Prophylactic Rules and State Constitutionalism

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Abstract -- Arthur Leavens

When the post-Warren Supreme Court began trimming back individual-rights, some state courts responded by interpreting analogous or cognate state-constitutional provisions to find broader protections, prompting a vigorous debate concerning the legitimacy and interpretive methodology of such state constitutionalism. How can two constitutional provisions, sharing the same language and history, mean different things? This article looks at that question in the context of so-called prophylactic rules, those specific constitutional rules meant to guide the implementation of broader federal constitutional principles. *Miranda’s* warning-and-waiver construct is probably the best known prophylactic rule, but they abound, particularly in criminal procedure.

This article, outlined below, argues that even if states ought to defer to the Supreme Court concerning the meaning of cognate constitutional provisions, such deference is not required in considering the reach of prophylactic rules. Such rules, while constitutional in status, are not vessels of constitutional meaning. Rather, they are a pragmatic means to implement more open-ended constitutional norms and thus by design are adjustable where necessary to improve their fitness for that task. The Supreme Court makes such adjustments, and there is no reason why states should not be able to as well where local conditions suggest the need for a more protective rule. A state’s expansion of a prophylactic rule leaves untouched the meaning of the underlying federal principle along with the Supreme Court’s prerogative to decide what that meaning is. The article analyzes such rule expansions under Massachusetts law to develop this point concretely.

But recognizing this latitude of states to unilaterally expand federal prophylactic rules does not necessarily mean that it should be the courts that work this expansion. Again using Massachusetts as the example, the article argues that depending on the conceptual linkage of the rule to its underlying principle, the designed impact of the rule, and the relative judicial vice legislative competence and legitimacy to make the cost-benefit judgments on which rule expansion often rests, the expansion of some prophylactic rules ought to be the province of the state legislature and not the courts. When it is unclear who should decide, the article argues that a state court should not freeze a rule expansion in constitutional principle, but rather found its decision in state common law and thus leaving open further reconsideration of the rule’s reach.

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For well over 30 years, the phenomenon of “judicial federalism” – a state court interpreting a state constitutional provision to provide broader protections than those afforded by the analogous federal constitutional provision – has become a fixture of American jurisprudence.¹ This development, no doubt prompted by the post-Warren Supreme Court retrenchment regarding the protection of individual rights, has given rise to a rich debate concerning the legitimacy and interpretive methodology of such state constitutionalism.² Boiled down, the question is, on what basis does a state court interpret a state constitutional provision, couched in virtually the same language and often with the same history as that of its federal counterpart, and decide that the state provision provides greater protection?

In this article, I examine that question in the context of so-called prophylactic rules, that is, those relatively concrete constitutional rules announced by the Supreme Court to guide lower courts in applying the Constitution’s more open-ended standards.

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¹ See, e.g., G. Alan Tarr, UNDERSTANDING STATE CONSTITUTIONS 178 (1998)(cataloging this development).

Such rules abound, particularly in criminal procedure. To take a familiar example, *Miranda*’s warnings-and-waiver rule constitutes the means by which the Fifth Amendment’s self-incrimination protection is implemented in the context of police interrogation. Less familiar, at least as a prophylactic rule, is the *Aguilar-Spinelli* two-pronged test meant to guide application of the Fourth Amendment’s requirement that a neutral magistrate determine probable cause in issuing a warrant.

While I am among those who think a state court should ordinarily defer to the Supreme Court on the meaning of a provision common to the federal and state constitutions, I take a different view regarding the breadth of constitutional prophylactic rules. I will argue here that there is no theoretical impediment to a state’s unilateral expansion of federal prophylactic rules. However, this interpretive latitude does not mean that a state’s courts should necessarily enjoy that prerogative. I will argue that expansion of at least some of these rules, as a matter of institutional competence and political legitimacy, should be province of the state’s legislature rather than its courts.

My argument accepts the following premises. First, prophylactic rules such as *Miranda*’s warnings-and-waiver construct and *Aguilar-Spinelli*’s two-pronged test at times (perhaps often) over-enforce the constitutional principles that justify their existence. Second, such rules nevertheless have constitutional status. Third, the

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3 I am principally interested in prophylactic rules, which as a matter of accepted terminology are understood generally to over-enforce the constitutional standard for which they stand. See Brian Landsberg, *Safeguarding Constitutional Rights: The Uses and Limits of Prophylactic Rules*, 66 Tenn. L. Rev. 925, 951 (1999). I appreciate that such rules constitute but a sub-set of a larger category of rules created by the Supreme Court to provide guidance concerning the implementation or enforcement of more indeterminate constitutional standards.

4 Here I make a brief, if obvious, disclaimer and that is that what constitutes “over-enforcement” of a constitutional standard is often, if not inevitably, in the eye of the beholder. It assumes that we can agree with some precision how a particular, relatively indeterminate standard should “correctly” be applied in a particular factual circumstance. It is only with such a measuring rod that we can say that the prophylactic
provisions common to the federal and a state’s constitution ought presumptively to mean the same thing. Fourth, the Supreme Court is the presumptive arbiter concerning what that meaning is.\(^5\)

Why, in brief, should a state presumptively bound by the Supreme Court’s interpretation of what a constitutional provision means nevertheless be free to expand the reach of a prophylactic rule such as \textit{Miranda’s} warning-and-waiver requirement or \textit{Aguilar-Spinelli’s} two-pronged test? The answer lies in the nature of prophylactic rules and their relation to the underlying constitutional standards that they implement. Unlike a Supreme Court decision laying out the meaning or scope of a constitutional provision – its “operative proposition” in the words of Mitchell Berman\(^6\) -- prophylactic rules\(^7\) are relatively specific, often bright-line, rules meant principally to guide lower courts in rule does or does not over-enforce that standard on those facts. As will be developed, however, if the standard’s meaning were readily apparent there would be no need for the rule. \textit{See, e.g.}, Lawrence Rosenthal, \textit{Against Orthodoxy: Miranda Is Not Prophylactic and the Constitution Is Not Perfect}, 10 Chap. L. Rev. 579 (2007) for an interesting argument that \textit{Miranda’s} warning-and-waiver requirements do not over-enforce but rather conform to the Fifth Amendment’s protection against compelled self-incrimination in the context of custodial interrogation. \textit{See also} Stephen Schulhofer, \textit{Miranda, Dickerson, and the Puzzling Persistence of Fifth Amendment Exceptionalism}, 99 Mich. L. Rev. 941 (2001) (\textit{Miranda, Dickerson}); Charles Ogletree, \textit{Are Confessions Really Good for the Soul?: A Proposal to Mirandize Miranda}, 100 Harv. L. Rev. 1826 (1987) for thoughtful arguments that \textit{Miranda} consistently under-enforces Fifth Amendment protection.

\(^5\) I appreciate that none of these premises represent anything close to a consensus among either courts or commentators that have considered these issues. I nevertheless adopt them with little in the way of analytic defense because, first, the arguments both for and against each have been well made and my recitation of them seems unnecessary, and second, these assumptions, if anything, impede rather than promote the claim I here make. If the rules in question were not federal constitutional commands, there would be little conceptual quarrel with a state court taking a different path under its own constitution. If a rule routinely under-enforced its underlying standard, there would be less about which to complain – the state court would merely be filling in the gap, a gap perhaps purposely left as a matter of comity by the Supreme Court. And, if one takes an expansive view of a state’s conceptual legitimacy in unilaterally expanding the protection of a shared constitutional provision in the face of a contrary Supreme Court decision, it would seem to matter little what the nature of the constitutional protection in question is. As an aside, I also adopt these premises because I agree with them, but for purposes of the argument that is quite beside the point.\(^6\)


\(^7\) Prophylactic rules are a sub-set of what Mitchell Berman calls “constitutional decision rules,” \textit{id.}, a term which is more neutral and which, for our purposes, can be used interchangeably with “prophylactic rules.”
implementing less determinate constitutional principles such as the Fourth Amendment’s requirement that a neutral and detached magistrate determine probable cause in issuing a warrant. How is that requirement supposed to work when the police seek a warrant based on information provided by an informant whose identity is undisclosed? The *Aguilar-Spinelli* two-pronged test was crafted to provide the answer.

Given their pragmatic, instrumental purpose, such prophylactic rules – though surely constitutional – of necessity are more mutable than the operative propositions they implement. I will argue that as such they are properly subject to unilateral state adjustment based on the state’s experience with the rule. Because such adjustments often reflect a policy judgment founded at least in part on a cost-benefit, empirical analysis, in some cases the legislature is better equipped than the courts to undertake that analysis and has more legitimacy to impose the resulting policy judgment.

This article will examine these issues concretely, examining the Massachusetts Supreme Judicial Court’s (SJC’s) restoration of the *Aguilar-Spinelli* test under article 14 of the Massachusetts Declaration of Rights[^8] following the Supreme Court’s rejection of that test under the Fourth Amendment[^9], and the SJC’s expansion of three *Miranda* protections following the Supreme Court’s rejection of those protections under the Fifth Amendment[^10]. In the first part of this article, adopting Mitchell Berman’s terminology, I


will review the distinction between constitutional operative propositions and constitutional decision rules (of which prophylactic rules are a sub-set), showing that Aguilar-Spinelli’s two-pronged test as well as Miranda’s warning-and-waiver construct\(^{11}\) fall into the latter category.

In the second part of the article, I will argue that these concededly federal prophylactic rules are properly subject to review and enhancement under state law. Massachusetts provides a particularly interesting lens through which to examine this point for two reasons. First, in spite of the SJC’s occasional rhetoric to the contrary, the Supreme Court and the SJC do not differ concerning the meaning and scope of the constitutional provisions here in question (the Fourth Amendment and article 14; the Fifth Amendment and article 12). With one possible exception, which I will discuss, the federal and state constitutional operative propositions here at issue are essentially identical. Second, almost from the time Miranda was announced, the SJC has expressly declined to accept its warning-and-waiver construct as something that is required under its state constitution, regarding it exclusively as a creature of federal law. Nevertheless, I will argue that it is conceptually legitimate for the state to consider expanding that federal decision rule under state law.

In the final part of the article, I turn to the question of which among a state’s three constitutional branches should decide whether to expand these prophylactic rules. I will argue that who should decide, the courts or the legislature, depends on several factors, three of which I will here mention and later develop. First is the conceptual linkage

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\(^{11}\) By warning-and-waiver construct, I mean to include not just the requirements set down in Miranda itself, but also Miranda’s progeny that have given shape to this intricate decision rule, both extending and limiting its reach.
between the decision rule in question and its underlying operative proposition; the closer the connection between the rule and its underlying proposition, the more it lies with the courts to determine its reach. Second is the apparent focus of the rule’s impact; the closer the impact is to the judicial function, the more appropriate it would be for the courts to decide precisely what that impact should be. Third is the institutional competence and political legitimacy of the courts (compared to that of the legislature) to measure the particular costs and benefits of expanding a decision rule and then to impose the new rule. The more apparent it is that one or the other branch has greater competence or legitimacy in weighing the rule’s costs and benefits and imposing its judgment in that regard, the more appropriate it would be for that branch to be the constitutional arbiter. Of course, it could well be in a particular case that these factors would not yield a clear answer. In such a case, a court might decide the issue in some sense provisionally, doing so in a way that – either expressly or as a practical matter – leaves it open for the legislature to consider the matter and reach a different decision. That is, the court could decide the issue not in the unalterable script of a constitutional command but as a sort of constitutional common law. If the legislature takes a different view on the issue, the courts might then be called on to determine whether the decision is one that after all should be in its constitutional bailiwick.12

12 Cf. Susan Klein, Identifying and (Re)formulating Prophylactic Rules, Safe Harbors, and Incidental Rights in Constitutional Criminal Procedure, 99 Mich. L. Rev. 1030, 1054 & n. 108 (2001). Citing the Supreme Court’s opinion in City of Boerne v. Flores, 521 U.S. 507 (1997), Professor Klein argues that the Court’s invitation to Congress and the Executive to “assist in the fashioning of prophylactic rules and incidental rights” reserves for the Court the final say as to “whether the action would be congruent with, and proportional to, a constitutional violation,” Bourne, 521 U.S. at 520. As the Court stated, “While the Court will, of course, have the final say as to whether alternative prophylactic rules and rights provided by legislators, law enforcement agencies, and state judges sufficiently protect the Bill of Rights in a manner that the court can effectively oversee, the use of prophylactic rules and incidental rights rather than pure constitutional interpretation gives the states exactly that opportunity for diversity and experimentation.” Id.
With that, I turn to the arguments, first laying their foundation and then developing them with concrete reference to the Massachusetts experience.

I. Operative Propositions and Decision Rules.

Courts and commentators have long recognized that constitutional jurisprudence constitutes a broad spectrum of decision-making, ranging from decisions couching the meaning of constitutional provisions in terms of expansive, often value-laden principles to decisions setting out specific rules to guide the application of such indeterminate standards. Over 30 years ago, Henry Monaghan made this point in his influential argument that the Court’s constitutional jurisprudence should be separated into those decisions that have what he called constitutional status, i.e., have their basis in the interpretation of constitutional provisions, and those that could more productively and realistically be seen as constitutional common law designed to advance particular constitutional interests but that could be overridden by Congressional action. Other scholars have continued this recognition of differential constitutional decision-making, arguing that constitutional jurisprudence necessarily includes doctrinal rules, often bright-line generalizations, that may reach beyond core constitutional meaning but that are

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14 Henry P. Monaghan, Foreward: Constitutional Common Law, 89 Harv. L. Rev. 1, 20-23 (1975). Professor Monaghan argued that this constitutional common law generally over-enforced what the Constitution required, and thus could be trimmed by Congress without violence to Marbury’s command. Three years later, Professor Lawrence Sager argued that the Court often under-enforced the Constitution’s meaning, leaving room for the states (and presumably Congress) to expand (or not) constitutional commands as they saw fit. See Lawrence Sager, supra note 13.
nevertheless have constitutional status. Coining terminology that has become accepted in this discourse, Mitchell Berman has distinguished between what he calls “constitutional operative propositions,” which he describes as “constitutional doctrines that represent the judiciary’s understanding of the proper meaning of a constitutional power, right, duty”, and “constitutional decision rules,” which he terms “doctrines that direct courts how to decide whether a constitutional operative proposition is satisfied.”

The Court’s decision in *Miranda* epitomizes this dichotomy. On the one hand, the Court expanded the reach of the Fifth Amendment privilege against compelled self-incrimination, holding that it applied not just to testimony in formal proceedings but also to police interrogation of suspects in police custody. But the Court also, and more

15 See, e.g., John Parry, *Constitutional Interpretation, Coercive Interrogation and Civil Rights Litigation after Chavez v. Martinez*, 39 Ga. L. Rev. 733, 781 & n. 266 (2005) (citing authorities and noting widespread acceptance of the constitutional status of “prophylactic rules that protect constitutional rights by creating a buffer zone of prohibited conduct beyond the scope of the actual right.”). Professor Parry suggests abandoning the term “prophylactic,” arguing that it interferes with the understanding that such rules are but a part of constitutional doctrine along with judicial decisions concerning “what the law is” and remedies (as to which Congress may have some role). Id. at note 327 and text. See Richard Fallon, *Judicially Manageable Standards*, supra note 13 at 1279, 1281 (arguing it is sometimes acceptable for a gap to emerge between meaning and doctrine); Kathleen Sullivan, *The Justices of Rules and Standards*, 106 Harv. L. Rev. 22, 58 (1992) (noting that such doctrinal rules “capture[ ] the background principle or policy incompletely and so produce[ ] errors of over- and under-inclusiveness.”) But see, e.g., Daryl Levinson, *Rights Essentialism and Remedial Equilibration*, 99 Colum. L. Rev. 857, 869-70 (1999) (arguing such a distinction is conceptually insupportable). See generally Mitchell Berman, supra note 6 at 40-50 (capturing well the debate regarding the status of prophylactic rules).

16 Mitchell Berman, supra note 6 at 9, 44. See, e.g., Richard Fallon, *The Core of an Uneasy Case for Judicial Review*, 125 Harv. L. Rev. 1693, 1732 (2008) (*The Core of an Uneasy Case*); Susan R. Klein, supra note 12 at 1032-33 (characterizing such rules that over-protect constitutional values as “prophylactic, rules” that under-protect as “safe harbors” [for those, e.g., law enforcement officers, who must follow constitutional commands] and the remedies for violations as “incidental rights”). Professor Berman points out that Monaghan, Sager and Fallon each articulate distinct and differing views of this process, but that each recognizes “two conceptually distinct components” to constitutional decision-making. Mitchell Berman, supra note 6 at 37.

famously, went on to announce what it characterized as “concrete constitutional
guidelines for law enforcement agencies and courts to follow” in observing and enforcing
this expanded application of the Fifth Amendment protection. The Court suggested that
these “guidelines” were intended to provide but one path among many to safeguard the
underlying right, planting the seed for ensuing attacks on the warning-and-waiver rules
as being no more than sub-constitutional prophylaxis that can be ignored if their costs
seem too high. Even in the face of the Court’s re-affirmance of Miranda and its
warning-and-waiver construct as a constitutional requirement in Dickerson v. United
States, these doubts concerning the constitutional status of Miranda persist.

As many have pointed out, however, one does not have to view Miranda’s
warning-and-waiver construct as sub-constitutional to accept that it stands on different
ground than a decision setting forth the meaning and scope of the Fifth Amendment
itself. Seeing the warning-and-waiver requirements as but one of many decision rules

18 Miranda, 384 U.S. at 441-42, 86 S.Ct. at 1611. Professor Fallon characterizes these guidelines as the
“epitome of a judicially manageable standard.” Richard Fallon, Judicially Manageable Standards, supra
note 13 at 1306; Mitchell Berman, supra note 6 at 114 (pointing out Miranda’s guidelines as decision rules
crafted to minimize adjudicatory errors).

19 Miranda, 384 U.S. at 458, 467, 477, 490; 86 S.Ct. at 1619, 1624, 1629, 1630, 1636.


judicially crafted prophylactic rules do not violate the constitutional rights of any person”)(Thomas, J.,
writing for four-justice plurality); Missouri v. Siebert, 542 U.S. 600, 623-24, 124 S.Ct. 2601, 2616-17
(2004)(“This Court has made clear that there simply is no place for a robust deterrence doctrine with
regards to violations of Miranda”, noting that “the ‘Miranda exclusionary rule … serves more broadly than
the Fifth Amendment itself.’”)(O’Connor, J., writing for four-justice dissent)(citing and quoting Elstad).

23 See supra Note 15 & text.
that, particularly in criminal procedure, guide the application of the more amorphous underlying operative propositions offers a sensible perspective on their constitutional role. Constitutional protections like the Fifth Amendment’s privilege against compelled self-incrimination or the Fourth Amendment’s requirement that searches and seizures be reasonable are not by their terms readily applicable in the field, be it a rapidly unfolding criminal investigation or even the slightly more measured pace of a motions session in one or another of the countless criminal courts that are bound to apply these bedrock principles on a daily basis. Asking judges and the lawyers that appear before them – not to mention police officers on the street – to achieve even a semblance of consistency and fealty to such indeterminate constitutional commands requires some version of such rules, whether one calls them “constitutional decision rules,”25 “prophylactic” and “safe-harbor” rules,26 or “concrete constitutional guidelines.”27 Not surprisingly, they abound, although few have attracted the attention of the *Miranda* rules.28

24 I mean here to include not just the requirements set down in *Miranda* itself but also *Miranda*’s progeny that have given shape to this complex decision rule, both extending and limiting its reach.

25 Mitchell Berman, *supra* note 6. While Berman contends that the primary function of such decision rules is to guide the judiciary in its application of the more indeterminate operative propositions, he acknowledges the important secondary role that such rules play in providing actors bound by such constitutional commands, such as law enforcement officers, with sufficiently clear guidance to ensure that their conduct will withstand judicial review. *Id.* at 109. See also Brian Landsberg, *supra* note 3 at 959 (citing the utilitarian function that such decision rules play in guiding both lower courts and governmental officials in their respective application of constitutional standards).

26 See Susan Klein, *supra* note 12 at 1037-47.

27 *Miranda*, 384 U.S. at 441-42, 86 S.Ct. at 1611.

To take a transparent example, in *Chimel v. California*,\(^{29}\) the Supreme Court held that a search incident to arrest is reasonable and thus lawful under the Fourth Amendment if it is confined to “the area ‘within [the arrestee’s] immediate control’ – construing that phrase to mean the area from which he might gain possession of a weapon or destructible evidence.”\(^ {30}\) Concerned that this principle,\(^ {31}\) clear as it might seem, had proved difficult and confusing to apply when the police arrest the recent occupant of a car, the Court in *New York v. Belton*\(^ {32}\) held that, incident to such an arrest, the arresting officer lawfully could search “the passenger compartment of that automobile . . . examin[ing] the contents of any containers found in the passenger compartment, . . . whether [such a container] is open or closed.”\(^ {33}\) As a justification for this rule, the Court observed:

> [C]ourts have found no workable definition of “the area within the immediate control of the arrestee” when that area arguably includes the interior of an automobile and the arrestee is its recent occupant. Our reading of the cases suggests the generalization that articles inside the relatively narrow compass of the passenger compartment of an automobile

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\(^{30}\) *Id.* at 762, 89 S.Ct. at 2040.

\(^{31}\) This is a good example of Berman’s concession that it is often not clear where a doctrinal construct falls on the spectrum marked at one end by operative propositions and the other by decision rules. See Mitchell Berman, *supra* note 6 at 61, 78-79. In *Chimel*, the Court redefined the scope of a search incident to arrest, over-ruling a prior line of cases that permitted officers to search the area in the arrestee’s control, taking a constructive approach to defining control and thus permitting a search of the arrestee’s domicile if he was there arrested. See *Chimel*, 395 U.S. at 760 & n. 4, 89 S.Ct. at 2038 & n.4. See also United States v. Rabinowitz,, 339 U.S. 56, 61, 70 S.Ct. 430, 433 (1950)(setting forth the earlier rule). Because *Chimel* strikes out in a new direction in defining the constitutional limits of “reasonable” searches in the context of arrests – relying on the function of the intrusion instead of a more abstract assessment of the connection between the area searched and the arrestee – its holding could fairly be characterized as a new operative proposition as opposed to a different decision rule. Indeed, the Court itself in *Belton* described its earlier *Chimel* holding as setting out “the fundamental principles . . . regarding the basic scope of searches incident to lawful custodial arrests.” New York v. Belton, 453 U.S. 454, 460 n. 3, 101 S.Ct. 2860, 2864 n. 3 (1981). But even if one views the *Chimel* measure of a search incident to an arrest as a decision rule, the analysis of *Belton*’s subsequent rule is unchanged.


\(^{33}\) *Id.* at 460-61, 101 S.Ct. at 2864.
are in fact generally, even if not inevitably, within “the area into which an arrestee might reach in order to grab a weapon or evidentiary item.”

Underscoring the status of Belton’s rule as a constitutional guideline in service of the underlying Fourth Amendment principle, a “decision rule” if you will, the Court stated, “Our holding today does no more than determine the meaning of Chimel’s principles in this particular and problematic context. It in no way alters the fundamental principles established in the Chimel case regarding the basic scope of searches incident to lawful custodial arrests.”

As the Court recognized in crafting its decision rule in Belton, this bright-line approach to constitutional analysis – substituting a generalization for case-by-case, fact-specific applications of underlying constitutional principles – is necessarily imprecise, often under-enforcing or over-enforcing the constitutional operative proposition. It thus is appropriate for the Court, if it subsequently identifies a misfit between the decision rule and its underlying operative proposition that has become too glaring, to adjust the decision rule, notwithstanding its constitutional status. In spite of grumbling about

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34 Id. at 460, 101 S.Ct. at 2864.

35 Id. at 460 n. 3, 101 S.Ct. at 2864. Susan Klein characterizes the Chimel/Belton rule as a “safe harbor” that under-protects the Fourth Amendment’s requirement that searches be reasonable but that provides police officers with concrete assurance that if they follow its dictates their searches in such circumstances will be upheld. See Susan Klein, supra note 12 at 1044-46. But see Arizona v. Gant, 556 U.S. --, 129 S.Ct. 1710 (2009)(striking down a search that complied with Belton’s rule, announcing a modified rule in its place) discussed infra note 40.

36 See Richard Fallon, Judicially Manageable Standards, supra note 13 at 1320 (noting that virtually all legal or moral rules are “entrenched generalizations” that either under- or over-enforce the values that they are crafted to serve).

37 See id. at 1274, 1278, 1284 (observing that such “substantive distortion” of constitutional measures is an acceptable price to pay for a clear rule). See also Kathleen Sullivan, supra note 15 at 58; Brian Landsberg, supra note 3 at 951 n. 185.

38 See Mitchell Berman, supra note 6 at 113.
stare decisis, these adjustments are not uncommon. Of course, too much of this tinkering with constitutional rules undercuts the apparent legitimacy of the Court’s interpretative authority, but given their basis in pragmatism and their derivative nature, decision rules seem inevitably more mutable than the underlying constitutional principles that they are meant to advance, the operative propositions.

II. Decision Rules and State Constitutionalism

How does this fit into the debate concerning the legitimacy of a state court’s expansion of a constitutional protection through a broader interpretation of a state


40 Just this term, the Supreme Court adjusted two criminal-procedure decision rules, cutting back on one and eliminating another as unnecessary.

First, in Arizona v. Gant, 556 U.S. --, 129 S.Ct. 1710 (2009), the Court trimmed the reach of Belton’s decision rule regarding searches incident to arrest of recent occupants of automobiles. See supra Notes 31-35 & text. The Belton rule, as it had come to be applied, permitted automatic searches of cars even though by the time of the search the arrestee was fully in police custody, often handcuffed in a police cruiser. See, e.g., Thornton v. United States, 541 U.S. 615, 124 S.Ct. 2127 (2004). In Gant, the Court limited searches incident to arrests in such circumstances to cases in which the arrestee “is unsecured and within reaching distance of the passenger compartment at the time of the search” (the Court conceding that this would likely be a “rare case,” id. at n. 4) or in which “it is reasonable to believe evidence relevant to the crime of arrest might be found in the vehicle.” (citing and quoting Justice Scalia’s dissent in Thornton).

Second, in Montejo v. Louisiana, 556 U.S. --, 129 S.Ct. 2079 (2009), the Court overruled Michigan v. Jackson, 475 U.S. 625, 106 S.Ct. 1404 (1986) in which it had held, first, that an arraignment request for counsel effectively invoked the Sixth Amendment right to counsel (which under the Massiah decision rule forbade the deliberate elicitation by the police of a statement in the absence of counsel) and, second, that once invoked this right to counsel could not be waived unless the defendant initiated the contact with the police. In Montejo, a five-justice majority opined that this “prophylactic rule” had outlived its usefulness, concluding that the rule’s “marginal benefits [were] dwarfed by its substantial costs.” Id. at --, 129 S.Ct. at 2091.

41 See Richard Fallon, Judicially Manageable Standards, supra note 13 at 1329-30; Kermit Roosevelt, Polyphonic Stare Decisis: Listening to Non-Article III Actors, 83 Notre Dame L. Rev. 1303, 1320 (2008)(Polyphonic Stare Decisis)(arguing that the legitimacy of judicial decision-making is most vulnerable when courts work a change on an operative proposition as opposed to a decision rule). See also Mitchell Berman, supra note 6 at 100-01 (suggesting that stare decisis should have less impact in cases reviewing decision rules as opposed to those reviewing operative propositions).

42 See Mitchell Berman, supra note 6 at 113; Kermit Roosevelt, Polyphonic, supra note 41 at 1320 (agreeing with Berman that decision rules should be less subject to considerations of stare decisis and arguing that changes to decision rules should be governed by their apparent workability as guideposts to the implementation of the underlying operative propositions, the reliance that courts have placed in extant rules, the changes in the doctrinal landscape since the rule was announced, and the changes in the factual circumstances that have emerged since the rule was announced); Brian Landsberg, supra note 3 at 972-73.
constitutional provision? Even if – for reasons of interpretive legitimacy and uniformity of our basic national law – the meaning and reach of constitutional provisions common to the federal and state constitutions ought presumptively to be the same,⁴³ there is no good reason why federal and state decision rules must similarly be identical. On the contrary, in our federal system subordinate state actors should be free to enhance the protection of a decision rule if it appears necessary to achieve a better local fit with its underlying constitutional operative proposition.⁴⁴

Allowing states this leeway marks no incursion on the proper authority of the Supreme Court, even though the decision rule in question is undoubtedly federal. The underlying operative proposition remains unchanged, the presumptive prerogative of the Court,⁴⁵ and any enhancement of the decision rule risks only possible over-enforcement of that principle; the operative proposition itself (as well as the protection offered by the Court’s more permissive decision rule) remain protected.⁴⁶ Even if one is concerned that a federal constitutional provision – particularly one like the Fourth Amendment that

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⁴³ This represents a polar view in the state-constitutionalism debate, a view that is most hostile to state-court activism in interpreting cognate provisions of state constitutions to provide protections beyond those of the federal Constitution. See Alan Tarr, supra note 1 at 174-85 (canvassing the various approaches). But see Lawrence Sager, supra note 13 at 1217-20 (arguing that there are good reasons why the Supreme Court might interpret the Constitution in a manner that under-enforces its norms, leaving room for state courts and, if appropriate, Congress to fill out the reach of its commands).

⁴⁴ See Kermit Roosevelt, Polyphonic Stare Decisis, supra note 41 at 1327-28 (recognizing a role for non-Article III actors, including state courts, in adjusting decision rules). See also Susan Klein, supra note 12 at 1054 n. 108 (agreeing that state courts may play a proper role adjusting prophylactic rules, but not safe harbor rules). Cf. David Strauss, Miranda, the Constitution, and Congress, 99 Mich. L. Rev. 958, 969 (2001)(Miranda, the Constitution) (arguing that it is appropriate to recognize an appropriate role for the states and Congress to achieve what they see as the right fit, at least in cases involving equal protection); John Parry, supra note 15 at 789 n. 291 (citing authorities).

⁴⁵ See Kermit Roosevelt, Constitutional Calcification, supra note 28 at 1716-17 (cautioning that recognizing the authority of non-Article III actors to work changes in decision rules underscores the importance of the conceptual distinction between decision rules and operative propositions in order to avoid blurring the Court’s exclusive prerogative to decide what the Constitution means).

⁴⁶ See Lawrence Sager, supra note 13 at 1248.
explicitly balances state and individual interests on the fulcrum of reasonableness – might be over-enforced to the detriment of effective law enforcement, the risks of state-law over-enforcement seem relatively low. After all, the state actors are closer to the action, better able to see how a particular decision rule is working (or not) in that state to advance the underlying operative proposition and better positioned to assess and take into account local concerns, including possible over-enforcement.\footnote{See Kermit Roosevelt, \textit{Polyphonic Stare Decisis}, supra note 41 at 1322 (arguing that non-judicial or state actors may be better positioned to assess the factual changes that contribute to a decision rule’s “loose fit” with its operative proposition); Susan Klein, \textit{supra} note 12 at 1054 n. 108 (observing that the Court in \textit{Miranda} explicitly invited such state adjustments to its decision rule, but cautioning that the limits to these changes must be congruent with and proportional to the underlying constitutional operative proposition).}

Simply put, a state’s striking this enforcement balance in its particular locale would be more fine-tuned than a one-size-fits-all decision rule crafted by the Supreme Court.\footnote{See Lawrence Sager, \textit{supra} note 13 at 1255 (observing that state courts can play an important constitutional role here because they “may have had substantial exposure to the details of the state experience”). So, too, one might suppose with state legislatures.}

So it is that for many years, the Supreme Court did not interfere with state courts’ more expansive interpretation of federal decision rules.\footnote{Indeed, until 1914, the Court was without jurisdiction to review state decisions striking down governmental actions as violative of the Constitution. \textit{See} Lawrence Sager, \textit{supra} note 13 at 1247-49. Even after the Court’s jurisdiction was extended to permit review of such state decisions, the Court generally declined review in such cases. As Professor Strauss notes, there seems to be no good reason to preclude Congress or the states from balancing the costs and benefits in gauging the scope of and applying such rules as long as the 14th Amendment’s floor, established by the Court’s decisions, was not violated. \textit{See} David Strauss, \textit{Miranda, the Constitution}, \textit{supra} note 44 at 969.}

However, the Burger and then the Rehnquist Court shut down this corner of modest state independence, making it clear that the states are required to follow the Court’s lead not only concerning what the federal constitution means but also how it is to be applied.\footnote{\textit{See} Michigan v. Long, 463 U.S. 1032, 1039-42 & n. 8, 103 S.Ct. 3469, 3475-77 & n. 8 (1983). \textit{But see} Danforth v. Minnesota, 552 U.S. --, --, 128 S.Ct. 1029, 1038-42 (2008)(holding that states are not bound by federal retroactivity standards barring habeas application of “new” federal constitutional rules and may extend such federal protection to prisoners seeking state habeas relief).} That effectively left state courts
with state law – principally their respective state constitutions – as the only means for expanding decision rules, and then only if it is clear that the decision rests on an adequate state ground independent of the federal constitution. But as long as a state-law expansion of a decision rule does not similarly expand its underlying operative proposition, this unilateral expansion of a federal rule would mark no intrusion on the Supreme Court’s presumptive authority to determine the contours of our nation’s constitutional norms. The Massachusetts cases demonstrate how this plays out.

A. The Fourth Amendment and Aguilar-Spinelli’s Two-Pronged Test

The Fourth Amendment facially requires that warrants be founded on probable cause based on oath and affirmation. In a line of cases culminating in Aguilar v. Texas, the Supreme Court fleshed out the issuing magistrate’s central role in affording this protection, holding that warrants must be based on probable cause determined – as a Fourth Amendment operative proposition – by a neutral and detached magistrate based on “facts or circumstances presented to him under oath or affirmation. Mere affirmance of [the affiant’s] belief or suspicion is not enough.” As the Court elaborated, a court reviewing the issuance of a warrant, while giving substantial deference to the magistrate’s probable-cause determination, “must still insist that the magistrate perform his ‘neutral and detached’ function and not serve merely as a rubber stamp for the

51 See Long, 463 U.S. at 1040-42, 103 S.Ct. at 3476-77.


53 Id. at 112, 84 S.Ct. at 1512 (quoting Nathanson v. United States, 290 U.S. 41, 47, 54 S.Ct. 11, 13 (1933))(emphasis in original).
police.” That is, to exercise the required independent judgment that there is probable cause, the magistrate must have access to the facts on which it is said to rest.

The Court subsequently worked out a decision rule, the two-pronged Aguilar-Spinelli test, to provide the framework for applying this operative proposition in cases in which probable cause depends on a confidential informant’s tip. Under Aguilar as elaborated in Spinelli v. United States, the Court required that in seeking a tip-based warrant the police must include in the affidavit the facts from which the reviewing magistrate could determine both (1) that the informant had sufficient veracity to be believed and (2) that the informant’s basis of knowledge was adequate to support the tip. If under this test either prong came up short, the magistrate could not find probable cause unless she further determined from facts in the affidavit that the officer’s investigative corroboration filled that gap, providing a basis to conclude that the tip was nevertheless reliable.

The Aguilar-Spinelli decision rule lasted 15 years, when a more conservative Supreme Court concluded that the demands of its two-pronged test over-enforced the operative proposition requiring an independent magisterial determination of probable cause. In Illinois v. Gates, the Court thus jettisoned this decision rule and directed reviewing courts simply to apply their “common sense,” taking into account the “totality of the circumstances” set forth in the affidavit, in determining if the magistrate in that case had an adequate basis to find probable cause for the warrant she had issued. Under

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Gates, if the affidavit, so viewed, contained a sufficient basis to support such a magisterial finding, a reviewing court should defer to that determination.\(^{58}\)

The SJC did not agree, and in *Commonwealth v. Upton*\(^ {59}\) it went ahead and applied the at-that-point defunct two-pronged test to invalidate a search warrant under the Fourth Amendment, explaining that in *Gates* the Supreme Court had merely adjusted the test, not abandoned it.\(^ {60}\) The SJC in *Upton* did not disagree with the Supreme Court concerning the meaning or breadth of the requirement that there be independent magisterial determinations of probable cause, that is, what the Fourth Amendment required as an operative proposition. Its disagreement with the Court was rather that the *Gates* reliance on an unstructured review of the totality of the circumstances was inadequate to ensure independent magisterial determinations of probable cause which rested on information provided by an undisclosed tipster. So, the SJC returned to the more demanding *Aguilar-Spinelli* decision rule.\(^ {61}\) The Supreme Court reversed, holding that in applying the Fourth Amendment the SJC was bound by *Gates*, which – it scolded the SJC – rejected the two-pronged test in favor of a totality-of-the-circumstances

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\(^{58}\) *Id.* at 238, 103 S.Ct. at 2332. The Court also arguably at least loosened the definition of “probable cause,” surely announcing a new operative proposition, if that is how one reads the opinion. *Id.* at 238 (“fair probability”), 244 n. 13 (“substantial chance”), 103 S.Ct. at 2332, 2335 n. 13. Whether or not that is so is beyond the scope of this piece.


\(^{60}\) This apparent attempt to stay within the Supreme Court’s opinion in *Gates* read that opinion as adjusting the corroboration requirement of *Aguilar* and *Spinelli*’s two-pronged test rather than rejecting the test in favor of a “standardless ‘totality of the circumstances’ test.” *Id.* at 568, 458 N.E.2d at 720-21. However, the SJC was clear that if, as turned out to be the case, *Gates* stood for a rejection of the two-pronged test for assessing magisterial determinations of probable cause, it did not agree with that result. *Id.* at 572, 458 N.E.2d at 723.

\(^{61}\) *Id.* at 568-69, 458 N.E.2d at 721.
review. On remand (Upton II), the SJC reinstated its holding, this time based on the state’s constitution, article 14 of the Declaration of Rights.

Although in Upton II the SJC said that article 14 offered broader protections than the Fourth Amendment, it did not hold that article 14 had a different meaning, i.e., that its operative proposition was broader than that of the Fourth Amendment. Rather, the SJC held that the Aguilar-Spinelli decision rule was necessary to implement that proposition, differing with the Supreme Court’s view that that decision rule over-enforced the standard.

It is hard to say which court was right concerning the necessity of the Aguilar-Spinelli test to implement the operative proposition for which it stood. Indeed, both courts may well have been right. It could well be that the Aguilar-Spinelli decision rule is too technically demanding to be worth the candle as a one-size-fits-all, national requirement. It could be equally true that in Massachusetts, given the way that warrants are handled in its courts, the Aguilar-Spinelli decision rule is necessary to ensure that

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64 Id. at 373-78; 476 N.E.2d at 556-58. The SJC noted that article 14 preceded the Fourth Amendment, the latter in some substantial manner being based on article 14 and both sharing in similar language. Id. at 372, 476 N.E.2d at 555. The SJC observed that in Gates the Supreme Court had appeared to reformulate the definition of probable cause, id. at 370 n. 7, 476 N.E.2d at 554 n. 7, but the court expressly chose not to differ with the Supreme Court on that question. Id. at 373, 476 N.E.2d at 556.

65 Id. at 373-74, 376; 476 N.E.2d at 556-57 (the SJC noting that the two-pronged test “aids lay people, such as the police and certain lay magistrates, in a way that the ‘totality of the circumstances’ test never could.”) The SJC did not, of course, use the terminology of “decision rules” and “operative propositions,” but the concepts fairly characterize what the court did.

66 Upton, 466 U.S. at 732, 104 S.Ct. at 2087 (the Court emphasizing that in Gates “[w]e rejected [the Aguilar-Spinelli two-pronged test] as hypertechnical and divorced from ‘the factual and practical considerations of everyday life on which reasonable men, not legal technicians, act.’”).
deputy clerk magistrates in the 60 plus local courts that daily issue warrants have a sufficient basis for independent determinations of probable cause in tip cases.67

There is no reason why both of these approaches could not fairly co-exist under the Fourth Amendment without the necessity of the SJC turning to state law for its resurrection of this decision rule. The Supreme Court was well within its prerogatives to decide, after 15 years of observation, that the Fourth Amendment does not in every case require the two-pronged test to enforce its mandate of independent magisterial decision-making in tip cases,68 particularly given the Court’s role in our federal system of establishing constitutional minima below which no state may go. Considerations of comity may counsel resolving doubts concerning the reach (or even use) of decision rules in favor of under-enforcement, leaving it for the states to be more protective in setting out more demanding decision rules if apparently warranted in that more local context.69 And, the SJC’s holding that in Massachusetts courts the two-pronged rule is necessary to ensure proper decision making by its magistrates in this narrow Fourth Amendment context seems equally appropriate. The constitutional operative proposition is the same in either case; the only question is how it should be implemented. But given the Supreme Court’s insistence that it alone should decide not just what the Fourth Amendment means

67 See Lawrence Sager, supra note 13 at 1256 (noting the likelihood of superior state court competence in applying federal constitutional norms in the particular circumstances of that state). As noted, the SJC in Upton II specifically pointed out the importance of a clear test, which in its judgment the Aguilar-Spinelli decision rule provides, to “aid[] lay people, such as the police and certain magistrates [in determining probable cause] in a way that the ‘totality of the circumstances’ test never could.” Upton II, 394 Mass. at 376, 476 N.E.2d at 557.

68 Even as it struck down the Aguilar-Spinelli two-prong decision rule, the Court observed that its test provides appropriate guidance to magistrates in their probable-cause determinations in tip cases. See Gates, 462 U.S. at 230, 233, 104 S.Ct. at 2328, 2329.

69 See Lawrence Sager, supra note 13 at 1249 (“Unless compelling constitutional concerns are at stake, there would seem to be no occasion for an abiding federal judicial role in policing state courts against overly generous interpretations of federal constitutional values.”).
but also how that protection should be put in place, the SJC’s reluctant turn to the state’s parallel constitutional provision for this decision rule is appropriate and does not undercut the Supreme Court’s role as the final arbiter of federal constitutional values.

B. The Fifth Amendment and *Miranda*

The Massachusetts experience with *Miranda* is more complex. As noted, *Miranda*’s requirement of warnings and waiver is a decision rule designed to ensure consistent and full enforcement of the Fifth Amendment’s protection against compelled self-incrimination in the context of custodial interrogation. It is openly premised on a set of interlocking presumptions that all such interrogation is inherently coercive, that any statement by a suspect during such interrogation is coerced and thus compelled under the Fifth Amendment, and that the only way to overcome this presumed coercion is to administer particular warnings concerning the right to silence and to counsel during the interrogation. However, once the warnings are given and the suspect knowingly, voluntarily and intelligently waives those rights, the presumed coercion disappears and the otherwise compelled statement is presumed to be freely given and not compelled under the Fifth Amendment. These are not rebuttable presumptions, serving to assign burdens of proof in this factually murky area of stationhouse interrogation. They are

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70 *See supra* Note 60.

71 *See supra* pp. 8-9. *See also* Mitchell Berman, *supra* note 6 at 114 & n. 345, 127-28 (noting that the principal function of *Miranda*’s decision rule is to reduce adjudicatory errors).

72 *See* Miranda, 384 U.S. at 479, 86 S.Ct. at 1630. In his dissent, Justice White wonders how the Court on the one hand can hold that stationhouse interrogation is inherently coercive but on the other can be confident that a suspect’s waiver of his rights in such an atmosphere is knowing, voluntary and intelligent, all without knowing – as the Court concedes – what really goes on during such sessions. *See id.* at 535-36, 86 S.Ct. at 1660 (White, J., dissenting).
irrebuttable, establishing the ultimate fact of whether or not a confession was compelled by proof (or not) of the warnings and waiver that preceded the confession.

Almost from the beginning, this decision rule was thought by many to over-enforce the Fifth Amendment’s privilege against compelled self-incrimination in its newly minted expansion into the police station, that is, to function as a prophylactic rule. As developed above, this does not doom *Miranda*’s construct as a constitutional command, but to the extent that a decision rule is thought consistently to over-enforce its underlying operative proposition, its apparent legitimacy may be suspect. The SJC seems initially to have shared in this skepticism, explicitly declining to adopt *Miranda*’s warning-and-waiver decision rule under article 12, the provision in the Declaration of Rights protecting against compelled self-incrimination.

Relatively soon, the Supreme Court itself (with a changed membership at this point led by Chief Justice Burger) set out to trim *Miranda*’s warnings-and-waiver decision rule, characterizing it as a “prophylactic rule” not required by the Fifth Amendment. Among its adjustments to the rule, the Court held that statements taken in violation of *Miranda* could be used to impeach the defendant if he testified inconsistently.

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73 See supra pp. 9-10.

74 See Commonwealth v. Morrissey, 351 Mass. 505, 509-10, 222 N.E.2d 755, 758-59 (1967) (declining to accept the Supreme Court’s suggestion that as a state court it was free to adopt *Miranda*’s warning-and-waiver requirements under state law even though the decision was not retroactive as a matter of federal law). That refusal to adopt *Miranda*’s decision rule as required under article 12 of the Declaration of Rights continues through the present. See, e.g., Commonwealth v. Snyder, 413 Mass. 521, 531, 597 N.E.2d 1363, 1368 (1992); Commonwealth v. Martin, 444 Mass. 213, 221, 827 N.E.2d 198, 204 (2005). Indeed, early on the SJC was explicitly grudging in its enforcement of *Miranda* even under the Fifth Amendment. See Morrissey, 315 Mass. at 510-11, 222 N.E.2d at 759 (declining to exercise discretion to apply *Miranda* where not required by federal principles of retroactivity).

with his custodial statement,\textsuperscript{76} that certain derivative fruits of a \textit{Miranda} violation are not subject to the exclusionary rule’s bar,\textsuperscript{77} that an unwarned statement taken to protect public safety does not violate \textit{Miranda},\textsuperscript{78} and that a suspect’s waiver of the right to counsel is valid even if the suspect is not informed that his lawyer is readily available and has requested an opportunity to consult with him prior to questioning.\textsuperscript{79} These decisions seemed to foretell the eventual overturning of \textit{Miranda},\textsuperscript{80} but that, of course, did not come to pass. In \textit{Dickerson v. United States},\textsuperscript{81} the Court reaffirmed \textit{Miranda}’s decision rule, explicitly confirming its constitutional foundation, and reaffirmed as well those subsequent decisions cutting back on its reach.\textsuperscript{82}

Putting the rhetoric aside and looking at \textit{Miranda} as a decision rule necessary to the enforcement of the Fifth Amendment self-incrimination protection in the difficult


\textsuperscript{78} Quarles, 467 U.S. at 655, 104 S.Ct. at 2631.


\textsuperscript{80} It is perhaps worth noting that not all of the Court’s adjustments or clarifications of \textit{Miranda}’s requirements cut back on its protections; some fortified those protections. So, the Court held that \textit{Miranda} applied not just to express questioning but also to its functional equivalent, Rhode Island v. Innis, 446 U.S. 291, 100 S.Ct. 1682 (1980), that a suspect’s invocation of the right to silence must be “scrupulously honored,” Michigan v. Mosely, 423 U.S. 96, 96 S.Ct. 321 (1975), that a suspect’s invocation of the right to counsel bars further questioning unless the suspect himself initiates further conversation, Edwards v. Arizona, 451 U.S. 477, 101 S.Ct. 1880 (1981), barring even unsolicited questioning by different police about an unrelated crime, Arizona v. Roberson, 486 U.S. 675, 108 S.Ct. 2093 (1988), or such questioning even after the suspect had consulted with a lawyer. Minnick v. Mississippi, 498 U.S. 146, 111 S.Ct. 486 (1990).

\textsuperscript{81} 530 U.S. 428, 443-44, 120 S.Ct. 2326, 2336 (2000).

\textsuperscript{82} \textit{See id.} at 443-44, 120 S.Ct. at 2336.
context of police interrogation, *Dickerson* and the earlier decisions that it left in place
seem justifiable (even if in the eye of any particular beholder not completely justified).\(^8\)

*Miranda’s* decision rule (really, web of decision rules) is, like other such rules, founded
on pragmatism, and it is, and should be, subject to re-shaping as its costs and benefits
become more apparent.\(^4\) But if pragmatism justifies the Supreme Court’s contextual
adjustments to *Miranda’s* constitutional decision rule, there is no good reason why states
should not be similarly free to consider further pragmatic adjustments – at least ones that
are more protective of the underlying privilege – as long as these rule expansions do not
intrude on the Supreme Court’s authority to interpret the Fifth Amendment’s meaning.

The three cases to which I now turn, *Commonwealth v. Smith*,\(^5\) *Commonwealth v.
Mavredakis*,\(^6\) and *Commonwealth v. Martin*,\(^7\) demonstrate this point.

*Smith* dealt with *Miranda’s* decision rule in the context of the serial-interrogation
technique in which the police first question a suspect and only administer the warnings
and seek a waiver after the unwarned suspect confesses. The officers then re-interrogate
the suspect with the not-surprising result that frequently the newly-warned suspect
repeats and often embellishes his prior unwarned admissions. The SJC had joined many
courts across the country in holding that this tactic violates *Miranda*. Even though the

\(^{8\text{E.g.}}\) Susan Klein, *supra* note 12 at 1060-63 (accepting the conceptual validity of the limitations on
*Miranda*, with the possible exception of *Quarles*’ emergency exception but noting that as a practical matter
no right is absolute).

\(^{4\text{See}}\) David Strauss, *Miranda, the Constitution, supra* note 44 at 966-69 (arguing that the Court’s trimming
of *Miranda’s* construct in *Harris, Tucker, Elstad* and *Quarles* based on a cost-benefit analysis and did not
detract from the constitutional status of the decision rule).


second statement was preceded by the required warnings and waiver, the cat (the suspect’s confession) was already out of the bag by the time of the second statement, and thus the suspect – unless he knew that the first, unwarned statement was not admissible at trial – had no reason to think that his rights of which he had now been advised were anything but empty formalities. 88 Courts, including the SJC, thus held that the second, warned statement was presumptively tainted by the first, unwarned statement and thus should be suppressed unless the prosecution could show that there was an intervening event that cleansed the second interrogation of the impact of the first, unlawful interrogation. 89

This was all framed as a matter of federal law, required by the Fifth Amendment. Or so the courts thought. In Oregon v. Elstad, 90 the Supreme Court held otherwise, opining that in such a situation Miranda required no more than proof of warnings and waiver prior to the second statement. Under Elstad, the second, warned statement is admissible unless the reviewing court finds that the police used “deliberately coercive or improper tactics in obtaining the initial statement.” 91 To be sure, Elstad marked the first time that the Supreme Court had weighed in on this particular application of Miranda’s decision rule, but to many Elstad constituted a trimming back of its reach. 92 Following

88 See Commonwealth v. Haas, 373 Mass. 545, 554, 369 N.E.2d 692, 699 (1977); Commonwealth v. Mahnke, 368 Mass. 662, 682-83, 335 N.E.2d 660, 673-74 (1975), cert. denied, 425 U.S. 959, 96 S.Ct. 1740 (1976). Indeed, taken on their face, the warnings tell the subject that “anything you say may be used against you in court,” reinforcing the notion that by his earlier statement the suspect has given up the game. See John Parry, supra note 15 at 757.

89 See Smith, 412 Mass. at 829, 593 N.E.2d at 1291-92 (citing cases so holding).


91 Id. at 314, 105 S.Ct. at 1296.

92 The Supreme Court itself encouraged that view, characterizing the warning-and-waiver construct as prophylactic only, not required by the Fifth Amendment itself. Id. at 308-09, 105 S. Ct. at 1292-93
Elstad, the SJC revisited the issue, holding as a matter of state common law that this practice violated Miranda and explicitly restoring Miranda’s decision rule to its pre-Elstad state.93

Similarly, in Mavredakis the SJC decided that another apparent loosening of Miranda’s decision rule by the Supreme Court left the privilege against compelled self-incrimination newly under-protected. Mavredakis dealt with the scenario in which police interrogate a suspect whose lawyer is readily available and has requested but been denied an opportunity to consult with the suspect prior to or during the interrogation. The SJC had held under the Fifth Amendment that in such a case, the suspect’s waiver would not satisfy Miranda unless the suspect had been told that not only did he have a right to counsel during the interrogation but that a lawyer – purporting to be his lawyer – was actually knocking on the door, requesting an opportunity to speak with him.94 As in Smith, the Supreme Court subsequently disagreed, holding in Moran v. Burbine95 that Miranda required no such additional warning and waiver.96

The SJC re-considered this issue in Mavredakis, restoring the rule that Burbine had rejected and returning Miranda’s decision rule to its pre-Burbine contours.97 Unlike its decision in Smith, however, the court framed Mavredakis in terms of article 12 – not

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93 Smith, 412 Mass. at 837, 593 N.E.2d at 1296.
94 See Mavredakis, 430 Mass. at 856, 725 N.E.2d at 176 (citing SJC cases so holding).
96 Id. at 422, 106 S.Ct. at 1141.
97 Mavredakis, 430 Mass. at 857-58, 725 N.E2d at 177.
state common law – suggesting, if not holding, that article 12 provides greater protection than does the Fifth Amendment against compelled self-incrimination. If the SJC meant what it appeared to say, i.e., that article 12’s operative proposition forbidding compelled stationhouse self-incrimination is broader than that of its federal counterpart, this was both unnecessary to the decision and incorrect as a reading of the then-extant precedents. No doubt that Mavredakis (like Smith) represents a more expansive view than that of the Supreme Court concerning the decision rule necessary to implement the protection against compelled self-incrimination in the stationhouse. However, neither Mavredakis nor Smith depends on a state version of constitutional protection against self-incrimination that is broader than that of the Fifth Amendment. Moreover, a review of the history and precedents of article 12 and of the Fifth Amendment demonstrate that, at least insofar as they apply to police interrogation, their operative propositions concerning compelled self-incrimination are essentially the same.

98 Id. at 858-59, 725 N.E.2d at 177-78.

99 Interpreting article 12 to provide greater protection against compelled self-incrimination than does the Fifth Amendment in order to justify resurrection of its pre-Burbine version of Miranda’s rule not only misread article 12’s history and prior interpretation; it needlessly conflated the common operative proposition of two constitutional provisions – protecting against compelled self-incrimination – with the web of decision rules intended to guide the application of that operative proposition.

The problem is not simply one of conceptual elegance, for this anchoring of Mavredakis’s expanded decision rule in the meaning of article 12 “calcifies” this rule, see Kermit Roosevelt, Constitutional Calcification, supra note 28 at 1693, making further adjustments in the light of unforeseen consequences, changed circumstances, or a reassessment of the rule’s wisdom beyond the reach of any decision-maker but the SJC and, even for the SJC considerably more difficult than it had to be.

100 The two constitutional provisions have common historical roots, article 12 being a predecessor of and one of the models for the Fifth Amendment. Article 12’s terms (“[n]o subject shall be compelled to accuse, or furnish evidence against himself”) are different, and seem broader, than those of the Fifth Amendment (no person “shall be compelled in a criminal case to be a witness against himself”). However, authorities agree that no difference was intended, the terms “furnish evidence” and “be a witness” being “virtually synonymous” to the Framers, see Thomas Davies, Farther and Farther from the Original Fifth Amendment: The Recharacterization of the Right Against Self-Incrimination as a “Trial Right” in Chavez v. Martinez, 70 Tenn. L. Rev. 987, 1008 & n. 118 (2003) (citing Blackstone), article 12 (along with similar provisions in seven other pre-Bill-of-Rights state constitutions) serving as a model for the Fifth Amendment in this regard. See id. at 998-1018 & n. 62 (demonstrating through an exhaustive review of
historical materials that the textual differences between the Fifth Amendment’s self-incrimination clause and that of Massachusetts, among other predecessors, were stylistic and not substantive).

As a matter of history, both article 12 and the Fifth Amendment were aimed at pre-accusation judicial examinations of persons not charged with – or maybe even suspected of – any crime. The earlier English experience with such inquisitorial “fishing expeditions” by ecclesiastical courts and the Court of the Star Chamber, formally examining uncharged persons in an effort to use the power of the oath, known as “ex-officio oath,” to force self-accusation, was the core concern, not investigatory questioning by constables or other executive officers. See id. at 1000-07. Indeed, at the time both constitutional provisions were written and adopted, there were no police to speak of, criminal investigation and prosecution still being basically in private hands. Id. The Framers’ core concern (John Adams perhaps particularly), id. at nn. 77, 123 & text, was to preserve the accusatory nature of the criminal process by prohibiting judicially compelled self-accusation.

Both privileges tracked each other during the century and a half that their respective protections were mutually exclusive, the Fifth Amendment applying only to federal cases and article 12 only to state cases. The Supreme Judicial Court interpreted article 12’s privilege against compelled self-incrimination to include not only protection against using the ex-officio oath to compel self incrimination, but also the common law extension of that privilege barring compelled testimony at one’s own trial (or the trial of others). See Emery’s Case, 107 Mass. 172, 181 (1871) ("[t]his branch of the constitutional exemption [article 12’s privilege] corresponds with the common law maxim, nemo tenetur seipsum accusare [no man is bound to criminate (accuse) himself]. . . ."). See also 1 William Blackstone, Commentaries 68 (1st ed. 1765), cited in Thomas Davies, supra at 1001-02 & nn. 78-79.

The Supreme Court in a like manner extended the Fifth Amendment protection against self-incrimination to include this common-law, “nemo tenetur” rule barring the introduction of judicially compelled confessions at trial. See Counselman v. Hitchcock, 142 U.S. 547 (1892)(over-ruled on the breadth of immunity required to overcome the privilege), in which the Supreme Court held that the privilege extended generally to testimony compelled under oath, whether or not the proceeding was a criminal trial at which the witness stood accused. The Court cited the SJC’s opinion in Emery’s Case and observed:

It is impossible that the meaning of the [Fifth Amendment’s privilege against self-incrimination] can only be, that a person shall not be compelled to be a witness against himself in a criminal prosecution against himself. It would doubtless cover such cases; but it is not limited to them. The object was to insure that a person should not be compelled, when acting as a witness in any investigation, to give testimony which might tend to show that he himself had committed a crime. The privilege is limited to criminal matters, but it is as broad as the mischief against which it guards.

Id. at 562.

The Court arguably went further in Bram v. United States, 168 U.S. 532, 543-65 (1897), striking down a confession that had resulted from coercive police interrogation on the grounds that it was not voluntary and thus was barred by the Fifth Amendment privilege. However, this decision was strongly criticized by Wigmore for, in his view, conflating the privilege against judicially-compelled self-accusation in formal proceedings with the common-law protection against involuntary confessions, see Lawrence Herman, The Unexplored Relationship Between the Privilege Against Compulsory Self-Incrimination and the Involuntary Confession Rule (Part I), 53 Ohio St. L. J. 101, 170-71 (1992); Thomas Davies, supra at 1038, and it lay dormant as precedent until almost 70 years later, when the Court dusted it off in Miranda. See Miranda v. Arizona, 384 U.S. 436, 461-62 (1966).

Whether or not Wigmore was correct in his criticism, but see Lawrence Herman, supra at 170-95 (arguing that the common-law protection against coerced confessions was largely subsumed in the common-law “nemo tenetur” protections once those protections applied under the Fifth Amendment to governmental agents other than judges), the matter is moot after the Supreme Court’s (and the SJC’s) holding that the privilege against compelled self-incrimination applies to police questioning of suspects in custody. That, of course, is the holding of Miranda, echoed under article 12, as to which the SJC’s assertion is not that article 12’s protection stops short of Miranda, but that it goes farther. See Commonwealth v. Martin, 444 Mass. 213, 219-20, 827 N.E.2d 198, 203 (2005); Commonwealth v. Mavredakis, 430 Mass. 848, 858-59, 725 N.E.2d 169, 178 (2000).
rhetoric is stripped away, it does not expand article 12’s protection against compelled self-incrimination beyond that of the Fifth Amendment. Rather, it is no more than a restoration of one aspect of Miranda’s decision rule implementing that protection.

Reduced to their essentials, then, both Smith and Mavredakis represent no more than a state striking a different and more protective balance than that struck by the Supreme Court in crafting the decision rule implementing self-incrimination protection in the context of police interrogation. Neither decision depends on a more expansive article 12 version of the underlying operative proposition than that of the Fifth Amendment. These state-law adjustments of Miranda’s decision rule thus do not undercut the premise that the Supreme Court ought presumptively to be the final arbiter concerning the meaning and scope of a shared constitutional provision.¹⁰¹

Martin, the third case, is different, although it, too, marks an expansion of Miranda appropriate for a state to consider. Martin addresses the question of remedy, specifically whether, in addition to any statement unlawfully obtained, the derivative fruits of a Miranda violation – in Martin, a gun that the police found as a result of an unwarned statement – must be suppressed. The Supreme Court, in United States v.

¹⁰¹ The fact that the SJC has declined to adopt Miranda’s decision rule as one required by article 12, see supra Note 74, does not foreclose the state-law expansion of that rule in Smith or Mavredakis. That refusal to adopt Miranda as an article 12 requirement came in cases in which the SJC held that Miranda’s rule adequately implemented the Fifth Amendment’s protection against compelled self-incrimination, protection that is the same as that mandated by article 12 and that under the 14th Amendment the SJC is required to enforce. See, e.g., Commonwealth v. Snyder, 413 Mass. 521, 597 N.E.2d 1363 (1992)(declining to extend Miranda’s requirements under article 12 to a public school principal’s questioning of a student). In such cases, as the SJC put it, “[t]here has been no need to consider the question [of whether article 12 separately requires Miranda’s decision rule] because Miranda warnings furnish information about State constitutional rights as well as rights contained in the Constitution of the United States.” Id. at 531, 597 N.E.2d at 1368. The SJC went on to note that should Miranda be deemed inadequate to protect the state constitutional privilege, the SJC could look to common law to provide that additional protection. Id. This is precisely what the court did in Smith and what it could have done in Mavredakis.
Patane,\textsuperscript{102} earlier held that suppression of an unwarned statement fully vindicates the Fifth Amendment’s protection against compelled self-incrimination and that the derivative fruits of a \textit{Miranda} violation – in that case also a gun found as a result of the unwarned statement – should not be suppressed.\textsuperscript{103} The SJC disagreed in \textit{Martin}, holding that the gun as well as the unwarned statement must be suppressed.\textsuperscript{104}

The SJC explicitly grounded \textit{Martin} in its view that police failure to administer warnings to suspects prior to custodial interrogation, is “illegal,”\textsuperscript{105} “‘an improper police tactic’ that is strongly to be discouraged.”\textsuperscript{106} In order to advance what it called “\textit{Miranda}’s prophylactic purpose,”\textsuperscript{107} the court held as a matter of state common law that derivative fruits of \textit{Miranda} violations must be suppressed. “To do otherwise,” in the words of the court, “would countenance precisely the kind of police interrogation we have intended to deter.”\textsuperscript{108} Such an instrumental use of the suppression remedy, what Susan Klein has called a “constitutional incidental right,”\textsuperscript{109} seems plainly to be a proper prerogative of a state, even where both the decision rule and its underlying operative

\textsuperscript{102} 542 U.S. 630, 124 S.Ct. 2620 (2004).

\textsuperscript{103} \textit{Id.} at 636-37, 124 S.Ct. at 2626.

\textsuperscript{104} Martin, 444 Mass. at 215, 827 N.E.2d at 200.


\textsuperscript{106} \textit{Id.} at 218, 827 N.E.2d at 203 (quoting \textit{Smith}, 412 Mass. at 836, 593 N.E.2d at 1288).

\textsuperscript{107} \textit{Id.} at 218, 827 N.E.2d at 203.

\textsuperscript{108} \textit{Id.} at 218-19, 827 N.E.2d at 203.

\textsuperscript{109} See Susan Klein, \textit{supra} note 12 at 1047 (characterizing as “constitutional incidental rights” judicially created “rights which are not themselves mandated by the constitutional clause the right is designed to further” and offering as a prime example the exclusionary rule suppressing evidence illegally seized under the Fourth Amendment in order to deter police violations of the amendment’s operative command as opposed to restoring the privacy interests that have been irreparably breached).
proposition are federal. The SJC’s decision in *Martin* does not quarrel with the Supreme Court regarding either the meaning of the Fifth Amendment’s self-incrimination clause or the reach of the decision rule that implements it in the police station. The court differs with the Supreme Court only on what is necessary to encourage the police to follow the rule, a difference that marks no incursion on the Supreme Court’s role as the presumptive arbiter on issues of constitutional meaning. It is thus no surprise that there is a longstanding history of state independence in crafting remedies for federal constitutional violations as long as those remedies are at least as protective as those that the Supreme Court has held are required by the Constitution. If *Martin* is what it purports to be – an instrumental adjustment of the *Miranda* remedy to encourage full police compliance with its requirements – it presents no conceptual problem as a state-law construct.

But there is another plausible theory justifying the suppression of the gun in *Martin*, one resting on an interpretation of article 12 providing broader protection than that of the Fifth Amendment. In *Patane*, the Supreme Court (at least a three-judge plurality) characterized the Fifth Amendment’s protection against compelled self-

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110 *See, e.g.*, Wolf v. Colorado, 338 U.S. 25, 69 S.Ct. 1359 (1949)(holding that the Fourth Amendment’s protections against unreasonable searches and seizures are incorporated into the 14th Amendment’s due process clause and are thus binding on the states but leaving to the states the question of what the remedy for a Fourth Amendment violation ought to be). In declining to require suppression as the remedy for a Fourth Amendment violation, Justice Frankfurter wrote that “the ways of enforcing such a basic right raise questions of a different order [than does the existence of the right itself]. How such arbitrary conduct should be checked, what remedies should be afforded, the means by which the right should be made effective, are all questions that [should be left to] varying solutions which spring from an allowable range of judgment,” which the Court left to the states. *Id.* at 28, 69 S.Ct. at 1361.

Of course, 12 years later the Court changed its mind, holding in *Mapp* v. Ohio, 367 U.S. 643, 81 S.Ct. 1684 (1961) that the remedy of suppression is required by the Fourth Amendment. But the important point for our purposes is not that Fourth Amendment holding but that the Court recognized a legitimate role for the states in crafting remedies for federal constitutional violations. Even today, when the Court has become far more jealous of its prerogative as keeper of the Constitution, the remnants of this longstanding tradition that states may craft their own respective remedies for federal violations remain. *See Danforth v. Minnesota*, 552 U.S. --, --, 128 S.Ct. 1029,1038-42 (2008)(holding that states are free under state habeas law to extend a “new federal rule” to petitioners seeking habeas review of their convictions, though such relief is barred under federal habeas law).
incrimination as a “trial right,” fully vindicated by excluding a governmentally compelled statement at their maker’s criminal trial.\textsuperscript{111} In contrast, for well over a century the SJC has interpreted article 12 to provide for an apparently broader privilege, one that protects against not just the use of compelled statements at trial but against compelled self-accusation generally.

In \textit{Emery's Case},\textsuperscript{112} decided in 1871, the SJC reviewed a statute that required witnesses in particular legislative proceedings to testify, explicitly providing that such compelled testimony could not be used against such a witness at any subsequent criminal trial. The SJC held that this immunity was insufficient to protect article 12’s privilege, observing that article 12 protects a witness not just against such trial use of compelled statements but also against being compelled ahead of trial “to disclose the circumstances of his offence, the sources from which, or the means by which evidence of its commission, or of his connection with it, may be obtained, or made effectual for his conviction.”\textsuperscript{113} Even if never offered against the witness at trial, such compelled disclosures, the court noted, “might furnish the only means of discovering the names of those who could give evidence concerning the transaction, the instrument by which a crime was perpetrated, or even the \textit{corpus delicti} itself,”\textsuperscript{114} a result that the court held was forbidden by article 12’s protection.\textsuperscript{115} In the court’s view, the only immunity that would

\begin{footnotes}
\item[112] 107 Mass. 172 (1871).
\item[113] \textit{Id.} at 182.
\item[114] \textit{Id.}
\item[115] \textit{Id.}
\end{footnotes}
adequately protect against being compelled not just to confess, but also to give over the means by which his criminality might be proved, was transactional immunity, which the court thus held was necessary to overcome article 12’s privilege.  

This view of article 12 arguably requires – as a necessary corollary of its constitutional privilege protecting against compelled self-accusation – suppression of physical evidence disclosed by compelled statements. Just as Emery was constitutionally privileged to avoid handing over his papers that had been subpoenaed, now that the privilege extends to custodial interrogation Martin similarly should be privileged to avoid being compelled to direct the police to his gun. Forced by subpoena to hand over his papers, Emery was protected by transactional immunity, which put him in the same position as he would have been had he not been compelled to testify and there to deliver up his papers. Of course, when questioned Martin had no practical access to transactional immunity, and so any physical evidence to which his unwarned statement led arguably must be suppressed, not to deter police but to put Martin and those like him in the same

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116 Id. at 185. This article 12 requirement of transactional immunity remains in force, see Attorney General v. Colleton, 387 Mass. 790, 796-97, 444 N.E.2d 915, 918-20 (1982), even though under the Fifth Amendment the Supreme Court long ago cut back that requirement to derivative-use immunity. See Kastigar v. United States, 406 U.S. 441, 92 S.Ct. 1653 (1972).

117 See also Commonwealth v. Hughes, 380 Mass. 583, 404 N.E.2d 1239 (1980). In Hughes, the SJC struck down a court order that the defendant produce a gun that the Commonwealth alleged he had used in a charged assault by means of a dangerous weapon. The SJC reasoned that production of the weapon would constitute an implicit statement concerning the “existence, location and [defendant’s] control” of the gun, and that forcing such a statement through a court order backed by the power of contempt violated the defendant’s privilege against compelled self-incrimination. Id. at 592-93, 404 N.E.2d at 1244-45. The SJC founded its decision in the Fifth Amendment, but it noted that if the Fifth Amendment did not require this result, article 12 would, citing Emery’s Case. Id. at 595, 404 N.E.2d at 1246. If a court cannot, consistent with the privilege, compel a suspect to produce a gun, it is no great leap to say than neither may a police officer. And, if that order to produce the gun is unlawful, the resulting gun would seem to be its direct, and suppressible, fruit.
position as he would have been had his statement not been compelled. The suppression remedy is a measure of, and is measured by, the privilege ignored.

If this were the basis for the SJC’s decision, it nevertheless would not constitute a state court’s undue refusal to defer to the Supreme Court concerning the meaning of a shared constitutional provision. The SJC addressed this article 12 issue in 1871, two decades before the Supreme Court first addressed the issue under the Fifth Amendment, and over 130 years before the Court appeared to retrench on the reach of the self-incrimination provision in \textit{Patane}. In sum, whether as an instrumental “incidental right” crafted as a way to buttress \textit{Miranda}’s decision rule or as a remedy that is a necessary corollary to article 12’s longstanding protection against self-accusation, there is no conceptual roadblock to the state-law enhancement of the remedy in \textit{Martin}.

Now the final question: who should decide?

\textbf{III. Who Should Decide: Court or Legislature?}

I assume it is too plain for argument that the executive is not a candidate for this constitutional decision making. At least where the decision rules are ones of criminal procedure, the executive has a stake in the outcome and would have no claim to legitimacy. It has to be either the court or the legislature. Given the pragmatic cast of

\footnote{As noted above, the fact that the SJC has never adopted \textit{Miranda}’s decision rule under article 12 does not foreclose its decision here to expand the reach of that rule to implement article 12’s apparently broader protection that includes the privilege. \textit{See supra} Note 101. Until the Supreme Court’s decisions in \textit{Patane} and \textit{Chavez v. Martinez}, 538 U.S. 760, 123 S.Ct. 1994 (2003), the SJC had every reason to think that the privilege was a part of the Fifth Amendment as well as article 12, both protected by \textit{Miranda}’s decision rule. \textit{See supra} Note 100.}

\footnote{\textit{See, e.g.}, John Parry, \textit{supra} note 15 at 783-85 (arguing that the remedy is “cash value” of a right, and should be considered to be part and parcel of it).}

\footnote{\textit{See supra} Note 100.}

\footnote{As noted, this conception of the Fifth Amendment protection as a “trial right” first appeared in \textit{Chavez v. Martinez}, 538 U.S. 760, 123 S.Ct. 1994 (2003), also in a plurality opinion by Justice Thomas.}
decision rules and their derivative relationship to the operative propositions that they are meant to apply, answering this question of which of the two is best suited to expand a particular decision rule depends, it seems to me, on three factors.

First is the relationship between the decision rule in question and the operative proposition it is intended to apply. As noted, constitutional decision making occurs along a spectrum, with operative propositions and decision rules constituting polar categories. In the middle, it may be difficult to characterize a particular decision as one or the other. The closer a decision rule is to the operative proposition that underlies it, the tighter the correspondence between the two, the more its adjustment would seem to be the legitimate prerogative of the court, the institution vested with the authority to interpret the constitution. Looked at another way, to the extent that the expansion of a decision rule is justified by a principled integral connection to its underlying operative proposition, it seems legitimate as a judicial decision; to the extent that such expansion is driven by policy based in empiricism, it seems more properly a legislative function.

Second is the impact of the decision rule in question. Where the decision rule has its principal impact in the adjudicative process, its adjustment would seem to be the legitimate prerogative of the courts. So, adjustments of decision rules to reduce

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122 Professor Fallon makes the point well, arguing that while judicial review may lack democratic legitimacy due to its counter-majority nature, it promotes overall governmental legitimacy to the extent that it protects against violations of, mostly, individual rights. See Richard Fallon, The Core of an Uneasy Case, supra note 16 at 1716-18. In that view, the legitimacy of judicial review in cases such as we are considering (which surely involve individual rights) depends on a principled connection between the decision rule at issue and the underlying operative proposition. See also Mitchell Berman, supra note 6 at 101-03 (asserting that the legislature’s role in crafting constitutional rules should be confined to decision rules); Susan Klein, supra note 12 at 1051 & n. 97 (asserting that a constitutional operative proposition is not subject to legislative revision, but a prophylactic rule may be).

123 See Kermit Roosevelt, Polyphonic Stare Decisis, supra note 41 at 1308-09 (distinguishing judicial authority from legislative authority by observing that judicial departures from precedent require justification in recognized principles).
adjudicatory error in applying the underlying operative proposition\textsuperscript{124} would seem fairly to fall to the courts. Not only is it the courts that apply these rules in adjudication, but identifying instances of adjudicatory error necessarily requires first determining what the operative proposition requires, a judicial function. On the other hand, decision rules primarily meant to guide non-judicial actors, e.g., law enforcement officials in their application of operative propositions “on the street,” would seem less the exclusive prerogative of the courts. Using a decision rule as a stick to ensure police compliance with an operative proposition likely involves empirical judgments and assessment of extra-judicial costs that may more properly fall to the legislature as a matter of both legitimacy and competence.

Third is a factor that flows from the first two, and that is the institutional competence to identify and assess the costs and benefits of a decision rule’s expansion and the political legitimacy to make the judgments that justify that expansion.\textsuperscript{125} If a branch has an apparent competence or legitimacy advantage, it would be better positioned to decide if and how the decision should be adjusted.

I do not mean to suggest that these factors are independent of one another; they plainly are not. A decision rule meant to guide police in applying a constitutional

\textsuperscript{124} Mitchell Berman argues that this is the principal function of, and strongest claim to legitimacy for, a decision rule. See Mitchell Berman, supra note 6 at 154.

\textsuperscript{125} See, e.g., Jeremy Waldron, The Core of the Case Against Judicial Review, 115 Yale L. J. 1346, 1360 (2006)(arguing that courts have no demonstrable competency advantage over legislatures in determining what constitutional rights people have). But see Richard Fallon, The Core of Uneasy Case, supra note 16 at 1709 (asserting that “courts are likely to have a perspective that may make them more sensitive than legislatures to some possible rights violations [ due in part to judges’] professional training and mission [that] involves a solicitude for rights as they have historically been understood.”). See also Kermit Roosevelt, Constitutional Calcification, supra note 28 at 1658-61(noting the difference in judicial and legislative competence on particular kinds of questions as a factor in whether courts ought to create decision rules); John Parry, supra note 15 at n. 293 & text, n. 317 & text; Mitchell Berman, supra note 6 at 103-05.
command, for example, requires identifying the underlying operative proposition and likely implicates adjudication of the proposition through claims that the police have violated it in enforcing the law. Each decision rule may involve costs and benefits that may be both adjudicatory (e.g., sacrifices in fit with the operative proposition for clarity of application) and not (e.g., the degree to which effective law enforcement should be sacrificed in order to ensure greater police compliance with an operative proposition). The balance of factors in a particular case may point with reasonable clarity to one branch or the other. In another case, the balance may be not at all clear, counseling a court to decide the issue but leaving it open to the legislature to address the issue anew. So, how does this play out?

A. The Fourth Amendment and Aguilar-Spinelli’s Two-Pronged Test

Aguilar-Spinelli’s decision rule that a tip-based warrant must be based on an affidavit that allows the magistrate to assess both an informant’s veracity and basis of knowledge is a decision rule that seems quintessentially appropriate for a court to impose.

First, the two-pronged test is closely related to its underlying operative proposition that requires an independent determination of probable cause by a neutral and detached magistrate. In the view of the SJC, both prongs of the test – the first focused on the veracity of the informant from whom the tip came and the second focused on the basis for the informant’s information – are essential to assessing probable cause based on a tip, and thus “each element of the test must be separately considered and satisfied or supplemented in some way.” 126 Without this test, in the eyes of the SJC, the Fourth

126 Upton II, 394 Mass. at 376, 476 N.E.2d at 557.
Amendment’s and article 14’s core protection against searches without probable cause would be reduced to dependence on untested, potentially unreliable tips.\textsuperscript{127}

Second, the impact of the decision rule is confined to the adjudication of probable cause by judicial officers, including those – principally police officers – who are important parties in that adjudicatory process. The rule is intended to guide judicial officials who determine probable cause, as well as to instruct the law enforcement officers who seek warrants based on informant information, regarding the proper framework for that decision, a supervisory task that lies at the heart of a court’s competence and legitimate authority. Particularly in Massachusetts, where not only the police but many of the magistrates who issue the warrants are persons without formal legal training, the SJC’s determination that the two-pronged test “aids lay people, such as the police and certain magistrates, in a way that the ‘totality of the circumstances’ test never could”\textsuperscript{128} in determining tip-based probable cause seems an entirely appropriate judicial task. The court was explicit in its expectation that maintenance of the \textit{Aguilar-Spinelli} test as opposed to its abandonment “will tend to reduce the number of

\textsuperscript{127} \textit{See} Upton I, 390 Mass. at 573, 458 N.E.2d at 723. In \textit{Gates}, the Supreme Court did not dispute that the \textit{Aguilar-Spinelli} decision rule was closely related to its underlying operational proposition. Indeed, the Court conceded that “a conscientious assessment of the basis for [informant] tips is required by the Fourth Amendment,” \textit{Gates}, 462 U.S. at 238, 103 S.Ct. at 2332, and that the two prongs of the test are “relevant considerations in the totality-of-the-circumstances analysis that traditionally has guided probable cause determinations.” \textit{Id.} at 233, 103 S.Ct. at 2329. Rather, the Court rejected the test as too demanding, “leave[ing] virtually no place for anonymous citizen informants.” \textit{Id.} at 238, 103 S.Ct. at 2332. Here was the point of disagreement. To the Supreme Court, the two-pronged test is a prophylactic rule that detrimentally over-protects the underlying operative proposition requiring independent magisterial determinations of probable cause; to the SJC, it is a decision rule necessary to ensure compliance with that constitutional command. \textit{See} Upton II, 394 Mass. at 376, 476 N.E.2d at 557 (holding that independent consideration and satisfaction of both prongs of the two-pronged test are necessary and observing that enforcing the test “will tend to reduce the number of unreasonable searches conducted in violation of article 14,” i.e., reduce adjudicatory error).

\textsuperscript{128} \textit{Id.}
unreasonable searches conducted in violation of article 14,\textsuperscript{129} i.e., reduce adjudicatory error.

Finally, the SJC seems at least as well, and probably better, positioned than the legislature, as a matter both of institutional competence and political legitimacy, to assess the costs and benefits attending the rule and to weigh these considerations in the decision to maintain the two-pronged test under article 14. In its decision, the court noted the successful experience of Massachusetts police over the prior 20 years in complying with the demands of the test.\textsuperscript{130} That is a historical fact discernible from its experience reviewing warrant applications that the court seems competent to determine. Even more plainly within the court’s competence is its conclusion that the test had not, over those 20 years, interfered with the deference that reviewing courts are supposed to give to magisterial determinations of probable cause.\textsuperscript{131} After all, observing that deference (or its asserted lack) and measuring it against the appropriate legal standard are quintessentially within the purview of a state’s highest court, both as a matter of competence and legitimacy. While the court’s assessment that the number of cases in which evidence had been suppressed during the prior 20 years of \textit{Aguilar-Spinelli}’s existence “has not been substantial in relation to the number of challenges made to the adequacy of the applications for search warrants”\textsuperscript{132} depends on the eye of the beholder, it would at least seem that the court would have access to the facts that would underlie that conclusion.

\textsuperscript{129} \textit{Id.}
\textsuperscript{130} \textit{Id.}
\textsuperscript{131} \textit{Id.}
\textsuperscript{132} \textit{Id.} at 376, 476 N.E.2d at 558.
Whether or not one agrees with the SJC on the merits, the court was well within its competence and legitimate prerogatives in restoring a decision rule designed to ensure the effectiveness of the operative proposition requiring independent judicial determinations of probable cause.

B. The Fifth Amendment and Miranda

In contrast to the SJC’s decision to maintain the Aguilar-Spinelli decision rule, the three SJC decisions expanding Miranda’s decision rule raise questions concerning their legitimacy as judicial acts. At least one and maybe two of these decision-rule expansions seem more properly the prerogative of the legislature. In only one, Commonwealth v. Smith,¹³³ is it reasonably clear that the SJC was the appropriate governmental branch to expand Miranda’s protections.

1. Smith: A Defensible Judicial Expansion of Miranda

In Smith, it will be recalled, the SJC addressed the serial-interrogation technique by which police question a suspect without administering the Miranda warnings, elicit an incriminatory statement, then – after a brief break – administer the warnings, elicit a waiver and then a repeat of the pre-warning statement, often embellished.¹³⁴ The Supreme Court held in Elstad that such intermediate warnings satisfied Miranda and thus that the subsequent statement was not compelled under the Fifth Amendment unless the police used “deliberately coercive or improper tactics in obtaining the initial statement.”¹³⁵ The SJC’s rejection of Elstad’s approach, while not so clear a case as its

¹³⁴ See supra p. 24.
¹³⁵ Elstad, 470 U.S. at 314, 105 S.Ct. at 1296.
restoration of the *Aguilar-Spinelli* test in *Upton II*, was an appropriate exercise of judicial authority.

First, the relationship between *Smith’s* slice of *Miranda’s* decision rule and *Miranda’s* underlying operative proposition extending the self-incrimination privilege to the stationhouse is closer than might first appear. To be sure, the SJC in *Smith* was plainly interested in deterring *Miranda* violations, fashioning a “presumed taint” that attaches to a statement that follows a *Miranda* violation to achieve that end. From this perspective, this rule looks more like means to achieve police compliance with the decision rule than a requirement that is integral to the underlying operative proposition. But the core of the court’s concern was the possibility that police could systematically use the serial-interrogation technique to circumvent *Miranda’s* requirements,\(^\text{136}\) resulting in statements that (1) under *Miranda* are “by definition coerced”\(^\text{137}\) and (2) in the case of a suspect such as Smith (who was young, poorly educated, isolated and uninformed of his rights) are in a very real sense compelled.\(^\text{138}\)

These concerns seem real, so much so that in *Missouri v. Seibert*,\(^\text{139}\) the Supreme Court itself backtracked from *Elstad*, tightening its rule to avoid the worst of these serial-

\(^{136}\) See *Smith*, 412 Mass. at 829, 593 N.E.2d at 1292.

\(^{137}\) Id.

\(^{138}\) The court did not quite go this far, but its expressed concern about the effect of this serial technique on Smith justify this characterization. *See id.* at 836, 593 N.E.2d at 1295. *See also* John Parry, *supra* note 15 at nn. 366-78 & text and sources cited (cataloging the concerns regarding the reliability and actual coerciveness of stationhouse interrogation); Stephen Schulhofer, *Some Kind Words for the Privilege Against Self-Incrimination*, 26 Val. U. L. Rev. 311, 329 (1991)(arguing that the privilege protects innocent defendants, supporting this argument with data suggesting some correlation between defendants who assert the privilege and their ultimate acquittal).

\(^{139}\) 542 U.S. 600, 124 S.Ct. 2601 (2004).
interrogation tactics. So seen, *Smith* is less an instrumental belt-tightening of *Miranda*’s decision rule and more an effort to plug a potentially gaping hole in the heart of the rule, a hole which even the Supreme Court has come to agree threatens the efficacy of the sole means by which the privilege against compelled self-incrimination is implemented in the context of stationhouse questioning. There is, then, a direct relationship between the rule that *Smith* advances and the operative proposition that justifies that rule, a factor suggesting that it is appropriate for the court to render this decision.

Turning to the impact of *Smith*’s enhanced decision rule, as noted, the SJC’s explicit reason for restoring the Massachusetts rule to its pre-*Elstad* contours was to deter police from strategically circumventing *Miranda*’s requirements. The rule thus seems aimed principally at non-judicial actors, seeking to alter their behavior, and thus not so plainly the prerogative of the court. However, as noted, the police behavior at which *Smith*’s rule is aimed has the potential to significantly reduce the effectiveness of *Miranda* as a decision rule, thus risking an increase in governmentally compelled statements being offered into evidence in criminal trials. So, while it is true that unlike the *Aguilar-Spinelli* rule, the primary conduct affected by *Smith*’s rule occurs in the stationhouse and not the courthouse, the rule applies to a particular interrogation technique the apparent purpose of which – to use artifice to avoid *Miranda*’s protections – provides evidence of its potential for compelled confessions. Avoiding this potential seepage of compelled confessions into evidence at criminal trials provides the court with

140 *Id.* at 611-12, 124 S.Ct. at 2610 (holding that in a “question first and warn later” scenario, the government must show that the warnings “function[ed] effectively . . . [to] advise the suspect that he had a real choice about giving an admissible statement at [the time of his ensuing interrogation]”).
a plausible, although certainly not dispositive, claim to legitimacy in making this
decision. And, as the SJC noted, restoring the bright-line presumption that the
subsequent, warned statement is tainted avoids the very difficult fact questions about the
“deliberately coercive or improper police tactics” in the interrogation process,\textsuperscript{141} thus
reducing the potential for judicial error in the lower courts’ adjudication of privilege
claims arising out of serial interrogations.\textsuperscript{142}

Finally, the balance of institutional competence to assess costs and benefits of the
rule seems to favor the court over the legislature as the decision-maker on this issue.
Although the police practice at which the rule is aimed takes place beyond judicial eyes,
its effectiveness as a tool to avoid \textit{Miranda’s} application of the protection against
compelled self-incrimination seems self-evident and thus within the ken of both the court
and legislature to assess. The SJC seems better positioned to judge the likely impact of
\textit{Elstad} on criminal trials, determining whether or not \textit{Smith’s} restoration of the state’s
pre-\textit{Elstad} decision rule is necessary to shield the jury from such compelled confessions.
This judgment must take into account, as the SJC’s in \textit{Smith} did, the parallel protections
offered by the due-process voluntariness doctrine and the Commonwealth’s common-law
humane-practice rule, which requires that before considering a confession the jury must
find it voluntary beyond a reasonable doubt.\textsuperscript{143} And the SJC seems to enjoy a
competence and legitimacy advantage over the legislature in assessing the need for the

\textsuperscript{141} Smith, 412 Mass. at 836-37, 593 N.E.2d at 1295-96.
\textsuperscript{142} See Mitchell Berman, \textit{supra} note 6 at 154 (arguing that avoidance of adjudicatory error is the strongest
justification for decision rules).
\textsuperscript{143} See \textit{Smith}, 412 Mass. at 837, 593 N.E.2d at 1296 (citing the humane practice rule and noting its
consistency with the rule the court announces).
bright-line rule that it restores in *Smith* as a means of reducing error by the lower courts in adjudicating self-incrimination claims arising in this context.

Last but not least, the SJC took a classically restrained, supplemental approach to state constitutionalism that does not foreclose future review – legislative or judicial – if circumstances seem to merit it.\(^{144}\) The court was careful to frame the rule as one of common law, avoiding the relative permanence of a constitutional command, thus maintaining the mutability appropriate for a decision rule. However one may feel about the merits of *Smith*’s rule, the decision seems an appropriate exercise of the SJC’s decision-making authority.


*Mavredakis* is different kettle of fish, a case involving an expansion of a *Miranda* decision rule better left for the legislature. The case involved a suspect whose lawyer sought to confer with him prior to interrogation, and the question was whether, in addition to the standard *Miranda* warnings, the police also had to notify such a suspect of his lawyer’s presence and request to confer in order for the ensuing waiver of the right to counsel to be valid.\(^{145}\) As noted above, the Supreme Court earlier held in *Moran v. Burbine* that withholding such information did not affect the validity of a suspect’s waiver and that the ensuing confession was not taken in violation of the *Miranda* rules.\(^{146}\) In *Mavredakis*, the SJC disagreed, concluding that article 12 imposed a “duty to inform a

\(^{144}\) *See* Herbert Wilkins, *Judicial Treatment of the Massachusetts Declaration of Rights in Relation to Cognate Provisions of the United States Constitution*, 16 Suff. U. L. Rev. 887, 889 (1980)(then-Justice Wilkins, observing that nonconstitutional grounds for rules permit “greater flexibility” that may allow “further adjustments [to the rule] without altering constitutional principles, and, in areas not within the court’s exclusive province, [legislative participation] in the process of fixing standards”).

\(^{145}\) *See supra* pp. 25-26.

suspect of an attorney’s efforts to render assistance [, a duty which] is necessary to actualize the abstract rights listed in Miranda”.

Although the SJC explicitly tied its holding to Miranda’s “abstract rights,” the decision rule of Mavredakis bears only a tangential relationship to Miranda’s underlying operative proposition, which is the protection against compelled self-incrimination. The court explicitly intended Mavredakis’ requirement that the police inform a suspect in custody about the presence of his lawyer in order to prevent “police interference with the attorney-client relationship,” the court noting its preference “to view the ‘role of the lawyer . . . as an aid to the understanding and protection of constitutional rights’ rather than ‘as a nettlesome obstacle to the pursuit of wrongdoers.’” That may be good policy, but article 12’s privilege against compelled self-incrimination does not provide for a right to stationhouse counsel, much less any attorney-client relationship.

Miranda, of course, includes within its warnings a right to counsel during any custodial interrogation and a right to have counsel appointed if the suspect cannot afford to retain counsel. Miranda’s decision rule – as elaborated by the Supreme Court in a


148 Mavredakis, 430 Mass. at 860, 725 N.E.2d at 179 (quoting Burbine, 475 U.S. at 433, 106 S.Ct. at 11 (Stevens, J., dissenting)).

149 Two years prior to Miranda, in Escobedo v. Illinois, 378 U.S. 478, 84 S.Ct. 1758 (1964), the Supreme Court briefly extended the Sixth Amendment’s right to counsel to suspects who had become the focus of police investigation, see id. at 490-91, 84 S.Ct. at 1764-65, but the Court almost immediately pulled back from that approach, limiting the right to counsel to cases in which formal proceedings had begun. See Massiah v. United States, 377 U.S. 201 (1964). In the place of Escobedo’s broader Sixth Amendment right to stationhouse counsel during investigation, the Court in Miranda turned to the warnings-and-waiver rule as a means to apply the Fifth Amendment’s protection against self-incrimination in the stationhouse. The SJC was bound to, and did, follow the Supreme Court’s lead in these decisions, but it never suggested, much less held, that article 12’s privilege against compelled self-incrimination included any right to counsel beyond Miranda. See supra Note 145, citing pre-Burbine SJC cases, both of which grounded the right to counsel in Miranda’s Fifth Amendment decision rule.
series of cases beginning with *Edwards v. Arizona*\(^{150}\) – goes on to forbid further questioning by police once a suspect invokes that right, including questioning about other crimes,\(^{151}\) even after the suspect has consulted with a lawyer.\(^{152}\) The police cannot resume the interrogation unless the suspect, on his own initiative, agrees to do so.\(^{153}\) This elaboration of *Miranda*’s decision rule draws a bright line of protection around a suspect who declines to undergo custodial interrogation without the assistance of counsel, effectively declaring such a suspect off-limits to police interrogators. However, it does not create a categorical right to a lawyer as part of the operative proposition protecting against compelled self-incrimination.\(^{154}\) The point of this corner of *Miranda*’s decision rule is not to ensure the presence of a lawyer during custodial interrogation but rather to provide the suspect with a measure of control, giving him an iron-clad out when the pressure of interrogation becomes greater than he is willing to handle by himself.\(^{155}\) To be sure, the police can respond by arranging for a lawyer to consult with such a suspect, but they can also – and almost always do – simply leave him alone. If *Miranda*’s “right to counsel” means more than this, every stationhouse statement given in the absence of counsel would be suspect.\(^{156}\)


\(^{153}\) *See* Edwards, 451 U.S. at 484-85, 101 S.Ct. 1885.


\(^{155}\) *See* id. at 981-82.

\(^{156}\) Some have so argued, *see*, e.g., Charles Ogletree, *supra* note 4 at 1830; Stephen Schulhofer, *supra* note 4 at 953-55, but the point here is not the wisdom or effectiveness of *Miranda*’s decision rule(s) but rather the particular role that counsel plays in them and the relationship of that role to the underlying operative proposition protecting against compelled self-incrimination in the stationhouse.
Where does that leave us? The right to counsel that the SJC in *Mavredakis* seeks to “actualize” is not embedded in article 12’s privilege against compelled self-incrimination; indeed, it is less a right to counsel than a means to empower isolated suspects to avoid going it alone during custodial interrogation. There surely is a cognizable relationship between this “right” and the operative proposition which is meant to advance, but the two are hardly congruent. As such, any claim that *Mavredakis*’ expansion of the decision rule is integrally related to the meaning of the constitution and thus the exclusive prerogative of the court is suspect.\(^{157}\)

Turning to the impact of *Mavredakis*’ expanded rule, like all *Miranda* rules it necessarily affects police officers. However, unlike *Smith*’s rule – which plausibly impacts the adjudicatory function as well – the impact of the rule requiring the additional warning that a lawyer is present seems to stop with the police. That is because there does not seem to be even a colorable argument that the additional warning mandated by *Mavredakis* would have any significant impact on the likelihood that a compelled confession would find its way into evidence at a criminal trial. The SJC in *Mavredakis* does not claim that in the general run of cases *Miranda*’s standard warning-and-waiver construct under-enforces article 12’s privilege against compelled self-incrimination. Any claim that the extra warning required by *Mavredakis* would in some systematic way reduce compelled confessions would have to be based on a conclusion that a suspect whose lawyer (unbeknownst to the suspect) actually shows up at the station is for that

\(^{157}\) See Brian Landsberg, note 3 *supra* at 964 (arguing that the legitimacy of a judicially created prophylactic rule is proportional to the clarity of the operative proposition it advances and the conceptual connection of the rule to that underlying proposition).
reason no longer adequately protected by the standard warnings against compelled self-incrimination.

It is hard to imagine how this could be so. To be sure, if the suspect were told the lawyer was there, he might well be less likely to waive his right to counsel,\(^{158}\) thus reducing the likelihood of a confession, either because the lawyer was given access\(^{159}\) or because questioning stopped. But that says nothing about whether a confession taken after a warning that did not include notice of the lawyer’s presence would have been compelled. Unless there is something different – in a way that makes a difference with regard to compelled self-incrimination – about a suspect whose lawyer unexpectedly shows up as compared to the more ordinary and less lucky suspect for whom no lawyer appears, the impact of this new rule seems random and arbitrary rather than necessary to correct an under-protective decision rule. Couple this randomness with the relatively small number of cases in which the lawyer does appear at the station during interrogation, and the constitutional impact of this rule in the courtroom seems negligible.

Neither is there any claim that the *Mavredakis* restoration of *Miranda*’s warning-and-waiver requirements would reduce adjudicatory error. The required notice that a lawyer is available is not a bright-line substitute for difficult and potentially inconsistent fact-finding in which lower courts would otherwise have to engage as was so in *Smith*. Rather, it is simply an addition to the required warnings that applies on those occasions when a lawyer seeks to consult with a potential subject of police interrogation. In

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\(^{158}\) Interestingly, when the police did tell Mavredakis (while he was writing out his confession) that his lawyer wanted to speak with him, Mavredakis replied that he wanted first to finish his confession. *See* Mavredakis, 430 Mass. at 853, 725 N.E.2d at 174.

\(^{159}\) Justice Harlan, in his *Miranda* dissent, observed that if a suspect had access to a lawyer “worth his salt,” there would rarely be a confession. *Miranda*, 384 U.S. at 516 n. 12, 86 S.Ct. at 1649-50 n. 12 (Harlan, J., dissenting).
*Mavredakis,* the SJC did not suggest that this additional warning reduces the potential for adjudicatory error, and it is hard to see how it might.

Of course, that is not the end of the question. Given the pragmatic reasons justifying decision rules in general, a rule expansion such as that wrought by *Mavredakis,* even though only tangentially connected to its underlying operative proposition and aimed exclusively at non-judicial actors, would still be justifiable if its benefits in guiding the application of the operative proposition outweigh its costs. But given that the courts have no exclusive claim, arising from the nature of the rule or its impact, to make this judgment, the appropriate decision-maker would have to be based solely on institutional competence in assessing that cost-benefit balance and political legitimacy in imposing the revamped rule. Here, the legislature rather than the courts seems better suited to assess the need for and to impose any new rule.

The beginning of any such cost-benefit analysis would be a determination that the standard *Miranda* warning-and-waiver requirements under-enforce the article 12 privilege when a lawyer shows up at the police station and seeks to consult with her unknowing client. As noted above, reason alone does not explain how this apparent happenstance changes anything about the effectiveness of the standard warnings and waiver as a decision rule, causing *Miranda’s* protections to lose their force for that class of suspects but not for unrepresented suspects. If there really is a difference here that suggests the tightened rule, it could only be substantiated through a broad empirical inquiry that a legislature would be far better equipped to handle than a court. Maybe a review of actual interrogation experience, expert testimony from interrogation specialists, psychologists, social scientists, and the like would reveal a basis for such a distinction
that is not readily apparent. But whatever such an inquiry might reveal, it seems reasonably clear that the case-by-case regimen of judicial decision-making provides an inapt set of tools for such empiricism.

There is another, more plausible, justification for the *Mavredakis* rule flowing from the pragmatic character of decision rules. Such rules are, at best, imperfect in implementing the operative propositions that justify their existence, and thus it would not be inappropriate to craft a rule that risks over-enforcement of an operative proposition – particularly one protecting an important individual right – in order to ensure against its under-enforcement.\(^{160}\) One might argue that *Miranda*’s warning-and-waiver construct is a pragmatic compromise which is acceptable to prevent most stationhouse compulsion but that a lawyer would be better (albeit too expensive on a system-wide basis).

However, if a lawyer is actually available (at no expense to the Commonwealth), there is little harm and – in that case at least – much to gain by telling the suspect about the lawyer as part of the required warnings. Assuming that this is a proffered justification for expanding the decision rule, does it lie with the court – or should it be reserved for the legislature – to make such a judgment? I think the legislature is again the more appropriate decision-maker in this instance. Why?

We start again with the premise that if there is any under-enforcement by *Miranda* of article 12’s operative proposition, it is sufficiently modest to be generally acceptable. The SJC did not in *Mavredakis* challenge this premise, and so it seems fair to assume that any problem of *Miranda*’s general under-enforcement is not constitutionally

If the legislature did nothing, there would be little if any cost to efficacy of the privilege.

But what of the costs and benefits of adopting the rule? Assuming that a suspect told of his lawyer’s presence would invoke his right to counsel and that the police would allow the consult (as opposed to simply ending the interrogation), one benefit would be that suspects with access to counsel would have a better understanding of their constitutional rights at a time they could use such advice. That benefit, however, would be limited to the relatively few suspects whose lawyers show up, and, to the extent that this benefit would be generally if not inevitably confined to those rich enough to have counsel readily available, the benefit would be unfairly distributed. If the cure to the benefit’s modest reach or unfair distribution is to provide counsel to all similarly situated – establishing a categorical right to counsel during interrogation – that would mark a major departure from *Miranda* and from article 12, unjustified by precedent and conceptually distinct from the operative proposition *Miranda*’s decision rules are meant to implement. That is, such an extension of the right to counsel sounds more of

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161 Of course, if one does conclude that a lawyer’s presence, coupled with a required warning to the suspect of that presence, corrects a significant under-enforcement of the operative proposition protecting against compelled self-incrimination, surely the state would have to reconsider *Miranda*’s asserted compromise concerning the right to counsel which *Mavredakis* corrects. Otherwise, an appropriate level of enforcement of this core constitutional right would be limited to those lucky (or rich) enough to have a lawyer show up. The alternative would seem to be a general system of appointed, available stationhouse counsel.

I suppose one could argue that all that really is at stake is the warning, not the lawyer that stands behind the warning. The arbitrary distribution of *Mavredakis*’s upgraded warning could be solved by requiring that every suspect be told not just that he has a right to counsel but that such a lawyer – indeed, his lawyer if you like – is available and ready to give counsel, whether or not that is true. If the suspect nevertheless waives this reified right to counsel, interrogation could proceed. If he does not, interrogation would cease, just as it now does. The lawyer is never going to be given access; all that is at issue is what “bucking up” of the suspect is necessary to overcome the coercion inherent in stationhouse questioning. Such an artifice, although perhaps no greater than that which is now in place, does not seem to be what the SJC had in mind when, in *Mavredakis*, Justice Ireland spoke for the court and held that the announced rule was "necessary to actualize the abstract rights listed in *Miranda*.” *Mavredakis*, 430 Mass. at 860, 725 N.E.2d at 178.
legislation than judicial interpretation.\cite{footnote162} Moreover, any such categorical right to counsel would carry its own costs, not the least of which is paying for such appointments, surely a legislative prerogative.

Another cost of a categorical right to stationhouse counsel would likely be the loss of some number of confessions. Under the assumptions on which \textit{Miranda} is based, after the standard warnings and ensuing waivers, none of these confessions would have been compelled. Each would constitute relevant, often compelling, evidence in prosecuting crimes. Of course, suspects might routinely waive this enhanced right to counsel, just as they now often waive \textit{Miranda}’s more general right to counsel. But if they do not, there will be fewer interrogations, either because the interrogations will stop or because lawyers given access will advise suspects not to confess, advice that likely will be heeded. The legislature is in the best position to identify and weigh those potential costs and benefits to the polity as a whole, and to act on that assessment.

As a matter of both institutional competence and legitimacy, then, the legislature seems to be the branch of government best positioned to decide the \textit{Mavredakis} issue. It is not just that the legislature is elected whereas the judges, at least in Massachusetts, are appointed with life tenure (although democratic legitimacy counts for something). It is also that the costs and benefits of this policy decision to extend \textit{Miranda}’s decision rule in this limited context do not seem tightly connected to the core operative proposition it is designed to advance – preventing compelled self-incrimination. Rather, the underlying concerns seem to involve a more general right to legal counsel, gauging whether it seems fair or practical to recognize such a right given its apparent random application,

\cite{footnote162} See Kermit Roosevelt, \textit{Polyphonic Stare Decisis}, \textit{supra} note 28 at 1308-09 (observing that what separates the nature of the judicial power from legislative power is that departures from precedent require conceptual justification as opposed to sheer policy judgments).
considering the fiscal and law-enforcement costs of extending its reach, and exploring
whether there might be alternatives that could address the problem in a less expensive or
apparently unfair way (e.g., providing for videotaped interrogations if a primary concern
is being extra sure that there is not undue coercion brought to bear). These seem to be
quintessentially legislative judgments, not ones for a court.

One might argue, however, that neither the court nor the legislature have an
plainly superior claim to decide this issue and that this is one of those cases in which the
court could appropriately expand the decision rule, leaving it open for the legislature to
consider the issue, perhaps in response to the court’s decision. Unfortunately, in
Mavredakis the SJC foreclosed that option, grounding its decision to expand Miranda’s
decision rule in what it asserted was article 12’s “higher standard of protection [against
compelled self-incrimination] than that provided by [the Supreme Court’s interpretation
of the Fifth Amendment in] Moran [v. Burbine].”163 This “calcification”164 of the new
rule was as unnecessary as it was unjustified under article 12 precedent.

Taking the latter point first, the SJC asserted that the text, history and prior
precedent of article 12 justified its claim that the operative proposition of this state
provision protecting against compelled self-incrimination is broader than that of the Fifth
Amendment. As noted above,165 this vastly over-reads article 12. Its operative
proposition may be broader, but only insofar as article 12 is not limited to a trial right and
includes the privilege itself. That aspect of article 12 has no apparent application in the

163 Mavredakis, 430 Mass. at 859, 725 N.E.2d at 178.

164 Professor Roosevelt so refers to decisions immunized from legislative, or even subsequent judicial,
review by virtue of their asserted constitutional foundation. See Kermit Roosevelt, Constitutional
Calcification, supra note 28 at 1692-93.

165 See supra Note 100 & text.
Mavredakis issue. Quite simply, the text, history and prior precedent of article 12 together demonstrate that – other than as just noted – the operative propositions of article 12 and the Fifth Amendment are the same insofar as the protection against compelled self-incrimination through police interrogation are concerned.

Turning to the necessity that the decision be cast in terms of article 12, there is no reason, other than a mistaken conflation of the decision rule and its underlying operative proposition, for this approach. Unless the court felt that it needed the fig leaf of broader constitutional cover to shore up the otherwise nebulous connection between article 12’s self-incrimination protection and its proposed extension of Miranda’s decision rule, it could have announced the new rule as a matter of state common law. That would have given effect to the court’s judgment that the decision rule needed to provide additional protection, at the same time leaving the issue open for further consideration by the legislature or perhaps even the court itself.

3. Martin: The Easiest and Hardest Case

Martin, it will be recalled, asks whether a gun – which the police found as the result of an unwarned statement elicited from Martin in violation of Miranda – should be suppressed. In Patane, the Supreme Court had earlier held on virtually identical facts that a gun should not be suppressed, but it did so by reasoning that arguably cut back on the scope of the Fifth Amendment’s operative proposition, conceptualizing the protection against compelled self-incrimination as a trial right fully satisfied once the compelled

\[166 \text{ See Kermit Roosevelt, } \textit{Constitutional Calcification, supra} \text{ note } 28 \text{ at } 1692 \text{ et seq. (observing that courts sometimes conflate the two kinds of constitutional decisions, needlessly injecting a decision-rule with inflexibility).}
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\[167 \text{ See supra p. } 29.\]
statement is barred from evidence at trial. This view of the Fifth Amendment, essentially reducing the privilege to a decision rule necessary to implement the trial right, seems inconsistent with earlier Supreme Court precedent and, more to the point, is inconsistent with even older SJC precedent construing article 12 to include the privilege within its operative proposition. As noted, the article 12 privilege protects against not just a governmental act compelling a statement but against compelling a witness through his statements to lead the government to witnesses or evidence that might incriminate him.168

If that is what Martin stands for, reading article 12 to prevent the police from forcing Martin to lead them to the gun that incriminates him, the question of whether to suppress the gun is plainly one for the court. The remedy of suppression flows directly from, indeed, seems required by, the operative proposition itself, a reaffirmation and modest extension of the SJC’s century-old interpretation of article 12 in Emery’s Case. That is what courts are supposed to do – tell us what the constitution means.

Martin, of course, does not involve a direct application of article 12’s privilege but rather its application through Miranda’s decision rule, and from that perspective the issue is one of remedying a decision-rule violation. Who should decide that is more complicated, particularly since in Martin the SJC seemed far more concerned with using the remedy of suppression to deter police misconduct rather than as a measure to ensure that Martin received the full protection of article 12’s privilege against compelled self-incrimination. We are not, of course, bound by the way in which the SJC framed the remedy question, and if article 12’s privilege protects Martin against being compelled by

168 See supra pp. 31-32.
the government to lead the authorities to the gun,\textsuperscript{169} suppressing the gun – even as a remedy for a \textit{Miranda} violation – seems an integral part of the constitutional protection that it implements. So seen, the decision to expand \textit{Miranda}'s remedy to include derivative fruits is a wholly appropriate judicial act.

But conceptualizing the issue as did the SJC in \textit{Martin}, suppressing the gun to deter police from ignoring \textit{Miranda}'s decision rule, makes the remedy no more than a means to advance the underlying constitutional interest.\textsuperscript{170} So seen, suppression of the gun is not a right of Martin at all; neither is it a decision rule, designed to guide lower courts in applying the operative proposition. It is a tool intended to guide non-judicial actors, the police, prodding them to obey \textit{Miranda}'s requirements. From this perspective, it is not at all clear that the court enjoys any special claim to impose the remedy of suppression. The right is clear; the decision rule that implements that right is clear; the only purpose of the expanded remedy is the policy to encourage police to respect and apply \textit{Miranda} in interrogating suspects. This sounds as much a legislative task as a judicial one.

Turning to the question of institutional competence and political legitimacy, this factor, too, depends on how one characterizes the nature of the remedy. If we see the remedy as tightly wound into the privilege itself, integral to the protection against being compelled to lead the authorities to incriminating evidence, the court has the plain competence and legitimacy edge. In this view, the remedy of suppression is a tight fit

\textsuperscript{169} \textit{See} Commonwealth v. Hughes, discussed \textit{supra} Note 117 & text.

\textsuperscript{170} \textit{See} Susan Klein, \textit{supra} note 12 at 1047.
with the operative proposition, and it is the court which ought—as both a competence matter and a normative matter—to make this decision.

But if the remedy is no more than a stick to encourage police compliance with *Miranda*'s decision rule, it represents a policy choice with costs and benefits that the legislature—as a matter of empirical competence and democratic legitimacy—ought to make. What are the costs? The major cost, as opponents of the exclusionary rule are quick to point out, is lost evidence, in this case (and in the case of most derivative fruits of *Miranda* violations) relevant and highly reliable physical evidence. The corresponding benefit is giving police the incentive to obey *Miranda*'s requirements—certainly an important interest. It may be that there is incentive enough, as many argue, in the certain suppression of a statement that violates *Miranda* and that the additional suppression of the gun exacts too high a cost for the marginal extra incentive thereby purchased. But maybe not. If an officer calculates that without the unwarned question he will not find the gun, why not question without the warnings? While the

171 Indeed, this was the basis on which Justices Kennedy and O'Connor concurred in *Patane*, never reaching the question of whether the Fifth Amendment is no more than a trial right. See United States v. *Patane*, 542 U.S. 630, 645, 124 S.Ct. 2620, 2631 (2004)(Kennedy, J., concurring).

This debate concerning the exclusionary rule as an appropriate remedy for a constitutional violation continues unabated in the Fourth Amendment context. See *Herring v. United States*, 555 U.S. --, 129 S.Ct. 695 (2009) for the latest edition. There the Court, 5 to 4, held that an arrest based on a warrant that had been recalled did not require suppression of contraband seized during the ensuing search incident to that arrest because, due to a negligent bookkeeping error by a police clerical employee, the arresting office reasonably believed that there was an outstanding warrant. Couched in terms of the good-faith exception to the exclusionary rule, this decision was but another adjustment to the incidental right to suppression as a remedy for constitutional error, and the cost-benefit deterrence arguments concerning this remedy are rehearsed once again. Compare id. at --, 129 S.Ct. at 701-03 (Roberts J., for the Court) with id. at --, 129 S.Ct. at 707-10 (Ginsburg, J., dissenting).

172 Justice Kennedy, in his concurrence joined by Justice O'Connor, so argued *Patane*, delivering the two votes necessary for a majority on that basis. See *Patane*, 542 U.S. at 645, 124 S.Ct. at 2631 (Kennedy, J., concurring).
resulting statement will be suppressed, as long as the gun is safe from suppression it seems like a good bet. Is that how police officers think? Is that how they act?

These are the basic assessments on which the incidental right or remedy of suppression rest, and they do not seem to be ones that require any special judicial expertise. They also involve issues in which the public, and thus their elected representatives, have an abiding interest. To be sure, the court has a claim to legitimacy as well. The privilege against compelled self-incrimination – implemented in the stationhouse solely by Miranda’s decision rule – is an important protection to the individual against serious governmental over-reaching. And while the public has an interest in how this question of remedy is resolved, giving legitimacy to a legislative resolution, the collective right to majoritarian decision-making at some point gives way to ensuring the protection of individual rights, a traditional and legitimate judicial function.

In the end, it may be that this question is one as to which it is unclear who the decision-maker should be. In that instance, the SJC’s path in Martin seems defensible even if analytically murky. The issue presented itself, and the court made the call; however, it did so not in the calcified script of a constitutional requirement but as a common law remedy that promotes the article 12 privilege. That way, as was so in Smith, it remains open for the legislature or the court to take a second look.

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173 See David Strauss, Miranda, the Constitution, supra note 44 at 969 (arguing that there is no good reason for precluding Congress and the states from trying to balance costs and benefits attributable particular decision rules).

174 See Richard Fallon, The Core of Uneasy Case, supra note 16 at 1709, 1713.

175 See Martin, 444 Mass. at 221-22, 827 N.E.2d at 204-05.
Conclusion

The term “prophylactic rule” has gotten something of a bad reputation, in no small measure due to its pejorative use by conservatives in their decades-long effort to roll back *Miranda*’s warning-and-waiver requirements. But it provides a useful way to look at constitutional doctrine, including as I have argued, the interaction between state and federal constitutionalism. Commentators, lawyers and judges may never agree about the legitimacy of state courts interpreting state constitutional provisions to mandate broader operative propositions than the Supreme Court finds in virtually identical federal provisions, but there is no good reason that a state should be precluded from broadening the protections of a decision rule (adopting Mitchell Berman’s more general and less provocative term) if circumstances within that state suggest it, even where – as with Massachusetts and *Miranda* – a state’s courts have expressly declined to adopt the federal decision rule under the state’s constitution.

Decision rules, while surely constitutional, are by design instruments to implement constitutional provisions not vessels of their meaning, and as such they are fairly subject to periodic adjustment. Recognizing a state’s authority to work such an adjustment, as long as the adjusted decision rule is no less protective of its underlying operative proposition than the rule it replaced, has no impact on the Supreme Court’s exclusive authority to decide what the Constitution means; the operative proposition remains the same, if anything more fully enforced. That is so whether the decision rule is expanded as a matter of federal law or, as now seems necessary, state law.

These are useful distinctions as a state court considers whether it should invoke its constitution to go beyond the protections that the Supreme Court has held the federal
Constitution to require, distinctions on which many state courts including the Massachusetts SJC have not focused. What kind of constitutional expansion is at issue – a decision rule (or a doctrinal cousin such as a remedy/incidental right) or an operative proposition? If it is a decision rule, *Miranda* being the prime example, there should be no objection to looking to state law for the necessary adjustment.

But just because a proposed constitutional expansion involves a decision rule does not mean that a state court should enjoy carte blanche to consider that expansion. In many instances, as a matter of institutional competence and/or political legitimacy, the state’s legislature ought to decide the issue. If a decision rule or its remedy is being used more to regulate non-judicial actors such as police than to provide a means to guide courts in implementing an operative proposition such as the privilege against self-incrimination, if the contours and justification of the rule depend more on balancing perceived costs and benefits than on applying interpretive principles, it may well be that a court should defer to a legislative judgment concerning its proper reach. At the very least, unless it is plain (as few constitutional matters are) that such a judgment is exclusively one for the court, a decision to expand a decision rule ought not to be in the unalterable script of the constitution but rather take the form of constitutional common law, open to possible reconsideration by the legislature or future courts. After all, possible reconsideration is part and parcel of the beast.