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The Supreme Judicial Court in its Fourth Century: Meeting the Challenge of the “New Constitutional Revolution”

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The Emergence of State Constitutional Law

The Supreme Judicial Court of Massachusetts enters its fourth century in the early years of what may be a new era of ascendancy of state supreme courts. Over the last 20 years, as the Supreme Court of the United States has reduced protections afforded individual liberties under the United States Constitution, increasing attention has been directed toward state supreme courts and the protections afforded under state constitutions. In 1977, in a now-famous Harvard Law Review article, U.S. Supreme Court Justice William Brennan lauded this trend and wished it Godspeed. “[S]tate courts no less than federal are and ought to be the guardians of our liberties,” he wrote.

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 A year later, another justice—this one less committed to continuing the agenda of the Warren Court—joined his voice to Justice Brennan’s.2

In a 1978 Suffolk Law Review article, Supreme Court of New Hampshire Associate Justice Charles Douglas hailed “the pendulum swing” back to state supreme courts. “State judges will be losing a golden opportunity for states’ rights,” he warned, “if they do not seize the moment to dust off their state constitutions and to set in motion institutional and attitudinal changes in order to creatively protect the rights of their citizens from increasingly meddlesome and burgeoning bureaucracies and governmental agencies.”3

In the years since these articles appeared, state supreme courts have increasingly followed the justices’ advice. Where the Supreme Court of the United States had been unable to find in the Fourteenth Amendment any limit upon state relegation of public education to the inequities of support by local property taxes,4 a growing number of state supreme courts have found such limits in their respective state constitutions.5 Where the United States Supreme Court has cut back on the criminal procedural protec-

3. Id. at 1123.
tions to be found in the Bill of Rights and the Fourteenth Amendment, many state supreme courts have found a basis in their state constitutions for retaining or increasing the protections previously afforded criminal defendants by the federal courts. And, in other areas where the Supreme Court has not definitively spoken, state supreme courts have increasingly struck out on their own in the effort to protect individual rights. For example, a number of state supreme courts have recognized a patient’s “right to die”—based on a right to privacy to be found in their state constitutions as well as in the Constitution of the United States. In recent years, there have been striking developments in state constitutional law, a leading scholar observed in 1991. |Since the early 1970’s we have been experiencing a ‘constitutional revolution’ in the judicial interpretation of individual rights provisions of state constitutions.|  

Perhaps the best evidence of the revolutionary magnitude and growing momentum of this movement is the enormous amount of literature that it has begun to generate. Over the last two decades, books and law review articles on state constitutional law have proliferated. A recently-published selected bibliography on the subject for the years 1980 to 1989 comprises some 358 entries. Special symposium issues on state constitutional law have been published by numerous journals. An “Annual Issue on State Constitutional Law” has, since 1988, been published by the Rutgers Law Journal. One treatise on state constitutional law has recently been published and at least one other is in process. One case book and a “nutshell” have already been published, as have five volumes of what will eventually be a 52-volume set of “reference guides” to each of the state constitutions. Since 1987, the National Association of Attorneys General has published a quarterly State Constitutional Law Bulletin, and, in 1988, it began publishing as well an annual law review, Emerging Issues in State Constitutional Law. The incredible growth of the literature in this field made Justice Brennan’s 1977 article the eighth most cited law review article in the years 1979 to 1985.

Nonetheless, despite its intensity, this rising tide of state constitutionalism does not seem yet to have made its impact on the consciousness of the average citizen or even that of the average practicing lawyer. A poll conducted in 1988 by the Advisory Commission on Intergovernmental Relations found that 52 percent of persons interviewed said that they were unaware even that their states had their own constitutions. “Even among lawyers,” the ACIR reported the next year:

state constitutional law is relatively unknown and little practiced. Compared to the U.S. Constitution, state constitutions are less frequently mentioned in the history and

civics classes of public schools or the university, and regular reporting of state constitutional decisions, as well as the statistics of state court activities, has been, until very recently, quite rare. Even the law schools seldom offer courses in state constitutional law.

Preeminence of The Massachusetts Constitution

Permitting study of U.S. constitutional law to eclipse study of state constitutional law in this fashion is particularly inappropriate in Massachusetts. The constitution of Massachusetts, as a source of fundamental principles of self-government, is at least the equal of the Constitution of the United States. Older than the U.S. Constitution by nine years—and perhaps "the oldest written working constitution in the world,"—it served as a principal model for the U.S. Constitution. Written by John Adams in 1779, at a time when he had become "undoubtedly the greatest expert on constitutions in America, if not in the world," it built upon Massachusetts' uniquely long and rich experience with written constitutions—starting with the Mayflower Compact and The Charter of the Massachusetts Bay Company—and engraved the experience of sister states under the written constitutions with which they experimented during the early years of the revolution.

While much of what is best in the U.S. Constitution can be traced to the Massachusetts constitution, (Adams once claimed "I made a Constitution for Massachusetts, which finally made the Constitution of the United States,"), the latter contains as well a rich lode of material not to be found in the former. Besides additional provisions which relate to state powers not delegated to the federal government, it contains provisions explicitly imposing duties on government in a fashion which has no analogue in the U.S. Constitution. As an example of the latter, consider Chapter V, Section II of Part Two:

Wisdom and knowledge, as well as virtue, diffused generally among the body of the people, being necessary for the preservation of their rights and liberties; and as these depend on spreading the opportunities and advantages of education in the various parts of the country, and among the different orders of the people, it shall be the duty of Legislatures and the Magistrates, in all future periods of this Commonwealth, to cherish the interests of literature and the sciences, and all seminaries of them; especially the university at Cambridge, public schools and grammar schools in the towns; to encourage private societies and public institutions, rewards and immunities, for the promotion of agriculture, arts, sciences, and commerce, trades, manufactures, and a natural history of the country; to countenance and inculcate the principles of humanity and general benevolence, public and private charity, industry and frugality, honesty and punctuality in their dealings; sincerity, good humour, and all social affections, and generous sentiments among the people.

Even where the two constitutions cover the same territory, the Massachusetts constitution frequently does so in a fashion which is more explicit, detailed and rich in resounding language. Where the U.S. Constitution merely employs principles of separation of powers, Article XXX of the Massachusetts Declaration of Rights attempts to guarantee them—and in forthright language which leaves no doubt as to the seriousness with which the guarantee was meant to be taken:

In the government of this Commonwealth, the legislative department shall never exercise the executive and judicial powers, or either of them: The executive shall never exercise the legislative and judicial powers, or either of them: The judicial shall never exercise the legislative and executive powers, or either of them: to the end it may be a government of laws and not of men.

And, where the U.S. Constitution merely attempts to assure independence of the judiciary by providing for life tenure and protected salaries, Article XXIX of the Declaration of Rights goes beyond that to expostulate:

It is essential to the preservation of the rights of every individual, his life, liberty, property and character, that there be an impartial interpretation of the laws, and administration of justice. It is the right of every Citizen to be tried by judges as free, impartial and independent as the lot of humanity will admit.

24. The Massachusetts Constitution lacks, however, some of the protections of the Bill of Rights. It does not, for example, contain an explicit provision protecting against double jeopardy.
25. By, among other things, vesting in the Congress "[a]ll legislative powers herein granted" in Article I, Section 1, vesting in the President "[t]he executive power" in Article II, Section 1, and vesting in the Supreme Court and the lower federal courts "[t]he judicial power of the United States" in Article III, Section 1.
26. Article III, Section 1 provides in pertinent part: "The judges, both of the Supreme and inferior courts, shall hold their offices during good behavior, and shall, at stated times, receive for their services, a compensation, which shall not be diminished during their continuance in office."
The Massachusetts Constitution in the Courts

The Massachusetts constitution has been, until recently, a sleeping giant. Over the last century, while the U.S. Supreme Court was slowly giving life to the Bill of Rights and gradually applying all but a few of its provisions to the states through the Fourteenth Amendment, it was easy to see the Massachusetts Declaration of Rights as an irrelevancy. What need was there to resort to the state constitution to protect individual liberties in the Commonwealth when the Supreme Court of the United States stood ready to do that job through its interpretation of the U.S. Constitution? Moreover, as Justice Wilkins points out in his seminal article on the Declaration of Rights, written for the Massachusetts constitution’s bicentennial in 1980, there was little in the history of the Supreme Judicial Court’s treatment of the Declaration of Rights to suggest that the court would have welcomed such claims.

There is . . . a strong tradition of judicial restraint on the court, and the Supreme Judicial Court has been most deferential to legislative determinations. It appears that from 1804 to 1916 only fifty-three acts were invalidated on constitutional grounds. Between 1916 and 1936, only eleven acts were declared unconstitutional. Additionally, the Supreme Judicial Court did not join in the practice of overturning legislation on substantive due process grounds to as great a degree as did the Supreme Court of the United States in the period from about 1900 to about 1937.27

However, attitudes are changing and the state constitutional “sleeping giant” has begun to stir. In his 1980 article, Justice Wilkins was already able to claim that “the Supreme Judicial Court currently appears more outspoken concerning the significance of rights under the Declaration of Rights than at any other time in its history.”28 At the time, much of the court’s “outspoken” behavior took the form of only dictum or language in concurring or dissenting opinions.29 But not all of it. In 1977, in Selectmen of Framingham v. Municipal Court of the City of Boston,30 Article XIV of the Declaration of Rights (which provides, in part, that “[e]very subject has a right to be secure from all unreasonable searches, and seizures, of his person, his houses, his papers, and all his possessions”) had been used along with the Fourth Amendment to hold illegal a warrantless police search related to a disciplinary proceeding against a Framingham police officer. In 1978, Article XVI of the Declaration of Rights, which, as amended,31 provides that “[t]he right of free speech shall not be abridged,” had emerged in Commonwealth v. Soares32 as a ground for protecting the right to freedom of expression of a nude dancer under circumstances where the U.S. Supreme Court would not have extended the protections of the First Amendment. In 1979, Article XII and Article XV, which protect rights to jury trial, had been employed in Commonwealth v. Soares33 to strike down a prosecutor’s discriminatory use of peremptory challenges—an action which had not yet been taken by the U.S. Supreme Court under the Fourteenth Amendment.34 And, in 1980, Article XXVI (prohibiting “cruel or unusual Punishments”) was used in District Attorney v. Watson35 to invalidate the Massachusetts death penalty by means of a standard which the Supreme Judicial Court acknowledged to be stricter than that which might be employed by the U.S. Supreme Court under the Eighth Amendment.36

Since 1980, this trend toward vitalizing the Massachusetts Declaration of Rights has shown a steady and dramatic growth. In 1981, the Supreme Judicial Court

28. Wilkins, supra note 27, at 890.
31. The original Article XVI provided merely: “The Liberty of the press is essential to the security of freedom in a state: it ought not, therefore, to be restrained in this Commonwealth.” The sentence quoted in the text was added by Amendment LXXXVII in 1948.
34. Seven years later, in Batson v. Kentucky, 476 U.S. 79 (1986), the United States Supreme Court followed suit.
36. In 1975, the Supreme Judicial Court had found the state’s mandatory death penalty for rape-murder unconstitutional under the Declaration of Rights in Commonwealth v. O’Neal, 369 Mass. 242 (1975). In 1977, the Supreme Judicial Court had rendered an
built on the foundation laid in its “right to die” cases to recognize a right to privacy in the Massachusetts constitution providing protections for abortion rights beyond those available from the U.S. Supreme Court. At issue in Moe v. Secretary of Administration and Finance was the constitutionality of provisions of the Massachusetts Medical Assistance Program that prohibited state funding for abortions if they were not necessary to prevent the death of the mother. In holding the provisions invalid under the due process requirements of the Massachusetts constitution (historically traced to articles I, X, and XII of the Declaration of Rights and Chapter I of The Frame of Government), Justice Quirico noted that the U.S. Supreme Court had, in Harris v. McRae, "upheld enactments substantially identical to those challenged here against claims that they violated the due process and equal protection components of the Fifth and Fourteenth Amendments to the United States Constitution." [40] "[W]hen asked to interpret the Massachusetts Constitution," he said, "this court is 'not bound by Federal decisions, which in some respects are less restrictive than our Declaration of Rights.' ... We think our Declaration of Rights affords a greater degree of protection to the right asserted here than does the Federal Constitution as interpreted in Harris v. McRae." [41]

In two 1983 cases, the Supreme Judicial Court further broadened the protection afforded by the state constitutions by announcing that it would not impose upon the commonwealth’s Declaration of Rights the same “state action” restrictions which the U.S. Supreme Court places upon the Bill of Rights and the Fourteenth Amendment. First, in Batchelder v. Allied Stores International, the court held that Article IX, which provides that “[a]ll 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,” prevented Allied Stores from peremptorily banning from its North Shore Shopping Center all candidates who wished to solicit signatures for nominating petitions. Because Allied Stores was not a state actor, its prohibition was immune from scrutiny under the Fourteenth Amendment—the U.S. Supreme Court had so held in a recent series of decisions. However, Justice Wilkins noted for the majority:

"Unlike the prohibition of the First Amendment to the Federal Constitution ("Congress shall make no law . . .") and the limitation of the Fourteenth Amendment ("nor shall any State deprive any person . . . ") art. 9 is not by its terms directed only against governmental action. There is, thus, no "state action" requirement expressed in art. 9, and we see no reason to imply such a requirement, and thereby to force a parallelism with the Federal Constitution." [44]

Bolstering the court’s position was the fact that courts in California, New Jersey, Pennsylvania and Washington [45] had “regarded as meaningful the absence of State action language in their state constitutions.” [46] "We also think," the court concluded, “that the distinction is significant and reject any suggestion that the Declaration of Rights should be read as directed exclusively toward restraining government action.” [47]

Later in 1983, in Phillips v. Youth Development Program, Inc., the court, in another opinion by Justice Wilkins, expanded upon the state action theme raised in Batchelder. In that case, the plaintiff had invoked the due process provisions of the state consti-
tution to claim that her discharge from employment by the defendant was invalid. The court noted that due process protections [unlike those of Article IX] were “inherently concerned with governmental action” and, therefore, could be applied only against defendants who are state actors. Nonetheless, the court went on to say:

[...]there is little doubt that this court may fashion its own concepts of due process of law under the Constitution of the Commonwealth and apply them within the permissible limits of the Constitution of the United States, [and, therefore,] in determining what is State action for State due process of law purposes, we need not define State action as the Supreme Court of the United States has defined State action for Fourteenth Amendment and [federal civil rights litigation] purposes.52

In 1984, the Supreme Judicial Court was once again faced with a death penalty statute and once again found such a statute unconstitutional. This time the court’s decision could not be bottomed, as it had in Watson, solely upon Article XXVI’s prohibition of “cruel or unusual punishments.” In 1982, the voters of the Commonwealth had effectively overruled Watson by adding to Article XXVI the following language:

No provision of the Constitution, however, shall be construed as prohibiting the imposition of the punishment of death. The general court may, for the purpose of protecting the general welfare of the citizens, authorize the imposition of the punishment of death by the courts of law having jurisdiction of crimes subject to the punishment of death.

But the death penalty statute enacted shortly thereafter carried other constitutional defects. In Commonwealth v. Colon-Cruz,53 the Supreme Judicial Court found that the new law violated Article XII’s jury trial and self-incrimination protections because it rendered defendants vulnerable to the death penalty only if they pleaded not guilty and demanded a jury trial. “The inevitable consequence,” said Justice Wilkins for the court, “is that defendants are discouraged from asserting their right not to plead guilty and their right to demand a trial by jury.”54 To the prosecutor’s claim that the new amendment insulated the death penalty from such review under constitutional provisions other than Article XXVI Justice Wilkins replied:

The construction of [the amendment] which the Commonwealth urges us to adopt would mean that a statute establishing the death penalty for members of one particular race only or providing for the imposition of the death penalty without trial would be valid under the Massachusetts Constitution. In the absence of any indication to the contrary in the language and history of the amendment, we cannot accept the Commonwealth’s radical construction of [it] as carrying into effect the reasonable purpose of the people.55

In 1985, the court began an important series of decisions employing Article XIV of the Declaration of Rights, rather than the Fourth Amendment, to protect citizen privacy from incursions by the state’s police processes. First, in Commonwealth v. Upton,56 the Supreme Judicial Court held Article XIV’s probable cause requirements for issuance of a search warrant to be stricter than those of the Fourth Amendment. The U.S. Supreme Court’s decision two years before, in Illinois v. Gates,57 had abandoned the probable cause requirements laid down by the Court in Aguilar v. Texas58 and Spinelli v. United States.59 In place of Aguilar and Spinelli’s specific two-pronged standard for testing the reliability of an informant’s statement,60 the Court had adopted a new, more evanescent “totality of the circumstances” standard. In Upton, the Supreme Judicial Court rejected the Gates test as “unacceptably shapeless and permissive [and] lacking the precision that we believe can and should be articulated in stating a test for determining probable cause.”61 Noting that Gates had been much criticized by scholars and other state supreme courts,62 the court announced that Massachusetts would retain the Aguilar-Spinelli test as the standard for probable cause under Article XIV of the Declaration of Rights. “The test we adopt has been followed successfully by the police in this Commonwealth for approximately twenty years,” Justice Wilkins wrote for the court. “It is a test that aids lay people, such as the police and certain magistrates, in a way that the ‘totality of the circumstances’ test never could. We believe it has encouraged and will continue to encourage more careful police work and thus will tend to reduce the number of unreasonable searches conducted in violation of art. 14.”63

Three days later, in Commonwealth v. Ford,64 the court went beyond Upton to decide, for the first time,

52. Id. at 658.
54. Id. at 163.
55. Id. at 161-62.
60. “Under the Aguilar-Spinelli standard, if an affidavit is based on information from an unknown informant, the magistrate must ‘be informed of [1] some of the underlying circumstances from which the informant concluded that the contraband was where he claimed it was (the basis of knowledge test), and [2] some of the underlying circumstances from which the affiant concluded that the informant was “credible” or his informant “reliable” (the veracity test). [Citing to Aguilar.] If the informant’s tip does not satisfy each aspect of the Aguilar test, other allegations in the affidavit that corroborate the information could support a finding of probable cause. [Citing to Spinelli.]” Commonwealth v. Upton, 394 Mass. 363, 374-75 (1985).
62. Id. at 374, n.10.
63. Id. at 376.
64. 394 Mass. 421 (1985).
that Article XIV imposed an exclusionary rule on the courts of the commonwealth. Upton had not decided this issue because, in that case, a state statute had been read to require exclusion of the illegally obtained evidence.\textsuperscript{65} The issue had not been determined in the 1977 \textit{Framingham} decision\textsuperscript{66} because, although the evidence in that case had been excluded "as a matter of Massachusetts law,"\textsuperscript{67} the court had not made clear whether the principle employed was one of common law, court rule or constitutional mandate.\textsuperscript{68} But the facts of Ford were seen to involve circumstances in which Article XIV required exclusion of the evidence. "We are thus holding," said Justice Wilkins, again writing for the majority, "that art. 14 of the Declaration of Rights requires the exclusion of evidence seized during a storage search not conducted pursuant to standard police procedures."\textsuperscript{69} Since 1985, Article XIV has been used as a basis for finding evidence excludable in four other important criminal cases. In \textit{Commonwealth v. Blood},\textsuperscript{70} the Supreme Judicial Court, in an opinion by Justice Lia­cos, held that, despite U.S. Supreme Court decisions interpreting the Fourth Amendment differently,\textsuperscript{71} "one party consent" by a police informant carrying a radio transmitter into a conversation with suspects could not, under Article XIV, eliminate the need to obtain a warrant upon probable cause before engaging in such police eavesdropping. In \textit{Commonwealth v. Panetti},\textsuperscript{72} the court, per Justice Wilkins, determined that warrantless eavesdropping by a policeman lodged in a crawlspace under a defendant's apartment violated Article XIV, "[w]hatever the Supreme Court of the United States might decide under the Fourth Amendment to the United States Constitution,"\textsuperscript{73} In \textit{Horsemen's Benevolent and Protective Association v. State Racing Commission},\textsuperscript{74} the court, in an opinion by Chief Justice Hennessey, found in favor of plaintiffs who challenged the commission's sweeping program for testing its licensees for drug use, saying: "[W]e need not consider this case in the context of the Fourth Amendment, because we now conclude that the drug testing program, in both the testing at random and on 'reasonable suspicion,' is unconstitutional under art. 14 of the Massachusetts Declaration of Rights."\textsuperscript{75} And in \textit{Guiney v. Police Commissioner of Boston},\textsuperscript{76} the court invalidated a similar drug testing program—this one imposed by departmental rule on all Boston police officers. The program had been held constitutional under the Fourth Amendment by the U.S. Court of Appeals for the First Circuit,\textsuperscript{77} but the Supreme Judicial Court found that it did not meet the more demanding scrutiny of Article XIV. "Constitu­tional safeguards should not be abandoned simply because there is a drug problem in this country," Justice Wilkins noted for the court. "Article 14 of the Declaration of Rights should not be a casualty in the war on drugs. It is at times when pressures on constitutional rights are greatest that courts must be espe­cially vigilant in the protection of those rights."\textsuperscript{78} In 1990, yet another provision of the Declaration of Rights—Article II, guaranteeing each citizen freedom for "worshipping GOD in the manner and season most agreeable to the Dictates of his conscience . . . provided he doth not Disturb the public peace, or obstruct others in their religious Worship"—was given new life by the Supreme Judicial Court. In \textit{Society of Jesus of New England v. Boston Landmarks Commission},\textsuperscript{79} a unanimous court, in an opinion by Justice Lynch, held that government efforts to closely regulate renovations to the interior of a Catholic church on the ground that the church had been designated an historic landmark violated constitutional limits imposed by Article II. In 1980, Justice Wilkins had noted in his bicentennial law review article that "[t]he pervasive impact of the Supreme Court's treatment of the freedom of religion under the first amend­ment seemingly has made unnecessary any considera­tion of article 2 in recent decades."\textsuperscript{80} In 1989, the year before \textit{Society of Jesus}, the court had held, in \textit{Commonwealth v. Nissenbaum},\textsuperscript{81} that religiously-motivated use of marijuana was not constitutionally-protected—largely on the basis of federal decisions which interpreted the First Amendment in a fashion which the court found "instructive" as to how it should interpret Article II.\textsuperscript{82} But in \textit{Society of Jesus}, the court made no reference to the First Amendment or federal decisions, preferring to rely entirely upon its independent reading of the Declaration of Rights. Pre-

65. G.L.M.c.276, §2B.
66. Supra, note 30.
67. Supra, note 30 at 787-88.
68. For a discussion of the Supreme Judicial Court's use of judicial rule-making and common law development to provide procedural protections without reaching constitutional issues, see Wilkins, supra note 27, at 888-89.
69. Supra, note 64, at 426.
70. 400 Mass. 61 (1987)
73. Id. at 234.
75. Id. at 694.
80. Wilkins, supra note 27, at 897.
82. Id. at 579-81.
sumably this was because the U.S. Supreme Court had, just eight months before, handed down its decision in *Employment Division v. Smith* for a severe cutting back of First Amendment “free exercise” protections by that court.

**Conclusion**

By now the trend is clear. As the U.S. Supreme Court has turned its face from established protections under the federal Bill of Rights, the Supreme Judicial Court has increasingly looked to the protections of the Massachusetts Declaration of Rights. This is a trend, as we noted earlier, which finds support in decisions of supreme courts in an increasing number of other states. It is a trend which finds support also in earlier decisions of the Supreme Judicial Court. As Justice Wilkins pointed out in his 1980 article, the Supreme Judicial Court of a half century ago refused to follow the U.S. Supreme Court in abandoning constitutional protections for economic rights in much the same way that today’s court refuses to follow the federal lead in abandoning protections for individual rights:

> Then as now, changes in the personnel of the U.S. Supreme Court had caused federal courts to radically alter protections afforded against governmental abuse. Then as now, the Supreme Judicial Court refused to automatically follow suit.

> Obviously, the Supreme Judicial Court and many other state supreme courts have their own independent views of the extent to which government is to be checked by constitutions and the judges who enforce them. That these views seem very much influenced by U.S. Supreme Court doctrine from the “high water mark” era of protection of individual rights should come as no surprise. To the extent that the federal doctrine of the period was incorporated into the Fourteenth Amendment, state judges became experienced in employing it because they were required to do so by the Supremacy Clause. The U.S. Supreme Court no longer requires state judges to employ all of that doctrine. But many of them find that their experience in applying it has led them to an independent belief in its validity. And they have found in their state constitutions independent bases upon which to ground it.

With the rediscovery of state constitutions, the process of development of constitutional law becomes enormously enriched. State supreme courts are offered the opportunity to participate in the discussion and development of doctrine as full partners. “For a state court interpreting a state constitution,” one scholar has observed, “opinions of the United States Supreme Court are like opinions of sister state courts. While neither binding in a constitutional sense nor precedent in a jurisprudential one, they are entitled to whatever weight their reasoning and intellectual persuasiveness warrant.” Where the nation has had essentially one crucible for trying the principles of judicial review it now has many. And new meaning is given to Justice Brandeis’ well-known paean to American federalism:

> It is one of the happy incidents of the federal system that a single courageous State may, if its citizens choose, serve as a laboratory; and try novel social and economic experiments without risk to the rest of the country.

Massachusetts is well equipped to play the role of such “courageous State.” It has a distinguished and venerable constitution rich in protections for civil rights and civil liberties. In 1976 and 1980, the Declaration of Rights’ equal protection provisions were bolstered by amendments which forbid discrimination on the basis of sex, race, color, creed, national origin or handicap. But even as it was in 1783, Article I’s declaration that “All men are born free and equal” provided a sufficient basis for the Supreme Judicial Court to declare slavery unlawful. Massachusetts also has a distinguished and learned bar steeped in a tradition of public service. Members of the bar have increasingly invoked the protections of the state constitution on behalf of their clients since the 1979 Massachusetts Civil Rights Act and the Supreme Judicial Court’s recognition of state-based exclusionary rules have made opportunities for so doing more readily available.

84. Wilkins, supra note 27, at 911.
85. U.S. Const., Art. VI, cl. 2.
88. Amendment CVI (1976) and Amendment CXIV (1980).
91. See supra text accompanying notes 63-68.
Finally, and perhaps most importantly, Massachusetts has the Supreme Judicial Court. In the mid-19th century, when the United States was confronted with daunting changes wrought by its expanding frontiers and the advent of the industrial revolution, its state supreme courts developed the principles of law which facilitated the nation's growth into the great continental power it became. First in influence among these state supreme courts was the Supreme Judicial Court of Massachusetts—whose chief justice, Lemuel Shaw, came widely to be known as “America’s greatest magistrate.” It is this tradition that the court brings with it as it develops its place in the “new constitutional revolution,” presently sweeping our state supreme courts. It is a tradition fraught with potential for great service to the commonwealth and to the nation as the Supreme Judicial Court enters its fourth century.

92. Professor Robert F. Williams has used this term to describe the rising constitutional prominence of state supreme courts. See Robert F. Williams, State Constitutional Law Processes, 24 WM. & MARY L. REV. 169, 171 (1983). In so doing, he means, among other things, to contrast it with the “constitutional revolution” wrought by the U.S. Supreme Court in the late 1930s. Id. at n.1.

Lemuel Shaw. (Image courtesy of the Social Law Library.)