it, the full realization of our liberties cannot be guaranteed.*[1]

> *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.*[2]

I. INTRODUCTION

In 2000, the Massachusetts Supreme Judicial Court ("SJC") decided *Commonwealth v. Mavredakis*,[3] which concerned the scope of a suspect's right to an attorney when in police custody. The defendant was under interrogation and did not know that his family had hired an attorney to represent him. The police refused the attorney's request to cease questioning the defendant until he arrived and did not tell the defendant that the attorney was trying to contact him.[4] Although the United States Supreme Court had decided in a parallel case that a defendant's Fifth

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* Associate Justice of the Massachusetts Supreme Judicial Court. I would like to thank John Pollock, a student intern from Northeastern University School of Law, for his tireless assistance on this article. I am grateful for all of his work and appreciate his dedication and enthusiasm.

1 William J. Brennan, Jr., *State Constitutions and the Protection of Individual Rights*, 90 HARV. L. REV. 489, 491 (1977).

2 Commonwealth v. Gonsalves, 711 N.E.2d 108, 115 (Mass. 1999) (Greaney, J.).

3 725 N.E.2d 169 (Mass. 2000).

4 *Id.* at 173-74.

Amendment rights were not offended in this scenario,[5] the SJC examined whether there nonetheless might be a violation of Article 12, the self-incrimination clause of the Massachusetts Declaration of Rights. The court examined textual differences between Article 12 and the Fifth Amendment, the unique history of Massachusetts, and prior interpretations of Article 12's self-incrimination provisions. Based on these considerations, it concluded that the police department's policy of preventing interrogated suspects from being contacted by third parties did violate Article 12.[6]

Mavredakis was but one in a line of Massachusetts cases decided over the past three decades that parted ways with federal law jurisprudence and provided greater protections under state constitutional law. This trend of state courts using their own constitutions has been actively encouraged by some justices of the Supreme Court. For example, Justice William Brennan, dissented in a case that allowed the police to re-initiate questioning of subjects who had invoked their Fifth Amendment rights, commented that,

> In light of today's erosion of *Miranda* standards as a matter of federal constitutional law, it is appropriate to observe that no State is precluded by the decision from adhering to higher standards under state law. Each State has power to impose higher standards governing police practices under state law than is required by the Federal Constitution.[7]

This paper is intended to: (1) provide a brief introduction to how basic principles of federalism support a separate analysis of the Massachusetts state constitution; and (2) explore the variety of analytical methods employed by the SJC to interpret the state constitution. This includes an examination of state history, a careful analysis of the text, an investigation of the body of statutory and common law on the subject, a comparison to the positions of other state courts, and weighing "common standards of decency." The paper demonstrates that when the court has provided a thoughtful and grounded analysis in these fashions, it has legitimized the process and helped to silence critics who accuse the court of charting a new path in constitutional jurisprudence.

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5 Moran v. Burbine, 475 U.S. 412, 422 (1986).

6 *Mavredakis*, 725 N.E.2d at 180.

7 Michigan v. Mosley, 423 U.S. 96, 120 (1975) (Brennan, J., dissenting).

II. FEDERALISM: THE SJC AND THE SUPREME COURT

As per a basic principle of federalism, "The Federal Bill of Rights did not supersede those of the states."[8] Nor do the state constitutions "mirror the federal Bill of Rights,"[9] particularly because states that rewrote their constitutions after the Federal Constitution was enacted "took their bills of rights from the preexisting state constitutions rather than from the federal amendments."[10] The Massachusetts Constitution is unique in that it not only predates the Federal Constitution,[11] but was also used as a model for it: "[T]he state constitutions—particularly that of Massachusetts—were the greatest single influence on the Federal Constitution."[12] As framer John Adams said, "'I made a Constitution for Massachusetts, which finally made the Constitution of the United States.'"[13]

Because the Massachusetts Declaration of Rights is a sovereign document, the SJC has an "'obligation to make an independent determination' of rights, liberties, and obligations for [Massachusetts]."[14] While the SJC often defers to the Supreme Court's reading of the U.S. Constitution on parallel matters, the court has recognized, "We are, of course, free to interpret our own Constitution differently from the manner in which the United States Supreme Court interprets basically the same language in the United States Constitution."[15] The Supreme

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8 Justice Hans A. Linde, *First Things First: Rediscovering the States' Bills of Rights*, 9 U. BALT. L. REV. 379, 381 (1980).

9 Brennan, *supra* note 1, at 501.

10 Linde, *supra* note 8, at 381.

11 The Massachusetts Constitution was ratified in 1780, whereas the federal constitution was not ratified until 1787. RONALD J. PETERS, JR., THE MASSACHUSETTS CONSTITUTION OF 1780: A SOCIAL COMPACT 14, 21 (1978).

12 ELISHA P. DOUGLASS, REBELS AND DEMOCRATS: THE STRUGGLE FOR EQUAL POLITICAL RIGHTS AND MAJORITY RULE DURING THE AMERICAN REVOLUTION 32 (Belknap Press 1967) (1955).

13 PETERS, *supra* note 11, at 14 (quoting John Adams to Mercy Warren, July 28, 1807, in *The Adams-Warren Letters*, COLLECTIONS OF THE MASSACHUSETTS HISTORICAL SOCIETY 73 (1925)).

14 Charles G. Douglas, *State Judicial Activism – The New Role for State Bills of Rights*, 12 SUFFOLK U. L. REV. 1123, 1145 (1978) (quoting in part from *Project Report: Toward an Activist Role for State Bills of Rights*, 8 HARV. C.R.-C.L. L. REV. 271, 275 (1973)).

15 Suffolk Dist. Attorney v. Watson, 411 N.E.2d 1274, 1300 (1980) (Quirico, J., dissenting).

Court will not overrule a decision of the SJC that is based solely on state law grounds.[16]

III. ANALYTICAL METHODS USED TO INTERPRET THE MASSACHUSETTS CONSTITUTION

In the 1970s, the SJC began to give more serious consideration to the Declaration of Rights and the protections it might afford in the absence of federal rights. For instance, SJC Justice Benjamin Kaplan suggested in several 1970s opinions that the Declaration of Rights might prove to be a barrier to certain regulations limiting free speech.[17] Additionally, a series of cases focused on death penalty statutes examined the meaning and purpose of Article 26 (cruel or unusual punishments) and Article 12 (protection against self-incrimination) as they pertained to the death penalty.[18]

The SJC, however, has faced criticism that it has protected certain constitutional rights by fiat, rather than by well-grounded reasoning. Justice Quirico, dissenting in a case expanding Article 26 protections beyond those of the equivalent Eighth Amendment, stated that the court was making a decision with "[a] total absence of any sound reason for the difference in interpretation."[19] This sentiment was echoed in *Commonwealth v. Amendola* ("It seems that, whenever we wish to expand

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16 *See* Murdock v. City of Memphis, 87 U.S. (20 Wall.) 590 (1875). Because of the Supremacy Clause of Article VI of the U.S. Constitution, states cannot use their constitutions to contravene decisions by the U.S. Supreme Court that provide or guarantee a baseline right; "[f]ederal law sets a minimum floor of rights below which state courts cannot slip." *Developments in the Law – The Interpretation of State Constitutional Rights*, 95 HARV. L. REV. 1324, 1334 (1982) [hereinafter *Developments*]. Furthermore, in order to avoid Supreme Court review, a state court utilizing its state constitution "[cannot] rest [its decision] primarily on federal law, or . . . be interwoven with the federal law . . . . [It must state] clearly and expressively that [its decision] is alternatively based on bona fide separate, adequate, and independent grounds." Michigan v. Long, 463 U.S. 1032, 1040-41 (1983).

17 Commonwealth v. Horton, 310 N.E.2d 316, 321, 325 (Mass. 1974) (Kaplan, J., concurring) (holding that a statute prohibiting obscene material is unconstitutionally vague). Justice Kaplan implied that "a State is without power [under the Massachusetts Constitution] to intrude on the choice of an adult who knowingly and willingly seeks out a pornographic work." *See also* Revere v. Aucella, 338 N.E.2d 816, 822 (Mass. 1975) (Kaplan, J., dissenting) (arguing that instead of finding a statute prohibiting lewd and lascivious behavior unconstitutionally vague, the court should have held the statute violated the state constitution on its face).

18 *See, e.g., In re* Opinion of the Justices, 364 N.E.2d 184 (Mass. 1977); Commonwealth v. O'Neal, 327 N.E.2d 622 (Mass. 1975).

19 *Watson*, 411 N.E.2d at 1300 (Quirico, J., dissenting).

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"),[20] and again in *Commonwealth v. Panetti* ("Equally gratuitous is the court's conclusion ... that seizure of the defendant's conversation violated [Article] 14.... No authority is cited. No analysis is advanced to support this conclusion. It is simply a naked ipse dixit without logic.").[21] A similar critique could have been directed at *Commonwealth v. Noffke*,[22] where the court declared that "[a]t least in this context, the [free speech] protections of [Articles] 16 and 19 extend no further than the comparable provisions of the First Amendment," but provided no further explanation.[23]

Realizing that it "must be able to explain [its] decisions in terms other than the personal preferences of those who make them,"[24] the SJC has blended methodologies such as textual analysis, history, common law, structural difference, and comparison to other states. *Mavredakis* utilized many of the basic approaches, as the court looked to "text, history, and our prior interpretations of art. 12, as well as the jurisprudence existing in the Commonwealth before [the parallel Supreme Court case of] *Moran* was decided."[25] The methods described in detail below are but some of the approaches taken by the SJC in its state constitutional analysis.

A. Massachusetts State and Constitutional History

The SJC has often analyzed the history of Massachusetts itself, as well as the legislative history of various provisions of the Massachusetts Constitution, in an attempt to ascertain the original intent of the drafters. It then has compared history to the issue at hand, in order to determine

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20 550 N.E.2d 121, 127 (Mass. 1990) (Nolan, J., dissenting) (arguing that defendants have automatic standing under state constitution to challenge evidence of possession of contraband).

21 547 N.E.2d 46, 49 (Mass. 1989) (Nolan, J., dissenting) (arguing that a police officer without a warrant who was listening to a conversation in a private apartment by hiding in a crawl space underneath the floor violated the Massachusetts Constitution).

22 379 N.E.2d 1086 (Mass. 1978) (holding that union organizers arrested for trespass when protesting on hospital grounds did not have a free speech right under state constitution).

23 *Id.* at 1090.

24 Jack L. Landau, *Hurrah for Revolution: A Critical Assessment of State Constitutional Interpretation*, 79 OR. L. REV. 793, 890-91 (2000).

25 *Mavredakis*, 725 N.E.2d at 177.

whether the "subject matter [is] local in character, or [whether there is] a need for national uniformity."[26] For instance, in the colonial era, Massachusetts served as a focal point of the Revolutionary War, and portions of the Massachusetts Constitution were drafted in response to unreasonable searches, seizures, and interrogations on the part of British soldiers and other officials.[27] This unique history has been relevant in a series of decisions regarding Declaration of Rights provisions that are comparable to the Fourth and Fifth Amendments.

In *Mavredakis*, the court considered whether a suspect in police custody has the right to be notified that his or her attorney is attempting to make contact. The Supreme Court decided in *Moran v. Burbine*[28] that prior to indictment, a suspect's right to an attorney is not automatically attached, and therefore, the police have no obligation to inform the suspect about "[e]vents occurring outside of the presence of the suspect"[29] like the attorney trying to reach the suspect. The SJC, however, concluded that Article 12 of the Massachusetts Declaration of Rights provided a broader protection against self-incrimination than the Fifth Amendment, noting the fact that "Article 12 and other similar State constitutional provisions evolved from a sense of disapproval of the inquisitorial methods of the Star Chamber and ecclesiastical courts in England."[30] In this historical light, the SJC commented that "[o]ur precedents have often interpreted [Article] 12 expansively."[31]

The court echoed a similar historical perspective in *Commonwealth v. Blood*,[32] prohibiting the recording of conversations in a private home with the consent of only one party (in this case, a police informant), which had been allowed in *United States v. White*.[33] The SJC stated that "[t]he vice of the consent exception is that it institutionalizes the historic danger that [Article] 14 was adopted to guard against."[34] It then described how British search policies were the source of much of the revolutionary sentiment in Massachusetts, and how Massachusetts had

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26 Dick Howard, *State Courts and Constitutional Rights in the Day of the Burger Court*, 62 VA. L. REV. 873, 937 (1976).

27 *See* Commonwealth v. Blood, 507 N.E.2d 1029, 1035-36 (Mass. 1987).

28 475 U.S. 412 (1986).

29 *Id.* at 422.

30 *Mavredakis*, 725 N.E.2d at 178.

31 *Id.*

32 507 N.E.2d 1029 (Mass. 1987).

33 401 U.S. 745, 753 (1971).

34 *Blood*, 507 N.E.2d at 1035.

adopted Article 14 in 1780 as a specific response to unreasonable searches and seizures: "[T]he colonists' memory of the use and abuse of the writs was one of the reasons for the adoption . . . of constitutional safeguards regarding searches."[35] The SJC then explained that Article 14 was a way of not only protecting citizens from illegal *physical* searches, but also "protect[ing] Americans in their beliefs, their thoughts, their emotions and their sensations"[36] which are "cherished possessions."[37] In particular, the court reasoned that "[s]ince the conversations at issue took place in private homes, and there is no evidence to suggest that the participants intended the contents to become more widely known," the parties had a "subjective expectation of privacy."[38] Finally, the court emphasized that "[t]hese [electronic surveillance] techniques are peculiarly intrusive upon that sense of personal security which [Article] 14 commands us to protect."[39] In the court's view, one-party consent violated the subjective expectation of privacy, and it concluded by declaring: "What was intolerable in 1780 remains so today."[40]

In *Commonwealth v. Gonsalves*,[41] the Court again expressed a disapproval for invasive police policies, this time involving police who ordered suspects to exit their vehicles without reasonable suspicion. It noted that "[t]he Declaration of Rights was written in the historical context of the abuses of governmental power inflicted on the colonists by British officials, and [Article] 14 was directed at the unlawful invasion of privacy rights by those officials."[42] In doing so, it firmly rejected the Supreme Court precedent established in *Pennsylvania v. Mimms*,[43] judging it insufficient to adequately protect the rights of Massachusetts citizens, given the State's particular history and concerns.

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35 *Id.* (quoting Commonwealth v. Cundriff, 415 N.E.2d 172 (Mass. 1980), *cert. denied*, 451 U.S. 973 (1981)).

36 *Blood*, 507 N.E.2d at 1034 (quoting Olmstead v. United States, 277 U.S. 438, 478 (1928) (Brandeis, J., dissenting)).

37 *Id.*

38 *Id.* at 1033.

39 *Id.* at 1034.

40 *Id.* at 1035.

41 711 N.E.2d 108 (Mass. 1999).

42 *Id.* at 115.

43 434 U.S. 106, 111 (1977) (holding that police officer may as a matter of course order driver of lawfully stopped car to exit vehicle).

B. Textual Differences

Textual differences between the State and Federal constitutions provide another basis for the SJC to depart from analogous Supreme Court decisions. Provisions in the Declaration of Rights are often more wordy than their federal counterparts, at times because John Adams "chose to develop in his draft of the Massachusetts Constitution the reasoning behind many of its provisions."[44] At other times, the reason for the difference lies in the Federal Constitution's preference toward general brevity: "Where the Federal Constitution settles for a word or a phrase, the Massachusetts Constitution takes up a sentence or even a paragraph."[45]

In *Attorney General v. Colleton*,[46] the defendant refused to respond to questioning by the Attorney General on the grounds of protection against self-incrimination. The Attorney General argued that Mass. Gen. Laws ch. 93A, § 6 ensured that the defendant's direct testimony could not be used as evidence, and that this "use and derivative use" immunity was sufficient to supplant the fuller protection against any self-incrimination. In *Kastigar v. United States*,[47] the Supreme Court agreed with the Attorney General's position and held that only "use and derivative use immunity" was constitutionally protected; there was no "absolute" or "transactional" immunity against any prosecution related to the testimony under the Fifth Amendment.[48]

The SJC began *Colleton* by noting that the Fifth Amendment reads, "No person . . . shall be compelled in any criminal case to be a witness against himself," whereas Article 12 more broadly states, "No subject shall be . . . compelled to accuse, *or furnish evidence against himself.*"[49] The court considered the "furnish evidence" phrase to be a significant expansion of the self-incrimination privilege unaffected by the immunity granted in chapter 93A: "Long before *Kastigar* . . . this court decided that the words of [Article] 12, 'or furnish evidence against himself,' may be presumed to be intended to add something to the significance of the

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44 PETERS, *supra* note 11, at 14.

45 *Id.*

46 444 N.E.2d 915 (Mass. 1982).

47 406 U.S. 441, 453 (1972), *reh'g denied*, 408 U.S. 931 (1972).

48 *Id.*

49 *Colleton*, 444 N.E.2d 915, 919 (emphasis added).

preceding language."[50] As evidence of this proposition, it cited to *Emery's Case*,[51] an 1871 suit that stated:

> It is a reasonable construction to hold that [the "furnish evidence" phrase] protects a person from being compelled to disclose the circumstances of his offence, the sources from which, or the means by which evidence of its commission . . . may be obtained, or made effectual for his conviction, without using his answers as direct admissions against him.[52]

Other SJC cases have reached the same conclusion based on the wording of the self-incrimination text. In 1992, the Massachusetts State Senate sought to amend Mass. Gen. Laws ch. 90, § 24(1)(e) to make a suspect's refusal to take a breathalyser test admissible as evidence. In an advisory opinion on the proposed statutory change, the SJC noted that a suspect could not refuse a breathalyser test without potentially incurring a penalty, which pressured the suspect into submitting to the test and inadvertently "furnishing evidence" against themselves.[53] Furthermore, both refusing and agreeing to take the test could produce equally incriminating evidence, leaving a suspect with no way to stay "silent." The SJC therefore concluded that the broad provisions of Article 12, as established in *Emery's Case*, would prevent admission of "refusal evidence," even if the Federal Constitution would not.[54] Similarly, the court in *Mavredakis* relied on the textual difference, combined with prior interpretations of Article 12's self-incrimination provisions, to declare that protecting this right was the only way to ensure that *Miranda* protections against self-incrimination were "substantively meaningful."[55]

Blurring the boundaries between free speech, free elections, and property rights, *Batchelder v. Allied Stores International, Inc.*[56] raised the question of whether a person possessed a constitutional right to gather signatures at a private shopping mall in support of increasing ballot

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50 *Id.*

51 107 Mass. 172 (1871).

52 *Id.* at 182.

53 *See In re* Opinion of the Justices, 591 N.E.2d 1073 (Mass. 1992).

54 *See generally id.* For the federal rule on breathalysers, see *South Dakota v. Neville*, 459 U.S. 553, 564 (1983).

55 *Mavredakis*, 725 N.E.2d at 179.

56 445 N.E.2d 590 (Mass. 1983).

access. Notably, in *PruneYard Shopping Center v. Robins*,[57] the Supreme Court had concluded that California's protection of this right under its state constitution did not offend the takings clause of the Fifth Amendment. The SJC compared the First Amendment to Article 9 of the Declaration of Rights, and noted that "[u]nlike the prohibition of the First Amendment ... ('Congress shall make no law ...') and the limitation of the Fourteenth Amendment ('nor shall any State deprive any person ...'), [Article] 9 is not by its terms directed only against governmental action."[58] The court concluded that there was "no reason to imply [a state action] requirement, and thereby to force a parallelism with the Federal Constitution,"[59] and noted in support that other provisions of the Declarations of Rights had been found to reach private parties as well.[60] Article 9 was thus construed as a larger textual whole that permitted the court to reach private conduct typically unreachable, such as a private property owner refusing access to signature collectors.

The heavy emphasis on the text has led some dissenters to criticize the court for expanding rights when those rights are not explicitly spelled out in the document.[61] But even when a provision of the

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57 447 U.S. 74, 83 (1980).

58 *Batchelder*, 445 N.E.2d at 593.

59 *Id.* Article 9 of the Declaration of Rights of the Massachusetts Constitution states, "All elections ought to be free; and all the inhabitants of this commonwealth, having such qualifications as they shall establish by their frame of government, have an equal right to elect officers, and to be elected, for public employments." *Id.* at 593 n.6.

60 The court stated:

> Although it is a powerful document expressing restraints on governmental action, the Declaration of Rights contains other provisions dealing with relationships between private parties. *See, e.g.*, Reeves v. Scott, 324 Mass. 594, 598-599 (1949) (arts. 1 and 10 of the Declaration of Rights of the Massachusetts Constitution preclude a private union of musicians from interfering with the lawful conduct of the business of an unaffiliated musician); McNeilly v. First Presbyterian Church in Brookline, 243 Mass. 331, 339-340 (1923) (art. 3 of the Declaration of Rights, as amended by art. 11 of the Amendments to the Massachusetts Constitution, entitles a religious society, against the objection of a minority of its members, to elect a pastor); Coffin v. Coffin, 4 Mass. 1, 25-29 (1808) (art. 21 of the Declaration of Rights bars a defamation action by one citizen against another for defamatory words if the speaker was acting as a member of the House of Representatives).

Id. at 594 n.9 (parallel citations omitted).

61 *See, e.g.*, Commonwealth v. Upton, 476 N.E.2d 548, 560 (Mass. 1985) (Lynch, J., dissenting) ("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."); *Amendola*, 550 N.E.2d at 127 (Nolan, J.,

Declaration of Rights is identical to a portion of the Federal Constitution, the mirrored language "does not mean that the state constitution's framers intended to incorporate federal constitutional law into their own constitutions; as Jerome Falk has observed with respect to the California constitution, 'different men may employ identical language yet intend vastly different meanings and consequences.'"[62] In *Colleton*, the court warned that it would be a mistake "[t]o assume that, because of the common source of the principles articulated in each Constitution, the two provisions must have the same meaning."[63] Instead, the court must independently ascertain not only the meaning of the Massachusetts framers, but also the meaning within the context of the state's history, culture, and prior jurisprudence.

C. Statutory and Common Law History

The body of legislative and common law history have been of particular use when there are no decisions by the SJC or Supreme Court directly on point, and can help address "the risk of going where there simply are no ascertainable standards to guide the judge."[64] Although not binding upon the court when not directly on point, such a body of law is a useful indicator of the will of the people or courts of the Commonwealth.

For instance, in *Colleton*, the SJC noted, "[The fact that] transactional immunity is the long-established and still vital law of this Commonwealth is also established by a variety of legislative enactments."[65] Similarly, in *Mavredakis*, the SJC noted that "[t]he establishment of a duty to inform a suspect of an attorney's efforts to provide legal advice builds on our decisions in *Commonwealth v. Sherman*[,] *Commonwealth v. Mahnke*[,] and *Commonwealth v. McKenna*."[66] Lastly, in *Commonwealth v. Stoute*,[67] the SJC noted that in a previous

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dissenting) ("Absolutely nothing in art. 14 of the Massachusetts Declaration of Rights suggests a rule of automatic standing.").

62 *Developments*, 95 HARV. L. REV. at 1497 (quoting Falk, *Adequate Ground*, 61 CAL. L. REV. at 282).

63 *Colleton*, 444 N.E.2d at 921.

64 Howard, *supra* note 26, at 943.

65 *Colleton*, 444 N.E.2d at 920 n.8. The court cited the following Mass Gen. Laws in support of its conclusion: G.L. c. 54, § 120; G.L. c. 93, § 7; G.L. c. 150A, § 7(3); G.L. c. 151A, § 43; G.L. c. 175, § 183; G.L. c. 176D, § 13; G.L. c. 233, § 20G. *Id.*

66 *Mavredakis*, 725 N.E.2d at 179 (parallel citations omitted).

67 665 N.E.2d 93, 95-96 (Mass. 1996).

case,[68] it had begun to turn away from the Supreme Court's definition of "seizure" as excluding a policeman's pursuit of a suspect with intent to detain.

D. Comparison to Other States

In situations where neither history nor text nor body of law provides a sense of direction, the SJC has opted at times to examine other jurisdictions' jurisprudence. The fact that the SJC has both highlighted and ignored the developments in other states at various times should not be looked upon as inconsistent because the decisions of other jurisdictions are not binding precedent.

In *Batchelder*, the court noted that "[a] majority of the State courts that recently have considered rights under State Constitutions to engage in orderly free speech, free assembly, or electoral activity on private property held open to the public have recognized such a right."[69] The court went on to cite examples from California, New Jersey, Pennsylvania, Washington, and Connecticut that determined that their citizens had a right to solicit signatures for a petition of the government in a private mall.[70] The court noted that North Carolina had determined that it was "not so disposed"[71] to locate such a right in its state constitution. Nonetheless, the SJC appeared to be influenced by the fact that the larger majority of states did protect the right to solicit signatures in a private mall.

In *Amendola*, the SJC faced a situation where a suspect was charged with a drug offense but lacked a possessory interest in the paraphernalia involved, and therefore was denied standing under *United States v. Salvucci*,[72] to bring a constitutional challenge to the method of collection. The SJC rejected the Supreme Court's abrogation of the "automatic standing" rule, noting:

> The Commonwealth, in order to prove possession, aims to show that the defendant was the driver of the Pontiac and was in possession of the contraband. But in arguing

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68 Commonwealth v. Cao, 644 N.E.2d 1294, 1296-97 (Mass. 1995), *cert. denied*, 515 U.S. 1146 (1995).

69 *Batchelder*, 445 N.E.2d at 594.

70 *Id.*

71 *Id.* (referencing State v. Felmet, 273 S.E.2d 708 (1981)).

72 448 U.S. 83, 90 (1980).

> against standing, the Commonwealth claims that the defendant had no connection with the Pontiac and was not in possession of the contraband. The Commonwealth may not have it both ways.[73]

Lacking a textual basis by which to ground a rationale for parting ways with the Supreme Court, the SJC instead chose to catalogue other states that had "reject[ed] the Supreme Court's abandonment of the automatic standing rule."[74]

At other times the court has examined the approach of other states as a way of drawing out the contrast between constitutional texts. In *Commonwealth v. Amirault*,[75] the court noted that the constitutions of Virginia, Pennsylvania, Delaware, Maryland, North Carolina, and Vermont adopted the phrase "[right] to be confronted with" for a suspect's right to have one's accusers present at trial.[76] In contrast, Massachusetts chose the phrase "to meet the witnesses against him face to face," a textual difference that provided a more specific right to actually *see* one's accusers at the actual trial. Since the defendant in *Amirault* was not able to visibly see his accusers owing to the setup of the room, the court ruled that his Article 12 rights had been violated.[77]

If another jurisdiction reaches a different conclusion from the SJC, it is not a sign of divisiveness, but a reflection upon a difference in state histories and constitutions. The fact that the states have distinct constitutions is no accident; in acknowledging the unique histories of each state, the first Constitutional Congress "rejected [the idea of uniform constitutions for the states] in favor of calling upon each state to write a constitution satisfactory to itself."[78] This individuality may lead to much diversity of law among the states, but regional difference is a

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73 *Amendola*, 550 N.E.2d at 125.

74 *Id.* at 126. The court listed the following cases to support its rationale: *State v. Owen*, 453 So. 2d 1202 (La. 1984); *People v. Chernowas*, 314 N.W.2d 505 (Mich. Ct. App. 1981); *State v. Settle*, 447 A.2d 1284 (N.H. 1982); *State v. Alston*, 440 A.2d 1311 (N.J. 1981); *Commonwealth v. Sell*, 470 A.2d 457 (Pa. 1983); *State v. Wood*, 536 A.2d 902 (Vt. 1987); *State v. Simpson*, 622 P.2d 1199 (Wash. 1980). *Id.* The court concluded, "The Supreme Courts of New Hampshire, New Jersey, Pennsylvania, and Vermont have all discarded expectation-of-privacy analysis in standing determinations." *Id.*

75 677 N.E.2d 652 (Mass. 1997).

76 *Id.* at 660.

77 *Id.* at 662.

78 Linde, *supra* note 8, at 381.

trademark of a federal system such as that of the United States when compared to a national system of government such as England's.[79]

E. Weighing "Contemporary Standards of Decency"

The loudest dissents have arisen when the SJC has attempted to determine constitutional "standards of decency" for controversial issues. It is in these forays that the SJC has had the fewest tools to guide it and has been described by some as a "superlegislature." 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. However, in order to "assert the supremacy of judicial construction of [state] constitutions,"[80] the SJC has needed to explain its decisions clearly.

The death penalty has been a primary example of the struggle to establish standards of decency. In *Suffolk County District Attorney v. Watson*,[81] for example, the SJC conceded that "'at the time of its adoption, [Article] 26 was not intended to prohibit capital punishment. Capital punishment was common both before and after its adoption.'"[82] It also recognized that public opinion was not unanimous by any means on the issue.[83] But it quoted approvingly to *Furman v. Georgia* for the proposition that the judicial interpretation of "cruel or unusual" could not be forced to "[depend] upon virtually unanimous condemnation of the penalty at issue,"[84] and commented that "[Article] 26, like the Eighth Amendment, 'must draw its meaning from the evolving standards of decency that mark the progress of a maturing society.'"[85] Building on this premise, the court concluded that the finality of the punishment, the protection of an individual's "fundamental" right to life, and the growing awareness of the physical pain involved in administration of the death penalty all added up to a "cruel" form of punishment.[86] Thus, the SJC fashioned a modern interpretation of "cruel or unusual."

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79 *See* Douglas, *supra* note 14, at 1146.
80 Landau, *supra* note 24, at 890-91.
81 411 N.E.2d 1274 (Mass. 1980).
82 *Id.* at 1281 (citing other cases).
83 *Id.* at 1282.
84 *Id.* (quoting Furman v. Georgia, 408 U.S. 238, 268 (1972) (Brennan, J., concurring)).
85 *Id.* at 1281 (citing other cases).
86 *Id.* at 1282-83.

The concern over this decision and its lack of historical or textual grounding was evident even within the *Watson* opinion. In his dissent, Justice Braucher commented, "I cannot rid myself of doubt whether, if I relied solely on 'contemporary standards of decency,' 'I would be enforcing my private view rather than that consensus of society's opinion which ... is the standard enjoined by the Constitution.'"[87] Justice Quirico went a step further, arguing in his dissent:

> [T]he total absence of any sound reason for the difference in interpretation gives cause to question the decision in this case. There is no historical reason to suppose that these words, first adopted as a part of the Massachusetts Constitution in 1780 and then adopted as part of the First through Tenth Amendments to the United States Constitution in 1790, were intended to have different meanings in substantially similar societal settings, both of which clearly recognized and sanctioned capital punishment for certain crimes.[88]

In response to rulings such as *Watson*, Article 26 of the Massachusetts Constitution was amended in 1982 with the following addition: "No provision of the Constitution, however, shall be construed as prohibiting the imposition of the punishment of death." This clause prevented the SJC from using Article 26 to strike down a subsequent death penalty law, but it also demonstrated the checks-and-balances between the courts and other branches of government that necessarily and properly occur when the court broaches sensitive constitutional questions. However, in a later case,[89] the court concluded that a new death penalty statute violated Article 12's self-incrimination clause because "it provided that only those defendants who pleaded not guilty and demanded a jury trial were at risk of being put to death. Those who pleaded guilty could avoid the death penalty."[90]

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87 *Id.* at 1287 (Braucher, J., dissenting) (citing Louisiana *ex rel.* Francis v. Resweber, 329 U.S. 459, 471 (1947) (Frankfurter, J., concurring)).

88 *Watson*, 441 N.E.2d at 1300.

89 Commonwealth v. Colon-Cruz, 470 N.E.2d 116 (Mass. 1984).

90 Alan Rogers, *"Success – at Long Last": The Abolition of the Death Penalty in Massachusetts, 1928-1984*, 22 B.C. THIRD WORLD L.J. 281, 352 (2002).

IV. CONCLUSION

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. In the words of a former Chief Justice of the SJC, "We often agree with [the Supreme Court]. We are not trying to be contrary. We are, however, entitled to our own views, indeed constitutionally required to have them."[91]

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91 Herbert 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) (cited approvingly in *Gonsalves*, 711 N.E.2d at 115).