The Massachusetts Constitution—The Last Thirty Years

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The Constitution of the Commonwealth has never been more significant for the rights of individuals than in the past thirty years. Although the greater impact has been on the rights of criminal defendants, the Constitution’s influence on civil relationships has been substantial, as indicated most particularly by Goodridge v. Department of Public Health on the right to same-sex marriage.

In 1980, this law review published my article comparing the treatment of similar provisions of the Federal Constitution and the State Constitution. My current effort is, in a sense, an updating of the 1980 article. Before 1980, there were only a handful of cases that foretold the impending impact of the Supreme Judicial Court’s independent treatment of provisions in the State Constitution that had parallels in the Federal Constitution. For example, Commonwealth v. Soares barred racial discrimination in the use of peremptory challenges to prospective jurors well before the Supreme Court did so in Batson v. Kentucky.

As will be seen, many Massachusetts cases rejected positions then taken by the Supreme Court, and others reached results unlikely to be acceptable to it. Thus, this article, unlike the 1980 article, identifies many instances in which the Constitution of the Commonwealth, particularly its Declaration of Rights, dictated positions not established under the Federal Constitution. The most that I could say in the 1980 article was that

In recent years, the Supreme Judicial Court has exercised the option to impose higher state constitutional standards in some instances and, in many other

1. Chief Justice (retired), Supreme Judicial Court of Massachusetts, and Richard G. Huber Distinguished Visiting Professor, Boston College Law School. I acknowledge the valuable research assistance provided by members of the Suffolk University Law Review, particularly that of Jeffrey E. Dolan, Class of 2010, and Sean Flanagan, Class of 2011. My colleagues at Boston College Law School, Professors Robert M. Bloom, Mark S. Brodin, R. Michael Cassidy, and Sanford N. Katz made helpful comments on an earlier draft, as did Brownlow M. Speer, Chief Appellate Counsel of the Committee for Public Counsel Services. I thank Dan Maltzman, my assistant at Boston College Law School and a member of the Suffolk University Law School, Class of 2011, for his patience and technical skill.


instances, without exercising that option, the court has explicitly acknowledged its authority to act independently under the state constitution. While these rumblings are not yet powerful . . . they are intensifying, suggesting that the personal freedoms of the Declaration of Rights may be about to receive new attention.6

Balanced against the numerous instances of greater rights under the Constitution of the Commonwealth, especially its Declaration of Rights, are the many examples of the Constitution of the United States, particularly the Bill of Rights, overriding the law of the Commonwealth.7 Massachusetts, for example, did not initially develop its own exclusionary rule. However, after the Supreme Court prescribed an exclusionary rule applicable to the states, the Supreme Judicial Court went beyond this mandate in certain instances to exclude evidence. The reach of freedom of speech under the Federal Constitution has been far greater in many areas than anything identified in the Constitution of the Commonwealth. In fact, a significant portion of my 1980 article discusses the inevitable losing battle that the Supreme Judicial Court waged with the Supreme Court over publication of assertedly obscene books.8 Recently, the Supreme Judicial Court has had to adapt to the limitations imposed by Crawford v. Washington9 on the use of “testimonial” hearsay and to the prohibition of Melendez-Diaz v. Massachusetts10 on the use of laboratory reports (and not the technician who did the tests) to prove that an item seized was a controlled substance.11 Even more recently, the Supreme Court has held that the Second Amendment, through the Fourteenth Amendment, applies to the states and grants an individual the right to have a gun in the home.12 Justice Scalia, in writing to uphold a Second Amendment right to have a gun in one’s home, asserted in relation to art. 17 of the Massachusetts Declaration of Rights (and three other state constitutional provisions) “that the most likely reading of . . . these pre-Second Amendment state constitutional provisions is that they secured an individual right to bear arms for defensive purposes.”13 This assertion blatantly ignores the thorough opinion of Justice Kaplan in Commonwealth v. Davis,14 which convincingly holds that art. 17 does not extend to a homeowner a constitutional right to have a gun in the home.15

6. See Wilkins, supra note 3, at 889-90.
7. See id. at 921-22.
8. See id. at 900-04.
13. Id. at 602.
15. See id. (noting prior interpretation of art. 17); see also Commonwealth v. Runyan, 456 Mass. 230, 235 n.5 (2010).
Differences in results under the two constitutions, however, should not be over-emphasized. In many instances, the constitutional standard (and almost always the result) is the same.\(^\text{16, 17}\)

I start my discussion of specific subjects with the Supreme Judicial Court’s treatment of the Miranda rule, a rule that went beyond anything that the Supreme Judicial Court had required as a prelude to a valid custodial interrogation of a suspect. Since the Miranda rule was adopted, however, the Supreme Judicial Court has added to it substantially.\(^\text{18}\) Next, I consider differences that have developed between the two courts in their treatment of search and seizure issues. This differing treatment has resulted in Massachusetts having greater restraints on police conduct, and clearer guidelines for the police to follow, than established by the Supreme Court. Next, I turn to the civil law, first discussing some civil cases that involve differences between the two courts. Then I consider the Goodridge case and cases elsewhere dealing with the question of same-sex marriage. I conclude with an attempt to explain why Massachusetts has gone its own way on many constitutional issues in the past three decades.


\(^{17}\) There have been occasions in which the Supreme Judicial Court has concluded that a federal constitutional standard has been violated but that, if that determination is not sound, in any event the State Constitution has been violated. See, e.g., Commonwealth v. Murphy, 448 Mass. 457, 465 (2007) (applying principles of Massiah v. United States, 377 U.S. 201 (1964), but relying independently on art. 12’s right to counsel). There is some logic to turning to the State Constitution first, and, if the issue is resolved under the State Constitution, the court need not reach the federal constitutional question. If, however, the federal answer is clear, it may make little sense to discuss the issue on the State Constitution.

\(^{18}\) Shortly after the Miranda opinion was released, my father, who was then Chief Justice of the Supreme Judicial Court, told me that the Miranda rule would result in fewer admissions and confessions, much to society’s disadvantage. No doubt some people in custody have abstained from talking to the police as a result of the Miranda rule, but admissions and confessions are still made in considerable numbers by people who know their rights. It is not apparent that the Miranda rule has had a significant impact on the number of confessions. See Richard A. Leo, The Impact of Miranda Revisited, 86 J. CRIM. L. & CRIMINOLOGY 621 (1996).
I. MIRANDA AND ARTICLE 12

A prime example of recent significant differences between the Supreme Court and the Supreme Judicial Court on the scope of protection of individual rights is shown by each court’s varying treatment of Miranda-related issues.\(^{19}\) These differences can in part be attributed to differences in the language of the two relevant constitutional provisions.\(^{20}\) Compare the Fifth Amendment ("No person shall . . . be compelled in any criminal case to be a witness against himself . . . .") with the broader language of art. 12 of the Declaration of Rights ("No subject shall . . . be compelled to . . . furnish evidence against himself."). Another, and I think greater, reason for the differences is attitudinal. As the protection afforded by the federal right against self-incrimination has shrunk, protection afforded by state law has become more prominent.\(^{21}\)

The phenomenon that, when the Supreme Court has restricted the scope of the Miranda principle, the Supreme Judicial Court has acted under state law to preserve protections initially provided by the Miranda rule is described in Justice Cordy’s carefully crafted opinion in Commonwealth v. Martin.\(^{22}\) In 2004, the Supreme Court reversed course and decided that the failure to give Miranda warnings to a suspect in custody did not require suppression of physical evidence that was obtained as a result of the suspect’s unwarned statement.\(^{23}\) Because Miranda principles, as thus reconstructed, were no longer adequate to secure the “parallel but broader protections afforded . . . by art. 12,” the Supreme Judicial Court adopted a common-law rule that physical evidence derived from an unwarned statement was presumptively excluded at trial “as ‘fruit’ of the improper failure to provide [Miranda] warnings.”\(^{24}\)

The Martin opinion followed an already established pattern of developing


\(^{20}\) See Commonwealth v. Burgess, 426 Mass. 206, 209, 217 (1997). For example, in Commonwealth v. Bergstrom, 402 Mass. 534, 540-41 (1988), the Supreme Judicial Court held that a defendant’s right under art. 12 to face-to-face confrontation with a witness required courtroom procedures which the Supreme Court concluded in Maryland v. Craig, 497 U.S. 836, 849-50 (1990), were not required by the Sixth Amendment.

\(^{21}\) There are certainly situations in which the differences in the language of art. 12 and the Fifth Amendment have been the basis for contrary results on constitutional issues involving self-incrimination. See, e.g., Commonwealth v. Conkey, 430 Mass. 139, 141-43 (1999) (contrary to South Dakota v. Neville, 459 U.S. 553, 564 (1983), evidence of refusal to submit to blood-alcohol test inadmissible under art. 12 but not under the Fifth Amendment); Attorney Gen. v. Colleton, 387 Mass. 790, 800-01 (1982), relying on In re Emery, 107 Mass. 172 (1871) (State Constitution requires transactional immunity for an immunized witness and not just protection against use of the compelled testimony); Op. of the Justices, 412 Mass. 1201, 1202, 1211 (1992) (evidence of refusal to submit to breathalyzer test inadmissible in Massachusetts but not under Federal Constitution); Commonwealth v. Doe, 405 Mass. 676, 678 (1989) (contrary to Braswell v. United States, 487 U.S. 99 (1988), subpoenaed witness may not be held in contempt for invoking an art. 12 privilege if the act of producing subpoenaed evidence would tend to incriminate).

\(^{22}\) 444 Mass. 213 (2005).


\(^{24}\) See Martin, 444 Mass. at 215.
“[s]tate law principles as adjuncts to the Miranda rule” protections under the common law that go beyond what the Supreme Court would require under the Fifth Amendment in similar circumstances. In Oregon v. Elstad, the Supreme Court abandoned its position that an admission or confession obtained from an accused in violation of Miranda rights was presumed to taint any subsequent admission or confession, even if Miranda warnings were later given. The Supreme Judicial Court refused, as a matter of state common law, to agree.

Another time, relying on art. 12 itself, the court in Commonwealth v. Mavredakis declined to follow Moran v. Burbine, which had held that Fifth Amendment principles did not require the police to inform a suspect being interrogated that an attorney was seeking to reach him to provide legal assistance.

The Mavredakis opinion concerned an issue the court had already faced in three cases, each decided before the Supreme Court’s 1986 Moran opinion. The result in the Mavredakis case is consistent with these earlier cases, which seem to rely on Miranda principles, but might possibly be construed as a statement, not of a constitutional mandate, but of a common law requirement. These earlier opinions make no reference to, and seemingly are not based on, the State Constitution. The court cited several jurisdictions that had rejected the Moran position under their state constitutions. Whether constitutionally based, or a product of the common law, the obligation of the police to advise a suspect under questioning that a lawyer wants to speak with him or her was well-established by the time of the Mavredakis decision.

27. See id. at 312-14 (statement obtained in violation of Miranda admissible, absent actual coercion).
31. See Commonwealth v. Sherman, 389 Mass. 287, 295-96 (1983) (police failure to inform defendant of lawyer’s wish to be with client vitiates defendant’s waiver of rights); Commonwealth v. Mahnke, 368 Mass. 662, 691-92 (1975) (statements made by suspect after police knew defendant’s attorney wanted to speak with him inadmissible in prosecution’s direct case), cert. denied, 425 U.S. 959 (1976); Commonwealth v. McKenna, 355 Mass. 313, 324 (1969) (“But he was entitled to know of his counsel’s availability and, with that knowledge, to make the choice with intelligence and understanding.”).
32. See Mavredakis, 430 Mass. at 857 n.13.
33. Most recently the Supreme Judicial Court has gone beyond its Mavredakis holding. See Commonwealth v. McNulty, 458 Mass. 305 (2010). It appears that art. 12 requires that, if the lawyer asks the police to tell the suspect not to continue to talk to the police, the police must tell the suspect of the lawyer’s advice or risk the suppression of any statements made after a failure to deliver the lawyer’s advice. Id. at 317-18. The court noted that the three pre-Mavredakis opinions did not say whether they were premised “on the Federal or State Constitution.” Id. at 315 n.9. The court did not, however, consider the possibility that the three earlier opinions were simply expressions of the common law. In Professor Leavens’s thoughtful article on this issue, he argues that the Supreme Judicial Court should have left the issue to the legislature. See Arthur Leavens, Prophylactic Rules and State Constitutionalism, 44 SUFFOLK U. L. REV. 415 (2011). I doubt that the Massachusetts Legislature would want to pass a law announcing that, when a lawyer wants to consult with a
There may be little difference of consequence between a ruling that, on the one hand, a particular police interrogation practice violates a constitutionally influenced common-law rule, or, on the other, directly violates art. 12. A subsequent court, however, might be more hesitant to overrule a constitutionally based determination than a common-law one. The legislature, of course, could change the common-law rule, at which point the court would have to face the issue as a constitutional one. Would the legislature seek to establish a statutory standard that is less favorable to a defendant than a common-law rule adopted by the Supreme Judicial Court? Does the legislature have the time, experience, impartiality, and interest to become involved in such a controversial endeavor? Courts deal with these issues regularly. The situation discussed here differs from one in which the legislature might pass a law increasing—rather than decreasing—the rights of a criminal defendant.\textsuperscript{34}

In the Supreme Judicial Court’s most recent association with the Miranda rule and art. 12, three dissenting justices believed that art. 12 required that Miranda warnings be given even when counsel was present at the police questioning of a suspect and the suspect had had an opportunity to consult with counsel beforehand.\textsuperscript{35} On the court’s approach in the Simon case, it is possible (but only remotely) that a suspect in custody will be interrogated without ever being advised that he or she may remain silent and that any statement may be used against him or her. Because only a bare majority of the court found no art. 12 reason to bar use of the statement, perhaps the better course is to give Miranda warnings before every custodial interrogation of a suspect. The position of the dissenters, however, seems extreme. Surely the right to counsel was not implicated. If there were such a right in this situation, counsel was there. With counsel present, the possibility of coercive police intimidation was remote to nonexistent. The dissenters seem to impose a requirement that at best

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had a tenuous connection with the Miranda rule and its affiliated requirements in the Commonwealth.

II. SEARCH AND SEIZURE AND ARTICLE 14

In the past three decades, the Supreme Judicial Court has resisted urgings to relax the requirements of art. 14 to conform to the Supreme Court’s revisions of Fourth Amendment law. Article 14 was adopted in 1780 as part of the Massachusetts Declaration of Rights, when memories were fresh of intrusions on the rights of Massachusetts residents by representatives of the British crown. Article 14, on which the Fourth Amendment is based, therefore preceded and is independent of the Constitution of the United States. In the following cases, the Supreme Judicial Court has opposed relaxation of protections against what it viewed as unreasonable searches or seizures, and in doing so has declined to follow the trend of the Supreme Court.

In Commonwealth v. Upton, the court concluded for the first time that art. 14 afforded more substantive protection to criminal defendants than does the Fourth Amendment. In doing so, the court rejected the Fourth Amendment standard for the determination of probable cause recently adopted in Illinois v. Gates. It opted to provide “a more appropriate structure for probable cause inquiries under art. 14,” adhering to the Fourth Amendment principles the Supreme Court had developed in Aguilar v. Texas and Spinelli v. United

36. Article 14 of the Massachusetts Declaration of Rights 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.

37. 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.


40. Id.

41. Id. at 373.


States. The standard that the Supreme Judicial Court preserved is easier for lawyers and judges to apply. Equally important, that standard provides a clearer guide to police who are seeking to conform their conduct to clear professional standards. The Upton opinion was taking no particularly radical view in deciding to continue a standard the Supreme Court had itself established.

A statutorily authorized electronic recording of a conversation in one’s home, consented to and known only to the visitor, and not authorized by a search warrant, does not violate the Fourth Amendment, but it does contravene art. 14. The Supreme Judicial Court concluded “that it is objectively reasonable to expect that conversational interchange in a private home will not be invaded surreptitiously by warrantless electronic transmission or recording.” The testimony of the person who participated in the unlawfully recorded conversation would, however, be admissible. The court noted the anomaly that “arguably more accurate evidence” (the recording) would be excluded but the visitor’s testimony about the conversation would not be. Justice Nolan in dissent argued that the legislature’s judgment that “one person” consent to the recording was reasonable was sufficient to answer the question whether society would recognize a homeowner’s expectation of privacy as objectively reasonable. If, as suggested, the court were simply to accept the assumed legislative judgment on the objective reasonableness of the society’s expectation of privacy in such a case, the court would be abandoning its constitutional role. There was, of course, no indication that the legislature even considered the objective reasonableness question in passing the “one person” consent statute.

The issue whether a resident of a home has an objectively reasonable expectation of privacy in particular circumstances calls for judicial judgment. It is a judicial question, not a jury question. Would Massachusetts residents think a police officer, not acting pursuant to a warrant and carrying a concealed electronic recording or transmitting device, was unreasonably intruding into their home? The court concluded in the Blood and Panetti cases that the

44. 393 U.S. 410 (1969); see also Upton, 394 Mass. at 374.
45. One collateral consequence of the exclusionary rule is that police officers have to know more search and seizure law than most lawyers.
48. Id. at 70.
49. Id. at 74, 78.
50. Id. at 78.
52. See Blood, 400 Mass. at 79-80; Commonwealth v. Panetti, 406 Mass. 230, 234 (1989) (eavesdropping in crawl space to which the public did not have access under the defendant’s residence).
answer was “yes.”


The requirement that police “knock and announce” their presence and purpose prior to the execution of a warrant at a home has long been part of the common law of the Commonwealth. See Commonwealth v. Cundriff, 382 Mass. 137, 140 (1980), cert. denied, 451 U.S. 973 (1981). The Supreme Court more recently incorporated the rule into Fourth Amendment protections against unreasonable searches and seizures. See Wilson v. Arkansas, 514 U.S. 927, 934 (1995) (declaring method of entry relevant factor for reasonableness inquiry). When, however, the Supreme Court decided that a no-knock entry could be justified by a reasonable suspicion that evidence might be destroyed or that the safety of the officers would be threatened (Richards v. Wisconsin, 520 U.S. 385, 394-95 (1997)), the Supreme Judicial Court declined to depart from the probable cause standard of the common law. See Commonwealth v. Jimenez, 438 Mass. 213, 216 (2002).

The option to reach a conclusion on a common law ground, of course, is not available to the Supreme Court as it is to a state court. The “knock and announce” rule is an example of a state common-law rule. Also, the so-called “humane practice” in the treatment of a challenge to the voluntariness of a confession, a long-standing common law concept in Massachusetts, presents a position beyond what the Supreme Court requires. In Massachusetts courts there must be a preliminary hearing, and, if the judge decides that the confession was voluntary, the voluntariness issue is then submitted to the jury. See Commonwealth v. Tavares, 385 Mass. 140, 149-50, cert. denied 457 U.S. 1137 (1982). The United States Constitution requires a preliminary hearing on voluntariness, but not the submission to the jury, if the judge decides that the confession was voluntary. Id. at 150 n.15 (citing Lego v. Twomey, 404 U.S. 477, 489-90 (1972)); see also Wilkins, supra note 3, at 888.

Differences also exist in the application of the standards that the two courts have adopted to measure whether a defendant has had the effective assistance of counsel. The guaranty of effective assistance of counsel in art. 12 of the Declaration of Rights seems to be stronger in practice than the similar guaranty under the Sixth Amendment. In cases passing on a post-conviction challenge to the adequacy of defense counsel’s performance, the Supreme Judicial Court has said that if the requirements of the State Constitution have been satisfied, those of the Federal Constitution will necessarily have been met as well. See Commonwealth v. Fuller, 394 Mass. 251, 256 n.3 (1985). Although comparisons are unavoidably fact-based, I believe that art. 12 has been treated as more favorable toward an ineffective assistance of counsel argument than has the Sixth Amendment. The difference, as I see it, is in what the defendant must show to establish that the deficiency of counsel influenced the verdict. The federal standard seems directed toward requiring a showing that any incompetence of counsel was so serious as to create a reasonable probability that the result would have been different and that counsel’s conduct deprived the defendant of a fair trial—one whose result is reliable. See Strickland v. Washington, 466 U.S. 668, 687 (1984) (describing two components of defective assistance of
In *Guiney v. Police Commissioner*, the court held that art. 14 barred the use of random urine testing of police officers. The record lacked any showing that there was a problem, or the appearance of a problem, arising from the illicit use of drugs by Boston police officers. The testing would be a “search,” unannounced, warrantless, suspicionless, unconsented to, and random. As such, it would be an unreasonable search under art. 14, but not under the Fourth Amendment. The difference in view between the Supreme Judicial Court and the Supreme Court was stark. The Supreme Court concluded that random urinalysis could be justified by the government’s “compelling interest in preventing an otherwise pervasive societal problem from spreading.” On the other hand, I wrote that “[c]onstitutional safeguards should not be abandoned simply because there is a drug problem in this country.”

Chief Justice Liacos wrote in concurrence in the *Guiney* case, stating that he did not approve of deciding the case, as the court had done, by a balancing of public interests against privacy interests. This position was consistent with his previous expressions on the same subject. This is also the position that he took when the court considered the constitutionality of roadblocks conducted to identify intoxicated drivers. He would require a showing of probable cause to justify such a general search. Absent consent, as perhaps in a public employees’ contract, it is difficult to picture, on Chief Justice Liacos’s theory,
the circumstances in which random drug testing or any roadblock conducted to identify drunk drivers could be upheld against an art. 14 challenge. The Supreme Judicial Court adopted a position on roadblocks similar to that of the Supreme Court in Delaware v. Prouse under which a roadblock to identify drunk drivers is justified when conducted pursuant to written guidelines, properly followed.

In each case cited in this discussion of search and seizure in which the Supreme Judicial Court declined to join the Supreme Court’s retreat on Fourth Amendment rights, Justice Nolan and Justice Lynch dissented when on the panel. It seems surprising that Justice Lynch, departing from his usual restrictive position on art. 14 rights, condemned roadblocks designed to identify drunk drivers, even if the roadblock was conducted according to established procedures. His position was not an intermediate one in which, by balancing interests, he might have concluded that a given roadblock was unconstitutional in a particular situation, but rather he joined the view of Chief Justice Liacos that there should be no balancing of interests and that only probable cause (or perhaps reasonable suspicion in Justice Lynch’s view) would justify the police conduct.

After the Supreme Court abandoned the rule of Jones v. United States that a criminal defendant charged with unlawful possession of a controlled substance had automatic standing to challenge the constitutionality of the search by which the substance was obtained, the Supreme Judicial Court declined to follow. In a carefully constructed opinion, Chief Justice Liacos explained why the court adopted the automatic standing rule under art. 14. The Amendola case is of interest as much for Justice Nolan’s dissent as for its holding. “Once again, the court has invoked the Massachusetts Constitution to depart from settled Federal constitutional law without so much as a suggestion of authority. Absolutely nothing in art. 14 of the Massachusetts Declaration of Rights suggests a rule of automatic standing.”

64. See Horsemens Benevolent & Protective Ass’n, 403 Mass. at 708-10 (Lynch, J., dissenting); Guiney v. Police Comm’n, 411 Mass. 328, 339 (1991) (Lynch, J., dissenting). The Supreme Court has upheld roadblocks conducted to enforce license and registration requirements, even though the threat to public safety is not, or is minimally, involved in such violations. See South Dakota v. Neville, 459 U.S. 553 (1983). The Supreme Judicial Court has suggested that it might not follow that result, if the occasion arose to consider it. See Shields, 402 Mass. at 167 n.3.
67. Amendola, 406 Mass. at 599 n.3.
68. Id. at 602-03 (Nolan, J., dissenting, joined by Lynch, J.).
69. Id. at 602.
however, nothing in the Fourth Amendment either about a right to automatic standing, but in the Jones case in 1960, the Supreme Court decided that fairness called for it.  

If one is charged with the unlawful possession of a substance, it is not unreasonable to grant that person the right to challenge the constitutionality of the means by which the police obtained that substance. Is it so radical for the Supreme Judicial Court to adhere to a rule that the Supreme Court once decided was compelled by the Fourth Amendment? Justice Nolan added:

I am apprehensive about the direction which this court is taking in proclaiming that the Massachusetts Constitution is more zealous in protection of a defendant’s rights than the United States Constitution. 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.

A fair reading of Chief Justice Liacos’s opinion shows that this charge does not lie in the Amendola case. That opinion sets forth sound, analytical reasoning for the result. One may fairly disagree with the conclusion the court reached, but the disagreement should be based on an articulated rejection of the reasons fully given in the court’s opinion.

The idea that the Supreme Judicial Court should follow in lockstep the ebb and flow of constitutional interpretations of the Supreme Court ignores the valid point that the justices of the Supreme Judicial Court have a sworn duty to consider the mandates of the State Constitution. Those who advocate conforming the State Constitution to whatever a majority of the Supreme Court may say from time to time concerning a cognate provision of the United State

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70. To rely on the absence of any reference to automatic standing in art. 14 is to disregard the purpose of the Declaration of Rights (and the Bill of Rights). These provisions state general concepts. Not every right and obligation is spelled out. Nor should it be. These documents are not mortgage indentures. They call for judicial interpretation and application. The courts have interpreted the Bill of Rights and the Fourteenth Amendment well beyond their literal representations. Consider, for example, the mutations, range, and limits of First Amendment rights, the adoption of reasonable suspicion in lieu of probable cause in certain situations, the introduction, in certain circumstances, of the standard of “the totality of the circumstances,” and the exclusionary rule, none of which is set forth as such in any relevant constitutional provision.


72. In another dissent in a search and seizure case, Justice Nolan concluded that “[o]nce again, the court succeeds in imposing its own limitations on the power available to police officers to protect the public.” Commonwealth v. Lyons, 409 Mass. 16, 24 (1990) (Nolan, J., dissenting). Any decision that upholds an individual’s right to be protected from an unreasonable search or seizure puts limits on the police. To consider only the limitation on the police, however, is to look at only one side of the issue. The purpose of much of the Declaration of Rights and Bill of Rights is precisely to place limitations on government. Justice Nolan may have reached the zenith of eloquence dissenting in a similar case when he wrote, “the court elevates form to a triumphant height, leaving substance to stare upward in utter disbelief.” Commonwealth v. Anderson, 406 Mass. 343, 352 (1989) (Nolan, J., dissenting).
Constitution are, in effect, giving five justices the right to amend the State Constitution.

In 1999, the Supreme Judicial Court, construing art. 14, concluded that a police officer may not order occupants of a lawfully stopped vehicle out of the vehicle as a matter of course.\(^73\) An officer must have, for example, at least a reasonable suspicion that the occupant poses a danger to the officer or a third party before ordering an occupant out of such a vehicle.\(^74\) The Supreme Judicial Court rejected the Supreme Court’s contrary view, which upheld the legality of an officer’s issuance of exit orders without regard to the existence of a reason for the orders.\(^75\) The Supreme Judicial Court saw an automatic exit order as an intrusion and an invitation to discriminatory practices.\(^76\) The federal rule, although certainly a bright-line one, tends to tolerate arbitrary conduct.

Justice Fried wrote an eloquent dissent in the *Gonsalves* case.\(^77\) The *Gonsalves* opinions were released just sixteen days before Justice Fried resigned from the court to return to teach at Harvard Law School. His thorough dissent may be seen as his farewell address on the subject of the State Constitution in relation to the Federal Constitution. After extolling the obviously bright-line rule of the *Mimms* and *Wilson* opinions, expounding on the threat to police officers in traffic stops, and pointing out that most states that had dealt with the subject had followed the *Mimms* case as a matter of state law, Justice Fried stated that the issue “comes down to . . . policy judgments.”\(^78\) He bemoaned the fact that the court’s conclusion, founded on constitutional grounds, took the legislature out of the picture and meant that, absent a change by the court, “only a constitutional amendment can reverse a mistaken course of decision.”\(^79\) The prospect that the legislature would pass a statute authorizing the police to order occupants out of a motor vehicle when the police have no reason for doing so is doubtful. The police already have the right to issue exit orders on a reasonable suspicion of a threat to their safety, a particularly low threshold to justify an exit order.

Justice Fried then moved to criticize what he saw as the real reason for the

\(^{74}\) Id. at 661-63.
\(^{76}\) Gonsalves, 429 Mass. at 663-64 (describing possible discriminatory practices).
\(^{77}\) Id. at 671-83 (Fried, J., dissenting).
\(^{78}\) Id. at 680.
court’s action. He opined that it was not “the argument that John Adams made me do it” (a decision mandated by the Declaration of Rights), but rather the court’s acceptance of the urgings of Justice William J. Brennan that state courts take up the protection of individual rights, as the Supreme Court, in Justice Brennan’s view, had eroded them.\(^{80}\) Along the way, Justice Fried suggested that the court is “engaging in judicial chauvinism”\(^{81}\) and characterized the invocation of Massachusetts’s independent tradition as “more than a little opportunistic.”\(^{82}\) In the course of dealing with any tension between the rights of individuals and the interests of society, the points that Justice Fried made cannot be ignored (although some of his rhetoric might be). His points go on the scale when a court is balancing the competing interests. One need not, however, accept his view that the Supreme Court in the 1960s was wrong in its various decisions on individual rights and that it is well that “after the brief burst of activity in the Supreme Court, the Court itself calmed down and . . . [has adopted a] more sober trend.”\(^{83}\) One could conclude, on the contrary, that the Supreme Court has retreated from positions that merit preservation (at least in a particular jurisdiction) and that the Massachusetts court need not follow the national swing of the pendulum to the right. These are, as Justice Fried says, “policy judgments.”\(^{84}\)

It may seem strange that in a democracy, unelected federal and state judges decide important issues on constitutional grounds. People generally accept, however, that someone has to “call the shots,” and, in certain fundamental areas, it is not the majority, law enforcement, or the legislature that should do so. All reasoning observers agree that at some point, on certain issues, the judiciary provides the answer. Whether that point is reached on a given issue will often be a matter of serious disagreement. Each opposing position should be presented by reasoned analysis, carefully articulated, and without the injection of simplistic characterizations of the opposing view and its proponents. In this process, a state court justifiably may consider—indeed should consider—its traditions reflected in its state constitution and should have its own views of what is reasonable in a constitutional sense within its jurisdiction, when reasonableness is the test. In some instances, a state court will comfortably accept the nationwide constitutional “floor” fixed by the Supreme Court. There will be occasions, however, when a state court will adopt a “higher” standard than the Supreme Court has established. That

\(^{80}\) Gonsalves, 429 Mass. at 681-82. See generally William J. Brennan, Jr., State Constitutions and the Protection of Individual Rights, 90 HARV. L. REV. 489 (1977). My 1980 article noted the existence of Justice Brennan’s article, but rightly did not attribute the attitude of the Supreme Judicial Court to the influence of that article. See Wilkins, supra note 3, at 800 n.8.

\(^{81}\) See Gonsalves, 429 Mass. at 681.

\(^{82}\) See id. at 682.

\(^{83}\) Id.

\(^{84}\) Id. at 680.
“higher” standard should be reached on its merits, and the fact that that standard is not in accord with the Supreme Court’s view on the same point, although entitled to attention and explanation, should not be condemned simply because it is different or favors one position over another.

As I conclude this discussion of the application of rules leading to the exclusion of evidence, evidence that is significant to the proof of guilt and often indispensably so, I note a concern, along with many others, that I have had. Is it really necessary to go through this costly process to decide whether to deny the prosecution incriminating evidence, in effect to let the “guilty” go free, in order to assure that the police adhere to constitutional standards? I believe it is. There is no other way to influence the police to maintain a level of professionalism and, thus, adhere to constitutional standards. Neither a tort action by an accused whose constitutional rights have been violated nor some form of internal police disciplinary process is a reasonable alternative.

The process of hearing and deciding motions to suppress is costly. Each year thousands of motions to suppress are filed in this state. Many of them take substantial time of the judiciary, prosecutors, and publicly paid defense counsel. Scores of trial court rulings are appealed every year. The line-drawing can be complicated and delicately fine. Appellate justices often have difficulty agreeing themselves or even on which constitutional concept should control in a particular circumstance.

III. SPECIFIC CIVIL RIGHTS

By far, most cases in which Massachusetts has not followed the Supreme Court on constitutional issues have concerned the rights of criminal defendants. However, there have been similar cases involving the constitutional rights of persons seeking to act in a non-criminal context. Some of these cases, which I discuss first, involve differences in result that can easily be explained because of language in the Constitution of the Commonwealth that is not found in the Federal Constitution. There are opinions, however, in which the language difference was not significant, and the Supreme Judicial Court has disagreed with the Supreme Court. In Freeman v. Wood, for example, Justice Kaplan exquisitely discussed additur, upholding its constitutionality under art. 15 of the


86. Compare Commonwealth v. Connelly, 454 Mass. 808, 822-23 (2009) (concluding seizure principles should be applied in deciding constitutionality of placing certain GPS device on motor vehicle), with id. at 832-83 (Gants, J., concurring) (stating search principles should be applied when no physical intrusion into vehicle to install GPS device).

Declaration of Rights, contrary to the position taken by the Supreme Court under the Seventh Amendment in *Dimick v. Schiedt*. The *Goodridge* case, which I discuss last, also does not depend on language unique to the State Constitution. It is not yet clear that the *Goodridge* result will prove to be contrary to a position of the Supreme Court.

**A. Election Cases**

In 1983, based substantially on art. 3 of the Amendments to the Declaration of Rights, the Supreme Judicial Court held that “the Commonwealth is required to establish a registration procedure... for those prisoners who are domiciled in Massachusetts and who will be incarcerated on the date of the State elections.” The statutory scheme restricting prisoners’ fundamental right to vote in state elections lacked a compelling state interest. The constitutional right of a prisoner, duly qualified and registered to vote, had already been established in *Dane v. Board of Registrars of Voters*. The Federal Constitution provided no similar relief to prisoners. The right to vote provisions explicit in art. 3 of the Amendments, not paralleled in the Federal Constitution, justified the difference.

In a similar vein, the court relied on art. 9 of the Declaration of Rights when it upheld the right of a person seeking signatures on nomination papers to do so in a common area of a large shopping center. The court concluded that art. 9’s right to free elections and the right to be elected to public office applied to non-governmental (i.e. private) action that restricted those rights, but provided that the property owner could prescribe reasonable limitations on the solicitation process. Such a right based on the State Constitution had no parallel under the Federal Constitution.

Three Justices dissented. The dispute was whether a state action requirement should be found in art. 9 of the Declaration of Rights. If not, private parties’ actions that interfere with rights described in art. 9 would not be unconstitutional, and *Batchelder* would have had no art. 9 right to collect

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88. 293 U.S. 474, 488 (1935).
91. *Id.* at 937.
92. 374 Mass. 152, 161 (1978). In 2000, the people further amended art. 3 of the amendments to deny the right to vote for “persons who are incarcerated in a correctional facility due to a felony conviction.” *See MASS. CONST.* amend. art. 120 (amending MASS. CONST. amend. art. 3 as then amended). This petty, but politically popular, tampering with the Declaration of Rights was unnecessary.
95. *See id.*
signatures at the shopping center. No requirement of state action appears in art. 9, as it does in the First Amendment (“Congress shall make no law . . . .”) or in the Fourteenth Amendment (“[N]or shall any State deprive any person . . . .”).

B. The Right to an Adequate Education

The question whether a state constitution requires a state to provide an adequate public education has been answered differently in those states that have faced the issue. The inconsistent answers cannot be explained by differences in the language of the various constitutions, the activism or lack of it normally attributed to the respective courts, or any other obvious factor. In the McDuffy case, the court held, in a prolix opinion, that there was a constitutional right to an adequate education set forth in Part II, Chapter 5, Section 2 of the Constitution of the Commonwealth. The provision that the legislature and the executive have a duty to “cherish” the schools in the towns carried the day. In 1780, the word “cherish” included the idea of support. The court acknowledged that the right it identified was not stated in the Declaration of Rights, but instead appeared in Part II of the Constitution, which sets forth the obligations of the legislature and the executive. The difference in the placement of the provision could have been significant, if the court had sought to compel the legislature to fund public education in specific detail or if the court were to give individual students the right to challenge the amount or distribution of revenues. Although the court set forth what it thought an educated child must have, the lack of specific directions as to what must be done meant that the court, for the time being, left the matter to the other branches of government. Justice O’Connor, dissenting in part, concluded that the plaintiffs had not proved a violation of their right to an adequate education. The Supreme Court had decided, in San Antonio Independent

98. But see id. at 89 n.7 (majority opinion) (supporting no change if state action required).
99. See id. at 88-89. This opinion had an interesting internal history, most of which can be inferred from the public record. In those days, the court normally sat in panels of five. Justices Abrams and Liacos were not in the original panel. If there were not four votes for a result in the original panel, the other two justices—barring recusal—would be added to the panel. That is what happened here. I disagreed with a draft opinion by a member of the original panel and distributed a memorandum to that effect, anticipating that I would be alone in dissent. However, to my surprise, Justice Nolan reported that he agreed with me. Justices Abrams and Liacos were then added to the panel; they joined the position that Justice Nolan and I had taken; and I ended up writing the opinion of the court.
101. Id. at 562-64.
102. Id. at 566 n.23 (stating impact of clause placed elsewhere in Constitution rather than in Declaration of Rights).
104. See id. at 621-24 (O’Connor, J., dissenting).
School District v. Rodriguez,106 that there was no federal constitutional right to an education.107 It is interesting to note that, although there is a constitutional right in Massachusetts to an adequate education and a right to counsel at public expense for a criminal defendant threatened with incarceration, there is no constitutional right, under either the State or Federal Constitution, to sustenance (outside of custodial situations) or to adequate housing.

Any expectation that the McDuffy case would lead to substantial judicial involvement in the implementation of its guiding principles was substantially dispelled in Hancock v. Commissioner of Education.108 Although the court was divided, a majority of justices declined to direct the executive and legislative branches in carrying out the constitutional mandate (at least in the then-present circumstances). Three justices thought the Department of Education was doing enough to raise levels of student performance, although many school districts had not met established goals.109 Two justices substantially rejected the premise that the judiciary has an appropriate role in fulfilling the demands of the education clause (Massachusetts Constitution, Part II, Chapter 5, Section 2).110 Only Justices Greaney and Ireland, in dissent, believed that the judiciary had a continuing role in the circumstances.111

C. Same-Sex Marriage

Beyond question, Goodridge v. Department of Public Health112 is the most controversial and far-reaching constitutionally based opinion of recent decades. Relying solely on the State Constitution, a majority of the justices concluded that the Commonwealth could not deny same-sex couples the right to marry.113 There were five opinions: an opinion of Chief Justice Marshall, joined by Justices Ireland and Cowin (thirty-two pages); a concurrence of Justice Greaney (six pages); and three separate dissents by Justices Spina (seven pages), Sosman (six pages), and Cordy (thirty-one pages).114
The court’s opinion relies, without differentiation, on the due process\textsuperscript{115} and equal protection\textsuperscript{116} provisions of the State Constitution. Each provision requires that legislation have at least a rational basis for its existence. The court held that a statutory limitation of marriage only to a marriage between a man and a woman lacked any justifying rational basis.\textsuperscript{117} “[W]e conclude that the marriage ban does not meet the rational basis test for either due process or equal protection. Because the statute does not survive rational basis review, we do not consider the plaintiffs’ arguments that this case merits strict judicial scrutiny.”\textsuperscript{118} Chief Justice Marshall’s opinion derived analytical support from \textit{Lawrence v. Texas},\textsuperscript{119} the case cited first in the \textit{Goodridge} opinion.\textsuperscript{120} Both cases were argued in March of 2003.\textsuperscript{121} The \textit{Lawrence} opinion was released on June 26, 2003, months before the \textit{Goodridge} opinion was released.\textsuperscript{122} The \textit{Lawrence} opinion speaks of a liberty interest protected by equality of treatment and a denial of substantive due process by a state with no legitimate interest in criminalizing private, consensual homosexual conduct.\textsuperscript{123} In deciding the case on the basis that there was no legitimate state interest (that is, no rational basis) in barring same-sex marriage, the Supreme Judicial Court struck down the ban in the starkest terms possible.\textsuperscript{124} I shall discuss
later whether the court could have used a more traditional Massachusetts approach in deciding that the statutory ban on same-sex marriage is unconstitutional.\footnote{It has been suggested that the court’s opinion was in fact based on rational basis “plus.” Justice Sosman commented that the court’s opinion is a perversion of the rational basis test. \textit{Goodridge v. Dep’t of Pub. Health}, 440 Mass. 309, 363 (2003) (Sosman, J., dissenting). I see no sign of the “plus” expressed in the court’s opinion.}

Justice Greaney’s analysis, in concurrence with the result, relied on “traditional equal protection analysis.”\footnote{\textit{Id.} at 344 (Greaney, J., concurring).} He cited the right to equal treatment expressed in art. 1 of the Declaration of Rights of the State Constitution, as amended by art. 106 of the Amendments of the Constitution, commonly called the Equal Rights Amendment (“Equality under the law shall not be denied or abridged because of sex, race, color, creed or national origin.”). He concluded that same-sex couples have a fundamental right under art. 1 to marry that could not be denied unless the state advanced a “compelling purpose” for the discrimination that could not be achieved in some other reasonable manner.\footnote{\textit{See id.} at 344-45, 347.}

In Justice Greaney’s view, the justifications advanced in support of the statute were insufficient for the reasons stated by the court. If the statute could not pass a rational basis test, quite obviously it could not pass the stricter test that he applied. Justice Cordy’s strong rejection both of the existence of a fundamental right of same-sex couples to marry and of the applicability of the Equal Rights Amendment would have posed a problem if the court had elected to follow Justice Greaney’s approach.\footnote{\textit{See id.} at 365-79 (Cordy, J., dissenting).} As I note later, other courts that have rejected the ban on same-sex marriage have used similar reasoning to that of Justice Greaney. The fact that the 1976 addition of the word “sex” as an art. 1 category, which was based solely on protecting women from discrimination, made application of art. 1 to same-sex couples difficult to accept. If the issue were to be raised decades later, when the reason for the addition of the word “sex” to art. 1 had faded, Justice Greaney’s position on the application of art. 1 would likely have greater appeal.

The court thus cast its lot with the absence of any rational basis for treating same-sex couples who want to marry differently from opposite-sex couples who want to marry. A successful challenge to a statute on the ground that it lacks any rational basis is rare. The traditional deference to the judgment of the legislature and the ease with which a rational basis may be demonstrated tips the scales heavily in favor of any statute’s validity. The court cited eight Massachusetts opinions in which a statute “failed” rational basis review where no fundamental right or “suspect” classification was implicated.\footnote{\textit{Goodridge}, 440 Mass. at 330 & n.20 (majority opinion). Three of the opinions involved confiscatory legislation in which the absence of a rational basis was not discussed. \textit{See Aetna Cas. & Sur. Co. v. Comm’r of Ins.}, 358 Mass. 272, 280-81 (1970) (legislatively mandated reductions in motor vehicle insurance rates); Bos.
in the four opinions that explicitly addressed the rational basis question was based on the ground that legislation restricting specific commercial activity lacked any justification. These four opinions unquestionably support the position that legislation that lacks a rational basis cannot withstand a constitutional challenge. In each case, the absence of any rational justification was patent.

What then of a case in which a seemingly plausible rational basis is advanced in defense of a statute, and the challenger seeks to disprove the factual underpinning of the proponent’s argument? Or perhaps there is an argument in support of a statute that on its face seems insubstantial, and the proponent of the statute seeks to bolster the argument with evidentiary support. Surely evidence relating to the rationality issue is admissible. In Mansfield Beauty Academy v. Board of Registration of Hairdressers, the trial judge found as a fact that the statute had no rational tendency to promote the public welfare. In Coffee-Rich v. Commissioner of Public Health the court concluded that it was improbable (“fanciful”) that anyone would be misled into believing that the product was cream, considering the way in which the product was packaged and sold. The court then went on to say that there was nothing in the record showing that any buyer had been misled. At one point in the Goodridge opinion, the court noted that “[t]he department has offered no evidence that forbidding marriage to people of the same sex will increase the number of couples choosing to enter into opposite-sex marriages in order to have and raise children.” It seems that the court viewed as implausible the argument that upholding the statute would lead to an increase in “desirable” opposite-sex households. The notion that barring same-sex marriages would

Elevated Ry. Co. v. Commonwealth, 310 Mass. 528, 555-57 (1942) (proposed revocation of franchise unconstitutional); Durgin v. Minot, 203 Mass. 26, 30-31 (1909) (mandate to pave private way violates owner’s property rights). One could conclude that any legislation that is confiscatory lacks a public purpose and is not rationally based. In each of the three “confiscation” cases cited by the court there was, however, a public-interest reason for the enactment. One of the eight opinions does not appear to reach a constitutionally based conclusion. See Sec’y of the Commonwealth v. City Clerk, 373 Mass. 178, 186 (1977).

130. See Murphy v. Comm’r of Dep’t of Indus. Accidents, 415 Mass. 218, 233 (1992) (fee charged only if represented by counsel lacked rational relation to any legislative purpose); Coffee-Rich, Inc. v. Comm’r of Pub. Health, 348 Mass. 414, 426 (1965) (prohibition on retail sale of cream substitute, clearly identified and identifiable, lacked any rational basis); Mansfield Beauty Acad. v. Bd. of Registration of Hairdressers, 326 Mass. 624, 626-27 (1951) (prohibition of charge for hairdressing materials to otherwise non-paying customer lacked rational basis; indeed no statement of reason in defense of the statute was presented to the court); Op. of the Justices, 322 Mass. 755, 760-61 (1948) (prohibition of cemetery associations’ selling monuments had no rational basis).

131. See supra note 130 and accompanying text.


133. 326 Mass. 624 (1951).

134. Id. (noting no rational bearing on cleanliness, sanitation or prevention of disease in statute).


136. Id. at 425.

137. Id.

result in more children being raised in opposite-sex marriages certainly is not self-evident. Thus, it may not have been inappropriate for the court to note the absence of evidence in support of this asserted defense of the statute, just as the court noted the absence of evidentiary support for the statutory restriction in the Coffee-Rich case.139

If the great weight of authority, expert and otherwise, demonstrates a lack of statutory rationality, but there is some contrary credible authority, the statute should be upheld. A proffered basis that appears rational may or may not be factually sound, but, unless it could be shown by evidentiary proof to be wholly unsupported, the statute is constitutional. Justice Sosman’s dissent in the Goodridge case relies heavily on the absence of any demonstration that children raised by same-sex couples will be as well off as those raised by opposite-sex couples.140 One can speculate that if one accepts Justice Sosman’s argument, and in time it is shown that there are no developmental differences in the two groups, the statute, currently sustainable on her theory as rationally based, would have to be declared unconstitutional.

There was an analytical avenue available to the court that it could have easily traveled. Due process analysis in Massachusetts of a governmental intrusion on or restriction of individual rights is not limited either to a rational-relation test or a strict-scrutiny test. In the former standard, the state regulation need only have a rational relation to some reasonable governmental interest that might have been in the mind of the legislature, although there need be no showing that it was. An imaginative assistant attorney general could develop such a justification in his or her appellate brief, and, if so, the regulation will survive constitutional attack. On the other hand, where the scrutiny of the restriction or regulation must be strict, because of the fundamental nature of the personal interest sought to be regulated, the intrusion must be compelling, and it rarely is. Although the various opinions in the Goodridge case would seem to indicate that the court must apply one or the other of these tests of constitutionality, there is, however, a middle range. In Moe v. Secretary of Administration & Finance,141 Justice Quirico observed that the Supreme Judicial Court had recognized both “the limitations inherent in such a rigid formulation,” and that there was “a more flexible approach to the weighing of interests that must take place.”142 He cited Marcoux v. Attorney General.143

139. Justice Cordy suggested that the court had it wrong in relying on the department’s evidentiary omission, saying that the court’s statement is “surprising,” “misallocates the burden of proof in a constitutional challenge to the rational basis of a statute,” and “[t]he department is not required to present ‘evidence’ of anything.” Id. at 385 n.21 (Cordy, J., dissenting). As a general proposition, Justice Cordy is correct. But it is at least arguable that the absence of supporting proof is significant if the proposition advanced by the proponent of a statute seems improbable on its face.
140. Id. at 358-59 (Sosman, J., dissenting).
142. Id. at 655-56.
where Justice Kaplan described the dual tests of “reasonable relation” and “strict scrutiny” as “a shorthand for referring to the opposite ends of a continuum of constitutional vulnerability determined at every point by the competing values involved.”

Hence, in the *Moe* case, the court rejected a mechanical analysis of the state’s restriction on medically necessary abortions and instead tested the law “by the balancing [of] principles” developed in then recent Massachusetts decisions. The court also rejected the Supreme Court’s position that under the United States Constitution there is no impediment to funding childbirth, but not certain abortions. This “more flexible approach” releases a court from the rigidity of the largely result-oriented rational basis and strict scrutiny tests, but admittedly casts a court into a challenging analytical role. The strength of an assumed rational basis for an enactment may be weak and the interest of those adversely affected by the statute may be substantial. In the *Moe* case, the right to an abortion was constitutionally protected and the asserted financial justification for the denial of funding was based on analysis of doubtful merit. Similarly, the interest of two persons of the same sex to marry is often strong and an attempt to justify the denial of the right to marry may be weak. For example, the assertion that procreation is the primary purpose of marriage is a weak argument because many heterosexual married couples will never be able to reproduce due to the physical condition of one or both. Yet on analysis, we would not deny such a heterosexual couple the right to marry.

The *Goodridge* opinion had little precedent to rely on. In 1993, the Hawaii Supreme Court—using a strict scrutiny test—remanded a case to the trial court, concluding that, although there was no fundamental right of same-sex couples to marry, a ban on same-sex marriage could be justified only if the state could

144. *Id.* at 65 n.4.
148. In the aftermath of the *Goodridge* opinion, a majority of the justices gave the Senate an advisory opinion that legislation prohibiting same-sex couples from entering into marriage but allowing them to form civil unions would not meet the due process and equal protection requirements of the State Constitution. *Ops. of the Justices*, 440 Mass. 1201, 1209-10 (2004). Three justices, the *Goodridge* dissenters, disagreed. *Id.* at 1222. In *Cote-Whitacre v. Department of Public Health*, a majority of the justices agreed that there was no constitutional barrier to the statutory prohibition (M.A.S.S. GEN. LAWS ch. 207, § 11) against granting a marriage license to a same-sex couple who could not marry in their state of domicile (unless they intended thereafter to reside in Massachusetts, that is, to adopt a Massachusetts domicile). *See* 446 Mass. 350, 370 (2006) (Spina, J., concurring) (state may discriminate against non-resident same-sex couples); *id.* at 391 (Marshall, C.J., concurring). But see *id.* at 411-12 (Ireland, J., dissenting) (discrimination against non-resident same-sex couples unconstitutional). The use of the advisory opinion process, available in about ten states, provided a quick and easy assessment of the validity of the proposed civil union legislation. The Massachusetts Constitution does not have the federal constitutional requirement that courts deal only with “a case or controversy.” Although a branch of the legislature can use the process of seeking an opinion of the justices to avoid facing a tough issue, in my experience, the process has served a good purpose.
prove that there was a compelling state interest in prohibiting same-sex marriage. 149 Four years later, the Hawaii Supreme Court affirmed a judgment that enjoined the Department of Health from denying a marriage license solely because the applicants were of the same sex. 150 In the next year, Hawaii adopted a constitutional amendment giving the legislature “the power to reserve marriage to opposite-sex couples.”151 The Hawaii Legislature then conferred certain rights and benefits on same-sex couples short of the right to marry.152

In 1999, the Vermont Supreme Court held that under the state constitution same-sex couples were entitled to the benefits of civil unions, and that it was up to the legislature to decide if, beyond that, it favored allowing same-sex marriages.153 The court relied on the common benefits clause of the Vermont Constitution (“[The] government is, or ought to be, instituted for the common benefit, protection, and security of the people . . . .”) which had been treated in much the same way that equal protection principles had been applied.154 Justice Johnson, concurring in part and dissenting in part, concluded that, on equal protection grounds, the state must show that the challenged statute involved a narrow tailoring that furthered important interests.155 The Vermont statute, in her view, failed even a rational-basis test.156 In 2000, Vermont enacted a civil union statute and, in 2009, adopted a statute authorizing same-sex marriages.157

Following the release of the Goodridge opinion, several state courts of last resort have dealt with the right of same-sex couples to marry, invariably doing so at great length and almost always with dissenting opinions.158 Cases denying the existence of a constitutional right of same-sex couples to marry are Hernandez v. Robles,159 Lewis v. Harris,160 Andersen v. King County,161 and

151. HAW. CONST. art. I, § 23.
152. HAW. REV. STAT. § 572C-1 to -7 (2010).
154. VT. CONST. ch. I, art. 7.
156. Id.
158. The Supreme Court has not been asked to express its views on the constitutional right of same-sex couples to marry. It is at least uncertain (some would say doubtful) whether, in its current formulation, the Court would recognize such a right. One could build an argument that the denial of the right of same-sex couples to marry is a violation of a federal constitutional right. See Lawrence v. Texas, 539 U.S. 558, 578-79 (2003) (striking down Texas same-sex sodomy law on due process grounds). Justice Scalia, in dissent, asserted that the decision implicated the issue of homosexual marriage. Id. at 605 (Scalia, J., dissenting).
159. 855 N.E.2d 1 (N.Y. 2006) (4-2 decision) (statute limiting marriage to opposite-sex couples passes rational basis test; no fundamental right at issue; welfare of children is a legitimate government interest supporting the legislation).
160. 908 A.2d 196 (N.J. 2006) (4-3 decision) (no fundamental right to marry, but on equal protection grounds, same-sex couples entitled to the same benefits as opposite-sex couples).
161. 138 P.3d 963 (Wash. 2006) (5-4 decision) (on rational basis review, procreation and children’s well-being justify limitation to heterosexual marriage; not suspect class; no fundamental right to marry).
Conaway v. Deane.\textsuperscript{162}

On the other hand, there are recent decisions of state courts of last resort that have reached the opposite conclusion. In a surprising unanimous opinion, not citing the Goodridge case, the Supreme Court of Iowa held that sexual orientation was a suspect classification and that a law limiting marriage to opposite-sex couples was unconstitutional.\textsuperscript{163} The law failed to pass intermediate scrutiny. In 2008, the Supreme Court of Connecticut held that restricting marriage to heterosexual couples was unconstitutional on equal protection grounds.\textsuperscript{164} The court said that sexual orientation is a “quasi-suspect” classification and that laws discriminating on that basis are subject to intermediate scrutiny.\textsuperscript{165} The state failed to justify the classification. In 2008, the California Supreme Court reached the same result, applying a strict scrutiny standard because classifications based on sexual orientation were suspect and impinged on a fundamental right.\textsuperscript{166}

Opinions acknowledging a constitutional right of same-sex couples to marry used a traditional equal protection of the laws analysis, just as Justice Greaney did in his concurrence in the Goodridge case. Some courts relied on intermediate scrutiny and others relied on strict scrutiny. None of these courts, however, concluded that the limiting statute flunked a rational basis test. The dissenting opinions in the cited cases upholding the constitutionality of statutes barring same-sex marriage also applied an intermediate or strict scrutiny standard.

I favor the equal protection approach that puts the burden on the state to demonstrate that it has a compelling interest in limiting marriage to heterosexual couples. The procreation argument in defense of a limiting statute lacks serious foundation. The welfare of the children argument becomes relevant only if same-sex couples adopt a child or have one with outside assistance. It should be on the state to show that all same-sex marriages must be forbidden if (a) same-sex couples have children in their households, the

\textsuperscript{162} 932 A.2d 571 (Md. 2007) (4-3 decision) (sexual orientation not suspect class; no fundamental due process right involved; heightened or strict scrutiny not appropriate).

\textsuperscript{163}  Varnum v. Brien, 763 N.W.2d 862 (Iowa 2009).


\textsuperscript{165}  The label “quasi-suspect” is not instructive. I am reminded of the observation of Professor Warren A. Seavey that all we really know for sure about a “quasi-cow” is that it is not a cow.

\textsuperscript{166}  In re Marriage Cases, 183 P.3d 384 (Cal. 2008) (4-3 decision), superseded by constitutional amendment, 2008 Cal. Legis. Serv. 2315 (West), as recognized in Strauss v. Horton, 207 P.3d 48 (Cal. 2009). On November 5, 2008, the people of California adopted Proposition 8, which states that “only marriage between a man and a woman is valid or recognized in California.” See Strauss, 207 P.3d at 59 (6–1 decision) (upholding Proposition 8 as applicable prospectively). In Perry v. Schwarzenegger, based on extensive findings, the court ruled that Proposition 8 was unconstitutional under both the Due Process and Equal Protection Clauses. See 704 F. Supp. 2d 921, 1004 (N.D. Cal. 2010). Proponents of Proposition 8 appealed the district court’s decision, and the Ninth Circuit has recently certified a question to the Supreme Court of California asking whether the proponents have standing to bring an appeal. See Perry v. Schwarzenegger, 628 F.3d 1191, 1193 (9th Cir. 2011).
unity of the sex of the “parents” will be more detrimental to the children as against children in a heterosexual household and (b) the only way to prevent the harm is to deny all same-sex couples the right to marry. Such proof may be hard to come by.

How does one explain the various applications of constitutional principles in contests over the right of same-sex couples to marry? What has governed the choice of the standard to be applied—rational basis, suspect class, fundamental right, compelling state interest? Why has the issue been dealt with where it has and why not elsewhere? One factor is the developing tolerance of homosexual relationships, especially in jurisdictions thought to be more liberal than others (and in which a Defense of Marriage Act has not been enacted). 167 Hence, the issue has generally been decided in states in the northeast and those bordering on the Pacific Ocean. I do not, however, undertake to explain Iowa, although it may be symbolic of what is going to happen throughout this country by legislation or court decision in the balance of this century. 168

I have no helpful explanation of the choices made by judges in these cases. Why is the right of same-sex couples to marry a fundamental right in some states and not in others? How does one decide that a statutory classification is suspect, nearly so, or not suspect at all? The level of proof that a state must meet in order to uphold a marriage-limiting statute varies. In some instances, legislation or specific state constitutional provisions might warrant recognition of a particular constitutional right. In general, however, the decision to go one way or the other is subjective, a matter of judgment. As troublesome as this concept may be to some, there is no other reasonable way to face constitutional (and many other) issues in changing circumstances. The principal means of controlling the process is to have judges who are cautious, precedent-acknowledging, nonpartisan, and capable of giving, and in fact giving, reasoned results, expressed as narrowly as possible in the circumstances.

IV. CONCLUSION

What accounts for the departure of the Supreme Judicial Court from constitutionally based conclusions reached by the Supreme Court in analogous and often identical circumstances? Is it, as Justice Fried decried in Commonwealth v. Gonsalves, that the court invokes the Commonwealth’s independent tradition in an “opportunistic” way to justify its conclusions? 169

167. 28 U.S.C. § 1738C has not been adopted.
168. Or perhaps not. Three of the seven Iowa Supreme Court justices were voted out of office in the 2010 election.
169. 429 Mass. 658, 682 (1999) (Fried, J., dissenting). Justice Fried offered another, more pejorative, characterization when he commented that the court was “engaging in judicial chauvinism.” Id. at 681. It is a matter of judgment whether the court has been engaging in excessive or blind patriotism toward the Commonwealth. The justices of the Supreme Judicial Court are obliged to apply the State Constitution where appropriate; they take an oath to do so.
think the court has not been opportunistic in reaching its differing conclusions, but Justice Fried was on to something. There is a tradition of independence and leadership in Massachusetts that people identify with and respect, even though there are aspects of this tradition that date from long before they or their ancestors came to America.\textsuperscript{170}

There was another factor that bore on the state of mind of the Supreme Judicial Court at the beginning of the 1980s. In the previous ten years, there had been a major change in personnel and attitude on the court that resulted in many innovations, some long overdue. Between 1969 and 1972, Governor Francis W. Sargent appointed six members to the Supreme Judicial Court.\textsuperscript{171} The justices adopted rules of civil, criminal, and appellate procedure.\textsuperscript{172} They also approved Rules of Professional Conduct, established the Board of Bar Overseers and the Clients Security Board, and required lawyers to pay an annual fee to support the operation of these boards. The justices adopted all these administrative rules and bar regulations pursuant to their constitutional authority and without legislative involvement. During the decade of the 1970s, the court also had made major changes in the common law of the Commonwealth, especially by increasing the rights of tort victims.

Much of what I have just described would not have been possible were it not for the judgment of governors in their nomination of those justices, no longer on the court, who were major decision-makers in what I have set forth in this

\textsuperscript{170} This is hardly the place to recite the relevant history of the Commonwealth. But certain matters stand out: (a) the opposition to the British government that led to the commencement of the American Revolution here ("the shot heard 'round the world") and prompted certain provisions of the Massachusetts and Virginia Declaration of Rights; (b) the pronouncement shortly after the adoption of the Constitution of 1780 that slavery was unconstitutional in Massachusetts; (c) the Transcendentalists who honored individual expression (Emerson—self-reliance; Thoreau—"march to a different drummer"); (d) the leadership of the Supreme Judicial Court under Chief Justice Lemuel Shaw in redirecting the common law from an agrarian to an industrial society; (e) the strong abolitionist movement in the Commonwealth; and (f) the substantial innovative social legislation of the late 19th and early 20th centuries.

\textsuperscript{171} When I first sat on the court on the first Monday of November, 1972, Senior Associate Justice Paul C. Reardon had more appellate experience than all the other members of the court combined. Two new members, Robert Braucher and Benjamin Kaplan, came from the Harvard Law School faculty. They had first been members of the New York bar and brought no particular adherence to the law of the Commonwealth unless it deserved it. Each had been the reporter for a significant Restatement of the American Law Institute (Braucher—Restatement (Second) of Contracts; Kaplan—Restatement (Second) of Judgments). The American Law Institute held the view that in "restating" the law, the best rule should be selected, even if it were a minority position among the states. With this background, they were receptive to changes in the common law of the Commonwealth when a particular rule no longer seemed justified. Justices Francis J. Quirico and Edward F. Hennessey had been outstanding superior court judges. They were open-minded and, from experience, aware of the unnecessarily restrictive nature of certain aspects of the law of Massachusetts. Indeed, Justice Hennessey, shortly before his appointment to the Supreme Judicial Court, had written a law review article that called for certain law reforms. See Edward J. Hennessey, \textit{Evolution in Personal Injuries Law of Massachusetts}, 51 Mass. L.Q. 387, 394-401 (1966). When Chief Justice Tauro and Justice Reardon retired in the mid-1970s, Governor Michael S. Dukakis appointed Paul J. Liacos and Ruth I. Abrams to the court, neither of whom was a product of the traditional mold for a Supreme Judicial Court justice.

\textsuperscript{172} The coordination between the legislature and the justices in implementing the new rules and adapting or repealing statute was impressive.
article: Governors Sargent (Quirico, Braucher, Hennessey, Kaplan, and I) and Dukakis (Liacos, Abrams, and Greaney). The current court, whose members were appointed by three governors, is continuing the tradition, as my discussion of the cases from the first decade of this century shows.

What one may deride as “opportunistic” may appropriately be taken by others as a continuing manifestation of a strong tradition of independent thinking. I hope that I have demonstrated that the conclusions of the Supreme Judicial Court that depart from those of the Supreme Court are rational, sometimes based on differences in the two constitutions, sometimes based on the Supreme Judicial Court’s adherence to an earlier conclusion of the Supreme Court (now repudiated by that Court), and sometimes based on a reasoned analysis that simply, from time to time, disagrees with a current majority of the Supreme Court.