HISTORICAL SOCIETY *of the* NEW YORK COURTS

Justice Felix Frankfurter and the Idea of Judicial Self-Restraint

Then and Now in Federal and State Courts

CLE MATERIALS

Prof. John Q. Barrett
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Trustee Emeritus, Historical Society of the New York Courts

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Solicitor General of the State of New York
Former Acting Solicitor General of the United States

December 11, 2023 | In-Person at the New York City Bar Association & Virtual Program

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Biographies

Prof. John Q. Barrett is the Benjamin N. Cardozo Professor of Law at St. John's University in New York City, where he teaches Constitutional Law, Criminal Procedure, and Legal History courses. In the Fall 2023 semester, he is teaching Criminal Procedure: Investigation. Professor Barrett also is the Elizabeth S. Lenna Fellow and a Director at the Robert H. Jackson Center in Jamestown, New York. He is a graduate of Georgetown University and Harvard Law School and a former U.S. government lawyer and investigator.

Henry ("Hank") M. Greenberg is a shareholder with Greenberg Traurig, LLP, and a past President of the New York State Bar Association. From 2007 to 2010, Hank served as Counsel to the New York State Attorney General. He also served as General Counsel for the New York State Department of Health (1995-2000), where he was the chief legal advisor to the Commissioner of Health and administered an office of more than 100 attorneys engaged in virtually all aspects of administrative law. Amongst the other government posts he has held, Hank served as Counsel to the Lieutenant Governor of New York State (1995), an Assistant United States Attorney for the Northern District of New York (1990-1995) and law clerk to Judge (later Chief Judge) Judith S. Kaye of the New York Court of Appeals (1988-1990). Hank currently serves as chair of the Commission to Reimagine the Future of New York's Courts, counsel to the New York State Commission on Judicial Nomination, and vice-chair of statewide programming for the Historical Society of New York Courts.

Hon. Jonathan Lippman, former Chief Judge of the State of New York and Chief Judge of the New York Court of Appeals, is currently Of Counsel in the New York office of Latham & Watkins LLP. He served as Chief Judge from February 2009 to December 2015. Judge Lippman previously served at all levels of the New York State court system, including as a staff attorney, administrator, and judge. From January 1996 to May 2007, he served as the longest-tenured Chief Administrative Judge in state history, playing a central role in many far-reaching reforms of New York's judiciary and its legal profession. From May 2007 to 2009, Judge Lippman served as the Presiding Justice of the Appellate Division of the Supreme Court, First Department. He presently serves as the Chair of the Independent Commission on New York City Criminal Justice and Incarceration Reform and as President of the Historical Society of the New York Courts.

Dean Troy A. McKenzie is Dean and Cecelia Goetz Professor of Law at NYU School of Law. He served as faculty co-director of the Institute of Judicial Administration (IJA) for over six years, as well as faculty co-director of the Center on Civil Justice. From 2011-15, McKenzie

served, by appointment of the Chief Justice, as a reporter to the Advisory Committee on Bankruptcy Rules of the Judicial Conference of the United States. From 2015-17, he took a leave of absence from NYU to serve in the US Department of Justice as a Deputy Assistant Attorney General for the Office of Legal Counsel. McKenzie earned a bachelor's degree in chemical engineering in 1997 from Princeton University and a law degree in 2000 from NYU, where he was an executive editor of the Law Review and a member of the Order of the Coif. After law school, he served as a law clerk to Judge Pierre N. Leval of the US Court of Appeals for the Second Circuit and Justice John Paul Stevens of the Supreme Court of the United States. Before joining the NYU faculty in 2007, McKenzie was a litigation associate at Debevoise & Plimpton in New York. McKenzie is currently a Trustee of the Historical Society of the New York Courts.

Prof. Brad Snyder teaches constitutional law, sports law, and twentieth century American legal history. His book, *Democratic Justice: Felix Frankfurter, the Supreme Court, and the Making of the Liberal Establishment* (W.W. Norton), is the first comprehensive biography of the Harvard Law School professor, New Deal power broker, and Supreme Court justice. A Guggenheim fellow, Snyder has published law review articles about constitutional history and is the author of *The House of Truth: A Washington Political Salon and the Foundations of American Liberalism* (Oxford University Press, 2017). Prior to law teaching, he worked as an associate at Williams & Connolly LLP and wrote two critically acclaimed books about baseball including *A Well-Paid Slave: Curt Flood's Fight for Free Agency in Professional Sports* (Viking/Penguin, 2006). A graduate of Duke University and Yale Law School, he clerked for the Hon. Dorothy W. Nelson on the U.S. Court of Appeals for the Ninth Circuit.

Barbara Underwood, Esq., has served as New York's Solicitor General since 2007, except for the period from May to December of 2018, when she served as New York's 66th Attorney General – the first woman to hold that position. After finishing first in her class at Georgetown University Law Center, Underwood served as law clerk to two of the nation's most brilliant legal minds—Chief Judge David L. Bazelon of the U.S. Court of Appeals for the D.C. Circuit and Justice Thurgood Marshall of the U.S. Supreme Court. Shortly thereafter, she was a tenured Professor of Law at Yale Law School, an adjunct Professor at Brooklyn Law School, a visiting Professor at New York University School of Law, and a trial attorney in the Manhattan District Attorney's Office. She then commenced an illustrious career as an appellate litigator and executive supervisor in a series of public law offices: she was Chief of Appeals and Counsel to the Brooklyn District Attorney, Senior Executive Assistant for Legal Affairs to the Queens District Attorney, and Chief Assistant and Counsel to the United States Attorney for the Eastern District of New York. From 1998 to 2001, Barbara served as the Acting Solicitor General and Principal Deputy Solicitor General of the United States – the first female Solicitor General in American history. She has argued 21 cases in the United States Supreme Court.

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Participants selected the above materials during a program planning session on August 23, 2023. Additional materials were prepared on a program planning email chain on November 17, 2023.

Lochner v. New York

Supreme Court of the United States

Argued February 23, 24, 1905 ; April 17, 1905

No. 292

Reporter
198 U.S. 45 *; 25 S. Ct. 539 **; 1905 U.S. LEXIS 1153 ***; 49 L. Ed. 937

LOCHNER *v*. NEW YORK

Prior History: [*1]** ERROR TO THE COUNTY COURT OF ONEIDA COUNTY, STATE OF NEW YORK

Disposition: The Court reversed the judgment and remanded to the county court.

Case Summary

Procedural Posture
Plaintiff in error employer appealed a judgment from the Court of Appeals of New York. The state supreme court had found that the employer violated 1897 N.Y. Laws art. 8, ch. 415, § 110, which prohibited employers from allowing employees to work more than 10 hours in one day.

Overview

The state supreme court, which found that the employer allowed his employee, a baker, to work more than 60 hours in one week in violation of 1897 N.Y. Laws art. 8, ch. 415, § 110, upheld the labor law as a constitutional exercise of the state's police power. The United States Supreme Court reversed. The general right to make a contract in relation to one's business, and the right to purchase or to sell labor, was part of the liberty protected by the *Fourteenth Amendment*. The statute was not necessary as a health law to safeguard the public health or the health of the individuals who labored as bakers. The trade of a baker was not an unhealthy one to such a degree that would authorize the legislature to interfere with the right to labor and the right of free contract on the part of the individual. Various regulations already governed the cleanliness of the quarters in which bakeries were to be conducted. Restricting the number of hours that a baker could work would not further the purpose of those regulations. It was not possible to discover the connection between the number of hours a baker could work and the quality of the bread that he produced.

Outcome
The Court reversed the judgment and remanded to the county court.

Syllabus

The general right to make a contract in relation to his business is part of the liberty protected by the *Fourteenth Amendment*, and this includes the right to purchase and sell labor, except as controlled by the State in the legitimate exercise of its police power.

Liberty of contract relating to labor includes both parties to it; the one has as much right to purchase as the other to sell labor.

There is no reasonable ground, on the score of health, for interfering with the liberty of the person or the right of free contract, by determining the hours of labor, in the occupation of a baker. Nor can a law limiting such hours be justified as a health law to safeguard the public health, or the health of the individuals following that occupation.

Section 110 of the labor law of the State of New York, providing that no employes shall be required or permitted to work in bakeries more than sixty hours in a week, or ten hours a day, is not a legitimate exercise of the police power of the State, but an unreasonable, unnecessary and arbitrary interference with the right and liberty of the individual to contract, in relation **[***2]** to labor, and as such it is in conflict with, and void under, the Federal Constitution.

THIS is a writ of error to the County Court of Oneida County, in the State of New York (to which court the record had been remitted), to review the judgment of the Court of Appeals of that State, affirming the judgment of the Supreme Court, which itself affirmed the judgment of

the County Court, convicting the defendant of a misdemeanor on an indictment under a statute of that State, known, by its short title, as the labor law. The section of the statute under which the indictment was found is section 110, and is reproduced in the margin, [1] (together with the other sections of the labor law upon the subject of bakeries, being sections 111 to 115, both inclusive).

[*3]** The indictment averred that the defendant "wrongfully and unlawfully required and permitted an employe working for him in his biscuit, bread and cake bakery and confectionery establishment, at the city of Utica, in this county, to work more than sixty hours in one week," after having been theretofore convicted of a violation of the same act; and therefore, as averred, he committed the crime or misdemeanor, second offense. The plaintiff in error demurred to the indictment on several grounds, one of which was that the facts stated did not constitute a crime. The demurrer was overruled, and the plaintiff in error having refused to plead further, a plea of not guilty was entered by order of the court and the trial commenced, and he was convicted of misdemeanor, second offense, as indicted, and sentenced to pay a fine of $ 50 and to stand committed until paid, not to exceed fifty days in the Oneida County jail. A certificate of reasonable doubt was granted by the county judge of Oneida County, whereon an appeal was taken to the Appellate Division of the Supreme Court, Fourth Department, where the judgment of conviction was affirmed. *73 App. Div. N.Y. 120*. A further appeal was then **[***4]** taken to the Court of Appeals, where the judgment of conviction was again affirmed. *177 N.Y. 145*.

Counsel: *Mr. Frank Harvey Field* and *Mr. Henry Weissmann* for plaintiff in error:

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[1] "§ 110. *Hours of labor in bakeries and confectionery establishments.* -- No employe shall be required or permitted to work in a biscuit, bread or cake bakery or confectionery establishment more than sixty hours in any one week, or more than ten hours in any one day, unless for the purpose of making a shorter work day on the last day of the week; nor more hours in any one week than will make an average of ten hours per day for the number of days during such week in which such employe shall work.

"§ 111. *Drainage and plumbing of buildings and rooms occupied by bakeries.* -- All buildings or rooms occupied as biscuit, bread, pie or cake bakeries, shall be drained and plumbed in a manner conducive to the proper and healthful sanitary condition thereof, and shall be constructed with air shafts, windows or ventilating pipes, sufficient to insure ventilation. The factory inspector may direct the proper drainage, plumbing and ventilation of such rooms or buildings. No cellar or basement, not now used for a bakery shall hereafter be so occupied or used, unless the proprietor shall comply with the sanitary provisions of this article.

"§ 112. *Requirements as to rooms, furniture, utensils and manufactured products.* -- Every room used for the manufacture of flour or meal food products shall be at least eight feet in height and shall have, if deemed necessary by the factory inspector, an impermeable floor constructed of cement, or of tiles laid in cement, or an additional flooring of wood properly saturated with linseed oil. The side walls of such rooms shall be plastered or wainscoted. The factory inspector may require the side walls and ceiling to be whitewashed, at least once in three months. He may also require the wood work of such walls to be painted. The furniture and utensils shall be so arranged as to be readily cleansed and not prevent the proper cleaning of any part of a room. The manufactured flour or meal food products shall be kept in dry and airy rooms, so arranged that the floors, shelves and all other facilities for storing the same can be properly cleaned. No domestic animals, except cats, shall be allowed to remain in a room used as a biscuit, bread, pie, or cake bakery, or any room in such bakery where flour or meal products are stored.

"§ 113. *Wash-rooms and closets; sleeping places.* -- Every such bakery shall be provided with a proper wash-room and water-closet or water-closets apart from the bake-room, or rooms where the manufacture of such food product is conducted, and no water-closet, earth-closet, privy or ash-pit shall be within or connected directly with the bake-room of any bakery, hotel or public restaurant.

"No person shall sleep in a room occupied as a bake-room. Sleeping places for the persons employed in the bakery shall be separate from the rooms where flour or meal food products are manufactured or stored. If the sleeping places are on the same floor where such products are manufactured, stored or sold, the factory inspector may inspect and order them put in a proper sanitary condition.

"§ 114. *Inspection of bakeries.* -- The factory inspector shall cause all bakeries to be inspected. If it be found upon such inspection that the bakeries so inspected are constructed and conducted in compliance with the provisions of this chapter, the factory inspector shall issue a certificate to the persons owning or conducting such bakeries.

"§ 115. *Notice requiring alterations.* -- If, in the opinion of the factory inspector, alterations are required in or upon premises occupied and used as bakeries, in order to comply with the provisions of this article, a written notice shall be served by him upon the owner, agent or lessee of such premises, either personally or by mail, requiring such alterations to be made within sixty days after such service, and such alterations shall be made accordingly."

The statute in question denies to certain persons in the baking trade the equal protection of the laws.

The legislation must affect equally all persons engaged in the business of baking in order to conform to this provision of the *Fourteenth Amendment*. It really affects but a portion of the baking trade, namely, employes "in a biscuit, bread or cake bakery, or confectionery establishment." *Connolly v. Union Sewer Pipe Co., 184 U.S. 540*; *Ex parte Westerfield*, 55 California, 550.

The Constitution itself says that no State shall "deny to any person within its jurisdiction the equal protection of the laws." It does not say, "no considerable number of persons," but "any person." And this plaintiff in error may appeal with confidence to the supreme law of the land against this law which singles out a certain number of men employing bakers, and permits all others similarly situated, including many who are competitors in business, to work their employes as long as they choose. Freund's Police **[***5]** Power, 633; *Missouri v. Lewis, 101 U.S. 31*; *Barbier v. Connolly, 113 U.S. 27*; *Colling v. Goddard, 183 U.S. 79, 92*; *Yick Wo v. Hopkins, 118 U.S. 356*; Cooley's Const. Lim. 282; *Tin Sing* v. *Washburn*, 20 California, 534.

Classification must be based upon some difference bearing a reasonable and just relation to the act in respect to which the classification is attempted, but no mere arbitrary selection can ever be justified by calling it classification. *Santa Fe R. R. Co. v. Matthews, 174 U.S. 105*. Class legislation of the character of the act in issue enacted by the States which discriminates in favor of one person or set of persons and against another or others is forbidden by the *Fourteenth Amendment*. *Gulf C. & S. F. R. Co. v. Ellis, 165 U.S. 150*; *Cotting v. Kansas City S. Y. Co., 183 U.S. 79*; *Connolly v. U. S. P. Co., 184 U.S. 540*; *People v. Orange County Road Co., 175 N. Y. 87, 90*.

The equal protection of the laws is a pledge of the protection of equal laws. *Yick Wo v. Hopkins, 118 U.S. 356, 369*; *Gibbons v. Ogden, 9 Wheat. 1, 210*; *Sinnot v. Davenport, 22 How. 227, 243*; **[***6]** *Butchers' Union Co. v. Crescent City Co., 111 U.S. 746*; *M., K. & T. R. Co. v. Haber, 169 U.S. 613, 626*.

The statute in question is not a reasonable exercise of the police power either from the standpoint of the trade itself or from the standpoint of the decisions interpreting the exercise of the police power in connection with the *Fourteenth Amendment*.

As to the trade there is no danger to the employe in a first-class bakery and so far as unsanitary conditions are concerned the employe is protected by other sections of the law. *Ex parte Westerfield*, 55 California, 550; 2 Buck's Hygiene and Public Health, 10; The Lancet, vol. 2, 1895, 298; Special Sanitary Report of The Lancet on Bakeries, 1889, p. 1140; and 1890, pp. 42, 208, 719; Reference Handbook of Medical Sciences, vol. 6, p. 317; The Practitioner, vol. 53, 1894, p. 387; Arlidge on Diseases of Occupations; Dragle in 45th Annual Report, Register General.

The law is not a proper exercise of the police power. 4 Black. 162; Jeremey Bentham, Edinburgh ed., part IX, 157; Cooley Const. Lim. 572; 2 Kent's Com. 340; *Slaughter House Case, 16 Wall. 36*; *Re Jacobs, 98 N. Y. 98*; Tiedemann Police Power, § **[***7]** 178; Freund Police Power, 534.

Where the ostensible object of an enactment is to secure the public comfort, welfare or safety, it must appear to be adapted to that end, it cannot invade the rights of persons and property under the guise of the police regulation, when it is not such in fact. *Eden* v. *People*, 161 Illinois, 296; *Ex parte Jentsch*, 112 California, 468; *Ritchie* v. *People*, 155 Illinois, 98; *Lake View* v. *Rose Hill Cemetery Co.*, 70 Illinois, 191; *People v. Marx, 99 N. Y. 377, 387*; *People v. Gillson, 109 N. Y. 389, 399*; *People v. Bresecker, 169 N. Y. 53*; *People v. Hawkins, 157 N. Y. 1*; *People v. Beattie, 96 App. Div. N. Y. 383, 390, 399*. For other decisions of the Court of Appeals, interpreting the labor law, see *People ex rel. v. Coler, 166 N. Y. 1*; *Ryan v. City of New York, 177 N. Y. 271*; *People ex rel. v. Grout, 179 N. Y. 417*.

As to fundamental right to pursue occupations, see decisions of this court in cases cited *supra* and *Calder v. Bull, 3 Dall. 386*; *Munn v. Illinois, 94 U.S. 79*; *United States v. Martin, 94 U.S. 400*. And see *People v. Phyfe **[***8]** , 136 N. Y. 554*; *Henderson v. Mayor, 92 U.S. 259*.

In the other state courts legislation of the kind in issue has been almost uniformly declared invalid. *Sawyer* v. *Davis*, 136 Massachusetts, 239, 243; *Eden* v. *People*, 161 Illinois, 296; *Ritchie* v. *People*, 155 Illinois, 98; *Ex parte Kuback*, 85 California, 274; *Godcharles v. Wigeman, 113 Pa. St. 431*; *State v. Goodwill, 33 W. Va. 179*; *Leep* v. *St. Louis R. R. Co.*, 58 Arkansas, 407; *Low* v. *Rees Pub. Co.*, 41 Nebraska, 127.

The statute in question was never intended as a health provision but was purely a labor law. This is indicated

by the facts leading up to the adoption of this statute by the New York legislature. For acts of this nature generally, see English Bakehouse Acts of 1863, 26, 27 Vict., ch. 40; English Factory Act of 1883; Baker's Journal, New York City, May 8, 1895; Report New York State Bureau Labor Statistics, 1892, vol. 3; Ch. 548, New York Laws of 1895; Ch. 672, 1896; Ch. 415, § 5, Laws of 1897; New Jersey act of April, 1896; Bakeshop Act of Ontario, April 7, 1896; Acts of Maryland, and Massachusetts, passed in 1897.

Mr. Julius M. Mayer, Attorney **[***9]** General of the State of New York, for defendant in error:

The New York statute under consideration involves an exercise of the police power of the State. The burden of demonstrating that this statute is repugnant to the provisions of the Federal Constitution is upon the plaintiff in error, and he must show that there was no basis upon which the state court could rest its conclusion that the legislation in question was a proper exercise of police power. *Holden v. Hardy, 169 U.S. 366*.

The conditions existing in the State of New York, which may be considered as the occasion for the enactment of the statute under consideration, show that it was a proper exercise of the police power of the State.

The power of the legislature to decide what laws are necessary to secure the public health, safety or welfare is subject to the power of the court to decide whether an act purporting to promote the public health or safety has such a reasonable connection therewith as to appear upon inspection to be adapted to that end. And the court may take judicial notice of the fact of the common belief of the people upon that subject. *Matter of Viemeister, 179 N. Y. 235*.

There are two **[***10]** views as to the words in the statute -- "no employe shall be required or *permitted to work*." The statute was carefully drafted so as to prevent evasion. It was intended to be a barrier to the employer who might testify that he had not orally or in writing *required* his employe to work, and yet he might by inference and acquiescence accomplish the same result by "permitting" him to so work.

The State, in undertaking this regulation, has a right to safeguard the citizen against his own lack of knowledge. In dealing with certain classes of men the State may properly say that, for the purpose of having able-bodied men at its command when it desires, it shall not permit these men, when engaged in dangerous or unhealthful occupations, to work for a longer period of time each day than is found to be in the interest of the health of the person upon whom the legislation acts.

The unhealthful character of the baker's occupation was fully commented upon by Judge Vann in his opinion in the Court of Appeals. The opinions of the judges of that court are very exhaustive and refer fully to all the cases on this subject.

The propriety of its exercise within constitutional limits is **[***11]** purely a matter of legislative discretion with which courts cannot interfere. *People v. King, 110 N. Y. 418, 423*.

If the act "admits of two constructions as to its being a health measure or otherwise, the courts should give the construction which sustains the act and makes it applicable in furtherance of the public interests. *Bohmer v. Haffen, 161 N. Y. 390, 399*.

Judges: Fuller, Harlan, Brewer, Brown, White, Peckham, McKenna, Holmes, Day

Opinion by: PECKHAM

Opinion

[*52] **[**540]** MR. JUSTICE PECKHAM, after making the foregoing statement of the facts, delivered the opinion of the court.

The indictment, it will be seen, charges that the plaintiff in error violated the one hundred and tenth section of article 8, chapter 415, of the Laws of 1897, known as the labor law of the State of New York, in that he wrongfully and unlawfully required and permitted an employe working for him to work more than sixty hours in one week. There is nothing in any of the opinions delivered in this case, either in the Supreme Court or the Court of Appeals of the State, which construes **[**541]** the section, in using the word "required," as referring to any physical force being used **[***12]** to obtain the labor of an employe. It is assumed that the word means nothing more than the requirement arising from voluntary contract for such labor in excess of the number of hours specified in the statute. There is no pretense in any of the opinions that the statute was intended to meet a case of involuntary labor in any form. All the opinions assume that there is no real distinction, so far as this question is concerned, between the words

"required" and "permitted." The mandate of the statute that "no employe shall be required or permitted to work," is the substantial equivalent of an enactment that "no employe shall contract or agree to work," more than ten hours per day, and as there is no provision for special emergencies the statute is mandatory in all cases. It is not an act merely fixing the number of hours which shall constitute a legal day's work, but an absolute prohibition upon the employer, permitting, under any circumstances, more than ten hours work to be done in his establishment. The employe may desire to earn the extra money, which would arise from his working more than the prescribed **[*53]** time, but this statute forbids the employer from permitting the **[***13]** employe to earn it.

The statute necessarily interferes with the right of contract between the employer and employes, concerning the number of hours in which the latter may labor in the bakery of the employer. The general right to make a contract in relation to his business is part of the liberty of the individual protected by the *Fourteenth Amendment of the Federal Constitution*. *Allgeyer v. Louisiana, 165 U.S. 578*. Under that provision no State can deprive any person of life, liberty or property without due process of law. The right to purchase or to sell labor is part of the liberty protected by this amendment, unless there are circumstances which exclude the right. There are, however, certain powers, existing in the sovereignty of each State in the Union, somewhat vaguely termed police powers, the exact description and limitation of which have not been attempted by the courts. Those powers, broadly stated and without, at present, any attempt at a more specific limitation, relate to the safety, health, morals and general welfare of the public. Both property and liberty are held on such reasonable conditions as may be imposed by the governing power of the State in the **[***14]** exercise of those powers, and with such conditions the *Fourteenth Amendment* was not designed to interfere. *Mugler v. Kansas, 123 U.S. 623*; *In re Kemmler, 136 U.S. 436*; *Crowley v. Christensen, 137 U.S. 86*; *In re Converse, 137 U.S. 624*.

The State, therefore, has power to prevent the individual from making certain kinds of contracts, and in regard to them the Federal Constitution offers no protection. If the contract be one which the State, in the legitimate exercise of its police power, has the right to prohibit, it is not prevented from prohibiting it by the *Fourteenth Amendment*. Contracts in violation of a statute, either of the Federal or state government, or a contract to let one's property for immoral purposes, or to do any other unlawful act, could obtain no protection from the Federal Constitution, as coming under the liberty of **[*54]** person or of free contract. Therefore, when the State, by its legislature, in the assumed exercise of its police powers, has passed an act which seriously limits the **[**542]** right to labor or the right of contract in regard to their means of livelihood between persons who are *sui juris* (both employer and **[***15]** employe), it becomes of great importance to determine which shall prevail -- the right of the individual to labor for such time as he may choose, or the right of the State to prevent the individual from laboring or from entering into any contract to labor, beyond a certain time prescribed by the State.

This court has recognized the existence and upheld the exercise of the police powers of the States in many cases which might fairly be considered as border ones, and it has, in the course of its determination of questions regarding the asserted invalidity of such statutes, on the ground of their violation of the rights secured by the Federal Constitution, been guided by rules of a very liberal nature, the application of which has resulted, in numerous instances, in upholding the validity of state statutes thus assailed. Among the later cases where the state law has been upheld by this court is that of *Holden v. Hardy, 169 U.S. 366*. A provision in the act of the legislature of Utah was there under consideration, the act limiting the employment of workmen in all underground mines or workings, to eight hours per day, "except in cases of emergency, where life or property is in **[***16]** imminent danger." It also limited the hours of labor in smelting and other institutions for the reduction or refining of ores or metals to eight hours per day, except in like cases of emergency. The act was held to be a valid exercise of the police powers of the State. A review of many of the cases on the subject, decided by this and other courts, is given in the opinion. It was held that the kind of employment, mining, smelting, etc., and the character of the employes in such kinds of labor, were such as to make it reasonable and proper for the State to interfere to prevent the employes from being constrained by the rules laid down by the proprietors in regard to labor. The following citation **[*55]** from the observations of the Supreme Court of Utah in that case was made by the judge writing the opinion of this court, and approved: "The law in question is confined to the protection of that class of people engaged in labor in underground mines, and in smelters and other works wherein ores are reduced and refined. This law applies only to the classes subjected by their employment to the peculiar conditions and effects attending underground mining

and work in smelters, and other **[***17]** works for the reduction and refining of ores. Therefore it is not necessary to discuss or decide whether the legislature can fix the hours of labor in other employments."

It will be observed that, even with regard to that class of labor, the Utah statute provided for cases of emergency wherein the provisions of the statute would not apply. The statute now before this court has no emergency clause in it, and, if the statute is valid, there are no circumstances and no emergencies under which the slightest violation of the provisions of the act would be innocent. There is nothing in *Holden* v. *Hardy* which covers the case now before us. Nor does *Atkin v. Kansas, 191 U.S. 207*, touch the case at bar. The *Atkin case* was decided upon the right of the State to control its municipal corporations and to prescribe the conditions upon which it will permit work of a public character to be done for a municipality. *Knoxville Iron Co. v. Harbison, 183 U.S. 13*, is equally far from an authority for this legislation. The employes in that case were held to be at a disadvantage with the employer in matters of wages, they being miners and coal workers, and the act simply **[***18]** provided for the cashing of coal orders when presented by the miner to the employer.

The latest case decided by this court, involving the police power, is that of *Jacobson* v. *Massachusetts*, decided at this term and reported in *197 U.S. 11*. It related to compulsory vaccination, and the law was held valid as a proper exercise of the police powers with reference to the public health. It was stated in the opinion that it was a case "of an adult who, for aught that appears, was himself in perfect health and a fit **[*56]** subject for vaccination, and yet, while remaining in the community, refused to obey the statute and the regulation adopted in execution of its provisions for the protection of the public health and the public safety, confessedly endangered by the presence of a dangerous disease." That case is also far from covering the one now before the court.

Petit v. Minnesota, 177 U.S. 164, was upheld as a proper exercise of the police power relating to the observance of Sunday, and the case held that the legislature had the right to declare that, as matter of law, keeping barber shops open on Sunday was not a work of necessity or charity.

It must, of course, **[***19]** be conceded that there is a limit to the valid exercise of the police power by the State. There is no dispute concerning this general proposition. Otherwise the *Fourteenth Amendment* would have no efficacy and the legislatures of the States would **[**543]** have unbounded power, and it would be enough to say that any piece of legislation was enacted to conserve the morals, the health or the safety of the people; such legislation would be valid, no matter how absolutely without foundation the claim might be. The claim of the police power would be a mere pretext -- become another and delusive name for the supreme sovereignty of the State to be exercised free from constitutional restraint. This is not contended for. In every case that comes before this court, therefore, where legislation of this character is concerned and where the protection of the Federal Constitution is sought, the question necessarily arises: Is this a fair, reasonable and appropriate exercise of the police power of the State, or is it an unreasonable, unnecessary and arbitrary interference with the right of the individual to his personal liberty or to enter into those contracts in relation to labor which may **[***20]** seem to him appropriate or necessary for the support of himself and his family? Of course the liberty of contract relating to labor includes both parties to it. The one has as much right to purchase as the other to sell labor.

This is not a question of substituting the judgment of the **[*57]** court for that of the legislature. If the act be within the power of the State it is valid, although the judgment of the court might be totally opposed to the enactment of such a law. But the question would still remain: Is it within the police power of the State? and that question must be answered by the court.

The question whether this act is valid as a labor law, pure and simple, may be dismissed in a few words. There is no reasonable ground for interfering with the liberty of person or the right of free contract, by determining the hours of labor, in the occupation of a baker. There is no contention that bakers as a class are not equal in intelligence and capacity to men in other trades or manual occupations, or that they are not able to assert their rights and care for themselves without the protecting arm of the State, interfering with their independence of judgment and of action. **[***21]** They are in no sense wards of the State. Viewed in the light of a purely labor law, with no reference whatever to the question of health, we think that a law like the one before us involves neither the safety, the morals nor the welfare of the public, and that the interest of the public is not in the slightest degree affected by such an act. The law must be upheld, if at all, as a law pertaining to the health of the individual engaged in the occupation of a baker. It does not affect any other portion of the public

than those who are engaged in that occupation. Clean and wholesome bread does not depend upon whether the baker works but ten hours per day or only sixty hours a week. The limitation of the hours of labor does not come within the police power on that ground.

It is a question of which of two powers or rights shall prevail -- the power of the State to legislate or the right of the individual to liberty of person and freedom of contract. The mere assertion that the subject relates though but in a remote degree to the public health does not necessarily render the enactment valid. The act must have a more direct relation, as a means to an end, and the end itself must **[***22]** be appropriate and legitimate, before an act can be held to be valid which interferes **[*58]** with the general right of an individual to be free in his person and in his power to contract in relation to his own labor.

This case has caused much diversity of opinion in the state courts. In the Supreme Court two of the five judges composing the Appellate Division dissented from the judgment affirming the validity of the act. In the Court of Appeals three of the seven judges also dissented from the judgment upholding the statute. Although found in what is called a labor law of the State, the Court of Appeals has upheld the act as one relating to the public health -- in other words, as a health law. One of the judges of the Court of Appeals, in upholding the law, stated that, in his opinion, the regulation in question could not be sustained unless they were able to say, from common knowledge, that working in a bakery and candy factory was an unhealthy employment. The judge held that, while the evidence was not uniform, it still led him to the conclusion that the occupation of a baker or confectioner was unhealthy and tended to result in diseases of the respiratory organs. Three **[***23]** of the judges dissented from that view, and they thought the occupation of a baker was not to such an extent unhealthy as to warrant the interference of the legislature with the liberty of the individual.

We think the limit of the police power has been reached and passed in this case. There is, in our judgment, no reasonable foundation for holding this to be necessary or appropriate as a health law to safeguard the public health or the health of the individuals who are following the trade of a baker. If this statute be valid, and if, therefore, a proper case is made out in which to deny the right of an individual, *sui juris*, as employer or employe, to make contracts for the labor of the latter under the protection of the provisions of the Federal Constitution, there would seem **[**544]** to be no length to which legislation of this nature might not go. The case differs widely, as we have already stated, from the expressions of this court in regard to laws of this nature, as stated in *Holden* v. *Hardy and Jacobson v. Massachusetts, supra.*

[*59] We think that there can be no fair doubt that the trade of a baker, in and of itself, is not an unhealthy one **[***24]** to that degree which would authorize the legislature to interfere with the right to labor, and with the right of free contract on the part of the individual, either as employer or employe. In looking through statistics regarding all trades and occupations, it may be true that the trade of a baker does not appear to be as healthy as some other trades, and is also vastly more healthy than still others. To the common understanding the trade of a baker has never been regarded as an unhealthy one. Very likely physicians would not recommend the exercise of that or of any other trade as a remedy for ill health. Some occupations are more healthy than others, but we think there are none which might not come under the power of the legislature to supervise and control the hours of working therein, if the mere fact that the occupation is not absolutely and perfectly healthy is to confer that right upon the legislative department of the Government. It might be safely affirmed that almost all occupations more or less affect the health. There must be more than the mere fact of the possible existence of some small amount of unhealthiness to warrant legislative interference with liberty. It **[***25]** is unfortunately true that labor, even in any department, may possibly carry with it the seeds of unhealthiness. But are we all, on that account, at the mercy of legislative majorities? A printer, a tinsmith, a locksmith, a carpenter, a cabinetmaker, a dry goods clerk, a bank's, a lawyer's or a physician's clerk, or a clerk in almost any kind of business, would all come under the power of the legislature, on this assumption. No trade, no occupation, no mode of earning one's living, could escape this all-pervading power, and the acts of the legislature in limiting the hours of labor in all employments would be valid, although such limitation might seriously cripple the ability of the laborer to support himself and his family. In our large cities there are many buildings into which the sun penetrates for but a short time in each day, and these buildings are occupied by people carrying on the **[*60]** business of bankers, brokers, lawyers, real estate, and many other kinds of business, aided by many clerks, messengers, and other employes. Upon the assumption of the validity of this act under review, it is not possible to say that an act, prohibiting lawyers' or bank clerks,

or **[***26]** others, from contracting to labor for their employers more than eight hours a day, would be invalid. It might be said that it is unhealthy to work more than that number of hours in an apartment lighted by artificial light during the working hours of the day; that the occupation of the bank clerk, the lawyer's clerk, the real estate clerk, or the broker's clerk in such offices is therefore unhealthy, and the legislature in its paternal wisdom must, therefore, have the right to legislate on the subject of and to limit the hours for such labor, and if it exercises that power and its validity be questioned, it is sufficient to say, it has reference to the public health; it has reference to the health of the employes condemned to labor day after day in buildings where the sun never shines; it is a health law, and therefore it is valid, and cannot be questioned by the courts.

It is also urged, pursuing the same line of argument, that it is to the interest of the State that its population should be strong and robust, and therefore any legislation which may be said to tend to make people healthy must be valid as health laws, enacted under the police power. If this be a valid argument and **[***27]** a justification for this kind of legislation, it follows that the protection of the Federal Constitution from undue interference with liberty of person and freedom of contract is visionary, wherever the law is sought to be justified as a valid exercise of the police power. Scarcely any law but might find shelter under such assumptions, and conduct, properly so called, as well as contract, would come under the restrictive sway of the legislature. Not only the hours of employes, but the hours of employers, could be regulated, and doctors, lawyers, scientists, all professional men, as well as athletes and artisans, could be forbidden to fatigue their brains and bodies by prolonged hours of exercise, lest the fighting strength **[*61]** of the State be impaired. We mention these extreme cases because the contention is extreme. We do not believe in the soundness of the views which uphold this law. On the contrary, we think that such a law as this, although passed in the assumed exercise of the police power, and as relating to the public health, or the health of the employes named, is not within that power, and is invalid. The act is not, within any fair meaning of the term, a health **[***28]** law, but is an illegal interference with the rights of individuals, both employers and employes, to make contracts regarding labor upon such terms as they may think best, or which they may agree **[**545]** upon with the other parties to such contracts. Statutes of the nature of that under review, limiting the hours in which grown and intelligent men may labor to earn their living, are mere meddlesome interferences with the rights of the individual, and they are not saved from condemnation by the claim that they are passed in the exercise of the police power and upon the subject of the health of the individual whose rights are interfered with, unless there be some fair ground, reasonable in and of itself, to say that there is material danger to the public health or to the health of the employes, if the hours of labor are not curtailed. If this be not clearly the case the individuals, whose rights are thus made the subject of legislative interference, are under the protection of the Federal Constitution regarding their liberty of contract as well as of person; and the legislature of the State has no power to limit their right as proposed in this statute. All that it could properly **[***29]** do has been done by it with regard to the conduct of bakeries, as provided for in the other sections of the act, above set forth. These several sections provide for the inspection of the premises where the bakery is carried on, with regard to furnishing proper wash-rooms and water-closets, apart from the bake-room, also with regard to providing proper drainage, plumbing and painting; the sections, in addition, provide for the height of the ceiling, the cementing or tiling of floors, where necessary in the opinion of the factory inspector, and for other things of **[*62]** that nature; alterations are also provided for and are to be made where necessary in the opinion of the inspector, in order to comply with the provisions of the statute. These various sections may be wise and valid regulations, and they certainly go to the full extent of providing for the cleanliness and the healthiness, so far as possible, of the quarters in which bakeries are to be conducted. Adding to all these requirements, a prohibition to enter into any contract of labor in a bakery for more than a certain number of hours a week, is, in our judgment, so wholly beside the matter of a proper, reasonable and **[***30]** fair provision, as to run counter to that liberty of person and of free contract provided for in the Federal Constution.

It was further urged on the argument that restricting the hours of labor in the case of bakers was valid because it tended to cleanliness on the part of the workers, as a man was more apt to be cleanly when not overworked, and if cleanly then his "output" was also more likely to be so. Wthat has already been said applies with equal force to this contention. We do not admit the reasoning to be sufficient to justify the claimed right of such interference. The State in that case would assume the position of a supervisor, or *pater familias*, over every act of the individual, and its right of governmental interference with his hours of labor, his hours of exercise, the character thereof, and the extent to which it shall be carried would be recognized and upheld. In

our judgment it is not possible in fact to discover the connection between the number of hours a baker may work in the bakery and the healthful quality of the bread made by the workman. The connection, if any exists, is too shadowy and thin to build any argument for the interference of the legislature. **[***31]** If the man works ten hours a day it is all right, but if ten and a half or eleven his health is in danger and his bread may be unhealthful, and, therefore, he shall not be permitted to do it. This, we think, is unreasonable and entirely arbitrary. When assertions such as we have adverted to become necessary in order to give, if possible, a plausible foundation for the contention that the law is a "health law," **[*63]** it gives rise to at least a suspicion that there was some other motive dominating the legislature than the purpose to subserve the public health or welfare.

This interference on the part of the legislatures of the several States with the ordinary trades and occupations of the people seems to be on the increase. In the Supreme Court of New York, in the case of *People* v. *Beattie*, Appellate Division, First Department, decided in 1904, *89 N.Y. Supp. 193*, a statute regulating the trade of horseshoeing, and requiring the person practicing such trade to be examined and to obtain a certificate from a board of examiners and file the same with the clerk of the county wherein the person proposes to practice such trade, was held invalid, as an arbitrary interference **[***32]** with personal liberty and private property without due process of law. The attempt was made, unsuccessfully, to justify it as a health law.

The same kind of a statute was held invalid (*In re Aubry*) by the Supreme Court of Washington in December, 1904. *78 Pac. Rep. 900*. The court held that the act deprived citizens of their liberty and property without due process of law and denied to them the equal protection of the laws. It also held that the trade of a horseshoer is not a subject of regulation under the police power of the State, as a business concerning and directly affecting the health, welfare or comfort of its inhabitants; and that therefore a law which provided for the examination and registration of horseshoers in **[**546]** certain cities was unconstitutional, as an illegitimate exercise of the police power.

The Supreme Court of Illinois in *Bessette* v. *People*, 193 Illinois, 334, also held that a law of the same nature, providing for the regulation and licensing of horseshoers, was unconstitutional as an illegal interference with the liberty of the individual in adopting and pursuing such calling as he may choose, subject only to the restraint necessary **[***33]** to secure the common welfare. See also *Godcharles v. Wigeman, 113 Pa. St. 431, 437*; *Low* v. *Rees Printing Co.*, 41 Nebraska, 127, 145. In **[*64]** these cases the courts upheld the right of free contract and the right to purchase and sell labor upon such terms as the parties may agree to.

It is impossible for us to shut our eyes to the fact that many of the laws of this character, while passed under what is claimed to be the police power for the purpose of protecting the public health or welfare, are, in reality, passed from other motives. We are justified in saying so when, from the character of the law and the subject upon which it legislates, it is apparent that the public health or welfare bears but the most remote relation to the law. The purpose of a statute must be determined from the natural and legal effect of the language employed; and whether it is or is not repugnant to the Constitution of the United States must be determined from the natural effect of such statutes when put into operation, and not from their proclaimed purpose. *Minnesota v. Barber, 136 U.S. 313*; *Brimmer v. Rebman, 138 U.S. 78*. The court looks beyond the mere letter **[***34]** of the law in such cases. *Yick Wo v. Hopkins, 118 U.S. 356*.

It is manifest to us that the limitation of the hours of labor as provided for in this section of the statute under which the indictment was found, and the plaintiff in error convicted, has no such direct relation to and no such substantial effect upon the health of the employe, as to justify us in regarding the section as really a health law. It seems to us that the real object and purpose were simply to regulate the hours of labor between the master and his employes (all being men, *sui juris*), in a private business, not dangerous in any degree to morals or in any real and substantial degree, to the health of the employes. Under such circumstances the freedom of master and employe to contract with each other in relation to their employment, and in defining the same, cannot be prohibited or interfered with, without violating the Federal Constitution.

The judgment of the Court of Appeals of New York as well as that of the Supreme Court and of the County Court of Oneida County must be reversed and the case remanded to **[*65]** the County Court for further proceedings not inconsistent with this opinion.

[*35]** *Reversed.*

Dissent by: HARLAN; HOLMES

Dissent

[547contd]** [EDITOR'S NOTE: The page number of this document may appear to be out of sequence; however, this pagination accurately reflects the pagination of the original published document.]

MR. JUSTICE HARLAN, with whom MR. JUSTICE WHITE and MR. JUSTICE DAY concurred, dissenting.

While this court has not attempted to mark the precise boundaries of what is called the police power of the State, the existence of the power has been uniformly recognized, both by the Federal and state courts.

All the cases agree that this power extends at least to the protection of the lives, the health and the safety of the public against the injurious exercise by any citizen of his own rights.

In *Patterson v. Kentucky, 97 U.S. 501*, after referring to the general principle that rights given by the Constitution cannot be impaired by state legislation of any kind, this court said: "It [this court] has, nevertheless, with marked distinctness and uniformity, recognized the necessity, growing out of the fundamental conditions of civil society, of upholding state police regulations which were enacted in good faith, and had appropriate and **[***36]** direct connection with that protection to life, health, and property which each State owes to her citizen." So in *Barbier v. Connolly, 113 U.S. 27*: "But neither the [14th] Amendment -- broad and comprehensive as it is -- nor any other Amendment was designed to interfere with the power of the State, sometimes termed its police power, to prescribe regulations to promote the health, peace, morals, education, and good order of the people."

Speaking generally, the State in the exercise of its powers may not unduly interfere with the right of the citizen to enter into contracts that may be necessary and essential in the enjoyment of the inherent rights belonging to every one, among which rights is the right "to be free in the enjoyment of all his faculties; to be free to use them in all lawful ways; to live and work where he will; to earn his livelihood by any lawful calling; to pursue any livelihood or avocation." This was declared **[*66]** in *Allgeyer v. Louisiana, 165 U.S. 578, 589*. But in the same case it was conceded that the right to contract in relation to persons and property or to do business, within a State, may be "regulated and sometimes prohibited, when **[***37]** the contracts or business conflict with the policy of the State as contained in its statutes" (p. 591).

So, as said in *Holden v. Hardy, 169 U.S. 366, 391*: "This right of contract, however, is itself subject to certain limitations which the State may lawfully impose in the exercise of its police powers. While this power is inherent in all governments, it has doubtless been greatly expanded in its application during the past century, owing to an enormous increase in the number of occupations which are dangerous, or so far detrimental to the health of the employes as to demand special precautions for their well-being and protection, or the safety of adjacent property. While this court has held, notably in the cases of *Davidson v. New Orleans, 96 U.S. 97*, and *Yick Wo v. Hopkins, 118 U.S; 356*, that the police power cannot be put forward as an excuse for oppressive and unjust legislation, it may be lawfully resorted to for the purpose of preserving the public health, safety or morals, or the abatement of public nuisances, and a large discretion 'is necessarily vested in the legislature to determine not only what the interests of the public require, but what measures **[***38]** are necessary for the protection of such interests.' *Lawton v. Steele, 152 U.S. 133, 136*." **[**548]** Referring to the limitations placed by the State upon the hours of workmen, the court in the same case said (p. 395): "These employments, when too long pursued, the legislature has judged to be detrimental to the health of the employes, and, so long as there are reasonable grounds for believing that this is so, its decision upon this subject cannot be reviewed by the Federal courts."

Subsequently in *Gundling v. Chicago, 177 U.S. 183, 188*, this court said: "Regulations respecting the pursuit of a lawful trade or business are of very frequent occurrence in the various cities of the country, and what such regulations shall be and **[*67]** to what particular trade, business or occupation they shall apply, are questions for the State to determine, and their determination comes within the proper exercise of the police power by the State, and unless the regulations are so utterly unreasonable and extravagant in their nature and purpose that the property and personal rights of the citizen are unnecessarily, and in a manner wholly arbitrary, interfered with or destroyed **[***39]** without due process of law, they do not extend beyond the power of the State to pass, and they form no subject for Federal interference.

"As stated in *Crowley v. Christensen, 137 U.S. 86*, 'the possession and enjoyment of all rights are subject to

such reasonable conditions as may be deemed by the governing authority of the country essential to the safety, health, peace, good order and morals of the Community.'"

In *St. Louis, Iron Mountain &c.* Ry. v. Paul, 173 U.S. 404, 409, and in Knoxville Iron Co. v. Harbison, 183 U.S. 13, 21, 22, it was distinctly adjudged that the right of contract was not "absolute in respect to every matter, but may be subjected to the restraints demanded by the safety and welfare of the State." Those cases illustrate the extent to which the State may restrict or interfere with the exercise of the right of contracting.

The authorities on the same line are so numerous that further citations are unnecessary.

I take it to be firmly established that what is called the liberty of contract may, within certain limits, be subjected to regulations designed and calculated to promote the general welfare or to guard the public health, the **[***40]** public morals or the public safety. "The liberty secured by the Constitution of the United States to every person within its jurisdiction does not import," this court has recently said, "an absolute right in each person to be, at all times and in all circumstances, wholly freed from restraint. There are manifold restraints to which every person is necessarily subject for the common good." Jacobson v. Massachusetts, 197 U.S. 11.

[*68] Granting then that there is a liberty of contract which cannot be violated even under the sanction of direct legislative enactment, but assuming, as according to settled law we may assume, that such liberty of contract is subject to such regulations as the State may reasonably prescribe for the common good and the well-being of society, what are the conditions under which the judiciary may declare such regulations to be in excess of legislative authority and void? Upon this point there is no room for dispute; for, the rule is universal that a legislative enactment, Federal or state, is never to be disregarded or held invalid unless it be, beyond question, plainly and palpably in excess of legislative power. In Jacobson v. Massachusetts, ***[***41]*** supra, we said that the power of the courts to review legislative action in respect of a matter affecting the general welfare exists *only* "when that which the legislature has done comes within the rule that if a statute purporting to have been enacted to protect the public health, the public morals or the public safety, has no real or substantial relation to those objects, or is, beyond all question, a plain, palpable invasion of rights secured by the fundamental law" -- citing Mugler v. Kansas, 123 U.S. 623, 661; Minnesota v. Barber, 136 U.S. 313, 320: Atkin v. Kansas, 191 U.S. 207, 223. If there be doubt as to the validity of the statute, that doubt must therefore be resolved in favor of its validity, and the courts must keep their hands off, leaving the legislature to meet the responsibility for unwise legislation. If the end which the legislature seeks to accomplish be one to which is power extends, and if the means employed to that end, although not the wisest or best, are yet not plainly and palpably unauthorized by law, then the court cannot interfere. In other words, when the validity of a statute is questioned, the burden of proof, so to speak, **[***42]** is upon those who assert it to be unconstitutional. McCulloch v. Maryland, 4 Wheat. 316, 421.

Let these principles be applied to the present case. By the statute in question it **[**549]** is provided that, "No employe shall be required or permitted to work in a biscuit, bread or cake **[*69]** bakery or confectionery establishment more than sixty hours in any one week, or more than ten hours in any one day, unless for the purpose of making a shorter work day on the last day of the week; nor more hours in any one week than will make an average of ten hours per day for the number of days during such week in which such employe shall work."

It is plain that this statute was enacted in order to protect the physical well-being of those who work in bakery and confectionery establishments. It may be that the statute had its origin, in part, in the belief that employers and employes in such establishments were not upon an equal footing, and that the necessities of the latter often compelled them to submit to such exactions as unduly taxed their strength. Be this as it may, the statute must be taken as expressing the belief of the people of New York that, as a general rule, **[***43]** and in the case of the average man, labor in excess of sixty hours during a week in such establishments may endanger the health of those who thus labor. Whether or not this be wise legislation it is not the province of the court to inquire. Under our systems of government the courts are not concerned with the wisdom or policy of legislation. So that in determining the question of power to interfere with liberty of contract, the court may inquire whether the means devised by the State are germane to an end which may be lawfully accomplished and have a real or substantial relation to the protection of health, as involved in the daily work of the persons, male and female, engaged in bakery and confectionery establishments. But when this inquiry is entered upon I find it impossible, in view of common experience, to say

that there is here no real or substantial relation between the means employed by the State and the end sought to be accomplished by its legislation. *Mugler v. Kansas, supra.* Nor can I say that the statute has no appropriate or direct connection with that protection to health which each State owes to her citizens, *Patterson v. Kentucky, supra*; or that **[***44]** it is not promotive of the health of the employes in question, *Holden* v. *Hardy, Lawton v. Steele, [*70] supra*; or that the regulation prescribed by the State is utterly unreasonable and extravagant or wholly arbitrary, *Gundling v. Chicago, supra.* Still less can I say that the statute is, beyond question, a plain, palpable invasion of rights secured by the fundamental law. *Jacobson v. Massachusetts, supra.* Therefore I submit that this court will transcend its functions if it assumes to annul the statute of New York. It must be remembered that this statute does not apply to all kinds of business. It applies only to work in bakery and confectionery establishments, in which, as all know, the air constantly breathed by workmen is not as pure and healthful as that to be found in some other establishments or out of doors.

Professor Hirt in his treatise on the "Diseases of the Workers" has said: "The labor of the bakers is among the hardest and most laborious imaginable, because it has to be performed under conditions injurious to the health of those engaged in it. It is hard, very hard work, not only because it requires a great deal of physical exertion **[***45]** in an overheated workshop and during unreasonably long hours, but more so because of the erratic demands of the public, compelling the baker to perform the greater part of his work at night thus depriving him of an opportunity to enjoy the necessary rest and sleep, a fact which is highly injurious to his health." Another writer says: "The constant inhaling of flour dust causes inflammation of the lungs and of the bronchial tubes. The eyes also suffer through this dust, which is responsible for the many cases of running eyes among the bakers. The long hours of toil to which all bakers are subjected produce rheumatism, cramps and swollen legs. The intense heat in the workshops induces the workers to resort to cooling drinks, which together with their habit of exposing the greater part of their bodies to the change in the atmosphere, is another source of a number of diseases of various organs. Nearly all bakers are pale-faced and of more delicate health than the workers of other crafts, which is chiefly due to their hard work and their irregular and unnatural mode of living, whereby the power of resistance against disease is **[*71]** greatly diminished. The average age of a baker **[***46]** is below that of other workmen; they seldom live over their fiftieth year, most of them dying between the ages of forty and fifty. During periods of epidemic diseases the bakers are generally the first to succumb to the disease, and the number swept away during such periods far exceeds the number of other crafts in comparison to the men employed in the respective industries. When, in 1720, the plague visited the city of Marseilles, France, every baker in the city succumbed to the epidemic, which caused considerable excitement in the neighboring **[**550]** cities and resulted in measures for the sanitary protection of the bakers."

In the Eighteenth Annual Report by the New York Bureau of Statistics of Labor it is stated that among the occupations involving exposure to conditions that interfere with nutrition is that of a baker (p. 52). In that Report it is also stated that "from a social point of view, production will be increased by any change in industrial organization which diminishes the number of idlers, paupers and criminals. Shorter hours of work, by allowing higher standards of comfort and purer family life, promise to enhance the industrial efficiency of the wage-working **[***47]** class -- improved health, longer life, more content and greater intelligence and inventiveness" (p. 82).

Statistics show that the average daily working time among workingmen in different countries is, in Australia, 8 hours; in Great Britain, 9; in the United States, 9 3/4; in Denmark, 9 3/4; in Norway, 10; Sweden, France and Switzerland, 10 1/2; Germany, 10 1/4; Belgium, Italy and Austria, 11; and in Russia, 12 hours.

We judicially know that the question of the number of hours during which a workman should continuously labor has been, for a long period, and is yet, a subject of serious consideration among civilized peoples, and by those having special knowledge of the laws of health. Suppose the statute prohibited labor in bakery and confectionery establishments in excess of eighteen hours each day. No one, I take it, could dispute the power of the State to enact such a statute. But the statute **[*72]** before us does not embrace extreme or exceptional cases. It may be said to occupy a middle ground in respect of the hours of labor. What is the true ground for the State to take between legitimate protection, by legislation, of the public health and liberty of contract is **[***48]** not a question easily solved, nor one in respect of which there is or can be absolute certainty. There are very few, if any, questions in political economy about which entire certainty may be predicated. One writer on relation of the State to labor has well said: "The manner, occasion, and degree in

which the State may interfere with the industrial freedom of its citizens is one of the most debatable and difficult questions of social science." Jevons, 33.

We also judicially know that the number of hours that should constitute a day's labor in particular occupations involving the physical strength and safety of workmen has been the subject of enactments by Congress and by nearly all of the States. Many, if not most, of those enactments fix eight hours as the proper basis of a day's labor.

I do not stop to consider whether any particular view of this economic question presents the sounder theory. What the precise facts are it may be difficult to say. It is enough for the determination of this case, and it is enough for this court to know, that the question is one about which there is room for debate and for an honest difference of opinion. There are many reasons of a weighty, **[***49]** substantial character, based upon the experience of mankind, in support of the theory that, all things considered, more than ten hours' steady work each day, from week to week, in a bakery or confectionery establishment, may endanger the health, and shorten the lives of the workmen, thereby diminishing their physical and mental capacity to serve the State, and to provide for those dependent upon them.

If such reasons exist that ought to be the end of this case, for the State is not amenable to the judiciary, in respect of its legislative enactments, unless such enactments are plainly, palpably, beyond all question, inconsistent with the Constitution **[*73]** of the United States. We are not to presume that the State of New York has acted in bad faith. Nor can we assume that its legislature acted without due deliberation, or that it did not determine this question upon the fullest attainable information, and for the common good. We cannot say that the State has acted without reason nor ought we to proceed upon the theory that its action is a mere sham. Our duty, I submit, is to sustain the statute as not being in conflict with the Federal Constitution, for the reason -- and **[***50]** such is an all-sufficient reason -- it is not shown to be plainly and palpably inconsistent with that instrument. Let the State alone in the management of its purely domestic affairs, so long as it does not appear beyond all question that it has violated the Federal Constitution. This view necessarily results from the principle that the health and safety of the people of a State are primarily for the State to guard and protect.

I take leave to say that the New York statute, in the particulars here involved, cannot be held to be in conflict with the *Fourteenth Amendment*, without enlarging the scope of the Amendment far beyond its original purpose and without bringing under the supervision of this court matters which have been supposed to belong exclusively to the legislative departments of the several States when exerting their conceded power to guard the health and safety of their citizens by such regulations as they in their wisdom deem best. Health laws of every description constitute, said Chief Justice Marshall, a part of that mass of legislation **[**551]** which "embraces everything within the territory of a State, not surrendered to the General Government; all which can **[***51]** be most advantageously exercised by the States themselves." *Gibbons v. Ogden, 9 Wheat. 1, 203*. A decision that the New York statute is void under the *Fourteenth Amendment* will, in my opinion, involve consequences of a far-reaching and mischievous character; for such a decision would seriously cripple the inherent power of the States to care for the lives, health and well-being of their citizens. Those are matters which can be best controlled by the States. **[*74]** The preservation of the just powers of the States is quite as vital as the preservation of the powers of the General Government.

When this court had before it the question of the constitutionality of a statute of Kansas making it a criminal offense for a contractor for public work to permit or require his employes to perform labor upon such work in excess of eight hours each day, it was contended that the statute was in derogation of the liberty both of employes and employer. It was further contended that the Kansas statute was mischievous in its tendencies. This court, while disposing of the question only as it affected public work, held that the Kansas statute was not void under the *Fourteenth Amendment*. **[***52]** But it took occasion to say what may well be here repeated: "The responsibility therefor rests upon legislators, not upon the courts. No evils arising from such legislation could be more far-reaching than those that might come to our system of government if the judiciary, abandoning the sphere assigned to it by the fundamental law, should enter the domain of legislation, and upon grounds merely of justice or reason or wisdom annul statutes that had received the sanction of the people's representatives. We are reminded by counsel that it is the solemn duty of the courts in cases before them to guard the constitutional rights of the citizen against merely arbitrary power. That is unquestionably true. But it is equally true -- indeed, the public interests imperatively demand -- that legislative enactments should be

recognized and enforced by the courts as embodying the will of the people, unless they are plainly and palpably, beyond all question, in violation of the fundamental law of the Constitution." *Atkin v. Kansas, 191 U.S. 207, 223*.

The judgment in my opinion should be affirmed.

[546contd]** [EDITOR'S NOTE: The page number of this document may appear to be **[***53]** out of sequence; however, this pagination accurately reflects the pagination of the original published document.]

MR. JUSTICE HOLMES dissenting.

I regret sincerely that I am unable to agree with the judgment **[*75]** in this case, and that I think it my duty to express my dissent.

This case is decided upon an economic theory which a large part of the country does not entertain. If it were a question whether I agreed with that theory I should desire to study it further and long before making up my mind. But I do not conceive that to be my duty, because I strongly believe that my agreement or disagreement has nothing to do with the right of a majority to embody their opinions in law. It is settled by various decisions of this court that state constitutions and state laws may regulate life in many ways which we as legislators might think as injudicious or if you like as tyrannical as this, and which equally with this interfere with the liberty to contract. Sunday laws and usury laws are ancient examples. A more modern one is the prohibition of lotteries. The liberty of the citizen to do as he likes so long as he does not interfere with the liberty of others to do the same, **[***54]** which has been a shibboleth for some well-known writers, is interfered with by school laws, by the Post Office, by every state or municipal institution which takes his money for purposes thought desirable, whether he likes it or not. The *Fourteenth Amendment* does not enact Mr. Herbert Spencer's Social Statics. The other day we sustained the Massachusetts vaccination law. *Jacobson v. Massachusetts, 197 U.S. 11*. United States and state statutes and decisions cutting down the liberty to contract by way of combination are familiar to this court. *Northern Securities Co. v. United States, 193 U.S. 197*. Two years ago we upheld the prohibition of sales of stock on margins or for future delivery in the constitution of California. *Otis v. Parker, 187 U.S. 606*. The decision sustaining an eight hour law for miners is still recent. *Holden v. Hardy, 169 U.S. 366*. Some of these laws embody convictions or prejudices which judges are **[**547]** likely to share. Some may not. But a constitution is not intended to embody a particular economic theory, whether of paternalism and the organic relation of the citizen to the State or of *laissez faire*. **[*76]** **[***55]** It is made for people of fundamentally differing views, and the accident of our finding certain opinions natural and familiar or novel and even shocking ought not to conclude our judgment upon the question whether statutes embodying them conflict with the Constitution of the United States.

General propositions do not decide concrete cases. The decision will depend on a judgment or intuition more subtle than any articulate major premise. But I think that the proposition just stated, if it is accepted, will carry us far toward the end. Every opinion tends to become a law. I think that the word liberty in the *Fourteenth Amendment* is perverted when it is held to prevent the natural outcome of a dominant opinion, unless it can be said that a rational and fair man necessarily would admit that the statute proposed would infringe fundamental principles as they have been understood by the traditions of our people and our law. It does not need research to show that no such sweeping condemnation can be passed upon the statute before us. A reasonable man might think it a proper measure on the score of health. Men whom I certainly could not pronounce unreasonable would uphold it as a first **[***56]** instalment of a general regulation of the hours of work. Whether in the latter aspect it would be open to the charge of inequality I think it unnecessary to discuss.

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Erie R.R. v. Tompkins

Supreme Court of the United States

January 31, 1938, Argued ; April 25, 1938, Decided

No. 367

Reporter

304 U.S. 64 *; 58 S. Ct. 817 **; 82 L. Ed. 1188 ***; 1938 U.S. LEXIS 984 ****; 11 Ohio Op. 246; 114 A.L.R. 1487

ERIE RAILROAD CO. v. TOMPKINS

Prior History: [**1]** CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT.

CERTIORARI, 302 U.S. 671, to review the affirmance of a judgment recovered against the railroad company in an action for personal injuries. The accident was in Pennsylvania. The action was in New York, jurisdiction being based on diversity of citizenship.

Disposition: *90 F.2d 603*, reversed.

Case Summary

Procedural Posture

Petitioner railroad company appealed a decision of the United States Court of Appeals for the Second Circuit affirming judgment for respondent in a negligence action to recover damages for injuries respondent sustained when he was hit by a door projecting from petitioner's train while he was walking along a railroad right of way.

Overview

Respondent brought a negligence action against petitioner railroad company, seeking damages for injuries sustained when he was hit by a door projecting from petitioner's train while he was walking along a railroad right of way. The circuit court affirmed the judgment in favor of respondent, refusing to consider petitioner's claim that it was not liable for respondent's injuries under state common law. It held instead that liability was a question of general law about which federal courts were free to render independent decisions. On appeal, the court reversed and remanded, holding that there was no federal general common law, and that except in matters governed by the U.S. Constitution or by acts of Congress, the law to be applied by federal courts in any diversity case was the law of the state. In so holding, the court disapproved the contrary doctrine of Swift v. Tyson, 16 Pet. 1 (1842), finding it an unconstitutional assumption of powers by federal courts that invaded state autonomy and prevented uniformity in administering state law. The court also held that § 34 of the Federal Judiciary Act of 1789, 28 U.S.C.S. § 725, was not declarative of the Swift doctrine.

Outcome

The judgment was reversed and the case remanded for consideration of applicable state law as to petitioner railroad company's liability for respondent's injuries, the court holding that there was no federal general common law, and that except in matters governed by the U.S. Constitution or by acts of Congress, the law to be applied by the federal courts in diversity cases was the law of the state.

Syllabus

1. The liability of a railroad company for injury caused by negligent operation of its train to a pedestrian on a much-used, beaten path on its right-of-way along and near the rails, depends, in the absence of a federal or state statute, upon the unwritten law of the State where the accident occurred. Pp. 71 *et seq*.

2. A federal court exercising jurisdiction over such a case on the ground of diversity of citizenship, is not free to treat this question as one of so-called "general law," but must apply the state law as declared by the highest state court. *Swift* v. *Tyson*, 16 Pet. 1, overruled. *Id*.

3. There is no federal general common law. Congress has no power to declare substantive **[****2]** rules of common law applicable in a State whether they be local in their nature or "general," whether they be commercial law or a part of the law of torts. And no clause in the Constitution purports to confer such a power upon the federal courts. Except in matters governed by the Federal Constitution or by Acts of Congress, the law to be applied in any case is the law of the State. And

whether the law of the State shall be declared by its legislature in a statute or by its highest court in a decision is not a matter of federal concern. P. 78.

4. In disapproving the doctrine of *Swift* v. *Tyson*, the Court does not hold unconstitutional § 34 of the Federal Judiciary Act of 1789 or any other Act of Congress. It merely declares that by applying the doctrine of that case rights which are reserved by the Constitution to the several States have been invaded. P. 79.

Counsel: Mr. Theodore Kiendl, with whom Messrs. William C. Cannon and Harold W. Bissell were on the brief, for petitioner.

The Pennsylvania decisions denying permissive rights on longitudinal pathways as distinguished from crossings should have received due consideration in recognition of the elementary principle **[****3]** that the law to be applied is the lex loci delicti. *Restatement, Conflict of Laws, § 380*, p. 462.

Whatever difficulties there may be in ascertaining the pertinent Pennsylvania law or in fixing the extent to which the federal courts are bound to recognize the pertinent decisions of the Pennsylvania courts, it is settled beyond question that it is the Pennsylvania law which the federal courts, quite as truly as the state courts, are bound to ascertain and apply. There is no such thing as a federal common law applicable in such cases. *Bucher v. Cheshire Railroad Co., 125 U.S. 555, 583-584*; *Smith v. Alabama, 124 U.S. 465, 478-479*. See also *Carroll County v. Smith, 111 U.S. 556, 563*; *McGuire v. Sherwin-Williams Co., 87 F.2d 112*; *Boston & Maine R. v. Breslin, 80 F.2d 749*, (cert. denied, *297 U.S. 715*); *Moore v. Backus, 78 F.2d 571*, (cert. denied, *296 U.S. 640*); *Reed & Barton Corp. v. Maas, 73 F.2d 359*; *Public Service Ry. Co. v. Wursthorn, 278 F. 408*, (cert. denied, *259 U.S. 585*); *Keystone Wood Co. v. Susquehanna Boom Co., 240 F. 296,* **[****4]** (cert. denied, *243 U.S. 655*); *Snare & Triest Co. v. Friedman, 169 F. 1, 11*, (cert. denied, *214 U.S. 518*).

Although each State unquestionably has the power to determine the particular conception of the common law adopted by it, and although the common law is acclaimed as being adaptable to changing conditions, the opinion of the court below is an unqualified pronouncement that it is beyond the power of the Pennsylvania courts to determine or evolve the law of Pennsylvania as to permissive rights on railroad rights-of-way in Pennsylvania. It would seem clear that this is a sweeping repudiation of the principle that the law to be applied is that of the State.

The Pennsylvania decisions should have been recognized as controlling because they had established the rule of law with sufficient definiteness and finality to constitute it a local rule of property, action or conduct, even though the question might otherwise have been regarded as mainly one of general law.

We do not question the finality of the holding of this Court in Swift v. Tyson, 16 Pet. 1, that the "laws of the several States" referred to in the Rules of Decision **[****5]** Act do not include state court decisions as such. But whether by virtue of the Act or of comity, it is well settled that such decisions are pertinent and, under certain circumstances, controlling in ascertaining or determining the law of the State.

It would be idle to deny that this Court, in matters of a general nature, has exhibited a marked reluctance to recognize nonconformist state rules as settling the question of state law. But even in cases where an asserted rule of the state courts has been rejected, it has been stated or implied that the asserted rule would govern if sufficiently established. Expressions to this effect occur with such frequency and consistency that they must be recognized as forming a part of the general doctrine on the subject.

As a matter of comity at least and by virtue of the Rules of Decision Act as well, the federal courts are bound to recognize an asserted rule of state law where the evidence in the form of state decisions is sufficiently conclusive, in other words, when the asserted rule is established with sufficient definiteness and finality.

The implication from the Swift case would seem to be that the federal courts would follow the state **[****6]** rule if established with such definiteness and finality that the state courts would no longer resort to the general sources of the common law or to general reasoning and legal analogies, but would regard the question as foreclosed in the State.

This Court has so indicated in many cases where the conclusion was that there was no state rule so firmly established as to exclude resort to general principles. Carpenter v. Providence Washington Ins. Co., 16 Pet. 495; *Lane v. Vick, 3 How. 464*; *Chicago v. Robbins, 2 Black 418*; *Yates v. Milwaukee, 10 Wall. 497*; *New York Central R. Co. v. Lockwood, 17 Wall. 357*; *Burgess v. Seligman, 107 U.S. 20*; *Baltimore & Ohio R. Co. v. Baugh, 149 U.S. 368*; *Barber v. Pittsburgh, F. W. & C. Ry. Co., 166 U.S. 83*; *Kuhn v. Fairmont Coal Co., 215 U.S. 349*; *Black & White Taxicab Co. v. Brown & Yellow Taxicab Co., 276 U.S. 518*.

Obviously, a case is not regarded as depending "upon the doctrines of commercial law and general jurisprudence" when the applicable state rule is established by state statute, even though the statute **[****7]** deals with a matter which but for the statute would unquestionably come within the scope of commercial law and general jurisprudence. *Burns Mortgage Co. v. Fried, 292 U.S. 487*; *Marine Bank v. Kalt-Zimmers Co., 293 U.S. 357*. It would seem equally obvious that a case is not to be regarded as depending "upon the doctrines of commercial and general jurisprudence" when there is an applicable state rule of property, action or conduct, definitely and finally established as such by decisions of the highest state court, even though the decisions deal with a matter which but for such established rule would unquestionably come within the scope of commercial law and general jurisprudence. *Snare & Triest Co. v. Friedman, 169 F. 1, 12*; *214 U.S. 518*; *Bucher v. Cheshire Railroad Co., 125 U.S. 555*; *Byrne v. Kansas City, Ft. S. & M. R. Co., 61 F. 605*.

The Pennsylvania decisions denying permissive rights on longitudinal pathways, as distinguished from crossings, declare a Pennsylvania rule sufficiently local in nature to be controlling, even though more definiteness and finality might be required in a rule of a more **[****8]** general nature. It rests expressly on a local policy relating to the efficient operation of railroads, a policy which presumably was dictated by local conditions.

Mr. Fred H. Rees, with whom Messrs. Alexander L. Strouse and William Walsh were on the brief, for respondent.

In cases involving questions of general law, federal courts will exercise their independent judgment.

This doctrine, which is now elementary, found its inception in Swift v. Tyson, 16 Pet. 1; has constantly been reaffirmed by this Court and was most recently applied in the case of *Black & White Taxicab Co. v. Brown & Yellow Taxicab Co., 276 U.S. 518*.

Decisions of this Court, as well as logic and reason, have established that questions of the type here presented, involving railroad accidents, are questions of general law, upon which independent judgment may be exercised by federal courts. [Citing *Baltimore & Ohio R. Co. v. Baugh, 149 U.S. 368*, and many other cases.]

There is no doctrine that where a rule is well established in a State, the question is one of local law and federal courts must follow the rule even though the rule might otherwise be regarded as one of **[****9]** general law.

Even if a question of local law were here involved, the same result must be reached, since petitioner relies upon a solitary Pennsylvania decision, clearly contrary to the weight of Pennsylvania decisions, and of doubtful applicability to the facts of the case at bar.

Judges: Hughes, McReynolds, Brandeis, Butler, Stone, Roberts, Black, Reed; Cardozo took no part in the consideration or decision of this case.

Opinion by: BRANDEIS

Opinion

[*69] **[**818]** **[***1189]** MR. JUSTICE BRANDEIS delivered the opinion of the Court.

[1][2]The question for decision is whether the oft-challenged doctrine of *Swift* v. *Tyson* [1] shall now be disapproved.

[**10]** Tompkins, a citizen of Pennsylvania, was injured on a dark night by a passing freight train of the Erie Railroad Company while walking along its right of way at Hughestown in that State. He claimed that the accident occurred through negligence in the operation, or maintenance, of the train; that he was rightfully on the premises as licensee because on a commonly used beaten footpath which ran for a short distance alongside the tracks; and that he was struck by something which looked like a door projecting from one of the moving cars. To enforce that claim he brought an action in the federal court for southern New York, which had

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[1] 16 Pet. 1 (1842). Leading cases applying the doctrine are collected in *Black & White Taxicab Co*. v. *Brown & Yellow Taxicab Co., 276 U.S. 518, 530, 531*. Dissent from its application or extension was expressed as early as 1845 by Mr. Justice McKinley (and Mr. Chief Justice Taney) in *Lane v. Vick, 3 How. 464, 477*. Dissenting opinions were also written by Mr. Justice Daniel in *Rowan v. Runnels, 5 How. 134, 140*; by Mr. Justice Nelson in *Williamson v. Berry, 8 How. 495, 550, 558*; by Mr. Justice Campbell in *Pease v. Peck, 18 How. 595, 599, 600*; and by Mr. Justice Miller in *Gelpcke v. City of Dubuque, 1 Wall. 175, 207*, and *Butz v. City of Muscatine, 8 Wall. 575, 585*. Vigorous attack upon the entire doctrine was made by Mr. Justice Field in *Baltimore & Ohio R. Co*. v. *Baugh, 149 U.S. 368, 390*, and by Mr. Justice Holmes in *Kuhn v. Fairmont Coal Co., 215 U.S. 349, 370*, and in the *Taxicab* case, *276 U.S. at 532*.

jurisdiction because the company is a corporation of that State. It denied liability; and the case was tried by a jury.

[*70] **[***1190]** The Erie insisted that its duty to Tompkins was no greater than that owed to a trespasser. It contended, among other things, that its duty to Tompkins, and hence its liability, should be determined in accordance with the Pennsylvania law; that under the law of Pennsylvania, as declared by its highest court, persons who use pathways along the railroad right of way -- that is a longitudinal pathway as distinguished **[****11]** from a crossing -- are to be deemed trespassers; and that the railroad is not liable for injuries to undiscovered trespassers resulting from its negligence, unless it be wanton or wilful. Tompkins denied that any such rule had been established by the decisions of the Pennsylvania courts; and contended that, since there was no statute of the State on the subject, the railroad's duty and liability is to be determined in federal courts as a matter of general law.

The trial judge refused to rule that the applicable law precluded recovery. The jury brought in a verdict of $ 30,000; and the judgment entered thereon was affirmed by the Circuit Court of Appeals, which held, *90 F.2d 603, 604*, that it was unnecessary to consider whether the law of Pennsylvania was as contended, because the question was one not of local, but of general, law and that "upon questions of general law the federal courts are free, in the absence of a local statute, to exercise their independent judgment as to what the law is; and it is well settled that the question of the responsibility of a railroad for injuries caused by its servants is one of general law. . . . Where the public has made open **[****12]** and notorious use of a railroad right of way for a long period of time and without objection, the company owes to persons on such permissive pathway a duty of care in the operation of its trains. . . . It is likewise generally recognized law that a jury may find that negligence exists toward a pedestrian using a permissive path on the railroad right of way if he is hit by some object projecting from the side of the train."

[*71] The Erie had contended that application of the Pennsylvania rule was required, among other things, by § 34 of the Federal Judiciary Act of September 24, 1789, c. 20, 28 U. S. C. § 725, **[**819]** which provides:

"The laws of the several States, except where the Constitution, treaties, or statutes of the United States otherwise require or provide, shall be regarded as rules of decision in trials at common law, in the courts of the United States, in cases where they apply."

Because of the importance of the question whether the federal court was free to disregard the alleged rule of the Pennsylvania common law, we granted certiorari.

First. Swift v. *Tyson*, 16 Pet. 1, 18, held that federal courts exercising **[****13]** jurisdiction on the ground of diversity of citizenship need not, in matters of general jurisprudence, apply the unwritten law of the State as declared by its highest court; that they are free to exercise an independent judgment as to what the common law of the State is -- or should be; and that, as there stated by Mr. Justice Story:

"the true interpretation of the thirty-fourth section limited its application to state laws strictly local, that is to say, to the positive statutes of the state, and the construction thereof adopted by the local tribunals, and to rights and titles to things having a permanent locality, such as the rights and titles to real estate, and other matters immovable and intraterritorial in their nature and character. It never has been supposed by us, that the section did apply, or was intended to apply, to questions of a more general nature, not at all dependent upon local statutes or local usages of a fixed and permanent operation, as, for example, to the construction of ordinary contracts or other written instruments, and especially to questions of general commercial **[***1191]** law, where the state tribunals are called upon to perform the like functions **[****14]** as ourselves, that is, to ascertain upon general reasoning and legal analogies, what is the true exposition of the contract or **[*72]** instrument, or what is the just rule furnished by the principles of commercial law to govern the case."

The Court in applying the rule of § 34 to equity cases, in *Mason v. United States, 260 U.S. 545, 559*, said: "The statute, however, is merely declarative of the rule which would exist in the absence of the statute." [2] The federal courts assumed, in the broad field of "general law," the power to declare rules of decision which Congress was confessedly without power to enact as statutes. Doubt

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[2] In *Hawkins* v. *Barney's Lessee*, 5 Pet. 457, 464, it was stated that § 34 "has been uniformly held to be no more than a declaration of what the law would have been without it: to wit, that the lex loci must be the governing rule of private right, under whatever jurisdiction private right comes to be examined." See also *Bank of Hamilton* v. *Dudley's Lessee*, 2 Pet. 492, 525. Compare *Jackson v. Chew, 12 Wheat. 153, 162, 168*; *Livingston* v. *Moore*, 7 Pet. 469, 542.

was repeatedly expressed as to the correctness of the construction given § 34, [3] and as to the soundness of the rule which it introduced. [4] **[****16]** But it was the more recent research of a competent scholar, who examined the original document, which established that the construction given to it by the Court was erroneous; and that the purpose of the section was merely to make certain that, in all matters except those in which some federal law is controlling, **[*73]** the federal courts exercising jurisdiction in diversity of citizenship **[****15]** cases would apply as their rules of decision the law of the State, unwritten as well as written. [5]

Criticism of the doctrine became widespread after the decision of *Black & White Taxicab Co*. v. *Brown & Yellow* **[**820]** *Taxicab Co., 276 U.S. 518*. [6] There, Brown and Yellow, a Kentucky corporation owned by Kentuckians, and the Louisville and Nashville Railroad, also a Kentucky corporation, wished that the former should have the exclusive privilege of soliciting passenger and baggage transportation at the Bowling Green, Kentucky, railroad **[***1192]** station; and that the Black and White, a competing Kentucky corporation, should be prevented from interfering with that privilege. Knowing that such a contract would be void under the common law of Kentucky, it was arranged that the Brown and Yellow reincorporate under the law of Tennessee, and that the contract with the railroad should be executed there. The suit was then brought by the Tennessee corporation in the federal court for western Kentucky to enjoin competition by **[****17]** the Black and White; an injunction issued by the District Court **[*74]** was sustained by the Court of Appeals; and this Court, citing many decisions in which the doctrine of *Swift* v. *Tyson* had been applied, affirmed the decree.

[**18]** *Second*. Experience in applying the doctrine of *Swift* v. *Tyson*, had revealed its defects, political and social; and the benefits expected to flow from the rule did not accrue. Persistence of state courts in their own opinions on questions of common law prevented uniformity; [7] **[****19]** and the impossibility of discovering a satisfactory line of demarcation between the province of general law and that of local law developed a new well of uncertainties. [8]

On the other hand, the mischievous results of the doctrine had become apparent. Diversity of citizenship

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[3] Pepper, The Border Land of Federal and State Decisions (1889) 57; Gray, The Nature and Sources of Law (1909 ed.) §§ 533-34; Trickett, Non-Federal Law Administered in Federal Courts (1906) 40 Am. L. Rev. 819, 821-24.

[4] Street, Is There a General Commercial Law of the United States (1873) 21 Am. L. Reg. 473; Hornblower, Conflict between State and Federal Decisions (1880) 14 Am. L. Rev. 211; Meigs, Decisions of the Federal Courts on Questions of State Law (1882) 8 So. L. Rev. (n. s.) 452, (1911) 45 Am. L. Rev. 47; Heiskell, Conflict between Federal and State Decisions (1882) 16 Am. L. Rev. 743; Rand, *Swift* v. *Tyson* versus *Gelpcke* v. *Dubuque* (1895) 8 Harv. L. Rev. 328, 341-43; Mills, Should Federal Courts Ignore State Laws (1900) 34 Am. L. Rev. 51; Carpenter, Court Decisions and the Common Law (1917) 17 Col. L. Rev. 593, 602-03.

[5] Charles Warren, New Light on the History of the Federal Judiciary Act of 1789 (1923) 37 Harv. L. Rev. 49, 51-52, 81-88, 108.

[6] Shelton, Concurrent Jurisdiction -- Its Necessity and its Dangers (1928) 15 Va. L. Rev. 137; Frankfurter, Distribution of Judicial Power Between Federal and State Courts (1928) 13 Corn. L. Q. 499, 524-30; Johnson, State Law and the Federal Courts (1929) 17 Ky. L. J. 355; Fordham, The Federal Courts and the Construction of Uniform State Laws (1929) 7 N. C. L. Rev. 423; Dobie, Seven Implications of Swift *v*. Tyson (1930) 16 Va. L. Rev. 225; Dawson, Conflict of Decisions between State and Federal Courts in Kentucky, and the Remedy (1931) 20 Ky. L. J. 1; Campbell, Is Swift *v*. Tyson an Argument for or against Abolishing Diversity of Citizenship Jurisdiction (1932) 18 A. B. A. J. 809; Ball, Revision of Federal Diversity Jurisdiction (1933) 28 Ill. L. Rev. 356, 362-64; Fordham, Swift *v*. Tyson and the Construction of State Statutes (1935) 41 W. Va. L. Q. 131.

[7] Compare Mr. Justice Miller in *Gelpcke v. City of Dubuque, 1 Wall. 175, 209*. The conflicts listed in Holt, The Concurrent Jurisdiction of the Federal and State Courts (1888) 160 *et seq*. cover twenty-eight pages. See also Frankfurter, *supra* note 6, at 524-30; Dawson, *supra* note 6; Note, Aftermath of the Supreme Court's Stop, Look and Listen Rule (1930) 43 Harv. L. Rev. 926; cf. Yntema and Jaffin, Preliminary Analysis of Concurrent Jurisdiction (1931) 79 U. of Pa. L. Rev. 869, 881-86. Moreover, as pointed out by Judge Augustus N. Hand in *Cole v. Pennsylvania R. Co., 43 F.2d 953, 956-57*, decisions of this Court on common law questions are less likely than formerly to promote uniformity.

[8] Compare 2 Warren, The Supreme Court in United States History (rev. ed. 1935) 89: "Probably no decision of the Court has ever given rise to more uncertainty as to legal rights; and though doubtless intended to promote uniformity in the operation of business transactions, its chief effect has been to render it difficult for business men to know in advance to what particular topic the Court would apply the doctrine. . . ." The Federal Digest, through the 1937 volume, lists nearly 1000 decisions involving the distinction between questions of general and of local law.

jurisdiction was conferred in order to prevent apprehended discrimination in state courts against those not citizens of the State. *Swift* v. *Tyson* introduced grave discrimination by non-citizens against citizens. It made rights enjoyed under the unwritten "general law" vary according to whether enforcement was sought in the state **[*75]** or in the federal court; and the privilege of selecting the court in which the **[****20]** right should be determined was conferred upon the non-citizen. [9] Thus, the doctrine rendered **[**821]** impossible equal protection of the law. In attempting to promote uniformity of law throughout the United States, the doctrine had prevented uniformity in the administration of the law of the State.

The discrimination resulting became in practice far-reaching. This resulted in part from the broad province accorded to the so-called "general law" as to which federal courts exercised an independent judgment. [10] In addition to questions **[****21]** of purely **[***1193]** commercial law, "general law" was held to include the obligations under contracts entered into and to be performed within the State, [11] **[****22]** the extent to which a carrier operating within a State may stipulate for exemption from liability for his own negligence or that of his employee; [12] the liability for torts committed within the State upon persons resident or property located there, even where the question of liability **[*76]** depended upon the scope of a property right conferred by the State; [13] and the right to exemplary or punitive damages. [14] **[****23]** Furthermore, state decisions construing local deeds, [15] mineral conveyances, [16] and even devises of real estate [17] were disregarded. [18]

In part the discrimination resulted from the wide range of persons held entitled to avail themselves of the federal **[****24]** rule by resort to the diversity of citizenship jurisdiction. Through this jurisdiction individual citizens willing to remove from their own State and become citizens of another might avail themselves of the federal rule. [19] **[**822]** And, without even change of residence, a corporate citizen of **[*77]** the State could avail itself of the federal rule by re-incorporating under the laws of another State, as was done in the *Taxicab* case.

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[9] It was even possible for a non-resident plaintiff defeated on a point of law in the highest court of a State nevertheless to win out by taking a nonsuit and renewing the controversy in the federal court. Compare *Gardner v. Michigan Cent. R. Co., 150 U.S. 349*; ***Harrison v. Foley, 206 Fed. 57*** (C. C. A. 8); *Interstate Realty & Inv. Co*. v. *Bibb County, 293 Fed. 721* (C. C. A. 5); see Mills, *supra* note 4, at 52.

[10] For a recent survey of the scope of the doctrine, see Sharp & Brennan, The Application of the Doctrine of Swift *v*. Tyson since 1900 (1929) 4 Ind. L. J. 367.

[11] *Black & White Taxicab Co*. v. *Brown & Yellow Taxicab Co., 276 U.S. 518*; *Rowan v. Runnels, 5 How. 134, 139*; *Boyce v. Tabb, 18 Wall. 546, 548*; *Johnson v. Chas. D. Norton Co., 159 Fed. 361* (C. C. A. 6); *Keene Five Cent Sav. Bank v. Reid, 123 Fed. 221* (C. C. A. 8).

[12] *Railroad Co*. v. *Lockwood, 17 Wall. 357, 367-68*; *Liverpool & G. W. Steam Co*. v. *Phenix Ins. Co., 129 U.S. 397, 443*; *Eels v. St. Louis, K. & N. W. Ry. Co., 52 Fed. 903* (C. C. S. D. Iowa); *Fowler v. Pennsylvania R. Co., 229 Fed. 373* (C. C. A. 2).

[13] *Chicago v. Robbins, 2 Black 418, 428*. Compare *Yates v. Milwaukee, 10 Wall. 497, 506-07*; *Yeates* v. *Illinois Cent. R. Co., 137 Fed. 943* (C. C. N. D. Ill.); *Curtis v. Cleveland, C. C. & St. L. Ry. Co., 140 Fed. 777* (C. C. E. D. Ill.). See also *Hough v. Railway Co., 100 U.S. 213, 226*; *Baltimore & Ohio R. Co*. v. ***Baugh, 149 U.S. 368***; *Gardner v. Michigan Cent. R. Co., 150 U.S. 349, 358*; *Beutler v. Grand Trunk Junction Ry. Co., 224 U.S. 85*; *Baltimore & Ohio R. Co*. v. *Goodman, 275 U.S. 66*; *Pokora v. Wabash Ry. Co., 292 U.S. 98*; *Cole v. Pennsylvania R. Co., 43 F.2d 953* (C. C. A. 2).

[14] *Lake Shore & M. S. Ry. Co*. v. *Prentice, 147 U.S. 101, 106*; *Norfolk & P. Traction Co*. v. *Miller, 174 Fed. 607* (C. C. A. 4); *Greene v. Keithley, 86 F.2d 239* (C. C. A. 8).

[15] *Foxcroft v. Mallet, 4 How. 353, 379*; *Midland Valley R. Co*. v. *Sutter, 28 F.2d 163* (C. C. A. 8); *Midland Valley R. Co*. v. *Jarvis, 29 F.2d 539* (C. C. A. 8).

[16] *Kuhn v. Fairmont Coal Co., 215 U.S. 349*; *Mid-Continent Petroleum Corp*. v. *Sauder, 67 F.2d 9, 12* (C. C. A. 10), reversed on other grounds, *292 U.S. 272*.

[17] *Lane v. Vick, 3 How. 464, 476*; *Barber v. Pittsburgh, F. W. & C. R. Co., 166 U.S. 83, 99-100*; *Messinger v. Anderson, 171 Fed. 785, 791-792* (C. C. A. 6), reversed on other grounds, *225 U.S. 436*; *Knox & Lewis v. Alwood, 228 Fed. 753* (S. D. Ga.).

[18] Compare, also, *Williamson v. Berry, 8 How. 495*; *Watson v. Tarpley, 18 How. 517*; *Gelpcke v. City of Dubuque, 1 Wall. 175*.

[19] See *Cheever v. Wilson, 9 Wall. 108, 123*; *Robertson v. Carson, 19 Wall. 94, 106-07*; *Morris* v. *Gilmer*, 129 U.S. 315, 328; *Dickerman v. Northern Trust Co., 176 U.S. 181, 192*; *Williamson v. Osenton, 232 U.S. 619, 625*.

The injustice and confusion incident to the doctrine of *Swift* v. *Tyson* have been repeatedly urged as reasons for abolishing or limiting diversity **[***1194]** of citizenship jurisdiction. [20] Other legislative relief has been proposed. [21] **[****26]** **[****25]** If only a question of statutory construction were involved, we should not be prepared to abandon a doctrine so widely applied throughout nearly a century. [22] But the unconstitutionality **[*78]** of the course pursued has now been made clear and compels us to do so.

[3]*Third*. Except **[****27]** in matters governed by the Federal Constitution or by Acts of Congress, the law to be applied in any case is the law of the State. And whether the law of the State shall be declared by its Legislature in a statute or by its highest court in a decision is not a matter of federal concern. There is no federal general common law. Congress has no power to declare substantive rules of common law applicable in a State whether they be local in their nature or "general," be they commercial law or a part of the law of torts. And no clause in the Constitution purports to confer such a power upon the federal courts. As stated by Mr. Justice Field when protesting in *Baltimore & Ohio R. Co*. v. *Baugh, 149 U.S. 368, 401*, against ignoring the Ohio common law of fellow servant liability:

"I am aware that what has been termed the general law of the country -- which is often little less than what the judge advancing the doctrine thinks at the time should be the general law on a particular subject -- has been often advanced in judicial opinions of this court to control a conflicting law of a State. I admit that learned judges have fallen into the habit of repeating this **[****28]** doctrine as a convenient mode of brushing aside the law of a State in conflict with their views. And I confess that, moved and governed by the authority of the great names of those judges, I have, myself, in many instances, unhesitatingly and confidently, but I think now erroneously, repeated the same doctrine. But, notwithstanding the great names which may be cited in favor of the doctrine, and notwithstanding the frequency with which the doctrine has been reiterated, there stands, as a perpetual protest against its repetition, the Constitution of the United States, which recognizes and preserves the autonomy and independence of the States -- independence in their legislative and independence **[*79]** in their judicial departments. Supervision over **[***1195]** either the legislative or the judicial action of the States is in no case permissible except as **[**823]** to matters by the Constitution specifically authorized or delegated to the United States. Any interference with either, except as thus permitted, is an invasion of the authority of the State and, to that extent, a denial **[****29]** of its independence."

The fallacy underlying the rule declared in *Swift* v. *Tyson* is made clear by Mr. Justice Holmes. [23] The doctrine rests upon the assumption that there is "a transcendental body of law outside of any particular State but obligatory within it unless and until changed by statute," that federal courts have the power to use their judgment as to what the rules of common law are; and that in the federal courts "the parties are entitled to an independent judgment on matters of general law":

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[20] See, e. g., Hearings Before a Subcommittee of the Senate Committee on the Judiciary on S. 937, S. 939, and S. 3243, 72d Cong., 1st Sess. (1932) 6-8; Hearing Before the House Committee on the Judiciary on H. R. 10594, H. R. 4526, and H. R. 11508, 72d Cong., 1st Sess., ser. 12 (1932) 97-104; Sen. Rep. No. 530, 72d Cong., 1st Sess. (1932) 4-6; Collier, A Plea Against Jurisdiction Because of Diversity (1913) 76 Cent. L. J. 263, 264, 266; Frankfurter, *supra* note 6; Ball, *supra* note 6; Warren, Corporations and Diversity of Citizenship (1933) 19 Va. L. Rev. 661, 686.

[21] Thus, bills which would abrogate the doctrine of *Swift* v. *Tyson* have been introduced. S. 4333, 70th Cong., 1st Sess.; S. 96, 71st Cong., 1st Sess.; H. R. 8094, 72d Cong., 1st Sess. See also Mills, *supra* note 4, at 68-69; Dobie, *supra* note 6, at 241; Frankfurter, *supra* note 6, at 530; Campbell, *supra* note 6, at 811. State statutes on conflicting questions of "general law" have also been suggested. See Heiskell, *supra* note 4, at 760; Dawson, *supra* note 6; Dobie, *supra* note 6, at 241.

[22] The doctrine has not been without defenders. See Eliot, The Common Law of the Federal Courts (1902) 36 Am. L. Rev. 498, 523-25; A. B. Parker, The Common Law Jurisdiction of the United States Courts (1907) 17 Yale L. J. 1; Schofield, Swift *v*. Tyson: Uniformity of Judge-Made State Law in State and Federal Courts (1910) 4 Ill. L. Rev. 533; Brown, The Jurisdiction of the Federal Courts Based on Diversity of Citizenship (1929) 78 U. of Pa. L. Rev. 179, 189-91; J. J. Parker, The Federal Jurisdiction and Recent Attacks Upon It (1932) 18 A. B. A. J. 433, 438; Yntema, The Jurisdiction of the Federal Courts in Controversies Between Citizens of Different States (1933) 19 A. B. A. J. 71, 74-75; Beutel, Common Law Judicial Technique and the Law of Negotiable Instruments -- Two Unfortunate Decisions (1934) 9 Tulane L. Rev. 64.

[23] *Kuhn v. Fairmont Coal Co., 215 U.S. 349, 370-372*; *Black & White Taxicab Co*. v. *Brown & Yellow Taxicab Co., 276 U.S. 518, 532-36*.

"but law in the sense in which courts speak of it today does not exist without some definite authority behind it. The common law so far as it is enforced in a State, whether called common law or not, is not the common law generally but the law of that State existing by the authority of that State without regard to what it may have been in England or anywhere else. . . .

"the authority and only authority is the State, and if that be so, the voice adopted by the State as its own [whether it be of its Legislature or of its Supreme Court] should utter the last word."

Thus **[****30]** the doctrine of *Swift* v. *Tyson* is, as Mr. Justice Holmes said, "an unconstitutional assumption of powers by courts of the United States which no lapse of time or respectable array of opinion should make us hesitate to correct." In disapproving that doctrine we do not hold **[*80]** unconstitutional § 34 of the Federal Judiciary Act of 1789 or any other Act of Congress. We merely declare that in applying the doctrine this Court and the lower courts have invaded rights which in our opinion are reserved by the Constitution to the several States.

[4]*Fourth*. The defendant contended that by the common law of Pennsylvania as declared by its highest court in *Falchetti v. Pennsylvania R. Co., 307 Pa. 203*;*160 A. 859*, the **[****31]** only duty owed to the plaintiff was to refrain from wilful or wanton injury. The plaintiff denied that such is the Pennsylvania law. [24] In support of their respective contentions the parties discussed and cited many decisions of the Supreme Court of the State. The Circuit Court of Appeals ruled that the question of liability is one of general law; and on that ground declined to decide the issue of state law. As we hold this was error, the judgment is reversed and the case remanded to it for further proceedings in conformity with our opinion.

Reversed.

MR. JUSTICE CARDOZO took no part in the consideration or decision of this case.

MR. JUSTICE BUTLER.

The case presented by the evidence is a simple **[****32]** one. Plaintiff was severely injured in Pennsylvania. While walking on defendant's right of way along a much-used path at the end of the cross ties of its main track, he came into collision with an open door swinging from the side of a car in a train going in the opposite direction. Having been warned by whistle and headlight, he saw the locomotive **[*81]** approaching and had time and space enough to step aside and so avoid danger. To justify his **[***1196]** failure to get out of the way, he says that upon many other occasions he had safely walked there while trains passed.

Invoking jurisdiction on the ground of diversity of citizenship, plaintiff, a citizen and resident of Pennsylvania, brought this suit to recover damages against defendant, a New York corporation, in the federal court for the southern district of that State. The issues were whether negligence of defendant was a proximate cause of his injuries and whether negligence of plaintiff contributed. He claimed that, by hauling the car with the open door, defendant violated a duty to him. The defendant insisted that it violated no duty and that plaintiff's injuries were caused by his own **[**824]** negligence. **[****33]** The jury gave him a verdict on which the trial court entered judgment; the circuit court of appeals affirmed. *90 F.2d 603*.

Defendant maintained, citing *Falchetti v. Pennsylvania R. Co., 307 Pa. 203*; *160 A. 859*, and *Koontz v. B. & O. R. Co., 309 Pa. 122*; *163 A. 212*, that the only duty owed plaintiff was to refrain from willfully or wantonly injuring him; it argued that the courts of Pennsylvania had so ruled with respect to persons using a customary longitudinal path, as distinguished from one crossing the track. The plaintiff insisted that the Pennsylvania decisions did not establish the rule for which the defendant contended. Upon that issue the circuit court of appeals said (p. 604): "We need not go into this matter since the defendant concedes that the great weight of authority in other states is to the contrary. This concession is fatal to its contention, for upon questions of general law the federal courts are free, in absence of a local statute, to exercise their independent judgment as to what the law is; and it is well settled that the question of the responsibility of a railroad for **[****34]** injuries caused by its servants is one of general law." **[*82]** Upon that basis the court held the evidence sufficient to sustain a finding that plaintiff's

[24] Tompkins also contended that the alleged rule of the *Falchetti* case is not in any event applicable here because he was struck at the intersection of the longitudinal pathway and a transverse crossing. The court below found it unnecessary to consider this contention, and we leave the question open.

injuries were caused by the negligence of defendant. It also held the question of contributory negligence one for the jury.

Defendant's petition for writ of certiorari presented two questions: Whether its duty toward plaintiff should have been determined in accordance with the law as found by the highest court of Pennsylvania, and whether the evidence conclusively showed plaintiff guilty of contributory negligence. Plaintiff contends that, as always heretofore held by this Court, the issues of negligence and contributory negligence are to be determined by general law against which local decisions may not be held conclusive; that defendant relies on a solitary Pennsylvania case of doubtful applicability and that, even if the decisions of the courts of that State were deemed controlling, the same result would have to be reached.

No constitutional question was suggested or argued below or here. And as a general rule, this Court will not consider any question not raised below and presented by the petition. *Olson v. United States, 292 U.S. 246, 262*. **[****35]** *Johnson v. Manhattan Ry. Co., 289 U.S. 479, 494*. *Gunning v. Cooley, 281 U.S. 90, 98*. Here it does not decide either of the questions presented but, changing the rule of decision in force since the foundation of the Government, remands the case to be adjudged according to a standard never before deemed permissible.

The opinion just announced states that "the question for decision is whether the oft-challenged doctrine of *Swift* v. *Tyson* [1842, 16 Pet. 1] shall now be disapproved."

That case involved the construction of the Judiciary Act of 1789, § 34: "The laws of the several states, except where the Constitution, treaties, or statutes of the United States otherwise require or provide, shall be regarded as rules of decision in **[***1197]** trials at common law in the courts of **[*83]** the United States in cases where they apply." Expressing the view of all the members of the Court, Mr. Justice Story said (p. 18): "In the ordinary use of language it will hardly be contended that the decisions of Courts constitute laws. They are, at most, only evidence of what the laws are, and not of themselves laws. They are **[****36]** often re-examined, reversed, and qualified by the Courts themselves, whenever they are found to be either defective, or ill-founded, or otherwise incorrect. The laws of a state are more usually understood to mean the rules and enactments promulgated by the legislative authority thereof, or long established local customs having the force of laws. *In all the various cases, which have hitherto come before us for decision, this Court have uniformly supposed*, that the true interpretation of the thirty-fourth section limited its application to state laws strictly local, that is to say, to the positive statutes of the state, and the construction thereof adopted by the local tribunals, and to rights and titles to things having a permanent locality, such as the rights and titles to real estate, and other matters immovable and intraterritorial in their nature and character. *It never has been supposed by us*, that the section did apply, or was designed to apply, to questions of a more general nature, not at all dependent upon local statutes or local usages of a fixed and permanent operation, as, for example, to the construction of ordinary contracts or **[**825]** other written instruments, **[****37]** and especially to questions of general commercial law, where the state tribunals are called upon to perform the like functions as ourselves, that is, to ascertain upon general reasoning and legal analogies, what is the true exposition of the contract or instrument, or what is the just rule furnished by the principles of commercial law to govern the case. *And we have not now the slightest difficulty in holding*, that this section, upon its true intendment and construction, is strictly limited to local statutes and local usages of the character **[*84]** before stated, and does not extend to contracts and other instruments of a commercial nature, the true interpretation and effect whereof are to be sought, not in the decisions of the local tribunals, but in the general principles and doctrines of commercial jurisprudence. Undoubtedly, the decisions of the local tribunals upon such subjects are entitled to, and will receive, the most deliberate attention and respect of this Court; but they cannot furnish positive rules, or conclusive authority, by which our own judgments are to be bound up and governed." (Italics added.)

The doctrine of that case has been followed by this Court **[****38]** in an unbroken line of decisions. So far as appears, it was not questioned until more than 50 years later, and then by a single judge. [1] *Baltimore &*

[1] Mr. Justice Field filed a dissenting opinion, several sentences of which are quoted in the decision just announced. The dissent failed to impress any of his associates. It assumes that adherence to § 34 as construed involves a supervision over legislative or judicial action of the states. There is no foundation for that suggestion. Clearly the dissent of the learned Justice rests upon misapprehension of the rule. He joined in applying the doctrine for more than a quarter of a century before his dissent. The reports do not disclose that he objected to it in any later case. Cf. *Oakes v. Mase, 165 U.S.*

Ohio R. Co. v. *Baugh, 149 U.S. 368, 390*. In that case, Mr. Justice Brewer, speaking for the Court, truly said (p. 373): "Whatever differences of opinion may have been expressed, have not been on the question whether a matter of general law should be settled by the independent judgment of this court, rather than through an adherence to the decisions of the state courts, but upon the other **[***1198]** question, whether a given matter is one of local or of general law."

[**39]** And since that decision, the division of opinion in this Court has been one of the same character as it was before. In 1910, Mr. Justice Holmes, speaking for himself and two other Justices, dissented from the holding that a **[*85]** court of the United States was bound to exercise its own independent judgment in the construction of a conveyance made before the state courts had rendered an authoritative decision as to its meaning and effect. *Kuhn v. Fairmont Coal Co., 215 U.S. 349*. But that dissent accepted (p. 371) as "settled" the doctrine of *Swift* v. *Tyson*, and insisted (p. 372) merely that the case under consideration was by nature and necessity peculiarly local.

Thereafter, as before, the doctrine was constantly applied. [2] In *Black & White Taxicab Co*. v. *Brown & Yellow Taxicab Co., 276 U.S. 518*, three judges dissented. The writer of the dissent, Mr. Justice Holmes, said, however (p. 535): "I should leave *Swift* v. *Tyson* undisturbed, as I indicated in *Kuhn* v. *Fairmont Coal Co*., but I would not allow it to spread the assumed dominion into new fields."

[**40]** No more unqualified application of the doctrine can be found than in decisions of this Court speaking through Mr. Justice Holmes. *United Zinc Co*. v. *Britt, 258 U.S. 268*. *Baltimore & Ohio R. Co*. v. *Goodman, 275 U.S. 66, 70*. Without in the slightest departing from that doctrine, but implicitly applying it, the strictness of the rule laid down in the *Goodman* case was somewhat ameliorated by *Pokora v. Wabash Ry. **[**826]** Co., 292 U.S. 98*.

Whenever possible, consistently with standards sustained by reason and authority constituting the general law, this Court has followed applicable decisions of state courts. *Mutual Life Ins. Co*. v. *Johnson, 293 U.S. 335, 339*. See *Burgess v. Seligman, 107 U.S. 20, 34*. *Black & White Taxicab Co*. v. *Brown & Yellow Taxicab Co., supra, 530*. Unquestionably the issues of negligence and contributory negligence upon which decision of this case **[*86]** depends are questions of general law. *Hough v. Railway Co., 100 U.S. 213, 226*. *Lake Shore & M. S. Ry. Co*. v. *Prentice, 147 U.S. 101*. **[****41]** *Baltimore & Ohio R. Co*. v. *Baugh, supra. Gardner v. Michigan Central R. Co., 150 U.S. 349, 358*. *Central Vermont Ry. Co*. v. *White, 238 U.S. 507, 512*. *Baltimore & Ohio R. Co*. v. *Goodman, supra. Pokora v. Wabash Ry. Co., supra.*

While amendments to § 34 have from time to time been suggested, the section stands as originally enacted. Evidently Congress has intended throughout the years that the rule of decision as construed should continue to govern federal courts in trials at common law. The opinion just announced suggests that Mr. Warren's research has established that from the beginning this Court has erroneously construed § 34. But that author's "New Light on the **[***1199]** History of the Federal Judiciary Act of 1789" does not purport to be authoritative and was intended to be no more than suggestive. The weight to be given to his discovery has never been discussed at this bar. Nor does the opinion indicate the ground disclosed by the research. In his dissenting opinion in the *Taxicab* case, Mr. Justice Holmes referred to Mr. Warren's work but failed to persuade the Court **[****42]** that "laws" as used in § 34 included varying and possibly ill-considered rulings by the courts of a State on questions of common law. See, e. g., *Swift* v. *Tyson, supra*, 16-17. It well may be that, if the Court should now call for argument of counsel on the basis of Mr. Warren's research, it would adhere to the construction it has always put upon § 34. Indeed, the opinion in this case so indicates. For it declares: "If only a question of statutory construction were involved, we should not be prepared to abandon a doctrine so widely applied throughout a century. But the unconstitutionality of the course pursued has now been made clear and compels us to do so." This means that, so far as concerns the rule of decision now condemned, the Judiciary Act of 1789, passed to establish judicial **[*87]** courts to exert the judicial power of the United States, and especially § 34 of that Act as construed, is unconstitutional; that federal courts are now bound to follow decisions of the courts of the State in which the controversies arise; and that Congress is powerless otherwise to ordain. It is hard to foresee the consequences of the radical change so made. Our **[****43]** opinion in the *Taxicab* case cites

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[2] In *Salem Trust Co*. v. *Manufacturers' Finance Co., 264 U.S. 182*, Mr. Justice Holmes and Mr. Justice Brandeis concurred (p. 200) in the judgment of the Court upon a question of general law on the ground that the rights of the parties were governed by state law.

numerous decisions of this Court which serve in part to indicate the field from which it is now intended forever to bar the federal courts. It extends to all matters of contracts and torts not positively governed by state enactments. Counsel searching for precedent and reasoning to disclose common-law principles on which to guide clients and conduct litigation are by this decision told that as to all of these questions the decisions of this Court and other federal courts are no longer anywhere authoritative.

This Court has often emphasized its reluctance to consider constitutional questions, and that legislation will not be held invalid as repugnant to the fundamental law if the case may be decided upon any other ground. In view of grave consequences liable to result from erroneous exertion of its power to set aside legislation, the Court should move cautiously, seek assistance of counsel, act only after ample deliberation, show that the question is before the Court, that its decision cannot be avoided by construction of the statute assailed or otherwise, indicate precisely the principle or provision of the Constitution held to have been transgressed, **[****44]** and fully disclose the reasons and authorities found to warrant the conclusion of invalidity. These safeguards against the improvident use of the great power to invalidate legislation are so well-grounded and familiar that statement of reasons or citation of authority to support them is no longer necessary. But see e. g.: *Charles River Bridge* v. *Warren* **[**827]** *Bridge*, 11 Pet. 420, 553; *Township of Pine Grove v. Talcott, 19 Wall. 666, 673*; *Chicago & G. T. Ry. Co*. v. *Wellman, 143 U.S. 339, 345*; **[*88]** *Baker v. Grice, 169 U.S. 284, 292*; *Martin v. District of Columbia, 205 U.S. 135, 140*.

So far as appears, no litigant has ever challenged the power of Congress to establish the rule as construed. It has so long endured that its destruction now without appropriate deliberation cannot be justified. There is nothing in the opinion to suggest that consideration of any constitutional question is necessary to a decision of the case. By way of reasoning, it contains nothing that **[***1200]** requires the conclusion reached. Admittedly, there is no authority to support **[****45]** that conclusion. Against the protest of those joining in this opinion, the Court declines to assign the case for reargument. It may not justly be assumed that the labor and argument of counsel for the parties would not disclose the right conclusion and aid the Court in the statement of reasons to support it. Indeed, it would have been appropriate to give Congress opportunity to be heard before devesting it of power to prescribe rules of decision to be followed in the courts of the United States. See *Myers v. United States, 272 U.S. 52, 176*.

The course pursued by the Court in this case is repugnant to the Act of Congress of August 24, 1937, 50 Stat. 751. It declares: "That whenever the constitutionality of any Act of Congress affecting the public interest is drawn in question in any court of the United States in any suit or proceeding to which the United States, or any agency thereof, or any officer or employee thereof, as such officer or employee, is not a party, the court having jurisdiction of the suit or proceeding shall certify such fact to the Attorney General. In any such case the court shall permit the United States to intervene and become a party **[****46]** for presentation of evidence (if evidence is otherwise receivable in such suit or proceeding) and argument upon the question of the constitutionality of such Act. In any such suit or proceeding the United States shall, subject to the applicable provisions of law, have all the rights of a **[*89]** party and the liabilities of a party as to court costs to the extent necessary for a proper presentation of the facts and law relating to the constitutionality of such Act." That provision extends to this Court. § 5. If defendant had applied for and obtained the writ of certiorari upon the claim that, as now held, Congress has no power to prescribe the rule of decision, § 34 as construed, it would have been the duty of this Court to issue the prescribed certificate to the Attorney General in order that the United States might intervene and be heard on the constitutional question. Within the purpose of the statute and its true intent and meaning, the constitutionality of that measure has been "drawn in question." Congress intended to give the United States the right to be heard in every case involving constitutionality of an Act affecting the public interest. In view of the rule that, **[****47]** in the absence of challenge of constitutionality, statutes will not here be invalidated on that ground, the Act of August 24, 1937 extends to cases where constitutionality is first "drawn in question" by the Court. No extraordinary or unusual action by the Court after submission of the cause should be permitted to frustrate the wholesome purpose of that Act. The duty it imposes ought here to be willingly assumed. If it were doubtful whether this case is within the scope of the Act, the Court should give the United States opportunity to intervene and, if so advised, to present argument on the constitutional question, for undoubtedly it is one of great public importance. That would be to construe the Act according to its meaning.

The Court's opinion in its first sentence defines the question to be whether the doctrine of *Swift* v. *Tyson*

shall now be disapproved; it recites (p. 72) that Congress is without power to prescribe rules of decision that have been followed by federal courts as a result of the construction of § 34 in *Swift* v. *Tyson* and since; after discussion, it declares (pp. 77-78) that "the unconstitutionality of the course pursued [meaning the rule **[****48]** of decision **[*90]** resulting from that construction] compels" abandonment of the doctrine so long applied; and then near the end of the last page the Court states that it does not hold § 34 unconstitutional, but merely that, in applying the doctrine of **[***1201]** *Swift* v. *Tyson* construing it, this Court and the lower courts have invaded rights which are reserved **[**828]** by the Constitution to the several States. But, plainly through the form of words employed, the substance of the decision appears; it strikes down as unconstitutional § 34 as construed by our decisions; it divests the Congress of power to prescribe rules to be followed by federal courts when deciding questions of general law. In that broad field it compels this and the lower federal courts to follow decisions of the courts of a particular State.

I am of opinion that the constitutional validity of the rule need not be considered, because under the law, as found by the courts of Pennsylvania and generally throughout the country, it is plain that the evidence required a finding that plaintiff was guilty of negligence that contributed to cause his injuries and that the judgment below should be reversed **[****49]** upon that ground.

MR. JUSTICE McREYNOLDS concurs in this opinion.

MR. JUSTICE REED.

I concur in the conclusion reached in this case, in the disapproval of the doctrine of *Swift* v. *Tyson*, and in the reasoning of the majority opinion except in so far as it relies upon the unconstitutionality of the "course pursued" by the federal courts.

The "doctrine of *Swift* v. *Tyson*," as I understand it, is that the words "the laws," as used in § 34, line one, of the Federal Judiciary Act of September 24, 1789, do not include in their meaning "the decisions of the local tribunals." Mr. Justice Story, in deciding that point, said (16 Pet. 19):

[*91] "Undoubtedly, the decisions of the local tribunals upon such subjects are entitled to, and will receive, the most deliberate attention and respect of this Court; but they cannot furnish positive rules, or conclusive authority, by which our own judgments are to be bound up and governed."

To decide the case now before us and to "disapprove" the doctrine of *Swift* v. *Tyson* requires only that we say that the words "the laws" include in their meaning the decisions of the local tribunals. As the majority opinion **[****50]** shows, by its reference to Mr. Warren's researches and the first quotation from Mr. Justice Holmes, that this Court is now of the view that "laws" includes "decisions," it is unnecessary to go further and declare that the "course pursued" was "unconstitutional," instead of merely erroneous.

The "unconstitutional" course referred to in the majority opinion is apparently the ruling in *Swift* v. *Tyson* that the supposed omission of Congress to legislate as to the effect of decisions leaves federal courts free to interpret general law for themselves. I am not at all sure whether, in the absence of federal statutory direction, federal courts would be compelled to follow state decisions. There was sufficient doubt about the matter in 1789 to induce the first Congress to legislate. No former opinions of this Court have passed upon it. Mr. Justice Holmes evidently saw nothing "unconstitutional" which required the overruling of *Swift* v. *Tyson*, for he said in the very opinion quoted by the majority, "I should leave *Swift* v. *Tyson* undisturbed, as I indicated in *Kuhn* v. *Fairmont Coal Co*., but I would not allow it to spread the assumed dominion into new fields. **[****51]** " *Black & White Taxicab Co*. v. *Brown & Yellow Taxicab Co., 276 U.S. 518, 535*. If the opinion commits this Court to the position that the Congress is without power to declare what rules of substantive law shall govern the federal courts, **[*92]** that conclusion also seems questionable. The line between procedural and substantive law is hazy but no one doubts federal power over procedure. **[***1202]** *Wayman v. Southard, 10 Wheat. 1*. The Judiciary Article and the "necessary and proper" clause of Article One may fully authorize legislation, such as this section of the Judiciary Act.

In this Court, *stare decisis*, in statutory construction, is a useful rule, not an inexorable command. *Burnet v. Coronado Oil & Gas Co., 285 U.S. 393*, dissent, p. 406, note 1. Compare *Read* v. *Bishop of Lincoln*, [1892] A. C. 644, 655; *London Street Tramways Co*. v. *London County Council*, [1898] A. C. 375, 379. It seems preferable to overturn an established construction of an Act of Congress, rather than, in the circumstances of this case, to interpret the Constitution. Cf. *United States v. Delaware & Hudson Co., 213 U.S. 366*. **[****52]**

There is no occasion to discuss further the range or soundness of these few phrases of the opinion. It is sufficient now to call attention to them and express my own non-acquiescence.

Louisiana ex rel. Francis v. Resweber

Supreme Court of the United States

November 18, 1946, Argued ; January 13, 1947, Decided

No. 142

Reporter
329 U.S. 459 *; 67 S. Ct. 374 **; 91 L. Ed. 422 ***; 1947 U.S. LEXIS 2777 ****

LOUISIANA EX REL. FRANCIS v. RESWEBER, SHERIFF, ET AL.

Prior History: CERTIORARI TO THE SUPREME COURT OF LOUISIANA.

The Supreme Court of Louisiana denied petitioner's applications for writs of certiorari, mandamus, prohibition and habeas corpus to prevent a second attempt to execute him for murder. This Court granted certiorari. *328 U.S. 833*. Affirmed, p. 466.

Disposition: Affirmed.

Case Summary

Procedural Posture
Petitioner sought review of a decision from the Supreme Court of Louisiana, which denied his applications for writs of certiorari, mandamus, prohibition, and habeas corpus, in which petitioner sought to prevent a second attempt to execute him for murder.

Overview
Petitioner was convicted of murder and sentenced to death by electrocution. A death warrant was issued and when the executioner threw the switch, petitioner's death did not occur because there was a mechanical problem. Subsequently, a new death warrant was issued. Petitioner filed applications for writs of certiorari, mandamus, prohibition, and habeas corpus with the state supreme court. Execution of the sentence was stayed. The state supreme court denied the applications based on a finding that there was no basis for judicial relief. The court granted certiorari to consider the alleged violations of rights under the federal constitution. The court found no double jeopardy that amounted to a denial of federal due process in the proposed execution. The court held that the fact that an unforeseeable accident prevented the prompt consummation of the sentence did not add an element of cruelty to a subsequent execution. The court determined that so long as the law applied to all alike, the requirements of equal protection were met. The court found nothing to show any violation of petitioner's constitutional rights.

Outcome
The court affirmed the decision of the state supreme court that denied petitioner's applications for writs of certiorari, mandamus, prohibition, and habeas corpus. The court found no double jeopardy that amounted to a denial of federal due process in the proposed execution. The court held that petitioner's constitutional rights had not been infringed.

Syllabus

[**1]** Petitioner was convicted in a state court of murder and sentenced to be electrocuted. A warrant for his execution was duly issued. He was prepared for electrocution, placed in the electric chair and subjected to a shock which was intended to cause his death but which failed to do so, presumably because of some mechanical difficulty. He was removed from the chair and returned to prison; but another warrant for his execution at a later date was issued. *Held*:

1. Assuming, but not deciding, that violations of the principles of the double jeopardy provision of the *Fifth Amendment* and the cruel and unusual punishment provision of the *Eighth Amendment* would violate the *due process clause of the Fourteenth Amendment* --

(a) The proposed execution would not violate the *double jeopardy clause of the Fifth Amendment*. P. 462.

(b) It would not violate the *cruel and unusual punishment clause of the Eighth Amendment*. P. 463.

2. The proposed execution would not violate the *equal protection clause of the Fourteenth Amendment*. P. 465.

3. The record of the original trial, showing the warrant of arrest, the indictment, the appointment of counsel, and

the minute entries of trial, **[****2]** selection of jury, verdict and sentence, contains nothing on which this Court could conclude that the constitutional rights of petitioner were infringed at the trial. P. 465.

Counsel: James Skelly Wright argued the cause for petitioner. With him on the brief were Robert E. Kline, Jr. and John L. Ingoldsby, Jr.

Michael E. Culligan and L. O. Pecot argued the cause and filed a brief for respondents.

Judges: Vinson, Black, Reed, Frankfurter, Douglas, Murphy, Jackson, Rutledge, Burton

Opinion by: REED

Opinion

[*460] **[**374]** **[***424]** MR. JUSTICE REED announced the judgment of the Court in an opinion in which THE CHIEF JUSTICE, MR. JUSTICE BLACK and MR. JUSTICE JACKSON join.

This writ of certiorari brings before this Court a unique situation. The petitioner, Willie Francis, is a colored citizen of Louisiana. He was duly convicted of murder and in September, 1945, sentenced to be electrocuted for the crime. **[****3]** Upon a proper death warrant, Francis was prepared for execution and on May 3, 1946, pursuant to the warrant, was placed in the official electric chair of the State of Louisiana in the presence of the authorized witnesses. The executioner threw the switch but, presumably because of some mechanical difficulty, death did not result. **[**375]** He was thereupon removed from the chair and returned to prison where he now is. A new death warrant was issued **[*461]** by the **[***425]** Governor of Louisiana, fixing the execution for May 9, 1946.

[1]Applications to the Supreme Court of the state were filed for writs of certiorari, mandamus, prohibition and habeas corpus, directed to the appropriate officials in the state. Execution of the sentence was stayed. By the applications petitioner claimed the protection of the *due process clause of the Fourteenth Amendment* on the ground that an execution under the circumstances detailed would deny due process to him because of the double jeopardy provision of the *Fifth Amendment* and the cruel and unusual punishment provision of the *Eighth Amendment*. [1] These federal constitutional protections, petitioner claimed, would be denied because he had once gone through the **[****4]** difficult preparation for execution and had once received through his body a current of electricity intended to cause death. The Supreme Court of Louisiana denied the applications on the ground of a lack of any basis for judicial relief. That is, the state court concluded there was no violation of state or national law alleged in the various applications. It spoke of the fact that no "current of sufficient intensity to cause death" passed through petitioner's body. It referred specifically to the fact that the applications of petitioner invoked the provisions of the Louisiana Constitution against cruel and inhuman punishments and putting one in jeopardy of life or liberty twice for the same offense. We granted certiorari on a petition setting forth the aforementioned contentions, to consider the alleged violations of rights under the Federal Constitution in the unusual circumstances of this case. *328 U.S. 833*. For matters of state law, the opinion **[*462]** and order of the Supreme Court of Louisiana are binding on this Court, *Hebert v. Louisiana, 272 U.S. 312, 317*. So far as we are aware, this case is without precedent in any court.

[**5]** To determine whether or not the execution of the petitioner may fairly take place after the experience through which he passed, we shall examine the circumstances under the assumption, but without so deciding, that violation of the principles of the *Fifth* and *Eighth Amendments*, as to double jeopardy and cruel and unusual punishment, would be violative of the *due process clause of the Fourteenth Amendment*. [2] As nothing has been brought to our attention to suggest the contrary, we must and do assume that the state officials carried out their duties under the death warrant in a careful and humane manner. Accidents happen for which no man is to blame. We turn to the question as to whether the proposed enforcement of the criminal law of the state is offensive to any constitutional requirements to which reference has been made.

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[1] *Fifth Amendment*: ". . . nor shall any person be subject for the same offence to be twice put in jeopardy of life or limb; . . ."

Eighth Amendment: "Excessive bail shall not be required, nor excessive fines imposed, nor cruel and unusual punishments inflicted."

[2] See *Twining v. New Jersey, 211 U.S. 78, 99*; *Palko v. Connecticut, 302 U.S. 319, 324*; *In re Kemmler, 136 U.S. 436, 445*; *Collins v. Johnston, 237 U.S. 502, 510*.

[**6]** [2][3]*First*. Our minds rebel against permitting the same sovereignty to punish an accused twice for the same offense. *Ex parte Lange, 18 Wall. 163, 168, 175*; *In re Bradley, 318 U.S. 50*. Compare *United States v. Lanza, 260 U.S. 377, 382*. But where the accused successfully seeks review of a conviction, there is no double jeopardy upon a new trial. **[***426]** *United States v. Ball, 163 U.S. 662, 672*. See *People v. Trezza, 128 N. Y. 529, 535, 28 N. E. 533*. Even where a state obtains a new trial after conviction because of errors, while an accused may be placed **[**376]** on trial a second time, it is not the sort of hardship to the accused that is forbidden by the *Fourteenth Amendment*. **[*463]** *Palko v. Connecticut, 302 U.S. 319, 328*. [3] As this is a prosecution under state law, so far as double jeopardy is concerned, the *Palko* case is decisive. For we see no difference from a constitutional point of view between a new trial for error of law at the instance of the state that results in a death sentence instead of imprisonment for life and an execution that follows a failure of equipment. When an accident, with no suggestion of malevolence, prevents the consummation **[****7]** of a sentence, the state's subsequent course in the administration of its criminal law is not affected on that account by any requirement of due process under the *Fourteenth Amendment*. We find no double jeopardy here which can be said to amount to a denial of federal due process in the proposed execution.

[4][5]*Second*. We find nothing in what took place here which amounts to cruel and unusual punishment in the constitutional sense. The case before us does not call for an examination into any punishments except that of death. See *Weems v. United States, 217 U.S. 349*. The traditional humanity of modern Anglo-American law forbids the infliction of unnecessary pain in the execution of the death sentence. Prohibition against the wanton infliction of pain has come into our law from the *Bill of Rights* of 1688. The identical words appear in our *Eighth Amendment*. The Fourteenth would prohibit by **[****8]** its due process clause execution by a state in a cruel manner. [4]

[3] See *Kepner v. United States, 195 U.S. 100, 129*; cf. *United States v. Ball, 163 U.S. 662, 666-70*.

[4] This Court said of a similar clause embodied in the constitution of New York, *In re Kemmler, 136 U.S. 436, 446*:

". . . but the language in question as used in the constitution of the State of New York was intended particularly to operate upon the legislature of the State, to whose control the punishment of crime was almost wholly confided. So that, if the punishment prescribed for an offence against the laws of the State were manifestly cruel and unusual, as burning at the stake, crucifixion, breaking on the wheel, or the like, it would be the duty of the courts to adjudge such penalties to be within the constitutional prohibition."

It added, p. 447:

"Punishments are cruel when they involve torture or a lingering death; but the punishment of death is not cruel, within the meaning of that word as used in the Constitution. It implies there something inhuman and barbarous, something more than the mere extinguishment of life."

Louisiana has the same humane provision in its constitution. *Louisiana Constitution, Art. I, § 12*. The *Kemmler* case denied that electrocution infringed the federal constitutional rights of a convicted criminal sentenced to execution.

[**9]**

[*464] [6]Petitioner's suggestion is that because he once underwent the psychological strain of preparation for electrocution, now to require him to undergo this preparation again subjects him to a lingering or cruel and unusual punishment. Even the fact that petitioner has already been subjected to a current of electricity does not make his subsequent execution any more cruel in the constitutional sense than any other execution. The cruelty against which the Constitution protects a convicted man is cruelty inherent in the method of punishment, not the necessary suffering involved in any method employed to extinguish life humanely. The fact that an unforeseeable accident **[***427]** prevented the prompt consummation of the sentence cannot, it seems to us, add an element of cruelty to a subsequent execution. There is no purpose to inflict unnecessary pain nor any unnecessary pain involved in the proposed execution. The situation of the unfortunate victim of this accident is just as though he had suffered the identical amount of mental anguish and physical pain in any other occurrence, such as, for example, a fire in the cell block. We cannot agree that the hardship imposed upon the petitioner **[****10]** rises to that level of **[**377]** hardship denounced as denial of due process because of cruelty.

[*465] [7][8]*Third*. The Supreme Court of Louisiana also rejected petitioner's contention that death inflicted after his prior sufferings would deny him the equal protection of the laws, guaranteed by the *Fourteenth Amendment*. This suggestion in so far as it differs from the due process argument is based on the idea that

execution, after an attempt at execution has failed, would be a more severe punishment than is imposed upon others guilty of a like offense. That is, since others do not go through the strain of preparation for execution a second time or have not experienced a nonlethal current in a prior attempt at execution, as petitioner did, to compel petitioner to submit to execution after these prior experiences denies to him equal protection. Equal protection does not protect a prisoner against even illegal acts of officers in charge of him, much less against accidents during his detention for execution. See *Lisenba v. California, 314 U.S. 219, 226*. Laws cannot prevent accidents nor can a law equally protect all against them. So long as the law applies to all alike, the requirements **[****11]** of equal protection are met. We have no right to assume that Louisiana singled out Francis for a treatment other than that which has been or would generally be applied.

[9]*Fourth*. There is a suggestion in the brief that the original trial itself was so unfair to the petitioner as to justify a reversal of the judgment of conviction and a new trial. Petitioner's claim in his brief is that he was inadequately represented by counsel. The record of the original trial presented to us shows the warrant for arrest, the indictment, the appointment of counsel and the minute entries of trial, selection of jury, verdict and sentence. There is nothing in any of these papers to show any violation of petitioner's constitutional rights. See *Carter v. Illinois, 329 U.S. 173*. Review is sought here because of a denial of due process of law that would be brought about by execution of petitioner after failure of the first effort to electrocute him. Nothing is before us upon which a ruling **[*466]** can be predicated as to alleged denial of federal constitutional rights during petitioner's trial. On this record, we see nothing upon which we could conclude that the constitutional rights **[****12]** of petitioner were infringed.

Affirmed.

Concur by: FRANKFURTER

Concur

MR. JUSTICE FRANKFURTER, concurring.

When four members of the Court find that a State has denied to a person the due process which the *Fourteenth Amendment* safeguards, it seems to me important to be explicit regarding the criteria by which the State's duty of obedience to the Constitution must be judged. Particularly is this so when life is at stake. Until July 28, 1868, when the *Fourteenth Amendment* was ratified, the Constitution of the United States left the States free to carry out their own notions of criminal justice, except insofar as they were limited by Article I, § 10 of the Constitution which declares: "No State shall . . . pass any Bill of Attainder, [or] ex post facto Law . . ." **[***428]** The *Fourteenth Amendment* placed no specific restraints upon the States in the formulation or the administration of their criminal law. It restricted the freedom of the States generally, so that States thereafter could not "abridge the privileges or immunities of citizens of the United States," or "deprive any person of life, liberty, or property, without due process of law," or "deny to any person within its jurisdiction the equal **[****13]** protection of the laws."

These are broad, inexplicit clauses of the Constitution, unlike specific provisions of the first eight amendments formulated by the Founders to guard against recurrence of well-defined historic grievances. But broad as these clauses are, they are not generalities of empty vagueness. They are circumscribed partly by history and partly by the problems of government, large and dynamic **[*467]** though they be, with which they are concerned. The "privileges or immunities **[**378]** of citizens of the United States" concern the dual citizenship under our federal system. The safeguards of "due process of law" and "the equal protection of the laws" summarize the meaning of the struggle for freedom of English-speaking peoples. They run back to Magna Carta but contemplate no less advances in the conceptions of justice and freedom by a progressive society. See the classic language of Mr. Justice Matthews in *Hurtado v. California, 110 U.S. 516, 530-31*.

When, shortly after its adoption, the *Fourteenth Amendment* came before this Court for construction, it was urged that the "privileges or immunities of citizens of the United States" which were not to be abridged by **[****14]** any State were the privileges and immunities which citizens theretofore enjoyed under the Constitution. If that view had prevailed, the Privileges or Immunities Clause of the *Fourteenth Amendment* would have placed upon the States the limitations which the specific articles of the first eight amendments had theretofore placed upon the agencies of the national government. After the fullest consideration that view was rejected. The rejection has the authority that comes from contemporaneous knowledge of the purposes of the *Fourteenth Amendment*. See *Slaughter-House Cases, 16 Wall. 36, 67-68*; *Davidson v. New Orleans, 96 U.S. 97*. The notion that the Privileges or

Immunities Clause of the *Fourteenth Amendment* absorbed, as it is called, the provisions of the *Bill of Rights* that limit the Federal Government has never been given countenance by this Court.

Not until recently was it suggested that the *Due Process Clause of the Fourteenth Amendment* was merely a compendious reference to the *Bill of Rights* whereby the States were now restricted in devising and enforcing their penal code precisely as is the Federal Government by the **[*468]** first eight amendments. On this view, **[****15]** the States would be confined in the enforcement of their criminal codes by those views for safeguarding the rights of the individual which were deemed necessary in the eighteenth century. Some of these safeguards have perduring validity. Some grew out of transient experience or formulated remedies which time might well improve. The *Fourteenth Amendment* did not mean to imprison the States into the limited experience of the eighteenth century. It did mean to withdraw from the States the right to act in ways that are offensive to a decent respect for the dignity of man, and heedless of his freedom.

These are very broad terms by which to accommodate freedom and authority. As has been suggested from time to time, they may be too large to serve as the basis for adjudication, in that they allow much room for individual notions of policy. That is not our concern. The fact is that the duty of such adjudication **[***429]** on a basis no less narrow has been committed to this Court.

In an impressive body of decisions this Court has decided that the *Due Process Clause of the Fourteenth Amendment* expresses a demand for civilized standards which are not defined by the specifically enumerated guarantees **[****16]** of the *Bill of Rights*. They neither contain the particularities of the first eight amendments nor are they confined to them. That due process of law has its own independent function has been illustrated in numerous decisions, and has been expounded in the opinions of the Court which have canvassed the matter most thoroughly. See *Hurtado v. California, supra; Twining v. New Jersey, 211 U.S. 78*; *Snyder v. Massachusetts, 291 U.S. 97*; *Palko v. Connecticut, 302 U.S. 319*. Insofar as due process under the *Fourteenth Amendment* requires the States to observe any of the immunities "that are valid as against the federal government by force of the specific pledges of particular amendments," it does so because they "have **[*469]** been found to be implicit in the concept of ordered liberty, and thus, through the *Fourteenth Amendment*, **[**379]** become valid as against the states." *Palko v. Connecticut, supra, at 324-25*.

The Federal *Bill of Rights* requires that prosecutions for federal crimes be initiated by a grand jury and tried by a petty jury; it protects an accused from being a witness against himself. The States are free to consult their own conceptions of **[****17]** policy in dispensing with the grand jury, in modifying or abolishing the petty jury, in withholding the privilege against self-crimination. See *Maxwell v. Dow, 176 U.S. 581*; *Twining v. New Jersey, supra; Snyder v. Massachusetts, supra; Palko v. Connecticut, supra, at 323, 324*; *cf. Feldman v. United States, 322 U.S. 487*. In short, the *Due Process Clause of the Fourteenth Amendment* did not withdraw the freedom of a State to enforce its own notions of fairness in the administration of criminal justice unless, as it was put for the Court by Mr. Justice Cardozo, "in so doing it offends some principle of justice so rooted in the traditions and conscience of our people as to be ranked as fundamental." *Snyder v. Massachusetts, supra, at 105*.

A State may offend such a principle of justice by brutal subjection of an individual to successive retrials on a charge on which he has been acquitted. Such conduct by a State might be a denial of due process, but not because the protection against double jeopardy in a federal prosecution against which the *Fifth Amendment* safeguards limits a State. For the disputations that are engendered by technical aspects **[****18]** of double jeopardy as enshrined in the *Fifth Amendment*, see the majority and dissenting opinions in *Ex parte Lange, 18 Wall. 163*, and *In re Bradley, 318 U.S. 50*. Again, a State may be found to deny a person due process by treating even one guilty of crime in a manner that violates standards of decency more or less universally accepted though not when it treats him **[*470]** by a mode about which opinion is fairly divided. But the penological policy of a State is not to be tested by the scope of the *Eighth Amendment* and is not involved in the controversy which is necessarily evoked by that Amendment as to the historic meaning of "cruel and unusual punishment." See *Weems v. United States, 217 U.S. 349*, and particularly the dissenting opinion of White and Holmes, JJ.

[*430]** Once we are explicit in stating the problem before us in terms defined by an unbroken series of decisions, we cannot escape acknowledging that it involves the application of standards of fairness and justice very broadly conceived. They are not the application of merely personal standards but the

impersonal standards of society which alone judges, as the organs of Law, are empowered to enforce. When **[****19]** the standards for judicial judgment are not narrower than "immutable principles of justice which inhere in the very idea of free government," *Holden v. Hardy, 169 U.S. 366, 389*, "fundamental principles of liberty and justice which lie at the base of all our civil and political institutions," *Hebert v. Louisiana, 272 U.S. 312, 316*, "immunities . . . implicit in the concept of ordered liberty," *Palko v. Connecticut, supra, at 324-25*, great tolerance toward a State's conduct is demanded of this Court. Such were recently stated to be "the controlling principles." See Mr. Chief Justice Stone in *Malinski v. New York, 324 U.S. 401, 438*, in connection with the concurring opinion in that case, *ibid*., 412, 416, 417.

I cannot bring myself to believe that for Louisiana to leave to executive clemency, rather than to require, mitigation of a sentence of death duly pronounced upon conviction for murder because a first attempt to carry it out was an innocent misadventure, **[**380]** offends a principle of justice "rooted in the traditions and conscience of our people." See *Snyder v. Massachusetts, supra, at 105*. Short of **[*471]** the compulsion of such a principle, **[****20]** this Court must abstain from interference with State action no matter how strong one's personal feeling of revulsion against a State's insistence on its pound of flesh. One must be on guard against finding in personal disapproval a reflection of more or less prevailing condemnation. Strongly drawn as I am to some of the sentiments expressed by my brother BURTON, I cannot rid myself of the conviction that were I to hold that Louisiana would transgress the Due Process Clause if the State were allowed, in the precise circumstances before us, to carry out the death sentence, I would be enforcing my private view rather than that consensus of society's opinion which, for purposes of due process, is the standard enjoined by the Constitution.

The fact that I reach this conclusion does not mean that a hypothetical situation, which assumes a series of abortive attempts at electrocution or even a single, cruelly willful attempt, would not raise different questions. When the Fourteenth *Amendment first* came here for application the Court abstained from venturing even a tentative definition of due process. With wise forethought it indicated that what may be found within or without the Due **[****21]** Process Clause must inevitably be left to "the gradual process of judicial inclusion and exclusion, as the cases presented for decision shall require, with the reasoning on which such decisions may be founded." *Davidson v. New Orleans, supra, at 104*. This is another way of saying that these are matters which depend on "differences of degree. The whole law does so as soon as it is civilized." Holmes, J., in *LeRoy Fibre Co*. v. *Chicago, M. & St. P. R. Co., 232 U.S. 340, 354*. Especially is this so as to questions arising under the Due Process Clause. A finding that in this case the State of Louisiana has not gone beyond its powers is for me not the starting point for abstractly logical extension. Since I cannot say that it would be "repugnant to the conscience of mankind," **[*472]** *Palko v. Connecticut, supra, at 323*, **[***431]** for Louisiana to exercise the power on which she here stands, I cannot say that the Constitution withholds it.

Dissent by: BURTON

Dissent

MR. JUSTICE BURTON, with whom MR. JUSTICE DOUGLAS, MR. JUSTICE MURPHY and MR. JUSTICE RUTLEDGE concur, dissenting.

Under circumstances unique in judicial history, the relator asks this Court to stay his execution on the ground **[****22]** that it will violate the due process of law guaranteed to him by the Constitution of the United States. We believe that the unusual facts before us require that the judgment of the Supreme Court of Louisiana be vacated and that this cause be remanded for further proceedings not inconsistent with this opinion. Those proceedings should include the determination of certain material facts not previously determined, including the extent, if any, to which electric current was applied to the relator during his attempted electrocution on May 3, 1946. Where life is to be taken, there must be no avoidable error of law or uncertainty of fact.

The relator's execution was ordered by the Governor of Louisiana to take place May 3, 1946. Of the proceedings on that day, the Supreme Court of Louisiana has said:

". . . between the Hours of 12:00 o'clock noon and 3:00 o'clock p. m., Willie Francis was strapped in the electric chair and an attempt was made to electrocute him, but, because of some defect in the apparatus devised and used for electrocutions, the contrivance failed to function, and after an unsuccessful attempt to electrocute Francis he was removed from the chair."

Of the same proceedings, **[****23]** the State's brief

says:

[381]** "Through a latent electrical defect, the attempt to electrocute Francis failed, the State contending no **[*473]** current whatsoever reached Francis' body, the relator contending a current of electricity did pass through his body; but in any event, Willie Francis was not put to death."

On May 8, the death warrant was canceled, and the relator's execution has been stayed pending completion of these proceedings. The Governor proposes to issue another death warrant for the relator's electrocution and the relator now asks this Court to prevent it for the reason that, under the present unique circumstances, his electrocution will be so cruel and unusual as to violate the *due process clause of the Fourteenth Amendment to the Constitution of the United States*.

That Amendment provides: "nor shall any State deprive any person of life, liberty, or property, without due process of law; . . . ." When this was adopted in 1868, there long had been imbedded deeply in the standards of this nation a revulsion against subjecting guilty persons to torture culminating in death. Preconstitutional American history reeked with cruel punishment to such an extent that, in 1791, **[****24]** the *Eighth Amendment to the Constitution of the United States* expressly imposed upon federal agencies a mandate that "Excessive bail shall not be required, nor excessive fines imposed, nor cruel and unusual punishments inflicted." Louisiana and many other states have adopted like constitutional provisions. See *Section 12 of Article I of the Constitution of Louisiana* (1921).

The capital case before us presents an instance of the violation of constitutional due process that is more clear than would be presented by many lesser punishments prohibited by the *Eighth Amendment* or its state counterparts. Taking human life by unnecessarily cruel means shocks the most fundamental instincts of civilized man. It should not be possible under the constitutional procedure **[*474]** of a self-governing people. Abhorrence of the cruelty of ancient forms of capital punishment has increased steadily until, today, some states have prohibited capital punishment altogether. It is unthinkable that any state legislature **[***432]** in modern times would enact a statute expressly authorizing capital punishment by repeated applications of an electric current separated by intervals of days or hours until finally **[****25]** death shall result. The Legislature of Louisiana did not do so. The Supreme Court of Louisiana did not say that it did. The Supreme Court of Louisiana said merely that the pending petitions for relief in this case presented an executive rather than a judicial question and, by that mistake of law, it precluded itself from discussing the constitutional issue before us.

In determining whether the proposed procedure is unconstitutional, we must measure it against a lawful electrocution. The contrast is that between instantaneous death and death by installments -- caused by electric shocks administered after one or more intervening periods of complete consciousness of the victim. Electrocution, when instantaneous, *can* be inflicted by a state in conformity with due process of law. *In re Kemmler, 136 U.S. 436*. The Supreme Court of Louisiana has held that electrocution, in the manner prescribed in its statute, is more humane than hanging. *State ex rel. Pierre v. Jones, 200 La. 807, 9 So. 2d 42*, cert. denied, *317 U.S. 633*. See also, *Malloy v. South Carolina, 237 U.S. 180*.

The all-important consideration is that the execution shall be so instantaneous and **[****26]** substantially painless that the punishment shall be reduced, as nearly as possible, to no more than that of death itself. Electrocution has been approved only in a form that eliminates suffering.

The Louisiana statute makes this clear. It provides that:

"Every sentence of death imposed in this State shall be by electrocution; that is, causing to pass **[*475]** through the body of the person convicted a current of electricity of sufficient intensity to cause death, and the **[**382]** application and continuance of such current through the body of the person convicted until such person is dead. . . ." La. Code of Criminal Procedure (1928), Act No. 2, Art. 569, as amended by § 1, Act No. 14, 1940.

It does not provide for electrocution by interrupted or repeated applications of electric current at intervals of several days or even minutes. It does not provide for the application of electric current of an intensity less than that sufficient to cause death. It prescribes expressly and solely for the application of a current of sufficient intensity to cause death and for the *continuance* of that application until death results. Prescribing capital punishment, it should be construed strictly. **[****27]** There can be no implied provision for a second, third or multiple application of the current. There is no statutory or judicial precedent upholding a delayed process of electrocution.

These considerations were emphasized in *In re*

Kemmler, supra, when an early New York statute authorizing electrocution was attacked as violative of the *due process clause of the Fourteenth Amendment* because prescribing a cruel and unusual punishment. In upholding that statute, this Court stressed the fact that the electric current was to cause instantaneous death. Like the Louisiana statute before us, that statute called expressly for the continued application of a sufficient electric current to cause death. It was the resulting "instantaneous" and "painless" death that was referred to as "humane."

After quoting the New York County and Supreme Courts, this Court quoted the New York Court of Appeals, at 119 N. Y. 579, as follows:

"'We have examined this testimony and can find but little in it to warrant the belief that this new mode of execution is cruel, within the meaning of the constitution, **[*476]** **[***433]** though it is certainly unusual. On the contrary, we agree with the court below that it **[****28]** removes every reasonable doubt that the application of electricity to the vital parts of the human body, *under such conditions and in the manner contemplated by the statute, must result in instantaneous, and consequently in painless, death.'*" (Italics supplied.) *In re Kemmler, supra, at 443-444*.

Finally, speaking for itself, this Court said:

"*Punishments are cruel when they involve torture or a lingering death; but the punishment of death is not cruel, within the meaning of that word as used in the Constitution. It implies there something inhuman and barbarous, something more than the mere extinguishment of life*." (Italics supplied.) *Id. at 447*.

If the state officials deliberately and intentionally had placed the relator in the electric chair five times and, each time, had applied electric current to his body in a manner not sufficient, until the final time, to kill him, such a form of torture would rival that of burning at the stake. Although the failure of the first attempt, in the present case, was unintended, the reapplication of the electric current will be intentional. How many deliberate and intentional reapplications of electric current does it take **[****29]** to produce a cruel, unusual and unconstitutional punishment? While five applications would be more cruel and unusual than one, the uniqueness of the present case demonstrates that, today, two separated applications are sufficiently "cruel and unusual" to be prohibited. If five attempts would be "cruel and unusual," it would be difficult to draw the line between two, three, four and five. It is not difficult, however, as we here contend, to draw the line between the one continuous application prescribed by statute and any other application of the current.

[*477] Lack of intent that the first application be less than fatal is not material. The intent of the executioner cannot lessen the torture or excuse the result. It was the statutory duty of the state officials to make sure that there was no failure. The procedure in **[**383]** this case contrasts with common knowledge of precautions generally taken elsewhere to insure against failure of electrocutions. The high standard of care generally taken evidences the significance properly attached to the unconditional requirement of a single continued application of the current until death results. In our view of this case, we are giving **[****30]** careful recognition to the law of Louisiana. Neither the Legislature nor the Supreme Court of Louisiana has expressed approval of electrocution other than by one continuous application of a lethal current.

Executive clemency provides a common means of avoiding unconstitutional or otherwise questionable executions. When, however, the unconstitutionality of proposed executive procedure is brought before this Court, as in this case, we should apply the constitutional protection. In this case, final recourse is had to the high trusteeship vested in this Court by the people of the United States over the constitutional process by which their own lives may be taken.

In determining whether a case of cruel and unusual punishment constitutes a violation of due process of law, each case must turn upon its particular facts. The record in this case is not limited to an instance where a prisoner was placed in the electric chair and released before being subjected to the electric current. It presents more than a case of mental anguish, however severe such a case might be. The petition to the Supreme Court of Louisiana expressly states that a current of electricity was caused to pass through **[****31]** the body of the relator. This allegation was denied **[*478]** in the answer and no evidence was presented **[***434]** by either side. The Supreme Court of Louisiana thereupon undertook to decide the case on the pleadings. It said:

"Our conclusion is that the complaint made by the relator is a matter over which the courts have no authority. Inasmuch as the proceedings had in the district court, up to and including the pronouncing of the sentence of death, were entirely regular, we have no authority to set aside the sentence and release the relator from the sheriff's custody." [1]

[**32]** This statement assumed that the relief sought in the Supreme Court of Louisiana was only a review of the judicial proceedings in the lower state courts prior to the passing of sentence upon the relator on September 14, 1945. On the contrary, the issue raised there and here primarily concerns the action of state officials on and after May 3, 1946, in connection with their past and proposed attempts to electrocute the relator. This issue properly presents a federal constitutional question based on the impending deprivation of the life of the relator by executive officials of the State of Louisiana in a manner alleged **[*479]** to be a violation of the due process of law guaranteed by the *Fourteenth Amendment*. The refusal of the writs necessarily denied the constitutional protection prayed for. In ruling against the relator on the pleadings, in the absence of further evidence, the Supreme Court of Louisiana must be taken to have acted upon the allegations of fact most favorable to the relator. The petition contains the unequivocal allegation that the official electrocutioner "turned on the switch and a current of electricity was caused to pass through the body of relator, all in **[****33]** the **[**384]** presence of the official witnesses." This allegation must be read in the light of the Louisiana statute which authorized the electrocutioner to apply to the body of the relator only such an electric current as was of "sufficient intensity to cause death." On that record, denial of relief means that the proposed repeated, and at least second, application to the relator of an electric current sufficient to cause death is not, under present circumstances, a cruel and unusual punishment violative of due process of law. It exceeds any punishment prescribed by law. There is no precedent for it. What then is it, if it be not cruel, unusual and unlawful? In spite of the constitutional issue thus raised, the Supreme Court of Louisiana treated it as an executive question not subject to judicial review. We believe that if the facts are as alleged by the relator the proposed action is unconstitutional. We believe also that the Supreme Court of Louisiana should provide for the determination of the facts and then proceed in a manner not inconsistent with this opinion.

That counsel for both sides recognize the materiality of what occurred on May 3, 1946, is demonstrated by the affidavits **[****34]** and the transcript of testimony which they took from available public records and called to the attention of this **[***435]** Court by publication of them in connection with their respective briefs in this Court. Excerpts from those **[*480]** public records, printed in the margin, indicate the conflict of testimony which should be resolved. [2]

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[1] That court, in discussing the pleadings, also said:

"In this latter answer or opposition it is admitted that the attempt was made to electrocute Willie Francis on May 3, 1946, in obedience of the death warrant, but it is averred that through some latent electrical defect in the apparatus, no electric current reached the body of Willie Francis and for that reason the sentence of death was not carried out. We have no other evidence, of course, as to whether an electric current did reach the body of Willie Francis. The important fact, however, is that a current of sufficient intensity to cause death, as required by the statute on the subject, and by the death warrant, did not pass through the body of Willie Francis."

This means that, as long as the relator did not die, the court apparently regarded the carrying out of the death sentence as a purely executive function not subject to judicial review.

[2] The following excerpts are from copies of affidavits printed as appendices to the brief on behalf of the petitioner. The official witnesses named were persons charged by statute with the duty of making a signed report or "proces verbal" reciting the manner and date of the execution to be filed with the clerk of the court in which the sentence was imposed. La. Code of Criminal Procedure (1928), Act No. 2, Art. 571. The statements refer to what happened after the relator had been strapped into the electric chair and a hood placed before his eyes.

"Then the electrocutioner turned on the switch and when he did Willie Francis' lips puffed out and he groaned and jumped so that the chair came off the floor. Apparently the switch was turned on twice and then the condemned man yelled: 'Take it off. Let me breath.'" Affidavit of official witness Harold Resweber, dated May 23, 1946.

"I saw the electrocutioner turn on the switch and I saw his lips puff out and swell, his body tensed and stretched. I heard the one in charge yell to the man outside for more juice when he saw that Willie Francis was not dying and the one on the outside yelled back he was giving him all he had. Then Willie Francis cried out 'Take it off. Let me breath.' Then they took the hood from his eyes and unstrapped him.

. . . .

"This boy really got a shock when they turned that machine on." Affidavit of official witness Ignace Doucet, dated May 30, 1946.

[**35]** **[**385]** The remand of this cause to the Supreme Court of Louisiana in the manner indicated would not mean that the **[*481]** relator necessarily is entitled to a complete release. It would mean merely that the courts of Louisiana must examine the facts, both as to the actual nature of the punishment already inflicted and that proposed to be inflicted and, if the proposed punishment amounts to a violation of due process of law under the Constitution of the United States, then the State must find some means of disposing of this case that will not violate that Constitution.

For the reasons stated, we are unable to concur in the judgment of this Court which affirms the judgment below.

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"After he was strapped to the chair the Sheriff of St. Martin Parish asked him if he had anything to say about anything and he said nothing. Then the hood was placed before his eyes. Then the officials in charge of the electrocution were adjusting the mechanisms and when the needle of the meter registered to a certain point on the dial, the electrocutioner pulled down on the switch and at the same time said: 'Goodby Willie.' At that very moment, Willie Francis' lips puffed out and his body squirmed and tensed and he jumped so that the chair rocked on the floor. Then the condemned man said: 'Take it off. Let me breath.' Then the switch was turned off. Then some of the men left and a few minutes after the Sheriff of St. Martin Parish, Mr. E. L. Resweber, came in and announced that the governor had granted the condemned man a reprieve." Affidavit of official chaplain Reverend Maurice L. Rousseve, dated May 25, 1946.

Attached to the brief on behalf of the respondents there was submitted a copy of the transcript of testimony taken before the Louisiana Pardon Board on May 31, 1946, in support of the relator's application for executive clemency which was denied June 1, 1946. This transcript includes testimony of those who were in charge of the electrical equipment on May 3, to the effect that no electric current reached the body of the relator and that his flesh did not show electrical burns. It also included a statement by the sheriff of a neighboring parish, who accompanied the relator from the chair, that the relator told him on leaving the chair that the electric current had "tickled him."

These public records were not in existence and therefore not before the Supreme Court of Louisiana when it rendered its decision on May 15, 1946.

New York v. Burger

Supreme Court of the United States

February 23, 1987, Argued ; June 19, 1987, Decided

No. 86-80

Reporter

482 U.S. 691 *; 107 S. Ct. 2636 **; 96 L. Ed. 2d 601 ***; 1987 U.S. LEXIS 2725 ****; 55 U.S.L.W. 4890

NEW YORK v. BURGER

Prior History: [**1]** CERTIORARI TO THE COURT OF APPEALS OF NEW YORK.

Disposition: *67 N. Y. 2d 338, 493 N. E. 2d 926*, reversed and remanded.

Case Summary

Procedural Posture

Petitioner, the State of New York, sought review of a decision of the Court of Appeals of New York, which found that spontaneous warrantless inspections of respondent vehicle dismantler's junkyard pursuant to *N.Y. Veh. & Traf. Law § 415(a)(5)* violated the *Fourth Amendment*.

Overview

Police officers searched respondent vehicle dismantler's junkyard pursuant to *N.Y. Veh. & Traf. Law § 415(a)(5)*, which required junkyard owners to maintain records for routine spontaneous inspections by police officers and state agents. In the course of their search, officers discovered stolen vehicles and parts in respondent's junkyard. On appeal from a decision holding that the statute and search were constitutional, the appellate court reversed upon a conclusion that the statute violated the *Fourth Amendment* because of its authorization of warrantless searches solely for the purpose of uncovering criminality. On grant of certiorari, the Court reversed the appellate court's judgment upon a finding that vehicle dismantlers were part of a closely regulated industry that carried a reduced expectation of privacy thereby lessening the application of *Fourth Amendment* warrant and probable cause requirements. In addition, the high incidence of motor vehicle theft rendered such inspections essential and amounted to a substantial state interest and hence the State was allowed to address the major social problem of car theft by the implementation of an administrative scheme.

Outcome

The Court reversed the lower court's judgment upon a finding that vehicle dismantlers were part of a closely regulated industry that carried a reduced expectation of privacy, thereby lessening the application of *Fourth Amendment* warrant and probable cause requirements. Hence, the State's authorization of warrantless inspections of junkyards, concededly for the purpose of uncovering criminality, was not unconstitutional.

Syllabus

Respondent junkyard owner's business consists, in part, of dismantling automobiles and selling their parts. Pursuant to a New York statute authorizing warrantless inspections of automobile junkyards, police officers entered his junkyard and asked to see his license and records as to automobiles and vehicle parts in his possession. He replied that he did not have such documents, which are required by the statute. After announcing their intention to conduct an inspection of the junkyard pursuant to the statute, the officers, without objection by respondent, conducted the inspection and discovered stolen vehicles and parts. Respondent, who was charged with possession of stolen property and unregistered operation as a vehicle dismantler, moved in state court to suppress **[****2]** the evidence obtained as a result of the inspection, primarily on the ground that the administrative inspection statute was unconstitutional. The court denied the motion, and the Appellate Division affirmed. The New York Court of Appeals reversed, concluding that the statute violated the *Fourth Amendment's* prohibition of unreasonable searches and seizures.

Held:

1. A business owner's expectation of privacy in

commercial property is attenuated with respect to commercial property employed in a "closely regulated" industry. Where the owner's privacy interests are weakened and the government interests in regulating particular businesses are concomitantly heightened, a warrantless inspection of commercial premises, if it meets certain criteria, is reasonable within the meaning of the *Fourth Amendment*. Pp. 699-703.

2. Searches made pursuant to the New York statute fall within the exception to the warrant requirement for administrative inspections of "closely regulated" businesses. Pp. 703-712.

(a) The nature of the statute establishes that the operation of a junkyard, part of which is devoted to vehicle dismantling, is a "closely regulated" business. Although the duration of **[****3]** a particular regulatory scheme has some relevancy, and New York's scheme regulating vehicle dismantlers can be said to be of fairly recent vintage, nevertheless, because widespread use of the automobile is relatively new, automobile junkyards and vehicle dismantlers have not been in existence very long and thus do not have an ancient history of government oversight. Moreover, the automobile-junkyard business is simply a new branch of an industry -- general junkyards and secondhand shops -- that has existed, and has been closely regulated in New York, for many years. Pp. 703-707.

(b) New York's regulatory scheme satisfies the criteria necessary to make reasonable the warrantless inspections conducted pursuant to the inspection statute. First, the State has a substantial interest in regulating the vehicle-dismantling and automobile-junkyard industry because motor vehicle theft has increased in the State and because the problem of theft is associated with such industry. Second, regulation of the industry reasonably serves the State's substantial interest in eradicating automobile theft, and warrantless administrative inspections pursuant to the statute are necessary to further the **[****4]** regulatory scheme. Third, the statute provides a constitutionally adequate substitute for a warrant. It informs a business operator that regular inspections will be made, and also sets forth the scope of the inspection, notifying him as to how to comply with the statute and as to who is authorized to conduct an inspection. Moreover, the "time, place, and scope" of the inspection is limited to impose appropriate restraints upon the inspecting officers' discretion. Pp. 708-712.

3. The New York inspection statute does not violate the *Fourth Amendment* on the ground that it was designed simply to give the police an expedient means of enforcing penal sanctions for possession of stolen property. A State can address a major social problem *both* by way of an administrative scheme -- setting forth rules to guide an operator's conduct of its business and allowing government officials to ensure that such rules are followed -- *and* through penal sanctions. Cf. *United States v. Biswell, 406 U.S. 311*. New York's statute was designed to contribute to the regulatory goals of ensuring that vehicle dismantlers are legitimate businesspersons and that stolen vehicles and **[****5]** vehicle parts passing through automobile junkyards can be identified. Nor is the administrative scheme unconstitutional simply because, in the course of enforcing it, an inspecting officer may discover evidence of crimes, besides violations of the scheme itself. Moreover, there is no constitutional significance in the fact that police officers, rather than "administrative" agents, are permitted to conduct the administrative inspection. So long as a regulatory scheme is properly administrative, it is not rendered illegal by the fact that the inspecting officer has the power to arrest individuals for violations other than those created by the scheme itself. Pp. 712-718.

Counsel: Elizabeth Holtzman argued the cause for petitioner. With her on the briefs were Barbara D. Underwood and Leonard Joblove.

Stephen R. **[****6]** Mahler argued the cause for respondent. With him on the brief was Perry S. Reich. *

Judges: Blackmun, J., delivered the opinion of the Court, in which Rehnquist, C. J., and White, Powell, Stevens, and Scalia, JJ., joined. Brennan, J., filed a dissenting opinion, in which Marshall, J., joined, and in all but Part III of which O'Connor, J., joined, post, p. 718.

Opinion by: BLACKMUN

Opinion

[*693] [*608] [**2639]** JUSTICE BLACKMUN delivered the opinion of the Court.

[1A] [2A]This case presents the question whether the warrantless search of an automobile junkyard,

* Richard Emery, Gerard E. Lynch, and Alvin J. Bronstein filed a brief for the American Civil Liberties Union et al. as amici curiae urging affirmance.

conducted pursuant to a statute authorizing such a search, falls within the exception to the warrant requirement for administrative inspections of pervasively regulated industries. The case also presents the question whether an otherwise proper administrative inspection is unconstitutional because the ultimate purpose **[****7]** of the regulatory statute pursuant to which the search is done -- the deterrence of criminal behavior -- is the same as that of penal laws, with the result that the inspection may disclose violations not only of the regulatory statute but also of the penal statutes.

I

Respondent Joseph Burger is the owner of a junkyard in Brooklyn, N. Y. His business consists, in part, of the dismantling of automobiles and the selling of their parts. His junkyard is an open lot with no buildings. A high metal fence surrounds it, wherein are located, among other things, vehicles and parts of vehicles. At approximately noon on November 17, 1982, Officer Joseph Vega and four other plainclothes officers, all members of the Auto Crimes Division of the New York City Police Department, entered respondent's **[*694]** junkyard to conduct an inspection pursuant to *N. Y. Veh. & Traf. Law § 415-a5* (McKinney 1986). [1] **[****8]** **[***609]** Tr. 6. On any given day, the Division conducts from 5 to 10 inspections of vehicle dismantlers, automobile junkyards, and related businesses. [2] *Id.*, at 26.

Upon entering the junkyard, the officers asked to see Burger's license [3] and his "police book" -- the record of the automobiles **[*695]** **[**2640]** and vehicle parts in his possession. Burger replied that he had neither a license nor a police book. [4] The officers then announced their intention to conduct a § 415-a5 inspection. Burger did not object. Tr. 6, 47. In accordance with their practice, the officers copied down the Vehicle Identification Numbers (VINs) of several vehicles and parts of vehicles that were in the junkyard. *Id.*, at 7, 20, 44, 46. After checking these numbers against a police computer, the officers determined that respondent was in possession of stolen vehicles and parts. [5] **[****10]** Accordingly, Burger was arrested and charged with five counts of possession of stolen property [6] **[*696]**

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[1] This statute reads in pertinent part:

"Records and identification. (a) Any records required by this section shall apply only to vehicles or parts of vehicles for which a certificate of title has been issued by the commissioner [of the Department of Motor Vehicles] or which would be eligible to have such a certificate of title issued. Every person required to be registered pursuant to this section shall maintain a record of all motor vehicles, trailers, and major component parts thereof, coming into his possession together with a record of the disposition of any such motor vehicle, trailer or part thereof and shall maintain proof of ownership for any motor vehicle, trailer or major component part thereof while in his possession. Such records shall be maintained in a manner and form prescribed by the commissioner. The commissioner may, by regulation, exempt vehicles or major component parts of vehicles from all or a portion of the record keeping requirements based upon the age of the vehicle if he deems that such record keeping requirements would serve no substantial value. Upon request of an agent of the commissioner or of any police officer and during his regular and usual business hours, a vehicle dismantler shall produce such records and permit said agent or police officer to examine them and any vehicles or parts of vehicles which are subject to the record keeping requirements of this section and which are on the premises. . . . The failure to produce such records or to permit such inspection on the part of any person required to be registered pursuant to this section as required by this paragraph shall be a class A misdemeanor."

[2] It was unclear from the record why, on that particular day, Burger's junkyard was selected for inspection. Tr. 23-24. The junkyards designated for inspection apparently were selected from a list of such businesses compiled by New York City police detectives. *Id.*, at 24.

[3] An individual operating a vehicle-dismantling business in New York is required to have a license:

"Definition and registration of vehicle dismantlers. A vehicle dismantler is any person who is engaged in the business of acquiring motor vehicles or trailers for the purpose of dismantling the same for parts or reselling such vehicles as scrap. No person shall engage in the business of or operate as a vehicle dismantler unless there shall have been issued to him a registration in accordance with the provisions of this section. A violation of this subdivision shall be a class E felony." *N. Y. Veh. & Traf. Law § 415-a1* (McKinney 1986).

[4] There appears to have been some initial confusion among the inspecting officers as to whether Burger had not compiled a police book or whether, at the moment of the inspection, it simply was not in his possession. See Tr. 6, 30, 46-47, 59-60.

[5] The officers also determined that Burger possessed a wheelchair and a handicapped person's walker that had been located in a stolen vehicle. See *id.*, at 8-11, 13, 34-36.

[6] Respondent was charged with two counts of criminal possession of stolen property in the second degree in violation of a New York statute that, at that time, read:

"A person is guilty of criminal possession of stolen property in

[**9]** and one **[***610]** count of unregistered operation as a vehicle dismantler, in violation of § 415-a1.

[**11]** In the Kings County Supreme Court, Burger moved to suppress the evidence obtained as a result of the inspection, primarily on the ground that § 415-a5 was unconstitutional. After a hearing, the court denied the motion. It reasoned that the junkyard business was a "pervasively regulated" industry in which warrantless administrative inspections were appropriate, that the statute was properly limited in "time, place and scope," and that, once the officers had reasonable cause to believe that certain vehicles and parts were stolen, they could arrest Burger and seize the property without a warrant. App. to Pet. for Cert. 18a-19a. When respondent moved for reconsideration in light of a recent decision of the Appellate Division, *People v. Pace, 101 App. Div. 2d 336, 475 N. Y. S. 2d 443 (1984)*, aff'd, *65 N. Y. 2d 684, 481 N. E. 2d 250 (1985)*, [7] **[****13]** **[**2641]** the court granted reargument. Upon reconsideration, **[*697]** the court distinguished the situation in *Pace* from that in the instant case. It observed that the Appellate Division in *Pace* did not apply § 415-a5 to the search in question, *125 Misc. 2d 709, 711, 479 N. Y. S. 2d 936, 938 (1984)*, **[****12]** and that, in any event, the police officers in that case were not conducting an administrative inspection, but were acting on the basis of recently discovered evidence that criminal activity was taking place at the automobile salvage yard. *Id., at 712-714, 479 N. Y. S. 2d, at 939-940*. The court therefore reaffirmed its earlier determination in the instant case that § 415-a5 was constitutional. [8] For the same reasons, the Appellate

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the second degree when he knowingly possesses stolen property, with intent to benefit himself or a person other than an owner thereof or to impede the recovery by an owner thereof, and when:

"1. The value of the property exceeds two hundred fifty dollars; or

. . . .

"3. He is a pawnbroker or is in the business of buying, selling or otherwise dealing in property . . . .

. . . .

"Criminal possession of stolen property in the second degree is a class E felony." *N. Y. Penal Law § 165.45* (McKinney 1975).

Burger also was charged with three counts of criminal possession of stolen property in the third degree pursuant to the following provision of a New York statute:

"A person is guilty of criminal possession of stolen property in the third degree when he knowingly possesses stolen property, with intent to benefit himself or a person other than an owner thereof or to impede the recovery by an owner thereof.

"Criminal possession of stolen property in the third degree is a class A misdemeanor." *N. Y. Penal Law § 165.40* (McKinney 1975).

[7] In *People* v. *Pace*, the Appellate Division was faced with a situation in which officers had conducted a warrantless search of an automobile salvage yard immediately after having their suspicions aroused about criminal activity there. The court did not find the exception for warrantless administrative inspections applicable in that situation, *101 App. Div. 2d, at 340, 475 N. Y. S. 2d, at 446*, but made the following footnote remark:

"Subdivision 5 of section 415-a of the Vehicle and Traffic Law, the statute under which the police officers said they were acting, has no application. While this section requires dismantlers to keep a police book, the book was missing when the officers entered and it would thus have been impossible for the officers to exercise the alleged implied authority to compare the book entries to the contents of the yard." *Id., at 339, n. 1, 475 N. Y. S. 2d, at 445, n. 1*.

Respondent construed this footnote to mean that police officers had to obtain a search warrant if a vehicle dismantler did not produce a police book and thus they could not conduct a warrantless inspection in the absence of this book. See *125 Misc. 2d 709, 711, 479 N. Y. S. 2d 936, 938 (Sup. 1984)*.

[8] In addition, the court determined that the search was proper under New York City Charter and Admin. Code § 436 (Supp. 1985). *125 Misc. 2d, at 712-715, 479 N. Y. S. 2d, at 939-940*. That section reads:

"The commissioner [of the Police Department] shall possess powers of general supervision and inspection over all licensed and unlicensed pawnbrokers, vendors, junkshop keepers, junk boatmen, cartmen, dealers in second-hand merchandise and auctioneers within the city; and in connection with the performance of any police duties he shall have power to examine such persons, their clerks and employees and their books, business premises, and any articles of merchandise in their possession. A refusal or neglect to comply in any respect with the provisions of this section on the part of any pawnbroker, vendor, junkshop keeper, junk boatman, cartman, dealer in second-hand merchandise or auctioneer, or any clerk or employee of any thereof shall be triable by a judge of the criminal court and punishable by not more than thirty days' imprisonment, or by a fine of not more than fifty dollars, or both."

Division affirmed. *112 App. Div. 2d 1046, 493 N. Y. S. 2d 34 (1985)*.

[**14]** The New York Court of Appeals, however, reversed. *67 N. Y. 2d 338, 493* ***[***611]*** *N. E. 2d 926 (1986)*. In its view, § 415-a5 violated the *Fourth Amendment's* prohibition of unreasonable searches and seizures. [9] According to the Court of Appeals, **[*698]** "the fundamental defect [of § 415-a5] . . . is that [it] authorize[s] searches undertaken solely to uncover evidence of criminality and not to enforce a comprehensive regulatory scheme. The asserted 'administrative schem[e]' here [is], in reality, designed simply to give the police an expedient means of enforcing penal sanctions for possession of stolen property." *Id., at 344, 493 N. E. 2d, at 929*. In contrast to the statutes authorizing warrantless inspections whose constitutionality this Court has upheld, § 415-a5, it was said, "do[es] little more than authorize general searches, including those conducted by the police, of certain commercial premises." *Ibid*. To be sure, with its license and recordkeeping requirements, and with its authorization for inspections of records, § 415-a appears to be administrative in character. "It fails to satisfy the constitutional requirements **[****15]** for a valid, comprehensive regulatory scheme, however, inasmuch as it permits searches, such as conducted here, of vehicles and vehicle parts notwithstanding the absence of any records against which the findings of such a search could be compared." *Id., at 344-345, 493 N. E. 2d, at 929-930*. Accordingly, the only purpose of such searches is to determine whether a junkyard owner is storing stolen property on business premises. [10]

Because **[****16]** of the important state interest in administrative schemes designed to regulate the vehicle-dismantling or automobile-junkyard **[**2642]** industry, [11] we granted certiorari. *479 U.S. 812 (1986)*.

[9] The Court of Appeals found that the question of the constitutionality of the statute and charter was squarely presented by this case, as it had not been in *People* v. *Pace*, because there was no dispute that the inspection was made pursuant to those provisions. *67 N. Y. 2d, at 342-343, 493 N. E. 2d, at 928*.

[10] For similar reasons, the Court of Appeals concluded that Charter § 436 also violated the *Fourth Amendment's* prohibition on unreasonable searches and seizures. *67 N. Y. 2d, at 344-345, 493 N. E. 2d, at 929-930*.

[11] Numerous States have provisions for the warrantless inspections of vehicle dismantlers and automobile junkyards. See, *e. g.*, *Ala. Code § 40-12-419* (1985); Ariz. Rev. Stat. Ann. § 28-1307C (Supp. 1986); Ark. Stat. Ann. § 75-1803 (1979); *Cal. Veh. Code Ann. §§ 2805(a)* and *(c)* (West Supp. 1987); *Conn. Gen. Stat. § 14-67m(a)* (Supp. 1987); Del. Code Ann., Tit. 21, § 6717(a) (1985); *Fla. Stat. § 812.055* (Supp. 1987); Ga. Code Ann. § 43-48-16 (1984); Ill. Rev. Stat., ch. 95 1/2, para. 5-403 (Supp. 1986); Ind. Code §§ 9-1-3.6-10(a) and (d) and 9-1-3.6-12 (1979 and Supp. 1986); *Iowa Code §§ 321.90(3)(b)* and *321.95* (1985); *Kan. Stat. Ann. § 8-2408(c)* (1982); *Ky. Rev. Stat. § 177.935(7)* (1985); *La. Rev. Stat. Ann. § 32:757* (West Supp. 1987); *Me. Rev. Stat. Ann., Tit. 29, § 2459* (Supp. 1986); ***Md. Transp. Code Ann. § 15-105*** (Supp. 1986); *Mich. Comp. Laws § 257.251* (Supp. 1987); *Miss. Code Ann. § 27-19-313* (1972); *Mo. Rev. Stat. § 301.225* (Supp. 1986); *Mont. Code Ann. §§ 75-10-503* and *75-10-513* (1985); *Nev. Rev. Stat. § 482.3263* (1986); *N. H. Rev. Stat. Ann. § 261:132* (1982); N. J. Stat. Ann. § 39.10B-2c (West Supp. 1987); *N. M. Stat. Ann. § 66-2-12(A)(4)* (1984); *Okla. Stat., Tit. 47, § 591.6* (Supp. 1987); ***Ore. Rev. Stat. § 810.480*** (1985); *R. I. Gen. Laws § 42-14.2-15* (Supp. 1986); *S. C. Code § 56-5-5670(b)* (1976); *S. D. Codified Laws §§ 32-6B-38 to 32-6B-40* (Supp. 1987); *Tenn. Code Ann. § 55-14-106* (1980); Tex. Rev. Civ. Stat. Ann., Art. 6687-2(e) (Vernon Supp. 1987); Utah Code Ann. §§ 41-3-23(2) and (4) (Supp. 1987); *Vt. Stat. Ann., Tit. 23, § 466* (1978); Va. Code § 46.1-550.12 (Supp. 1986); *Wash. Rev. Code §§ 46.80.080(5)* and *46.80.150* (1970); *W. Va. Code § 17A-6-25* (1986); *Wis. Stat. § 218.22(4)(c)* (1982); *Wyo. Stat. § 31-13-112(e)(iii)* (1987).

Courts have upheld such statutes against federal constitutional attack. See, *e. g., Bionic Auto Parts & Sales, Inc*. v. *Fahner, 721 F.2d 1072, 1081 (CA7 1983)*; *People v. Easley, 90 Cal. App. 3d 440, 445, 153 Cal. Rptr. 396, 399*, cert. denied, ***444 U.S. 899 (1979)***; *Moore v. State, 442 So. 2d 215, 216 (Fla. 1983)*; *People v. Barnes, 146 Mich. App. 37, 42, 379 N. W. 2d 464, 466 (1985)*; *State v. Zinmeister, 27 Ohio App. 3d 313, 318, 501 N. E. 2d 59, 65 (1985)*; see also *State v. Tindell, 272 Ind. 479, 483, 399 N. E. 2d 746, 748 (1980)*; *Shirley v. Commonwealth, 218 Va. 49, 57-58, 235 S. E. 2d 432, 436-437 (1977)*. But see *People v. Krull, 107 Ill. 2d 107, 116-117, 481 N. E. 2d 703, 707-708 (1985)*, rev'd, *480 U.S. 340 (1987)*; *State v. Galio, 92 N. M. 266, 268-269, 587 P. 2d 44, 46-47 (1978)*.

[*612]**

[**17] [*699]** II

A

[3][4][5]The Court long has recognized that the *Fourth Amendment's* prohibition on unreasonable searches and seizures is applicable to commercial premises, as well as to private homes. *See* v. *City of Seattle, 387 U.S.*

541, 543, 546 (1967).An owner or operator of a business thus has an expectation of privacy in commercial property, which society is prepared to consider to be reasonable, see Katz v. United States, 389 U.S. 347, 361 (1967) (Harlan, J., concurring). This expectation **[*700]** exists not only with respect to traditional police searches conducted for the gathering of criminal evidence but also with respect to administrative inspections designed to enforce regulatory statutes. See Marshall v. Barlow's, Inc., 436 U.S. 307, 312-313 (1978). **[****18]** An expectation of privacy in commercial premises, however, is different from, and indeed less than, a similar expectation in an individual's home. See Donovan v. Dewey, 452 U.S. 594, 598-599 (1981). This expectation is particularly attenuated in commercial property employed in "closely regulated" industries. The Court observed in *Marshall* v. *Barlow's, Inc*.: "Certain industries have such a history of government oversight that no reasonable expectation of privacy, see Katz v. United States, 389 U.S. 347, 351-352 (1967), could exist for a proprietor over the stock of such an enterprise." 436 U.S., at 313.

The Court first examined the "unique" problem of inspections of "closely regulated" businesses in two enterprises that had "a long tradition of close government supervision." *Ibid*. In *Colonnade Corp*. v. United States, 397 U.S. 72 (1970), it considered a warrantless search of a catering business pursuant **[**2643]** to several federal revenue statutes **[****19]** authorizing the inspection of the premises of liquor dealers. Although the Court disapproved the search because the statute provided that a sanction be imposed when entry was refused, and because it did not authorize entry without a warrant as an alternative in this situation, it recognized that "the liquor industry [was] long subject to close supervision and inspection." Id., at 77. We returned to this issue in United States v. Biswell, 406 U.S. 311 (1972), which involved a warrantless inspection of the premises of a pawnshop operator, who was federally licensed to sell sporting weapons pursuant to the Gun Control Act of 1968, 18 U. S. C. § 921 et seq. While noting that "federal regulation of the interstate traffic in firearms is not as deeply rooted in history as is governmental control of the liquor industry," 406 U.S., at 315, **[***613]** we nonetheless concluded that the warrantless inspections **[*701]** authorized by the Gun Control Act would "pose only limited threats to the dealer's justifiable expectations of privacy." Id., at 316. We observed: "When a dealer chooses to **[****20]** engage in this pervasively regulated business and to accept a federal license, he does so with the knowledge that his business records, firearms, and ammunition will be subject to effective inspection." *Ibid*.

[6A]The "*Colonnade-Biswell*" doctrine, stating the reduced expectation of privacy by an owner of commercial premises in a "closely regulated" industry, has received renewed emphasis in more recent decisions. In *Marshall* v. *Barlow's, Inc*., we noted its continued vitality but declined to find that warrantless inspections, made pursuant to the Occupational Safety and Health Act of 1970, 84 Stat. 1598, 29 U. S. C. § 657(a), of *all* businesses engaged in interstate commerce fell within the narrow focus of this doctrine. 436 U.S., at 313-314. However, we found warrantless inspections made pursuant to the Federal Mine Safety and Health Act of 1977, 91 Stat. 1290, 30 U. S. C. § 801 et seq., proper because they were of a "closely regulated" industry. Donovan v. Dewey, supra.

[6B] **[****21]** Indeed, in *Donovan* v. *Dewey*, we declined to limit our consideration to the length of time during which the business in question -- stone quarries -- had been subject to federal regulation. 452 U.S., at 605-606.We pointed out that the doctrine is essentially defined by "the pervasiveness and regularity of the federal regulation" and the effect of such regulation upon an owner's expectation of privacy. See id., at 600, 606. We observed, however, that "the duration of a particular regulatory scheme" would remain an "important factor" in deciding whether a warrantless inspection pursuant to the scheme is permissible. Id., at 606. [12]

[6C]

[**22]** **[*702]** B

[6D]Because the owner or operator of commercial premises in a "closely regulated" industry has a reduced expectation of privacy, the warrant and probable-cause requirements, which fulfill the traditional Fourth

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[12] We explained in *Donovan* v. *Dewey*: "If the length of regulation were the only criterion, absurd results would occur. Under appellees' view, new or emerging industries, including ones such as the nuclear power industry that pose enormous potential safety and health problems, could never be subject to warrantless searches even under the most carefully structured inspection program simply because of the recent vintage of regulation." 452 U.S., at 606.

Amendment standard of reasonableness for a government search, see *O'Connor v. Ortega, 480 U.S. 709, 741 (1987)* (dissenting opinion), have lessened application in this context. Rather, we conclude that, as in other situations of "special need," see *New Jersey v. T. L. O., 469 U.S. 325, 353 (1985)* (opinion concurring in judgment), where the privacy interests of the owner are **[**2644]** weakened and the government interests in regulating particular businesses are concomitantly **[***614]** heightened, a warrantless inspection of commercial premises may well be reasonable within the meaning of the *Fourth Amendment*.

[7]This **[****23]** warrantless inspection, however, even in the context of a pervasively regulated business, will be deemed to be reasonable only so long as three criteria are met. First, there must be a "substantial" government interest that informs the regulatory scheme pursuant to which the inspection is made. See *Donovan v. Dewey, 452 U.S., at 602* ("substantial federal interest in improving the health and safety conditions in the Nation's underground and surface mines"); *United States v. Biswell, 406 U.S., at 315* (regulation of firearms is "of central importance to federal efforts to prevent violent crime and to assist the States in regulating the firearms traffic within their borders"); *Colonnade Corp*. v. *United States, 397 U.S., at 75* (federal interest "in protecting the revenue against various types of fraud").

Second, the warrantless inspections must be "necessary to further [the] regulatory scheme." *Donovan v. Dewey, 452 U.S., at 600*. For example, in *Dewey* we recognized that forcing mine inspectors to obtain a warrant before every inspection **[*703]** might alert mine owners or operators to the **[****24]** impending inspection, thereby frustrating the purposes of the Mine Safety and Health Act -- to detect and thus to deter safety and health violations. *Id., at 603*.

Finally, "the statute's inspection program, in terms of the certainty and regularity of its application, [must] provid[e] a constitutionally adequate substitute for a warrant." *Ibid*. In other words, the regulatory statute must perform the two basic functions of a warrant: it must advise the owner of the commercial premises that the search is being made pursuant to the law and has a properly defined scope, and it must limit the discretion of the inspecting officers. See *Marshall v. Barlow's, Inc., 436 U.S., at 323*; see also *id., at 332* (STEVENS, J., dissenting). To perform this first function, the statute must be "sufficiently comprehensive and defined that the owner of commercial property cannot help but be aware that his property will be subject to periodic inspections undertaken for specific purposes." *Donovan v. Dewey, 452 U.S., at 600*. In addition, in defining how a statute limits the discretion of the inspectors, we have observed **[****25]** that it must be "carefully limited in time, place, and scope." *United States v. Biswell, 406 U.S., at 315*.

III

A

[1B] [8]Searches made pursuant to § 415-a5, in our view, clearly fall within this established exception to the warrant requirement for administrative inspections in "closely regulated" businesses. [13] **[****27]** First, the nature **[***615]** of the regulatory statute reveals that the operation of a junkyard, part of which is devoted to **[*704]** vehicle dismantling, is a "closely regulated" business in the State of New York. [14] The provisions **[**2645]** regulating the activity of vehicle dismantling are extensive. An operator cannot engage in this industry without first obtaining a license, which means that he must meet the registration requirements and must pay a fee. [15] **[****28]** Under § 415-a5(a), the

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[13] Because we find the inspection at issue here constitutional under § 415-a5, we have no reason to reach the question of the constitutionality of § 436 of the New York City Charter. Moreover, because the Court of Appeals addressed only the general question concerning the constitutionality of the administrative inspection, not the specific question whether the search and seizure of the wheelchair and walker were within the scope of the inspection, we do not reach here this latter issue.

[14] The New York Court of Appeals did not imply that automobile junkyards were *not* a "closely regulated" business in that State. Rather, it found fault with one aspect of the administrative statutes regulating these junkyards. *67 N. Y. 2d, at 344-345, 493 N. E. 2d, at 929-930*. In his brief in opposition to the petition for certiorari, respondent appears to concede that this industry in New York is "closely regulated" by his statement that the New York Legislature could enact a "'comprehensive regulatory scheme'" directed at the industry. Brief in Opposition 3.

[15] Under § 415-a1, "no person shall engage in the business of or operate as a vehicle dismantler unless there shall have been issued to him a registration in accordance with the provisions of this section." In making an application for a registration, the operator must provide "a listing of all felony convictions and all other convictions relating to the illegal sale or possession of a motor vehicle or motor vehicle parts, and a

operator must maintain a police book recording the acquisition and disposition of motor vehicles and vehicle parts, and **[****26]** make such records and inventory available for inspection by the police or any agent of the Department of Motor Vehicles. The operator also must display his registration number prominently at his place of business, on business documentation, and on vehicles and parts that pass through his business. § 415-a5(b). Moreover, the person engaged in this activity is subject to criminal penalties, as well as to loss of license or civil fines, **[*705]** for failure to comply with these provisions. See §§ 415-a1, 5, and 6. [16] That other **[***616]** States besides New York have imposed similarly extensive regulations on automobile junkyards

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listing of all arrests for any such violations by the applicant and any other person required to be named in such application." § 415-a2. Section 415-a3 requires that the operator pay a registration fee, and § 415-a4 stipulates that

"no registration shall be issued or renewed unless the applicant has a permanent place of business at which the activity requiring registration is performed which conforms to section one hundred thirty-six of the general municipal law as such section applies and to all local laws or ordinances and the applicant and all persons having a financial interest in the business have been determined by the commissioner to be fit persons to engage in such business."

[16] The broad extent of the regulation of the vehicle-dismantling industry further is shown by the fact that § 415-a regulates the activities not only of vehicle dismantlers but also of those in similar businesses, such as salvage pool operators, § 415-a1-a, mobile car crushers, § 415-a1-b, itinerant vehicle collectors, § 415-a1-c, vehicle rebuilders, § 415-a8, scrap processors, § 415-a9, and scrap collectors and repair shops, § 415-a10. Moreover, the Commissioner of the Department of Motor Vehicles has promulgated regulations dealing specifically with this industry: *e. g.*, N. Y. Comp. Codes, Rules & Regs., Tit. 15, § 81.2 (1986) (registration); § 81.8 (procedures upon acquisition of junk and salvage vehicles); § 81.10 (vehicle identification numbers); § 81.12 (records).

Amici argue that § 415-a does not create a truly administrative scheme, because its provisions are not sufficiently voluminous. See Brief for American Civil Liberties Union et al. as *Amici Curiae* 34-36. Although the number of regulations certainly is a factor in the determination whether a particular business is "closely regulated," the sheer quantity of pages of statutory material is not dispositive of this question. Rather, the proper focus is on whether the "regulatory presence is sufficiently comprehensive and defined that the owner of commercial property cannot help but be aware that his property will be subject to periodic inspections undertaken for specific purposes." *Donovan v. Dewey, 452 U.S., at 600*. Section 415-a plainly satisfies this criterion.

further supports the "closely regulated" status of this industry. See n. 11, *supra*.

[**29]** In determining whether vehicle dismantlers constitute a "closely regulated" industry, the "duration of [this] particular regulatory scheme," *Donovan v. Dewey, 452 U.S., at 606*, has some relevancy. Section 415-a could be said to be of fairly recent vintage, see 1973 N. Y. Laws, ch. 225, § 1 (McKinney), and the inspection provision of § 415-a5 was added only in 1979, see 1979 N. Y. Laws, ch. 691, § 2 (McKinney). But because the automobile is a relatively new phenomenon in our society and because its widespread use is even newer, automobile junkyards and vehicle dismantlers have not been in existence very long and thus do not have an ancient history of government oversight. Indeed, the industry **[*706]** did not attract government attention until the 1950's, when all used automobiles were no longer easily reabsorbed into the steel industry and attention then focused on the environmental and aesthetic problems associated with abandoned vehicles. See Landscape 1970: National Conference on the Abandoned Automobile **[**2646]** 11; see also Report to the President from the Panel on Automobile Junkyards, White House Conference on Natural Beauty 1 (1965) (statement **[****30]** of Charles M. Haar, Chairman: "There are junkyards and abandoned cars in the streets and along the countryside that are making America ugly, not beautiful").

The automobile-junkyard business, however, is simply a new branch of an industry that has existed, and has been closely regulated, for many years. The automobile junkyard is closely akin to the secondhand shop or the general junkyard. Both share the purpose of recycling salvageable articles and components of items no longer usable in their original form. As such, vehicle dismantlers represent a modern, specialized version of a traditional activity. [17] **[****32]** In New York, general

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[17] A member of the automobile-junkyard industry described it this way:

"Webster says junk is old metal, rags, and rubbish. The word 'junk' can also be used as a verb, and as such would mean to discard. I represent an industry that buys vehicles which are no longer suitable for transportation. These vehicles have been wrecked, damaged, or have otherwise become inoperative. They are taken apart by members of our industry. The components that are still usable are made available to garages, body shops, and the general public as used parts for repair of other vehicles. The portion of the vehicle that is not suitable for parts is passed on to a scrap processor who then transforms the hulk, or the remnants, into a product suitable

junkyards and secondhand shops long have been subject to regulation. One New York court has explained:

[*707] "Vehicle dismantlers are part of the junk industry as well as part of the auto industry. . . . Prior to the enactment of section 415-a of the Vehicle and Traffic Law, auto dismantlers were subject to regulatory provisions governing the licensing and operation of junkyards. These regulations included provisions mandating the keeping **[***617]** of detailed records of purchases and sales, and the making of such records available at reasonable **[****31]** times to designated officials including police officers, by junk dealers . . . and by dealers in secondhand articles . . . .

"These regulatory, record keeping and warrantless inspection provisions for junk shops have been a part of the law of the City of New York and of Brooklyn for at least 140 years." *People v. Tinneny, 99 Misc. 2d 962, 969, 417 N. Y. S. 2d 840, 845 (Sup. 1979)*.

See also N. Y. C. Charter and Admin. Code § B32-113.01 (1977) ("'Junk dealer'. Any person engaged in the business of purchasing or selling junk"); § B32-126.0a ("'dealer in second-hand articles' shall mean any person who, in any way or as a principal broker or agent: 1. deals in the purchase or sale of second-hand articles of whatever nature"). [18] The history of government regulation of junk-related activities argues strongly in favor of the "closely regulated" status of the automobile junkyard.

Accordingly, in light of the regulatory framework governing his business and the history of regulation of related industries, an operator of a junkyard engaging in vehicle dismantling has a reduced expectation of privacy in this "closely regulated" business.

[*708] B

The New York regulatory scheme satisfies the three criteria necessary to make reasonable warrantless inspections pursuant to § 415-a5. First, **[****33]** the State has a substantial interest in regulating the vehicle-dismantling and automobile-junkyard **[**2647]** industry because motor vehicle theft has increased in the State and because the problem of theft is associated with this industry. In this day, automobile theft has become a significant social problem, placing enormous economic and personal burdens upon the citizens of different States. For example, when approving the 1979 amendment to § 415-a5, which added the provision for inspections of records and inventory of junkyards, the Governor of the State explained:

"Motor vehicle theft in New York State has been rapidly increasing. It has become a multimillion dollar industry which has resulted in an intolerable economic burden on the citizens of New York. In 1976, over 130,000 automobiles were reported stolen in New York, resulting in losses in excess of $ 225 million. Because of the high rate of motor vehicle theft, the premiums for comprehensive motor vehicle insurance in New York are significantly above the national average. In addition, stolen automobiles are often used in the commission of other crimes and there is a high incidence of accidents resulting in property **[****34]** damage and bodily injury involving stolen automobiles." Governor's Message approving L. 1979, chs. 691 and 692, 1979 N. Y. Laws 1826, 1826-1827 (McKinney).

See also 25 Legislative Newsletter, **[***618]** New York State Automobile Assn., p. 1 (May 10, 1978), reprinted in Governor's Bill Jacket, L. 1979, ch. 691 (1979 Bill Jacket) ("Auto theft in New York State has become a low-risk, high-profit, multimillion **[*709]** dollar growth industry that is imposing intolerable economic burdens on motorists"). [19] Because contemporary automobiles are made from standardized parts, the nationwide extent of vehicle theft and concern about it are understandable.

[**35]** Second, regulation of the vehicle-dismantling industry reasonably serves the State's substantial

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for resmelting purposes." Junkyards & Solid Waste Disposal in the Highway Environment, Proceedings of National Seminar, June 10-11, 1975, p. 19 (1976) (statement of Donald J. Rouse, National Association of Auto and Truck Recyclers, now known as Automotive Dismantlers and Recyclers of America).

[18] In fact, by assuming that Charter § 436 with its use of the terms "junkshop keepers" and "dealers in second-hand merchandise," see n. 8, *supra*, could be applied to respondent, the New York Court of Appeals understood that a vehicle dismantler fell within the scope of those terms. See also *People v. Cusumano, 108 App. Div. 2d 752, 754, 484 N. Y. S. 2d 909, 912 (1985)*.

[19] A similar concern with stemming the social plague of automobile theft has motivated other States to pass legislation aimed at the vehicle-dismantling industry. See, *e. g.*, Ill. Rev. Stat., ch. 95 1/2, para. 5-100-1 (Supp. 1985) (legislative finding that "crimes involving the theft of motor vehicles and their parts have risen steadily over the past years, with a resulting loss of millions of dollars to the residents of this State").

interest in eradicating automobile theft. It is well established that the theft problem can be addressed effectively by controlling the receiver of, or market in, stolen property. 2 W. LaFave & A. Scott, Substantive Criminal Law § 8.10(a), p. 422 (1986) ("Without [professional receivers of stolen property], theft ceases to be profitable"); 2 Encyclopedia of Crime and Justice 789 (Kadish ed. 1983) ("[The criminal receiver] . . . inspires 95 per cent or more of the theft in America"). Automobile junkyards and vehicle dismantlers provide the major market for stolen vehicles and vehicle parts. See Memorandum from Paul Goldman, Counsel, State Consumer Protection Board, to Richard A. Brown, Counsel to the Governor (June 29, 1979), 1979 Bill Jacket ("It is believed that a major source of stolen vehicles, parts and registration documentation may involve vehicles which pass through the hands of [junk vehicle] dealers"). Thus, the State rationally may believe that it will reduce car theft by **[****36]** regulations that prevent automobile junkyards from becoming markets for stolen vehicles and that help trace the origin and destination of vehicle parts. [20]

[**37]** **[*710]** **[**2648]** Moreover, the warrantless administrative inspections pursuant to § 415-a5 "are necessary to further [the] regulatory scheme." *Donovan v. Dewey, 452 U.S., at 600*. In this respect, we see no difference between these inspections and those approved by the Court in *United States* v. *Biswell* and *Donovan* v. *Dewey*. We explained in *Biswell*:

"If inspection is to be effective **[***619]** and serve as a credible deterrent, unannounced, even frequent, inspections are essential. In this context, the prerequisite of a warrant could easily frustrate inspection; and if the necessary flexibility as to time, scope, and frequency is to be preserved, the protections afforded by a warrant would be negligible." *406 U.S., at 316*.

See also *Donovan v. Dewey, 452 U.S., at 603*. Similarly, in the present case, a warrant requirement would interfere with the statute's purpose of deterring automobile theft accomplished by identifying vehicles and parts as stolen and shutting down the market in such items. **[****38]** Because stolen cars and parts often pass quickly through an automobile junkyard, "frequent" and "unannounced" inspections are necessary in order to detect them. In sum, surprise is crucial if the regulatory scheme aimed at remedying this major social problem is to function at all.

[*711] Third, § 415-a5 provides a "constitutionally adequate substitute for a warrant." *Donovan v. Dewey, 452 U.S., at 603*. The statute informs the operator of a vehicle dismantling business that inspections will be made on a regular basis. *Id., at 605*. Thus, the vehicle dismantler knows that the inspections to which he is subject do not constitute discretionary acts by a government official but are conducted pursuant to statute. See *Marshall v. Barlow's, Inc., 436 U.S., at 332* (dissenting opinion). Section 415-a5 also sets forth the scope of the inspection and, accordingly, places the operator on notice as to how to comply with the statute. In addition, it notifies the operator as to who is authorized to conduct an inspection.

Finally, **[****39]** the "time, place, and scope" of the inspection is limited, *United States v. Biswell, 406 U.S., at 315*, to place appropriate restraints upon the discretion of the inspecting officers. See *Donovan v. Dewey, 452 U.S., at 605*. The officers are allowed to conduct an inspection only "during [the] regular and usual business hours." § 415-a5. [21] **[****40]** The

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[20] See Governor's Message approving L. 1979, chs. 691 and 692, 1979 N. Y. Laws 1826, 1827 (McKinney) ("By making it difficult to traffic in stolen vehicles and parts, it can be anticipated that automobile theft problems will be decreased and the cost to insurance companies and the public may be reduced"). As the Illinois Legislature found in passing regulations aimed at this industry,

"(2) essential to the criminal enterprise of motor vehicle theft operations is the ability of thieves to transfer or sell stolen vehicles or their parts through legitimate commercial channels making them available for sale to the automotive industry; and (3) motor vehicle dealers, used parts dealers, scrap processors, automotive parts recyclers, and rebuilders are engaged in a type of business which often exposes them and their operations to pressures and influences from motor vehicle thieves; and (4) elements of organized crime are constantly attempting to take control of businesses engaged in the sale and repair of motor vehicles so as to further their own criminal interests." Ill. Rev. Stat., ch. 95 1/2, para. 5-100-1 (1985).

See also *Kan. Stat. Ann. § 8-2402* (1982); *Nev. Rev. Stat. § 482.318* (1985).

[21] Respondent contends that § 415-a5 is unconstitutional because it fails to limit the number of searches that may be conducted of a particular business during any given period. Brief for Respondent 12. While such limitations, or the

inspections can be made only of vehicle-dismantling and related industries. And the permissible scope of these searches is narrowly defined: the inspectors may examine the records, as well as "any vehicles or parts of vehicles which are subject to **[*712]** the record keeping **[***620]** requirements of this section and which are on the premises." *Ibid*. [22]

[2649]** IV

[2B]A search conducted pursuant to § 415-a5, therefore, clearly falls within the well-established exception to the warrant requirement for administrative inspections of "closely regulated" businesses. The Court of Appeals, nevertheless, struck down the statute as violative of the *Fourth Amendment* because, in its view, the statute had no truly administrative purpose but was "designed simply to give the police an expedient means of enforcing penal sanctions for possession of stolen property." *67 N. Y. 2d, at 344, 493 N. E. 2d, at 929*. **[****41]** The court rested its conclusion that the administrative goal of the statute was pretextual and that § 415-a5 really "authorize[d] searches undertaken solely to uncover evidence of criminality" particularly on the fact that, even if an operator failed to produce his police book, the inspecting officers could continue their inspection for stolen vehicles and parts. *Id., at 344, 345, 493 N. E. 2d, at 929, 930*. The court also suggested that the identity of the inspectors -- police officers -- was significant in revealing the true nature of the statutory scheme. *Id., at 344, 493 N. E. 2d, at 929*.

In arriving at this conclusion, the Court of Appeals failed to recognize that a State can address a major social problem *both* by way of an administrative scheme *and* through penal sanctions. Administrative statutes and penal laws may have the same *ultimate* purpose of remedying the social problem, but they have different subsidiary purposes and prescribe different methods of addressing the problem. An administrative statute establishes how a particular business in a **[*713]** "closely regulated" industry should be operated, setting forth rules **[****42]** to guide an operator's conduct of the business and allowing government officials to ensure that those rules are followed. Such a regulatory approach contrasts with that of the penal laws, a major emphasis of which is the punishment of individuals for specific acts of behavior.

In *United States* v. *Biswell*, we recognized this fact that both administrative and penal schemes can serve the same purposes by observing that the ultimate purposes of the Gun Control Act were "to prevent violent crime and to assist the States in regulating the firearms traffic within their borders." *406 U.S., at 315*. It is beyond dispute that certain state penal laws had these same purposes. Yet the regulatory goals of the Gun Control Act were narrower: the Act ensured that "weapons [were] distributed through regular channels and in a traceable manner and [made] possible the prevention of sales to undesirable customers and the detection of the origin of particular firearms." *Id., at 315-316*. The provisions of the Act, including those authorizing the warrantless inspections, served these immediate goals **[***621]** and also contributed to achieving the same ultimate **[****43]** purposes that the penal laws were intended to achieve.

This case, too, reveals that an administrative scheme may have the same ultimate purpose as penal laws, even if its regulatory goals are narrower. As we have explained above, New York, like many States, faces a serious social problem in automobile theft and has a substantial interest in regulating the vehicle-dismantling industry because of this problem. The New York penal laws address automobile theft by punishing it or the possession of stolen property, including possession by individuals in the business of buying and selling property. See n. 6, *supra*. [23] **[****46]** In accordance

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absence thereof, are a factor in an analysis of the adequacy of a particular statute, they are not determinative of the result so long as the statute, as a whole, places adequate limits upon the discretion of the inspecting officers. Indeed, we have approved statutes authorizing warrantless inspections even when such statutes did not establish a fixed number of inspections for a particular time period. See *United States v. Biswell, 406 U.S. 311, 312, n. 1 (1972)*. And we have suggested that, in some situations, inspections must be conducted frequently to achieve the purposes of the statutory scheme. *Id., at 316* ("Here, if inspection is to be effective and serve as a credible deterrent, unannounced, even *frequent*, inspections are essential") (emphasis added).

[22] With respect to the adequacy of the statutory procedures, this case is indistinguishable from *United States* v. *Biswell*. There, the regulatory provisions of the Gun Control Act permitted warrantless inspections of *both* records *and* inventory "at all reasonable times." *Id., at 312, n. 1*. The Court held that the statute gave a firearms dealer adequate notice of "the purposes of the inspector [and] the limits of his task." *Id., at 316*.

[23] The penal laws often are changed in response to the growth of a particular type of crime. For example, in 1986 New York amended its definition of grand larceny to include the following

[2650]** with its interest **[*714]** in regulating the automobile-junkyard industry, the State also has devised a regulatory manner of dealing with this problem. Section 415-a, as a whole, serves the regulatory goals of seeking to ensure that vehicle dismantlers are legitimate businesspersons and that stolen vehicles and vehicle parts passing through automobile junkyards can be identified. [24] In particular, § 415-a5 was designed to contribute to these **[****44]** goals, as explained at the time of its passage:

"This bill attempts to provide enforcement not only through means of law enforcement but by making it unprofitable for persons to operate in the stolen car field.

[*715] "The various businesses which are engaged in this operation have been studied and the control and requirements on the businesses have been written in a manner which would permit the persons engaged in the business to legally operate in a manner conducive to good business practices while making it extremely difficult for a person to profitably transfer a stolen vehicle or stolen part. The general scheme is to identify every person who may legitimately be involved in the operation and to provide a **[***622]** record keeping system which will enable junk vehicles and parts to be traced back to the last legitimately registered or titled owner. Legitimate businessmen engaged in this field have complained with good cause that the lack of comprehensive coverage of the field has put them at a disadvantage with persons who currently are able to operate outside of statute and regulations. They have also legitimately complained that delays inherent in the present statutory **[****45]** regulation and onerous record keeping requirements have made profitable operation difficult.

"The provisions of this bill have been drafted after consultation with respected members of the various industries and provides *[sic]* a more feasible system of controlling traffic in stolen vehicles and parts." Letter of Stanley M. Gruss, Deputy Commissioner and Counsel, to Richard A. Brown, Counsel to the Governor (June 20, 1979), 1979 Bill Jacket.

Accordingly, to state that § 415-a5 is "really" designed to gather evidence to enable convictions under the penal laws is to ignore the plain administrative purposes of § 415-a, in general, and § 415-a5, in particular.

[**47]** If the administrative goals of § 415-a5 are recognized, the difficulty the Court of Appeals perceives in allowing inspecting officers to examine vehicles and vehicle parts even in the absence of records evaporates. **[**2651]** The regulatory purposes of § 415-a5 certainly are served by having the inspecting officers **[*716]** compare the records of a particular vehicle dismantler with vehicles and vehicle parts in the junkyard. The purposes of maintaining junkyards in the hands of legitimate businesspersons and of tracing vehicles that pass through these businesses, however, *also* are served by having the officers examine the operator's inventory even when the operator, for whatever reason, fails to produce the police book. [25] **[****48]** Forbidding inspecting officers to examine the inventory in this situation would permit an illegitimate vehicle dismantler to thwart the purposes of the

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provision:

"A person is guilty of grand larceny in the fourth degree when he steals property and when:

. . . .

"8. The value of the property exceeds one hundred dollars and the property consists of a motor vehicle, as defined in section one hundred twenty-five of the vehicle and traffic law, other than a motorcycle, as defined in section one hundred twenty-three of such law." 1986 N. Y. Laws, ch. 515, § 1 (McKinney), codified at *N. Y. Penal Law § 155.30* (McKinney Supp. 1987).

[24] See, *e. g.*, Memorandum of State Department of Motor Vehicles in support of 1973 N. Y. Laws, ch. 225, 1973 N. Y. Laws 2166, 2167 (McKinney) (purpose of § 415-a "is to provide a system of record keeping so that vehicles can be traced through junk yards and to assure that such junk yards are run by legitimate business men rather than by auto theft rings"); Letter of John D. Caemmerer, Chairman of Senate Committee on Transportation, to Michael Whiteman, Counsel to the Governor (Apr. 12, 1973), reprinted in Governor's Bill Jacket, L. 1973, ch. 225, p. 15 (1973 Bill Jacket) ("This bill establishes much needed safeguards for an industry which can be readily infiltrated by those wishing to dispose of stolen automobiles or automobile parts"); Letter of Peter M. Pryor, Chairman of New York State Consumer Protection Board, to Michael Whiteman, Counsel to the Governor (Apr. 18, 1973), 1973 Bill Jacket, p. 6 ("Organized crime has used the junk and salvage industry as a convenient staging ground for illicit activities concerning motor vehicles as well as for operations into other areas. The proposed legislation opens the junk and salvage business to the scrutiny of the police and the Department of Motor Vehicles thereby reducing the possibility of utilizing such dealerships as covers for covert businesses").

[25] Failure to produce a record is a misdemeanor, § 415-a5, which can be a ground for suspension of the operator's license, § 415-a6. This suspension serves to remove illegitimate operators from the industry.

administrative scheme and would have the absurd result of subjecting his counterpart who maintained records to a more extensive search. [26]

Nor do we think that this administrative scheme is unconstitutional simply because, in the course of enforcing it, an inspecting officer may discover evidence of crimes, besides violations of the scheme itself. In *United States* v. *Biswell*, the pawnshop operator was charged not only with a violation of the recordkeeping provision, pursuant to which the inspection was made, but also with other violations detected during the inspection, see *406 U.S., at 313, n. 2*, and convicted of a failure to pay an occupational tax for dealing in specific firearms, *id., at 312-313*. The discovery of **[***623]** evidence of crimes in the course of an otherwise proper administrative inspection does not render that search **[****49]** illegal or the administrative scheme suspect. Cf. *United States v. Villamonte-Marquez, 462 U.S. 579, 583-584, and n. 3 (1983)*. [27]

[**50]** **[*717]** Finally, we fail to see any constitutional significance in the fact that police officers, rather than "administrative" agents, are permitted to conduct the § 415-a5 inspection. The significance respondent alleges lies in the role of police officers as enforcers of the penal laws and in the officers' power to arrest for offenses other than violations of the administrative scheme. It is, however, important to note that state police officers, like those in New York, have numerous duties in addition to those associated with traditional police work. See *People v. De Bour, 40 N. Y. 2d 210, 218, 352 N. E. 2d 562, 568 (1976)* ("To consider the actions of the police solely in terms of arrest and criminal process is an unnecessary distortion"); see also ABA Standards for Criminal Justice 1-1.1(b) and commentary (2d ed. 1980, Supp. 1982). As a practical matter, many States do not have the resources to assign the enforcement of a particular administrative scheme to a specialized **[**2652]** agency. So long as a regulatory scheme is properly administrative, it **[****51]** is not rendered illegal by the fact that the inspecting officer has the power to arrest individuals for violations other than those created by the scheme itself. [28] In **[*718]** sum, we decline to impose upon the States the burden of requiring the enforcement of their regulatory statutes to be carried out by specialized agents.

V

Accordingly, the judgment of the New York Court of Appeals is reversed, and the case is remanded to that court for further proceedings not inconsistent with this opinion.

It is so ordered.

Dissent by: BRENNAN

Dissent

[**52]** JUSTICE BRENNAN, with whom JUSTICE **MARSHALL** joins, and with whom JUSTICE O'CONNOR joins as to all but Part III, dissenting.

[*624]** Warrantless inspections of pervasively regulated businesses are valid if necessary to further an urgent state interest, and if authorized by a statute that carefully limits their time, place, and scope. I have no objection to this general rule. Today, however, the Court finds pervasive regulation in the barest of

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[26] Indeed, in *United States* v. *Biswell*, we found no constitutional problem with a statute that authorized inspection both of records and inventory, *406 U.S., at 312, n. 1*, and with an actual inspection of a dealer's premises despite the fact that the dealer's records were not properly maintained, *id., at 313, n. 2*.

[27] The legislative history of § 415-a, in general, and § 415-a5, in particular, reveals that the New York Legislature had proper regulatory purposes for enacting the administrative scheme and was not using it as a "pretext" to enable law enforcement authorities to gather evidence of penal law violations. See *supra, at 714-715* and n. 24; see also *Illinois v. Krull, 480 U.S. 340, 351 (1987)* ("We are given no basis for believing that legislators are inclined to subvert their oaths and the *Fourth Amendment*"). There is, furthermore, no reason to believe that the instant inspection was actually a "pretext" for obtaining evidence of respondent's violation of the penal laws. It is undisputed that the inspection was made solely pursuant to the administrative scheme. In fact, because the search here was truly a § 415-a5 inspection, the Court of Appeals was able to reach in this case, as it could not in *People v. Pace, 65 N. Y. 2d 684, 481 N. E. 2d 250 (1985)*, the question of the constitutionality of the statute. See *67 N. Y. 2d, at 342-343, 493 N. E. 2d, at 928*; see also n. 7, *supra*.

[28] In *United States* v. *Biswell*, the search in question was conducted by a city police officer and by a United States Treasury agent, *406 U.S., at 312*, the latter being authorized to make arrests for federal crimes. See *27 CFR § 70.28 (1986)*. The Internal Revenue agents involved in the search in *Colonnade Corp*. v. *United States, 397 U.S. 72, 73 (1970)*, had similar powers. See *26 U. S. C. § 7608(a)*.

administrative schemes. Burger's vehicle-dismantling business is not closely regulated (unless most New York City businesses are), and an administrative warrant therefore was required to search it. The Court also perceives careful guidance and control of police discretion in a statute that is patently insufficient to eliminate the need for a warrant. Finally, the Court characterizes as administrative a search for evidence of only criminal wrongdoing. As a result, the Court renders virtually meaningless the general rule that a warrant is required for administrative searches of commercial property. [1]

[**53]** I

In *See* v. *City of Seattle, 387 U.S. 541, 543 (1967)*, we held that an administrative search of commercial property generally **[*719]** must be supported by a warrant. We make an exception to this rule, and dispense with the warrant requirement, in cases involving "closely regulated" industries, where we believe that the commercial operator's privacy interest is adequately protected by detailed regulatory schemes authorizing warrantless inspections. See *Donovan v. Dewey, 452 U.S. 594, 599 (1981)*. [2] The Court has previously made clear that "the closely regulated industry . . . is the exception." *Marshall v. Barlow's, Inc., 436 U.S. 307, 313 (1978)*. Unfortunately, today's holding makes it the rule.

[**54]** Initially, the Court excepted from the administrative-warrant requirement only industries which possessed a "'long tradition of government regulation,'" *Donovan v. Dewey, supra, at 605*, quoting *Marshall v. Dewey, 493 F.Supp. 963, 964 (1980)*, or which involved an "inherent and immediate danger to health or life." Note, 48 Ind. L. J. 117, 120-121 **[**2653]** (1972). [3] **[****55]** The Court today places substantial reliance on the historical justification, and maintains that vehicle dismantling is part of the general junk and secondhand industry, which has a long history of regulation. In *Dewey*, however, we clarified that, although historical supervision may **[***625]** help to demonstrate that close regulation exists, it is "the pervasiveness and regularity of . . . regulation that ultimately determines whether a warrant is necessary to render **[*720]** an inspection program reasonable under the *Fourth Amendment*." *452 U.S., at 606*. [4]

The provisions governing vehicle dismantling in New York simply are not extensive. A vehicle dismantler must register and pay a fee, display the registration in various circumstances, maintain a police book, and allow inspections. See *N. Y. Veh. & Traf. Law §§ 415-a1-6* (McKinney 1986). Of course, the inspections themselves cannot be cited as proof of pervasive regulation justifying elimination of the warrant requirement; that would be obvious bootstrapping. Nor can registration and recordkeeping requirements be characterized as close regulation. New York City, like many States and municipalities, imposes similar, and often more stringent licensing, **[****56]** recordkeeping, and other regulatory requirements on a myriad of trades and businesses. [5] **[****57]** **[*721]** Few substantive

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[1] The Court does not reach the question whether the search was lawful under New York City Charter and Admin. Code § 436 (Supp. 1985). I agree with the analysis of the New York Court of Appeals, holding that this provision is plainly unconstitutional.

[2] In only three industries have we invoked this exception. See *Colonnade Catering Corp*. v. *United States, 397 U.S. 72 (1970)* (liquor industry); *United States v. Biswell, 406 U.S. 311 (1972)* (firearm and ammunitions sales); *Donovan v. Dewey, 452 U.S. 594 (1981)* (coal mining).

[3] Compare *Biswell, supra, at 315* (permitting warrantless searches because, although regulation of firearms not as deeply rooted in history as control of the liquor industry, "close scrutiny of this traffic is undeniably of central importance to federal efforts to prevent violent crime"); *Dewey, supra, at 602* (permitting warrantless searches in mining industry, which ranks "among the most hazardous in the country"), with *Marshall v. Barlow's, Inc., 436 U.S. 307 (1978)* (requiring warrant when statute authorizes agency to perform health and safety inspections of all businesses engaged in interstate commerce).

[4] Moreover, it is "a long tradition of *close* government supervision" that is relevant to a finding that a business is closely regulated. *Id., at 313* (emphasis added). Historically, government regulation of the general junk and secondhand industry was roughly equivalent to the modern regulation discussed *infra*. Neither the general junk industry, nor the vehicle-dismantling industry, is or ever has been pervasively regulated.

[5] See licensing and regulatory requirements described in New York City Charter and Admin. Code § B32-1.0 (1977 and Supp. 1985) (exhibitors of public amusement or sport), § B32-22.0 (motion picture exhibitions), § B32-45.0 (billiard and pocket billiard tables), § B32-46.0 (bowling alleys), § B32-54.0 (sidewalk cafes), § B32-58.0 (sidewalk stands), § B32-76.0 (sight-seeing guides), § B32-93.0 (public carts and cartmen), § B32-98.0 (debt collection agencies), § B32-135.0 (pawnbrokers), § B32-138.0 (auctioneers), § B32-167.0

qualifications are required of an aspiring vehicle dismantler; no regulation governs the condition of the premises, the method of operation, the hours of operation, the equipment utilized, etc. This scheme stands in marked contrast to, *e. g.*, the mine safety regulations relevant in *Donovan v. Dewey, supra.* [6]

[2654]** In **[***626]** sum, if New York City's administrative scheme renders the vehicle-dismantling business closely regulated, **[****58]** few businesses will escape such a finding. Under these circumstances, the warrant requirement is the exception not the rule, and *See* has been constructively overruled. [7]

II

Even if vehicle dismantling were a closely regulated industry, I would nonetheless conclude that this search violated the *Fourth Amendment*. The warrant requirement protects **[*722]** the owner of a business from the "unbridled discretion [of] executive and administrative officers," *Marshall, supra, at 323*, by ensuring that "reasonable legislative **[****59]** or administrative standards for conducting an . . . inspection are satisfied with respect to a particular [business]," *Camara v. Municipal Court, 387 U.S. 523, 538 (1967)*. In order to serve as the equivalent of a warrant, an administrative statute must create "a predictable and guided [governmental] presence," *Dewey, 452 U.S., at 604*. Section 415-a5 does not approach the level of "certainty and regularity of . . . application" necessary to provide "a constitutionally adequate substitute for a warrant." *Id., at 603*. [8]

[**60]** The statute does not inform the operator of a vehicle-dismantling business that inspections will be made on a regular basis; in fact, there is *no* assurance that any inspections at all will occur. [9] **[****61]** There is neither an upper nor a lower limit on the number of searches that may be conducted at any given operator's establishment in any given time period. [10] **[*723]**

(laundries), § B32-183.0 (locksmiths and keymakers), § B32-206.0 (sales), § B32-251.0 (garages and parking lots), § B32-267.0 (commercial refuse removal), § B32-297.0 (public dance halls, cabarets, and catering establishments), § B32-311.0 (coffeehouses), § B32-324.0 (sight-seeing buses and drivers), § B32-352.0 (home improvement business), § B32-467.0 (television, radio, and audio equipment phonograph service and repairs), § B32-491.0 (general vendors), § B32-532.0 (storage warehouses).

New York State has equally comprehensive licensing and permit requirements. See *N. Y. Exec. Law § 875* (McKinney Supp. 1987):

"More than thirty-five state agencies issue rules and permits affecting businesses, organizations and individuals. Permits number in the hundreds in statute with still more in rules and regulations. Those who are regulated move in a maze of rules, permits, licenses, and approvals."

[6] This is not an assertion that some minimal number of pages is a prerequisite to a finding of close regulation, see *ante*, at 705, n. 16; instead, it is an assertion about the minimal substantive scope of the regulations. The Mine Safety and Health Act at issue in *Dewey, supra*, mandated inspection of all mines, defined the frequency of inspection (at least twice annually for surface mines, four times annually for underground mines, and irregular 5-, 10-, or 15-day intervals for mines that generate explosive gases), mandated followup inspections where violations had been found, mandated immediate inspection upon notification by a miner or miner's representative that a dangerous condition exists, required compliance with elaborate standards set forth in the Act and in Title 30 of the Code of Federal Regulations, and required individual notification to mine operators of all standards proposed pursuant to the Act. See *Dewey, supra, at 604*.

[7] The Court further weakens limitations on the closely regulated industries category when it allows the government to proceed without a warrant upon a showing of a *substantial* state interest. See *ante*, at 702, 708. The Court should require a warrant for inspections in closely regulated industries unless the inspection scheme furthers an *urgent* governmental interest. See *Dewey, supra, at 599-600*, *Biswell, supra, at 317*.

[8] I also dispute the contention that warrantless searches are necessary to further the regulatory scheme, because of the need for unexpected and/or frequent searches. If surprise is essential (as it usually is in a criminal case), a warrant may be obtained *ex parte*. See W. LaFave, Search and Seizure § 10.2(e), p. 653 (1987). If the State seeks to conduct frequent inspections, then the statute (or some regulatory authority) should somewhere inform the industry of that fact.

[9] See § 415-a5(a) ("Upon request of an agent of the commissioner or of any police officer and during his regular and usual business hours, a vehicle dismantler shall produce such records and permit said agent or police officer to examine them and any vehicles or parts of vehicles which are subject to the record keeping requirements of this section and which are on the premises").

[10] In *Dewey, supra*, of course, there was no upper limit on the number of mine inspections that could occur each year, but because the statute provided for the inspection of each mine every year, the chance that any particular mine would be singled out for repeated or intensive inspection was diminished. See *452 U.S., at 599* (inspections may not be so

Neither the statute, nor any regulations, nor any regulatory body, provides limits or guidance on the selection of vehicle dismantlers for inspection. In fact, the State could not explain why Burger's operation **[***627]** was selected for inspection. 67 N. Y. 2d 338, 341, 493 N. E. 2d 926, 927 (1986). This is precisely what was objectionable about the inspection scheme invalidated in *Marshall*: It failed to "provide any standards to guide inspectors either in their selection of establishments to be searched or in the exercise of their authority to search." *Dewey, supra, at 601*.

[2655]** The Court also maintains that this statute effectively limits the scope of the search. We have previously found significant that "the standards with which a [business] operator is required to comply are all specifically set forth," *452 U.S., at 604*, reasoning that a clear and complete definition of potential administrative violations constitutes an implied limitation on the scope of any inspection. Plainly, a statute authorizing a search which can uncover *no* administrative violations is not sufficiently limited **[****62]** in scope to avoid the warrant requirement. This statute fails to tailor the scope of administrative inspection to the particular concerns posed by the regulated business. I conclude that "the frequency and purpose of the inspections [are left] to the unchecked discretion of Government officers." *Ibid*. The conduct of the police in this case underscores this point. The police removed identification numbers from a walker and a wheelchair, neither of which fell within the statutory scope of a permissible administrative search.

The Court also finds significant that an operator is on notice as to who is authorized to search the premises; I do not find the statutory limitation -- to "any police officer" or "agent of the commissioner" -- significant. The *sole* limitation I see on a police search of the premises of a vehicle dismantler is that it must occur during business hours; otherwise it is open season. The unguided discretion afforded police in this scheme precludes its substitution for a warrant.

[*724] III

The fundamental defect in § 415-a5 is that it authorizes searches intended solely to uncover evidence of criminal acts. The New York Court of Appeals correctly **[****63]** found that § 415-a5 authorized a search of Burger's business "solely to discover whether defendant was storing stolen property on his premises." *67 N. Y. 2d, at 345, 493 N. E. 2d, at 930*. In the law of administrative searches, one principle emerges with unusual clarity and unanimous acceptance: the government may not use an administrative inspection scheme to search for criminal violations. See *Michigan v. Clifford, 464 U.S. 287, 292 (1984)* (opinion of POWELL, J.) (in fire investigation, the constitutionality of a postfire inspection depends upon "whether the object of the search is to determine the cause of the fire or to gather evidence of criminal activity"); *Michigan v. Tyler, 436 U.S. 499, 508 (1978)* ("'if the authorities are seeking evidence to be used in a criminal prosecution, the usual standard of probable cause will apply'") (citations omitted); *Donovan v. Dewey, supra, at 598, n. 6* ("[Warrant and probable-cause requirements] pertain when commercial property is searched for contraband or evidence of crime"); *Almeida-Sanchez **[***628]** v. United States, 413 U.S. 266, 278 (1973)* **[****64]** (POWELL, J., concurring) (traditional probable cause not required in border automobile searches because they are "undertaken primarily for administrative rather than prosecutorial purposes"); *Camara* v. *Municipal Court, supra*, at 539 (authorization of administrative searches on less than probable cause will not "endange[r] time-honored doctrines applicable to criminal investigations"); *See* v. *City of Seattle, 387 U.S., at 549* (Clark, J., dissenting) ("Nothing . . . suggests that the inspection was . . . designed as a basis for a criminal prosecution"); *Abel v. United States, 362 U.S. 217, 226 (1960)* ("The deliberate use by the Government of an administrative warrant for the purpose of gathering evidence in **[*725]** a criminal case must meet stern resistance by the courts"); *id., at 248* (Douglas, J., dissenting) (Government cannot evade the *Fourth Amendment* "by the simple device of wearing the masks of [administrative] officials while in fact they are preparing a case for **[**2656]** criminal prosecution"); *Frank v. Maryland, 359 U.S. 360, 365 (1959)* ("Evidence of criminal **[****65]** action may not . . . be seized without a judicially issued search warrant").[11]

Here the State has used an administrative scheme as a

"random, infrequent, or unpredictable that the owner, for all practical purposes, has no real expectation that his property will from time to time be inspected by government officials").

[11] In *Camara v. Municipal Court, 387 U.S. 523 (1967)*, using the presently relevant example of a search for stolen goods, the Court stated that "public interest would hardly justify a sweeping search of an entire city conducted in the hope that these goods might be found. Consequently, a search for these goods . . . is 'reasonable' only when there is 'probable cause' to believe that they will be uncovered in a particular dwelling." *Id., at 535*.

pretext to search without probable cause for evidence of criminal violations. It thus circumvented the requirements of the *Fourth Amendment* by altering the label placed on the search. This crucial point is most clearly illustrated by the fact that the police copied the serial numbers from a wheelchair and a handicapped person's walker that were found on the premises, and determined that these **[****66]** items had been stolen. Obviously, these objects are not vehicles or parts of vehicles, and were in no way relevant to the State's enforcement of its administrative scheme. The scope of the search alone reveals that it was undertaken solely to uncover evidence of criminal wrongdoing. [12]

Moreover, it is factually impossible that the search was intended to discover wrongdoing subject to administrative **[*726]** sanction. Burger stated that he was not registered to dismantle **[****67]** vehicles as required by § 415-a1, and that he did not have a police book, as required by § 415-a5(a). [13] At that point he had violated every **[***629]** requirement of the administrative scheme. There is no administrative provision forbidding possession of stolen automobiles or automobile parts. [14] The inspection became a search for evidence of criminal acts when all possible administrative violations had been uncovered. [15]

[**68]** The State contends that acceptance of this argument would allow a vehicle dismantler **[**2657]** to thwart its administrative scheme simply by failing to register and keep records. This is false. **[*727]** A failure to register or keep required records violates the scheme and results in both administrative sanctions and criminal penalties. See n. 13, *supra*. Neither is the State's further criminal investigation thwarted; the police need only obtain a warrant and then proceed to search the premises. If respondent's failure to register and maintain records amounted to probable cause, then the inspecting police officers, who worked in the Auto Crimes Division of the New York City Police Department, possessed probable cause to obtain a criminal warrant authorizing a search of Burger's premises. [16] Several of the officers might have stayed

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[12] Thus, I respectfully disagree with the Court's conclusion that there is "no reason to believe that the instant inspection was actually a 'pretext' for obtaining evidence of respondent's violation of the penal laws." *Ante*, at 717, n. 27. Inspection of the serial numbers on the wheelchair and walker demonstrates that the search went beyond any conceivable administrative purpose. At least the second and third counts of Burger's indictment for possession of stolen property, which involve the wheelchair and the walker, must be dismissed.

[13] These omissions also subjected him to potential criminal liability; it is a class E felony to fail to register, § 415-a1, and a class A misdemeanor to fail to produce a police book, § 415-a5(a).

[14] Had Burger been registered as a vehicle dismantler, his registration could have been revoked for illegal possession of stolen vehicles or vehicle parts, and the examination of the vehicles and vehicle parts on his lot would have had an administrative purpose. But he was not registered.

[15] In *Michigan v. Clifford, 464 U.S. 287 (1984)*, a case involving an administrative inspection seeking the cause and origin of a fire, the Court was "unanimous in [the] opinion that after investigators have determined the cause of the fire and located the place it originated, a search of other portions of the premises may be conducted only pursuant to a warrant, issued upon probable cause that a crime has been committed." *Id., at 300* (STEVENS, J., concurring); see also *id., at 294* ("Circumstances that justify a warrantless search for the cause of a fire may not justify a search to gather evidence of criminal activity once that cause has been determined"); *id., at 306* (REHNQUIST, J., dissenting) ("Although the remaining parts of the house could not have been searched without the issuance of a warrant issued upon probable cause" the basement was properly searched for the cause and origin of the fire). Thus, "fire officials [could] not . . . rely on [evidence of criminal activity discovered during the course of a valid administrative search] to expand the scope of their administrative search without first making a showing of probable cause to an independent judicial officer." *Id., at 294*. Likewise here, the administrative inspection ceased when all administrative purposes had been fulfilled. Further investigation was necessarily a search for evidence of criminal violations, and a warrant based on probable cause was required.

[16] Although the fact that the police conducted the search is not dispositive as to its administrative or criminal nature, it should caution the Court to proceed with care, because "searches by the police are inherently more intrusive than purely administrative inspections. Moreover, unlike administrative agents, the police have general criminal investigative duties which exceed the legitimate scope and purposes of purely administrative inspections." *Commonwealth v. Lipomi, 385 Mass. 370, 378, 432 N. E. 2d 86, 91 (1982)*. See also W. LaFave, Criminal Search and Seizure § 10.2(f), p. 661 (1987) ("Existing scope limitations would be entitled to somewhat greater weight where by law the inspections may be conducted only by specialized inspectors who could be expected to understand and adhere to the stated scope limitations, rather than by any law enforcement officer"); *United States ex rel. Terraciano v. Montanye, 493 F.2d 682, 685 (CA2 1974)* (Friendly, J.) (emphasizing the amendment of the New York statute on inspection of drug records "to restrict the right of inspection to representatives of the Health

on the premises to ensure that this unlicensed dismantler did no further business, while the others obtained a warrant. Any inconvenience to the police **[***630]** would be minimal, and in any event, "inconvenience alone has never been thought to be an adequate reason for abrogating the warrant requirement." *Almeida-Sanchez, 413 U.S., at 283* **[****69]** (POWELL, J., concurring).

[**70]** The Court properly recognizes that "a State can address a major social problem *both* by way of an administrative scheme *and* through penal sanctions." *Ante*, at 712. Administrative **[*728]** violations may also be crimes, and valid administrative inspections sometimes uncover evidence of crime; neither of these facts necessarily creates constitutional problems with an inspection scheme. In this case, the problem is entirely different. In no other administrative search case has this Court allowed the State to conduct an "administrative search" which violated no administrative provision and had no possible administrative consequences. [17]

[**71]** The Court thus implicitly holds that if an administrative scheme has certain goals and if the search serves those goals, it may be upheld even if no concrete administrative consequences could follow from a particular search. This is a dangerous suggestion, for the goals of administrative schemes often overlap with the goals of the criminal law. Thus, on the Court's reasoning, administrative inspections would evade the requirements of the *Fourth Amendment* so long as they served an abstract administrative goal, such as the prevention of automobile theft. A legislature cannot abrogate constitutional protections simply by saying that the purpose of an administrative search scheme is to prevent a certain type of crime. If the *Fourth Amendment* is to retain meaning in the commercial context, it must be applied to searches for evidence of criminal acts even if those searches would also serve an administrative purpose, unless that administrative **[**2658]** purpose takes the concrete form of seeking an administrative violation. [18]

[**72]** **[*729]** IV

The implications of the Court's opinion, if realized, will virtually eliminate *Fourth Amendment* protection of commercial entities in the context of administrative searches. No State may require, as a condition of doing business, a blanket submission to warrantless searches for any purpose. I respectfully dissent.

References

58 Am Jur 2d, Occupations, Trades, and Professions 15; *68 Am Jur 2d, Searches and Seizures 10- 21*, *35*, *36*

2 Federal Procedure, L Ed, Administrative Procedure 2:25

22 Am Jur Pl & Pr Forms (Rev), Searches and Seizures, Forms 71-81

USCS, *Constitution, Amendment 4*

US L Ed Digest, Search and Seizure 8, 25

Index to Annotations, Administrative Law; Search and Seizure

Annotation References:

[**73]** *Fourth Amendment's* prohibition of unreasonable search and seizure as applied to administrative inspections of private property. *69 L Ed 2d 1078*.

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Department, . . . rather than 'all peace officers within the state'").

[17] This case thus does not present the more difficult question whether a State could take any criminal conduct, make it an administrative violation, and then search without probable cause for violations of the newly created administrative rule. The increasing overlap of administrative and criminal violations creates an obvious temptation for the State to do so, and plainly toleration of this type of pretextual search would allow an end run around the protections of the *Fourth Amendment*.

[18] Today's holding, of course, does not preclude consideration of the lawfulness of the search under the State Constitution. See *People v. P. J. Video, Inc., 68 N. Y. 2d 296, 501 N. E. 2d 556 (1986)*; *People v. Class, 67 N. Y. 2d 431, 494 N. E. 2d 444 (1986)*.

People v. Scott

Court of Appeal of New York,

January 15, 1992, Argued ; April 2, 1992, Decided

No. 6, No. 27

Reporter
79 N.Y.2d 474 *; 593 N.E.2d 1328 **; 583 N.Y.S.2d 920 ***; 1992 N.Y. LEXIS 940 ****

The People of the State of New York, Respondent, v. Guy F. Scott, Appellant. The People of the State of New York, Respondent, v. George Keta, Appellant.

Subsequent History: [**1]** *People v Keta, 165 AD2d 172*, reversed.

Prior History: Appeal, in the first above-entitled action, by permission of an Associate Judge of the Court of Appeals, from an order of the Appellate Division of the Supreme Court in the Third Judicial Department, entered January 31, 1991, which affirmed a judgment of the Chenango County Court (Kevin M. Dowd, J.), convicting defendant, upon his plea of guilty, of criminal possession of marihuana in the first degree.

Appeal, in the second above-entitled action, by permission of a Justice of the Appellate Division of the Supreme Court in the Second Judicial Department, from an order of that court, entered February 19, 1991, which (1) reversed, on the law, an order of the Supreme Court (William D. Friedmann, J.; opn *142 Misc 2d 986*), entered in Queens County, granting a motion by defendant to suppress physical evidence seized during an administrative search of his vehicle dismantling business and statements made by him to police following his arrest, and (2) denied the motion to suppress the physical evidence and statements.

People v Scott, 169 AD2d 1023, reversed.

Disposition: In *People v Keta:* Order reversed and case remitted to the Appellate **[****2]** Division, Second Department, for further proceedings in accordance with the opinion herein.

Case Summary

Procedural Posture
Co-defendants appealed the orders of the Appellate Divisions of the Supreme Court in the Second and Third Judicial Departments of New York. The first co-defendant challenged the affirmation of his conviction for possession of marijuana. The second co-defendant challenged the reversal of the trial court's grant of his motion to suppress physical evidence obtained during an administrative search and his statements to police after his arrest.

Overview
A co-defendant was convicted of growing marijuana after a trespasser provided information to police and they entered his land without his knowledge or permission. The court of appeals affirmed. On appeal, the court reversed and held that the open fields exception did not adequately protect co-defendant's fundamental constitutional rights and the court declined to adopt it as New York Law. Co-defendant's no trespassing signs indicated his expectation of privacy making the search warrant based upon illegal entries onto the property a nullity. The other co-defendant was charged with possession of stolen property after police conducting an administrative inspection of his business found stolen auto parts. A trial court granted co-defendant's motion to suppress but the appeals court reversed. On appeal, the court reversed and held that the warrantless search was unconstitutional as it was not supported by the exigency of hot pursuit or the existence of a business that was closely regulated. The court found that such administrative inspections were only valid if they were part of a comprehensive administrative program unrelated to the enforcement of criminal laws.

Outcome
The court reversed the decisions of the appeals courts.

Counsel: *Terence L. Kindlon* for appellant in the first above-entitled action. "No Trespassing" signs or other indicia of efforts to exclude the public are relevant in ascertaining the extent of an owner's legitimate expectation of privacy under our State Constitution--as contradistinguished from the Supreme Court's "open fields" doctrine under the Fourth Amendment--in wooden lands, isolated rural areas and in the buildings

in the immediate vicinity of the home. (Oliver v United States, 466 US 170; People v Reynolds, 71 NY2d 552; People v Harris, 77 NY2d 434; Katz v United States, 389 US 347.)

James E. Downey, District Attorney, for respondent in the first above-entitled action. The Court of Appeals should not create a new constitutional right that makes "posted" lands inviolate without a search warrant under any and all circumstances. (People v Reynolds, 71 NY2d 552; Oliver v United States, 466 US 170; Florida v Riley, 488 US 445; People v Joeger, 111 AD2d 944; People v Abbot, 105 AD2d 1029; People v Fillhart, 93 Misc 2d ***[****3]*** 911.)

Stephen R. Mahler for appellant in the second above-entitled action. Vehicle and Traffic Law § 415-a (5) (a) violates the proscription against unreasonable searches and seizures contained in article I, § 12 of the New York Constitution. (People v Burger, 67 NY2d 338; People v Dunn, 77 NY2d 19; People v Vilardi, 76 NY2d 67; People v Kohl, 72 NY2d 191; People v Griminger, 71 NY2d 635; Matter of Patchogue-Medford Congress of Teachers v Board of Educ., 70 NY2d 57; People ex rel. Arcara v Cloud Books, 68 NY2d 553; People v P. J. Video, 68 NY2d 296; Serpas v Schmidt, 827 F2d 23, 485 US 904; People v Hedges, 112 Misc 2d 632.)

Richard A. Brown, District Attorney (Barbara D. Underwood and *Michael O'Brien* of counsel), for respondent in the second above- entitled action. I. The warrantless inspection of defendant's junkyard was permissible under the New York Constitution as well as under the United States Constitution. (New York v Burger, 482 US 691; People v Harris, 77 NY2d 434; People v Vilardi, 76 NY2d 67; People v Kohl, 72 NY2d 191; People v Griminger, 71 NY2d 635; People v Alvarez, ***[****4]*** 70 NY2d 375; People v P. J. Video, 68 NY2d 296; People v Ponder, 54 NY2d 160; People v Dunn, 77 NY2d 19.) II. This Court need not determine the constitutionality of New York City Charter § 436. In any event, the statute is constitutional. (New York v Burger, 483 US 691; Matter of Picone v Commissioner of Licenses, 241 NY 157; People v Tinneny, 99 Misc 2d 962; People v Pace, 111 Misc 2d 488, 101 AD2d 336, 65 NY2d 684; Eaton v New York City Conciliation & Appeals Bd., 56 NY2d 340; Pharmaceutical Mfrs. Assn. v Whalen, 54 NY2d 486.)

Judges: Judges Kaye, Alexander and Hancock, Jr., concur with Judge Titone; Judge Kaye concurs in a separate opinion in which Judges Alexander, Titone and Hancock, Jr., also concur; Judge Bellacosa dissents and votes to affirm in another opinion in which Chief Judge Wachtler and Judge Simons concur.

Opinion by: Hancock, Jr., J.

Opinion

[*478] [1330] [***922]** *People v Scott*

In Oliver v United States (466 US 170) the Supreme Court fully reaffirmed the doctrine articulated in Hester v United States (265 US 57): that in areas outside the curtilage, an owner of "open fields" enjoys no Fourth **[****5]** Amendment protection. This is so, the *Oliver* majority held, even for secluded lands and notwithstanding efforts of the owner to exclude the public by erecting fences or posting "No Trespassing" signs. In this appeal by defendant from a conviction for illegally growing marihuana on his land, we address the question expressly left open in People v Reynolds (71 NY2d 552): whether the Supreme Court's categorical ruling in *Oliver* should be adopted as the law of this State under article I, § 12 of the New York State Constitution. For reasons which follow, we hold that the *Oliver* ruling does not adequately protect fundamental constitutional rights *(see,* People v P. J. Video, 68 NY2d 296, 303-306) and we decline to adopt it. There should, therefore, be a reversal.

I

Defendant was convicted on his guilty plea in County Court of criminal possession of marihuana in the first degree. The plea followed the denial of defendant's motion to suppress the evidence of marihuana cultivation seized by State Police on the execution of a search warrant. The Appellate Division unanimously affirmed in a memorandum agreeing with County Court's conclusion that "defendant's act **[****6]** of posting no trespassing signs about every 20 to 30 feet around the perimeter of his property, which consisted of 165 acres of rural, hilly, **[*479]** undeveloped, uncultivated fields and woodlands except for defendant's cultivation of marihuana thereon, [did not establish] an expectation of privacy cognizable under the right to privacy protection of the 4th Amendment of the US Constitution and article I, section 12 of the NY Constitution" (People v Scott, 169 AD2d 1023, 1024).

The relevant facts upon which County Court denied suppression following the hearing are not in dispute. On August 23, 1988, the New York State Police with assistance from the Chenango County Sheriff's Department, executed a search warrant on property owned by the defendant. The application for the warrant included the "in camera" testimony of William Collar, a private citizen, who in the fall of 1987 had shot and wounded a deer and followed it onto defendant's property. He observed what appeared to be the remnants of a marihuana growing operation. When Collar entered the property again in July of 1988, he testified, he saw approximately 50 marihuana plants under cultivation. He reported this **[****7]** information to the State Police who requested that he obtain a leaf from one of the plants on the property. Collar did so. On August 22, 1988, Investigator Leslie Hyman of the State Police accompanied Collar to the site where Hyman personally observed the plants. None of the entries by Investigator Hyman or William Collar was with defendant's knowledge or permission.

In addition to the foregoing, the warrant application contained tax maps showing that the property belonged to defendant and a report of an anonymous telephone tip to the effect that defendant was growing marihuana on the property. The hearing court found that the property "was conspicuously marked with No Trespassing signs **[**1331]** **[***923]** clearly visible and indeed observed by not only the confidential informant [William Collar] but the police units entering the property." The residence consisted of a mobile home with no utilities located near County Route 19, a two-lane road in the Town of Preston. The marihuana plants were not found within the curtilage of defendant's mobile home but some 300-400 yards away.

In denying the motion to suppress, the hearing court relied on the rationale of *Oliver* ***[****8]*** *v United States (supra)* and held that the "intrusion by the confidential informant and police officer did not in any way infringe upon any of the personal or societal values that the Fourth Amendment was designed to protect against or article I section 12 of the State Constitution was designed to protect against."

[*480] The Appellate Division, in its affirmance, concluded that the "open fields doctrine upheld in *Oliver* is followed in New York" *(id., at 1025)*, citing its prior decision in *People v Joeger (111 AD2d 944)* and our decision in *People v Reynolds (71 NY2d 552, 556)*. The Appellate Division reasoned that inasmuch as the "marijuana … was clearly grown in an open, uncultivated field away from the curtilage of any residential structure …, defendant had no legitimate expectation of privacy" *(id., at 1025)*. Because defendant had no right of privacy under *Oliver,* it was of no moment, in the Court's view, whether Collar had become an agent of the police in reentering the property at their direction *(id., at 1025-1026)*. Defendant has appealed by leave. We now reverse.

II

There is nothing in *People v Reynolds (supra)* which inhibits **[****9]** our rejection of *Oliver* if we are persuaded that the proper safeguarding of fundamental constitutional rights requires that we do so *(see, e.g., People v P. J. Video, supra, at 303-306)*. In *Reynolds,* the Court pointed out that defendant made no claim that her property was bounded by fencing or marked by signs warning against trespass. Accordingly, it expressly declined to address the question of whether such obvious manifestations of an intention to exclude the public could--contrary to the Supreme Court's holding in *Oliver*--create an expectation of privacy cognizable under article I, § 12 of our State Constitution *(see, People v Reynolds, supra, at 556, 557, 558*; *see also, id., at 559, 562-563* [Hancock, Jr., J., dissenting]).

Nor, contrary to the People's argument, is there any inconsistency in our adopting a more protective rule under our State Constitution in the present case than in our prior decisions involving rights protected by article I, § 12 *(see, e.g., People v Keta,* majority opn, at 495-496, 496- 497; *People v Dunn, 77 NY2d 19, 24-25* [holding canine sniff to be an invasion of defendant's expectation of privacy under art I, § **[****10]** 12]; *People v Torres, 74 NY2d 224, 227* [rejecting Supreme Court's expansive view of "stop and frisk" procedures as applied to automobiles]; *Matter of Patchogue-Medford Congress of Teachers v Board of Educ., 70 NY2d 57, 65-69* [holding that mandatory drug testing of teachers constituted an illegal search in violation of teachers' rights of personal privacy protected by *NY Const, art I, § 12*]; *People v P. J. Video, 68 NY2d 296, 303-309*, [requiring standards more exacting than those demanded by Supreme **[*481]** Court for issuance of search warrant for videotapes as evidence in obscenity prosecution]; *People v Class, 67 NY2d 431, 433* [adhering on remand to earlier holding *(see, People v Class, 63 NY2d 491, 494)* that nonconsensual entry of automobile by police to inspect VIN number violated defendant's legitimate expectation of privacy under *NY Constitution, article* ***[**1332] [***924]*** *I, § 12* (citing, *inter alia, Katz v United States, 389 US 347*)]; *People v Gokey, 60 NY2d*

309, 312; People v Gleeson, 36 NY2d 462; see also, People v Millan, 69 NY2d 514, 519-522, n 7; People v Stith, 69 NY2d 313, 316; People v Johnson, **[****11]** 66 NY2d 398, 407; People v Bigelow, 66 NY2d 417, 426-427; People v Belton, 55 NY2d 49; People v Elwell, 50 NY2d 231, 234-242). [1]

III

In deciding whether our Court should adopt the absolute rule stated in *Oliver,* that decision must be considered in the light of the Supreme Court's prior Fourth Amendment holdings. In *Oliver,* the Court expressly reconfirmed its original "open fields" ruling in Hester v United States (265 US 57, *supra),* a decision founded on a literal interpretation of the language of the Fourth Amendment. The *Hester* Court had upheld a warrantless search of a field **[****12]** by Federal agents, declaring that "the special protection accorded by the Fourth Amendment to the people in their 'persons, houses, papers, and effects,' *is not extended to the open fields" (* id., at 59 [emphasis added]). The Court, three years later in Olmstead v United States (277 US 438)--holding that the Fourth Amendment did not apply to wiretap eavesdropping--endorsed *Hester's* literal interpretation and introduced the concept that a Fourth Amendment search required an actual trespass into a constitutionally protected area *(* id., at 463-466). Thus, under the combined holdings of *Hester* and *Olmstead,* a warrantless search of land was constitutionally prohibited only if it involved a physical trespass by a government agent into the residence itself or its curtilage.

In 1967, the Supreme Court, in its seminal decision in Katz **[*482]** v United States (389 US 347, *supra),* abandoned the *Hester-Olmstead* property-oriented, physical trespass approach to its Fourth Amendment jurisprudence and declared that the "Fourth Amendment protects people--and not simply 'areas'--against unreasonable searches and seizures" *(* id., at 353). Overruling **[****13]** its earlier eavesdropping and bugging decisions in Olmstead v United States (supra) and Goldman v United States (316 US 129), the Court held that the trespass doctrine of those cases was no longer controlling. Thus, the issue became not whether the telephone booth was a constitutionally protected area which State agents had transgressed, but whether the petitioner's privacy rights had been violated. The Court concluded that the government's actions in "electronically listening to and recording the petitioner's words violated the privacy upon which he justifiably relied while using the telephone booth and thus constituted a 'search and seizure' within the meaning of the Fourth Amendment" (id., at 353). In what came to be accepted as the *Katz* "expectation of privacy" formulation, Justice Harlan introduced a two-step analysis: (1) whether the individual has manifested a subjective expectation of privacy from the challenged search; and, (2) if so, whether society would find that expectation objectively reasonable *(see,* id., at 360-362 [Harlan, J., concurring]).

Seventeen years after *Katz,* the Court revisited the question of Fourth Amendment protection **[****14]** against warrantless searches on land outside the curtilage in two consolidated appeals decided in Oliver v United States (466 US 170, **[***925]** *supra).* **[**1333]** The search in each case was of land in a secluded area. The cases differed from *Hester* in one respect. Both landowners had posted "no trespassing" signs. Moreover, in *Oliver,* the agents had walked around a locked gate. Before the *Oliver* decision, many had speculated that the Court's decision in *Katz* had overruled or substantially limited *Hester,* inasmuch as *Katz* had repudiated the rigid property concepts applied in *Olmstead* and *Hester (see, e.g., United States v Oliver, 686 F2d 356 [6th Cir 1982, en banc],* dissenting opn, at 365-367; Oliver v United States, supra, at 174, n 3; 1 LaFave, Search and Seizure § 2.4, at 426, and cases cited, nn 17-18 [2d ed]).

In its *Oliver* decision, the Court put an end to the uncertainty. It reverted to and reinforced the doctrine established in the pre- *Katz* cases of *Hester* and *Olmstead.* After *Oliver,* it was settled that for land outside of the curtilage an owner was entitled to no Fourth Amendment protection, **[****15]** even for secluded property which has been fenced or posted. As the **[*483]** initial basis for its holding, the Court returned to the literal reasoning of *Hester:* that because the language of the Amendment referred to the security of the people only "in their persons, houses, papers, and effects", a warrantless intrusion by State agents on *open land* was not "proscribed by the text of the Fourth Amendment" *(* Oliver v United States, supra, at 177).

To obviate the seeming inconsistency between its

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[1] *See generally,* Brennan, *State Constitutions and the Protection of Individual Rights,* 90 Harv L Rev 489; Galie, *Modes of Constitutional Interpretation: The New York Court of Appeals Search for a Role,* 4 Emerging Issues in St Const Law 225; Galie, *State Constitutional Guarantees and Protection of Defendants' Rights: The Case of New York, 1960-1978,* 28 Buffalo L Rev 157.

revival of the strict *Hester* doctrine and the *Katz* expectation of privacy approach, the Court held that for the residence and its immediate environs the expectation of privacy rationale would apply. But the Court was faced with the argument that the two-part *Katz* formulation should logically apply as well to open land which was fenced or posted against trespassers. The Court simply dismissed this argument in its second legal holding: that an owner of such open land could have no expectation of privacy, in any event, because an expectation based on posting or fencing land or planting crops in secluded areas is, as a matter of law, not one that society recognizes **[****16]** as reasonable. In other words, the owner's claimed privacy expectancy could not pass the second or objective part of the *Katz* test. The Court held:

"There is no societal interest in protecting the privacy of those activities, such as the cultivation of crops, that occur in open fields. Moreover, as a practical matter these lands usually are accessible to the public and the police in ways that a home, an office, or commercial structure would not be. It is not generally true that fences or 'No Trespassing' signs effectively bar the public from viewing open fields in rural areas. And both petitioner Oliver and respondent Thornton concede that the public and police lawfully may survey lands from the air. *For these reasons, the asserted expectation of privacy in open fields is not an expectation that 'society recognizes as reasonable' " (* id., at 179 [emphasis added]).

Apparently attaching significance to the illegality of activities sought to be kept private (i.e., growing marihuana), [2] **[*484]** rather **[**1334]** **[***926]** than the nature of the efforts to assure privacy, the Court held that defendants' expectations of privacy *were not legitimate.* The **[****17]** Court's reasoning follows:

[**18]** "Initially, we reject the suggestion that steps taken to protect privacy establish that expectations of privacy in an open field are legitimate. *It is true, of course, that petitioner Oliver and respondent Thornton, in order to conceal their criminal activities, planted the marihuana upon secluded land and erected fences and 'No Trespassing' signs around the property.* And it may be that because of such precautions, few members of the public stumbled upon the marihuana crops seized by the police. *Neither of these suppositions demonstrates, however, that the expectation of privacy was legitimate in the sense required by the Fourth Amendment. The test of legitimacy is not whether the individual chooses to conceal assertedly 'private' activity. Rather, the correct inquiry is whether the government's intrusion infringes upon the personal and societal values protected by the Fourth Amendment.* As we have explained, we find no basis for concluding that a police inspection of open fields accomplishes such an infringement" *(*id., at 182-183 [emphasis added]).

In sum, the *Oliver* rule is absolute: in land outside the curtilage the owner has no constitutionally protectible **[****19]** interest. Regardless of steps taken to assure privacy, such as **[*485]** posting or erection of fences, and irrespective of the benign nature of the activities sought to be kept private, [3] the police may

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[2] Calling attention to the Court's reference to the nature of defendants' illegal activities--activities discovered only as a result of illegal entry by the police--Justice Marshall, in his dissent, observed that the inquiry as to whether the expectation of privacy is reasonable in most circumstances "requires analysis of the *sorts of uses to which a given space is susceptible, not the manner in which the person asserting an expectation of privacy in the space was in fact employing it.* See, *e.g., United States v. Chadwick,* 433 U. S., at 13. We make exceptions to this principle and evaluate uses on a case-by-case basis in only two contexts: when called upon to assess (what formerly was called) the 'standing' of a particular person to challenge an intrusion by government officials into a area over which that person lacked primary control, see, *e.g., Rakas v. Illinois,* 439 U. S., at 148-149; Jones v. United States, 362 U. S. 257, 265-266 (1960), and when it is possible to ascertain how a person is using a particular space without violating the very privacy interest he is asserting, see, *e. g.,* Katz v. United States, 389 U. S., at 352. ... Neither of these exceptions is applicable here. *Thus, the majority's contention that, because the cultivation of marihuana is not an activity that society wishes to protect, Oliver and Thornton had no legitimate privacy interest in their fields, ante, at 182-183, and n. 13, reflects a misunderstanding of the level of generality on which the constitutional analysis must proceed." (*Oliver v United States, id., at 191-192, n 13 [emphasis added].)

[3] As Justice Marshall observed: "Privately owned woods and fields that are not exposed to public view regularly are employed in a variety of ways that society acknowledges deserve privacy. Many landowners like to take solitary walks on their property, confident that they will not be confronted in their rambles by strangers or policemen. Others conduct agricultural businesses on their property. Some landowners use their secluded spaces to meet lovers, others to gather together with fellow worshippers, still others to engage in sustained creative endeavor. Private land is sometimes used as a refuge for wildlife, where flora and fauna are protected from human intervention of any kind" *(*id., at 192 [Marshall, J., dissenting]).

enter without a warrant.

IV

In considering whether the *Oliver* **[****20]** rule should be adopted as New York law, we note that the *Oliver* majority's holding that the Amendment covers persons, houses, papers and effects--but not land--seems directly contrary to the basic concept of post-*Katz* decisions that the Amendment protects a person's privacy, not particular places *(see, e.g.,* United States v Chadwick, 433 US 1, 7 [defendants' rights held to be infringed by a police search of container in automobile upon the ground that "the Fourth Amendment 'protects people, not places,' Katz v. United States, 389 U.S. 347, 351 (1967); more particularly, it protects people from unreasonable government intrusions into their legitimate expectations of privacy"]; [4] Smith v Maryland, 442 US 735, 740, and cases cited). Justice Marshall's dissent in *Oliver* points up the inconsistency between the majority's restricted reading of the Amendment's language and the *Katz* holding that a telephone conversation is protected under the Fourth Amendment although "neither a public telephone booth nor a conversation conducted therein *can* **[**1335]** **[***927]** *fairly be described as a person, house, paper, or effect" (* Oliver v United States, ***[****21]*** supra, at 185 [emphasis added]; *id., at 185-188*; *see also,* Marshall v Barlow's, Inc., 436 US 307, 311 [holding that business premises are protected although not covered by the **[*486]** plain language of the Amendment]; G. M. Leasing Corp. v United States, 429 US 338, 358-359 [same]). While we agree with Justice Marshall's dissent as to these evident contradictions, we find the *Oliver* majority's literal interpretation of the Amendment's language and its reliance on history to support it, to be of little relevance, in any event *(see, e.g.,* the majority's reference *[*Oliver v United States, supra, at 176-177] to the rejection of James Madison's proposed draft which had included "other property" in addition to "persons", "houses", and "papers"). For we are concerned here with a provision in a different Constitution with its own unique history.

[**22]** As pointed out in *P. J. Video* (68 NY2d, at 304, n 4, *supra),* the guarantee against unreasonable searches and seizures found in article I, § 12 was originally contained in a New York statute (Civil Rights Law § 8); it was not added to the State Constitution until 1938. The available constitutional history is sparse and provides little guidance *(see,* Titone, *State Constitutional Interpretation: The Search for an Anchor in a Rough Sea,* 61 St John's L Rev 431, 462-466). It should be noted, moreover, that the texts of article I, § 12 and the Fourth Amendment are not the same. The New York provision contains a clause not found in the Fourth Amendment *(see,* NY Const, art I, § 12, 2d para [providing protection against interception of telephone and telegraph communications, contrary to the now obsolete rule of Olmstead v United States (supra)]; Berger v New York, 388 US 41, 46).

Thus, the significant question before us does not pertain to the *Oliver* majority's first basis for its holding--i.e., its literal textual analysis of the Amendment. The question is whether we should adopt the Court's second ground for its decision and its basis for not applying **[****23]** the *Katz* test to open land: the categorical holding that an expectation of privacy in land outside the curtilage (manifested by posting or erecting fences) *is not one which society is prepared to recognize as reasonable.* We believe that under the law of this State the citizens are entitled to more protection. A constitutional rule which permits State agents to invade private lands for no reason at all--without permission and in outright disregard of the owner's efforts to maintain privacy by fencing or posting signs--is one that we cannot accept as adequately preserving fundamental rights of New York citizens. Such a rule is contrary to New York decisions, particularly those adopting the *Katz* rationale in search and seizure cases. It is also incompatible with Justice Brandeis' *Olmstead* dissent declaring the "right to be **[*487]** let alone--the most comprehensive of rights and the right most valued by civilized men" *(* Olmstead v United States, supra, at 478)--a core principle reflected in our cases vindicating a broader privacy right in areas other than search and seizure *(see e.g.,* Matter of Doe v Coughlin, 71 NY2d 48, 52-53; People v Onofre, 51 ***[****24]*** NY2d 476, 485-488; Rubenfeld, *The Right of Privacy,* 102 Harv L Rev 737, 745, n 47).

It is true that not every property right entails a protectible privacy interest. Nevertheless, "property rights reflect

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[4] In *Chadwick* the Court held that the rationale of the "automobile exception" did not provide a basis for the warrantless inspection of a closed container in the trunk of an automobile and that a defendant has a greater expectation of privacy in personal luggage than in an automobile. This holding was abandoned and *Chadwick* together with Arkansas v Sanders (442 US 753) was overruled on May 30, 1991 in *California v Acevedo* (500 US, 111 S Ct 1982-1991; *see,* Green, *"Power, Not Reason": Justice Marshall's Valedictory and the Fourth Amendment in the Supreme Court's 1990 Term,* 70 NC L Rev 373, 374, n 5, 387-396).

society's explicit recognition of a person's authority to act as he wishes in certain areas, and therefore should be considered in determining whether an individual's expectations of privacy are reasonable." *(Rakas v Illinois, 439 US 128, 153* [Powell, J., concurring].) That a landowner has a legal right to exclude the public is recognized in the sections of New York's Penal Law dealing with offenses involving damage to and intrusion upon property *(see,* Penal Law art 140, particularly § 140.05 [trespass], and **[**1336]** **[***928]** § 140.10 [a] [criminal trespass in the third degree] [unlawful to remain upon real property which is fenced or otherwise enclosed in a manner designed to exclude intruders]; *see also,* Model Penal Code and Commentaries § 221.2, at 87 [1980]). This "power to exclude has traditionally been considered one of the most treasured strands in an owner's bundle of property rights" *(Loretto v Teleprompter Manhattan CATV Corp., **[****25]** 458 US 419, 435*; *see, Seawall Assocs. v City of New York, 74 NY2d 92, 102-106*; Holmes, The Common Law, at 208-214, 244-246).

Our Legislature has recognized the owner's right to prohibit entry on land in the posting provisions of the Environmental Conservation Law *(see, ECL 11-2111*, *11-2113*, *71-0925*, *71-0919*) and in *General Obligations Law § 9-103*, enacted for the purpose of dissuading landowners from posting their property and encouraging them to admit the public *(see, Ferres v City of New Rochelle, 68 NY2d 446, 452- 454)*. Despite the People's urging, we do not dismiss so lightly the fact that the police were violating defendant's property rights and committing criminal and civil trespass by entering the land. As Justice Brandeis observed, "Our Government is the potent, the omnipresent teacher. For good or for ill, it teaches the whole people by its example. Crime is contagious. If the Government becomes a lawbreaker, it breeds contempt for law" *(Olmstead v United States, 277 US, at 485*, [Brandeis, J., dissenting]). Significantly, our own Court--in suppressing evidence under the Fourth Amendment and article I, § 12--has adverted **[*488]** to the illegal **[****26]** conduct of the police in obtaining the evidence through a trespass on private property *(see, People v Gleeson, 36 NY2d 462, 464-467*, *supra).*

But it is in the search and seizure cases decided after *Katz* that it becomes plain that the *Oliver* majority's categorical no- protection rule would be inimical to New York law. Our Court, in applying both Federal and State law, has consistently adhered to the concept introduced in *Katz:* that the Fourth Amendment and article I, § 12 protect the privacy rights of persons, not places *(see, e.g., Matter of Seelig v Koehler, 76 NY2d 87, 91-93*; *id., at 97- 98* [Wachtler, Ch. J., dissenting]; and *Matter of Patchogue- Medford Congress of Teachers v Board of Educ., 70 NY2d 57, 65-69*, [both cases discussing the extent of privacy interests protected under article I, § 12 in the context of mandatory urinalysis of employees for drug testing]; *see also,* cases discussed, part II, *supra,* at 480-481, particularly, *People v Torres, 74 NY2d 224*, *227, supra; People v Class, 67 NY2d 431, 433*, *supra; People v Gokey, 60 NY2d 309, 312*, *supra).* Reverting to the *Oliver* majority's pre-*Katz,* property- **[****27]** oriented approach would subvert New York's acceptance of article I, § 12 and the Fourth Amendment as affording protection not to places, but to an individual's legitimate expectation of privacy.

Moreover, we find troublesome, as did Justice Marshall, the *Oliver* Court's suggestion that the very conduct discovered by the government's illegal trespass (i.e., growing marihuana) could be considered as a relevant factor in determining whether the police had violated defendant's rights *(see, Oliver v United States, supra, at 191, n 13* [Marshall, J., dissenting] [quoted *supra, at 483-484, n 2*]). Such after-the-fact justification for illegal police conduct would not be compatible with New York's recognition of fairness as an essential concern in criminal jurisprudence *(see, e.g., People v Millan, 69 NY2d 514, 518-520*; *People v Jones, 70 NY2d 547, 550-553*; *People v Rosario, 9 NY2d 286, 286-289)*.

[1337]** **[***929]** The reasoning of the *Oliver* majority, seems, to be this, in effect: that law-abiding persons should have nothing to hide on their property and, thus, there can be no reasonable objection to the State's unpermitted entry on posted or **[****28]** fenced land to conduct a general search for contraband. But this presupposes the ideal of a conforming society, a concept which seems foreign to New York's tradition of tolerance of the unconventional and of what may appear bizarre or even offensive *(see,* **[*489]** *People ex rel. Arcara v Cloud Books, 68 NY2d 553, 557*; *People v P. J. Video, supra, at 308-309*; *Bellanca v New York State Liq. Auth., 54 NY2d 228*; *People v Onofre, supra, at 487-489*). So also does this reasoning ignore the truism that even law-abiding citizens may have good reasons for keeping their activities private *(see, Oliver v United States, supra, at 192, n 15* [Marshall, J., dissenting] [quoted, *supra, at 485, n 3*]), and the general notion that the only legitimate purpose for governmental infringement on the rights of the individual is to prevent harm to others *(see, Bowers v Hardwick, 478 US 186, 199, 203-206, 211-213* [Blackmun, J., dissenting]; *id., at 217-218* [Stevens, J., dissenting]; *People v Onofre,*

supra, at 486-493; *and see,* Mill, On Liberty, at 68, 141-162 [Himmelfarb ed, 1985]; *see also,* Rubenfeld, *The Right of Privacy,* 102 Harv L **[****29]** Rev 737, 756-757, nn 106, 107). We do not find the *Oliver* Court's reasoning acceptable as a justification under article I, § 12 for a nonconsensual governmental search of properly posted or fenced land outside the curtilage.

V

The dissent is remarkable both for what it says, and does not say. Its displeasure is directed not at our determination that certain rights of the defendant require protection under our law but at our decision to afford protection to these rights under the State Constitution. Nowhere does the dissent take issue with the basic proposition that in a free society the police should not be permitted to encroach upon private property against the owner's will and then to use the fruits of their trespass as incriminating evidence. Its reproaches are aimed instead at our exercise of the authority of the State Constitution to prohibit such unlawful conduct where, as under *Oliver,* the Federal Constitution fails to do so. The dissent brings into sharp focus divergent views concerning the place of State Courts in our Federal system and the circumstances under which they should act to protect fundamental rights of citizens left unprotected by the Federal **[****30]** Constitution. The views of the dissent on these issues are thoroughly analyzed and answered by Judge Kaye in her concurrence which, in all respects, is adopted here.

In rejecting the *Oliver* majority's reversion to a pre-*Katz* application of the Fourth Amendment based on property concepts and a literal interpretation of its text, we have done so primarily for these reasons: (1) since the *Katz* decision in **[*490]** 1967 our Court, in countless search and seizure cases, has applied the *Katz* expectation of privacy rational, and to accept *Oliver's* return to what was thought to have been the abandoned *Hester-Olmstead* conception of the Fourth Amendment would be contrary to our post-*Katz* case law; (2) the rule that an owner can never have an expectation of privacy in open lands is repugnant to New York's acceptance of "the right to be let alone" *(* Olmstead v United States, supra, at 478 [Brandeis, J., dissenting]) as a fundamental right deserving legal protection; (3) the unbridled license given to agents of the State to roam at will without permission on private property in search of incriminating evidence is repugnant to the most basic notions of fairness **[****31]** in our criminal law. [5]

[1338]** **[***930]** These reasons we are convinced, require us to reject *Oliver* and to turn instead to our State Constitution for the protection of our citizens' rights. They are certainly as compelling or more so than the reasons which in the past have prompted the Court to resort to article I, § 12 for the adequate protection of fundamental rights *(compare,* cases **[****32]** cited, supra, at 480-481, particularly, People v Torres, supra; Matter of Patchogue-Medford Congress of Teachers v Board of Educ., supra; People v P. J. Video, supra; People v Class, supra; People v Gokey, supra*).* For the dissenters, it seems, these reasons are far from enough; for it is obvious that the dissent's distress is not only with this decision but with the general concept of State constitutionalism.

What would meet the requirements of the noninterpretative method of analysis which we are accused of scuttling (dissenting opn, at 518) is not clear; but we decline to adopt any rigid method of analysis which would, except in unusual circumstances, require us to interpret provisions of the State Constitution in "Lockstep" with the Supreme Court's interpretations of similarly worded provisions of the Federal Constitution *(see,* Abrahamson, *Criminal Law and State Constitutions: The Emergence of State Constitutional Law,* 63 Tex L Rev 1141, at 1166-1168). Fortunately, we believe, our Court has never **[*491]** adopted the "Lockstep" model or any other fixed analytical formula for determining when the proper protection of fundamental rights requires resort to **[****33]** the State Constitution *(see, e.g.,* Abrahamson, *Criminal Law and State Constitutions: The Emergence of State Constitutional Law, op. cit.,* at 1156-1193). Our role, as we see it, is to analyze the particular case and the Federal constitutional rule at issue in the light of considerations such as those discussed by Judge Titone in *People v Keta* (majority opn, at 496- 497, 497 [decided herewith]) in order to determine whether under established New York law and traditions some greater

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[5] To these reasons may be added the *Oliver* majority's suggestion that, in deciding whether a landowner's expectation of privacy is legitimate, a court may consider the legality of the very conduct sought to be kept private *(see,* supra, at 483-484, n 2, quoting *Oliver* [Marshall, J., dissenting]). It is obvious that such a rule, if allowed, would contravene our established search and seizure law and offend accepted notions as to the proper limits on governmental authority to intrude upon and control noninjurious activities of its citizens conducted within the private confines of their property.

degree of protection must be given. In this case we are convinced that it must be. For, as Justice William Brennan has emphasized, "state courts cannot rest when they have afforded their citizens the full protections of the federal Constitution" and without "the independent protective force of state law … the full realization of our liberties cannot be guaranteed" (Brennan, *State Constitutions and the Protection of Individual Rights,* 90 Harv L Rev 489, 491).

We hold that where landowners fence or post "No Trespassing" signs on their private property or, by some other means, indicate unmistakably that entry is not permitted, the expectation that their privacy rights will be respected **[****34]** and that they will be free from unwanted intrusions is reasonable. In the case at bar, the warrantless entries of State Police Investigator Hyman and of William Collar, acting at the request of the police, were illegal under *NY Constitution, article I, § 12*. That the property was posted with "No Trespassing" signs is undisputed. The People do not contend--notwithstanding this posting--that defendant permitted others on his land or that, in some other way, he failed to manifest a subjective expectation of privacy. Nor do they claim that the area where the marihuana was allegedly being cultivated was in plain view from a place of public access. The search warrant obtained on the basis of these illegal entries was, therefore, a nullity and the seizure of the evidence discovered upon its execution should have been suppressed.

[1339] [***931]** Accordingly, the order of the Appellate Division should be reversed, the guilty plea vacated, the motion to suppress the evidence granted and the indictment dismissed.

Titone, J.

People v Keta

In *New York v Burger (482 US 691*), the United States **[*492]** Supreme Court held that *Vehicle and Traffic Law § 415-a* **[****35]** (5) (a), which authorizes the police to conduct random warrantless searches of vehicle dismantling businesses to determine whether such businesses are trafficking in stolen automobile parts, does not violate the Fourth Amendment's proscription against unreasonable searches and seizures. This appeal calls upon us to determine whether that provision can likewise withstand challenge under article I, § 12 of our State Constitution. For the reasons that follow, we conclude that it cannot.

I

In February 1988, a five-member team from the Auto Crime Division of the New York City Police Department arrived at a vehicle dismantling operation located in the Maspeth section of Queens to conduct a random warrantless inspection of the premises pursuant to *Vehicle and Traffic Law § 415-a (5) (a)*. Upon their arrival, the members of the team entered the business's front office, where they identified themselves as police officers and announced that they were present to perform an administrative inspection. Upon the officers' request, defendant--the owner and operator of the business--produced various New York City permits and his vehicle dismantler's license. Two of the officers then proceeded **[****36]** to the premises' yard, where they randomly selected vehicle identification numbers from several auto parts. After entering the numbers into a mobile computer located in their patrol car, the officers discovered that two of the parts were from automobiles which had been reported stolen. Defendant was then ordered to produce his so-called "police book," in which entries relating to the purchase of vehicle parts were required to be recorded. After it was ascertained that defendant's "police book" did not contain the required entries pertaining to the stolen parts, defendant was placed under arrest. A detailed search of the premises, subsequently conducted pursuant to a search warrant, revealed some 35 other automobile parts which had also been reported stolen.

Defendant was thereafter charged with, *inter alia,* multiple counts of criminal possession of stolen property in the third degree. Prior to trial, he moved to suppress the physical evidence which had been seized from his vehicle dismantling business. In support of his motion, defendant argued that *section 415-a (5) (a)* violated the proscription against unreasonable searches and seizures contained in *article I, § 12 **[****37]** of the **[*493]** New York State Constitution.* The hearing court agreed and granted defendant's motion to suppress. On appeal, however, a divided Appellate Division reversed. Noting that the United States Supreme Court had already upheld the statutory provisions for warrantless "administrative" searches of vehicle dismantling businesses against a Fourth Amendment challenge *(New York v Burger, 482 US 691*, *supra),* the Appellate Division found no reason to reach a different conclusion under article I, § 12 of the State Constitution. A Justice of the Appellate Division subsequently granted defendant leave to appeal to this Court. We now reverse.

II

The United States Supreme Court has addressed the applicability of the Fourth Amendment to warrantless "administrative" searches on several occasions, with varying results. Initially, the Supreme Court held that the Fourth Amendment's warrant requirement applied only to searches undertaken to procure evidence of criminality and not to administrative inspections or searches undertaken to implement a regulatory scheme (*Frank v Maryland, 359 US 360*). The Court, however, abandoned that **[**1340]** **[***932]** position **[****38]** in *Camara v Municipal Ct. (387 US 523*) and *See v City of Seattle (387 US 541*), holding instead that the Fourth Amendment applies to searches undertaken for regulatory purposes as well as to searches for criminal evidence, although warrants for searches in the former category need not be supported by probable cause in the traditional sense since they "are neither personal in nature nor aimed at the discovery of evidence of crime" (*Camara v Municipal Ct., 387 US, at 537*, *supra).*

Shortly after *Camara* and *See* were decided, the Supreme Court carved out an exception to the warrant requirement it had established in those cases. In *Colonnade Corp. v United States (397 US 72*) and *United States v Biswell (406 US 311*), the Court held that the Fourth Amendment does not demand a warrant for an inspection or search of business premises where the particular industry is subject to close governmental supervision and the authorizing statute prescribes specific procedural rules to govern the manner in which the search is conducted. In a subsequent case, the Court explained that the *Colonnade-Biswell* exception was a response to "relatively *unique* circumstances" **[****39]** where "[c]ertain industries have such a *history* of government oversight that [the proprietor could **[*494]** have] no reasonable expectation of privacy" (*Marshall v Barlow's, Inc., 436 US 307, 313* [emphasis supplied]). Nevertheless, only three years later, the Court substantially broadened the exception, holding that it is not limited to industries having a long tradition of government regulation (*Donovan v Dewey, 452 US 594, 605-606)*. Rather, it is the "pervasiveness and regularity"--not the longevity--of regulation that determines whether a warrant is necessary.

It was against this somewhat perplexing legal backdrop that this Court first considered the constitutionality of *Vehicle and Traffic Law § 415-a (5) (a)*, which requires registered vehicle dismantling businesses to maintain records of the vehicles coming into their possession, authorizes Department of Motor Vehicles agents and police officers to examine such records and, finally, permits warrantless searches of the premises to locate and inspect any items that are subject to the recordkeeping requirement. [1] Examining this statute in *People v Burger (67 NY2d 338*), we held that it, as well as **[****40]** the analogous provisions of *New York City Charter § 436*, [2] violated the Fourth **[**1341]** **[***933]** Amendment's prohibition against warrantless **[*495]** searches. In so holding, we reasoned that the exception for administrative searches was not applicable because the asserted administrative schemes "authorize[d] searches undertaken solely to uncover evidence of criminality [i.e., the possession of stolen property] and not to enforce a comprehensive regulatory scheme" (*67 NY2d, at 344*, *supra).*

[**41]** On appeal, however, the United States Supreme Court reversed (*482 US 691*, *supra).* The Court disagreed with our primary premise that the

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[1] *Vehicle and Traffic Law § 415-a (5) (a)* provides, in part: "Every person required to be registered pursuant to this section shall maintain a record of all motor vehicles, trailers, and major component parts thereof, coming into his possession together with a record of the disposition of any such motor vehicle, trailer or part thereof and shall maintain proof of ownership for any motor vehicle, trailer or major component part thereof while in his possession. Such records shall be maintained in a manner and form prescribed by the commissioner. … *Upon request of an agent of the commissioner or of any police officer and during his regular and usual business hours, a vehicle dismantler shall produce such records and permit said agent or police officer to examine them and any vehicles or parts of vehicles which are subject to the record keeping requirements of this section and which are on the premises.* … The failure to produce such records or to permit such inspection on the part of any person required to be registered pursuant to this section as required by this paragraph shall be a class A misdemeanor."

[2] *New York City Charter § 436* provides: "The commissioner [of the police department] shall possess powers of general supervision and inspection over all licensed or unlicensed pawnbrokers, vendors, junkshop keepers, junk boatmen, cartmen, dealers in second-hand merchandise and auctioneers within the city; and in connection with the performance of any police duties he shall have power to examine such persons, their clerks and employees and their books, business premises, and any articles of merchandise in their possession. A refusal or neglect to comply in any respect with the provisions of this section on the part of any pawnbroker, vendor, junkshop keeper, junk boatman, cartman, dealer in second-hand merchandise or auctioneer, or any clerk or employee of any thereof shall be triable by a judge of the criminal court and punishable by not more than thirty days' imprisonment, or by a fine of not more than fifty dollars, or both."

administrative search exception cannot be used to validate warrantless searches conducted for the purpose of exposing violations of the State's penal laws. Instead, the Court held, a State may "address a major social problem *both* by way of an administrative scheme *and* through penal sanctions" *(id., at 712*); consequently, the fact that *section 415-a (5) (a)*'s administrative objectives coincided with those of the Penal Law was of little significance. In support of its conclusion that *section 415-a (5) (a)* did not facially violate the Fourth Amendment, the Court stressed that the State had a substantial interest in regulating the vehicle dismantling industry as a means of deterring trafficking in stolen vehicles and that warrantless inspections were reasonably necessary to serve that interest. With regard to the requirement that the industry be a "closely regulated" one, the Court concluded that the requirement was satisfied because, although the vehicle dismantling business was a fairly recent phenomenon, it was "related to" the **[****42]** junkyard and pawnshop businesses, both of which, according to the Court, had been the subject of close State supervision in the past. Finally, the Court concluded that the functions that would otherwise be served by a warrant were satisfied because the statute placed adequate limitations on the time, place and scope of the administrative inspection (*482 US, at 711-712*, *supra).*

III

With that background in mind, we turn now to the question presented by this appeal: whether an inspection conducted pursuant to *Vehicle and Traffic Law § 415-a (5) (a)* violates the privacy rights encompassed within *article I, § 12 of the New York State Constitution.* We begin our analysis by noting that in determining the scope of the guarantees contained in our State Constitution, we--consistent with well-settled principles of federalism--are not bound by decisions of the Supreme **[*496]** Court construing similar provisions of the Federal Constitution *(People v Alvarez, 70 NY2d 375, 378*; *People ex rel. Arcara v Cloud Books, 68 NY2d 553, 557*; *People v Barber, 289 NY 378, 384)*. The dissent's vigorously pressed argument to the contrary is amply answered in Judge Kaye's concurring **[****43]** opinion. The soundness and thoroughness of that concurrence renders a further extended discussion of the dissent's constitutional argument unnecessary. [3] Accordingly, rather than engaging in what would necessarily be a redundant exposition of basic analytical principles, we simply adopt the views expressed in the concurrence, including its well-founded point concerning the tone of the dissent, and add but a few brief comments on the issue.

[**44]** The Supreme Court itself has on more than one occasion reminded us that we--as **[**1342]** **[***934]** "the primary guardian[s] of the liberty of the people". *(Massachusetts v Upton, 466 US 727, 739* [Stevens, J., dissenting])--have the power to interpret the provisions of our State Constitution as providing greater protections than their Federal counterparts *(see, e.g., California v Greenwood, 486 US 35, 43*; *Oregon v Hass, 420 US 714, 719)*. Indeed, this very Court recently had occasion to explain that: "Even if parallel to a Federal constitutional provision, a State constitutional provision's presence in the document alone signifies its special meaning to the People of New York; thus, the failure to perform an independent analysis under the State Constitution would improperly relegate many of its provisions to redundancy" *(People v Alvarez, 70 NY2d, at 379*, n, *supra,* citing Kaye, *Dual Constitutionalism in Practice and Principle,* 42 Rec of Assn of Bar of City of NY 285, 297-299).

Although the language of the State and Federal constitutional proscriptions against unreasonable searches and seizures generally tends to support a policy of uniformity **[****45]** *(see, People v Johnson, 66 NY2d 398, 406*; *People v Ponder, 54 NY2d 160, 165)*, we have not hesitated in the past to interpret **[*497]** article I, § 12 of the State Constitution independently of its Federal counterpart when necessary to assure that our State's citizens are adequately protected from unreasonable governmental intrusions *(see, e.g., People v Scott,* decided herewith; *People v Dunn, 77 NY2d 19*; *People v Torres, 74 NY2d 224*; *People v P. J. Video, 68 NY2d 296*; *People v Class, 67 NY2d 431*; *People v Bigelow, 66 NY2d 417*; *People v Gokey, 60*

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[3] Apart from its basic philosophical difference with us as to analytical methodology, the only substantive objection the dissent seems to have is that the Court, in both this case and *People v Scott* (decided herewith), has carved a new "generalized" right of privacy out of a constitutional provision that protects only against invasions of privacy that implicate the constitutional proscription against "unreasonable searches and seizures" (*NY Const, art I, § 12*). Although that point is stated throughout the dissenters' opinion, nowhere does the dissent explain how the State constitutional privacy right we recognize here differs from "the traditional expectation of privacy attribute of the unreasonable searches and seizures protection [previously recognized] in criminal jurisprudence" (dissenting opn, at 513).

NY2d 309). An independent construction of our own State Constitution is particularly appropriate where a sharp or sudden change in direction by the United States Supreme Court dramatically narrows fundamental constitutional rights that our citizens have long assumed to be part of their birthright *(see, e.g., People v Griminger, 71 NY2d 635*; *People v Bigelow, supra; People v Johnson, supra).*

Our firm and continuing commitment to protecting the privacy rights embodied within article I, § 12 of our State Constitution leads us to the conclusion that *Vehicle and Traffic Law § 415-a* **[****46]** (5) (a)'s provisions for warrantless, suspicionless searches of business premises cannot withstand challenge under our State Constitution *(cf., Matter of Glenwood TV v Ratner, 65 NY2d 642*, *affg 103 AD2d 322*, *appeal dismissed 474 US 916*). [4] While State and Federal uniformity is a worthwhile goal in constitutional decision-making, that goal "must yield … to [the need for] a predictable, structured analysis" *(People v Johnson, 66 NY2d 398, 407*, *supra),* lest the rules governing official intrusions on individuals' privacy become muddied and the constitutional guarantees represented by article 1, § 12 concomitantly diluted *(see, People v P. J. Video, 68 NY2d, at 305*, *supra).* Nowhere is that danger more evident than in this context, where the underlying issue involves the degree to which government inspectors may enter upon and search commercial establishments without either particularized suspicion (much less probable cause) or advance judicial oversight *(see, People v Elwell, 50 NY2d 231* [expressing a preference for warrants issued by a neutral Magistrate]; **[**1343]** *People v Hanlon, 36 NY2d 549* [same]).

[**47]** As Justice O'Connor has observed, statutes authorizing "administrative searches" are "the 20th-century equivalent" of colonial writs of assistance *(Illinois v Krull, 480 US 340, **[*498]** 364* [O'Connor, J., dissenting]), which were general warrants authorizing officials to search any and all residential and commercial premises, without particularized suspicion, to enforce various trade regulations and restrictions and, more specifically, to halt the rampant smuggling of untaxed goods *(see, Marshall v Barlow's, Inc., 436 US, at 311*, *supra).* Such writs were an important component of colonial resentment against the Crown and, in fact, "ignited the flame that led to American independence" (Comment, *The Junking of the Fourth Amendment: Illinois v. Krull and New York v. Burger,* 63 Tulane L Rev 335, 337; *see, Davis v United States, 328 US 582, 603-606* [Frankfurter, J., dissenting]). Given this history and the potential similarity between writs of assistance and statutorily authorized administrative searches, the constitutional rules governing the latter must be narrowly and precisely tailored to prevent the subversion of the basic privacy values embodied in **[****48]** our Constitution. Because the principles and standards set forth in *New York v Burger (supra)* do not adequately serve those values, we decline to accept them as controlling in interpreting our own constitutional guarantees.

Thus, we adhere to the view expressed in *People v Burger* (*67 NY2d, at 344*, *supra)* that the so-called "administrative search" exception to the Fourth Amendment's probable cause and warrant requirements cannot be invoked where, as here, the search is "undertaken solely to uncover evidence of criminality" and the underlying regulatory scheme is "in reality, designed simply to give the police an expedient means of enforcing penal sanctions." This principle was a fundamental assumption in administrative-search jurisprudence before *Burger (see, Donovan v Dewey, 452 US 594, 598, n 6*, ["(warrant and probable-cause requirements) pertain when commercial property is searched for contraband or evidence of crime"]; *Camara v Municipal Ct., 387 US 523, 539*, [authorization of administrative searches on less than probable cause will not "endange[r] time-honored doctrines applicable to criminal investigations"]; *Matter of Glenwood TV v Ratner,* **[****49]** 103 AD2d, at 330, n 6, [noting that under approved regulatory scheme inspectors "do not seek evidence of a crime and their function is limited to insuring compliance with a civil regulatory scheme"]; *see also, Michigan v Clifford, 464 US 287, 292*; *Michigan v Tyler, 436 US 499, 508*; *People v Calhoun, 49 NY2d 398, 405-406).* And, notwithstanding *Burger,* it remains analytically sound, since, without such a limitation, what was originally conceived as a narrow exception **[*499]** would swallow up the rule and permit circumvention of the traditional probable cause and warrant requirements where their protections are most needed.

Further, the administrative search provisions of *Vehicle and Traffic Law § 415-a (5) (a)* cannot pass constitutional muster because the essential element of

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[4] Contrary to the dissent's intimation (at 517), there is no inconsistency between our holding here and the Court's earlier decision in *Glenwood TV.* To the contrary, the constitutional analysis in that case, which this Court expressly adopted (*65 NY2d, at 644*), tracks the analysis we utilize here and therefore lends affirmative support to the approach we have now taken.

pervasive governmental supervision is lacking. While the Supreme Court found this element to be satisfied by analogy to what it deemed "related" industries such as junkyards, which, according to that Court, are highly regulated, we conclude that more is required to permit an exception to the warrant and probable cause requirements embodied in article I, § 12. Once again, our insistence **[****50]** upon close analysis in this context is motivated by our belief that the administrative search exception should remain a narrow and carefully circumscribed one.

In order to fall within that exception, the regulatory scheme must be pervasive and include detailed standards in such matters **[**1344]** **[***936]** as, for example, the operation of the business and the condition of the premises. While a precise and all-encompassing definition of what constitutes a "pervasive" regulatory scheme is not possible, such minimal regulatory requirements as the obligations to register with the government, to pay a fee and to maintain certain prescribed books and records are not, in themselves, sufficient. Indeed, in modern society, many trades and businesses are subject to licensing, bookkeeping and other similar regulatory measures. If the existence of such relatively nonintrusive obligations were sufficient, few businesses would escape being labeled "closely regulated," and warrantless, suspicionless general inspections of commercial premises would become the rule rather than the exception *(cf., Matter of Glenwood TV v Ratner,* 103 AD2d, at 328-330, [upholding administrative inspection **[****51]** scheme that is limited to inspection of required records and business's public areas]).

Vehicle and Traffic Law § 415-a (5) (a) is also constitutionally deficient in its failure to delineate rules to guarantee the "certainty and regularity of … application" necessary to provide a "constitutionally adequate substitute for a warrant" *(Donovan v Dewey, supra, at 603*). The statute does not set forth a minimum or maximum number of times that a particular establishment may be searched within a given time period, and it does not furnish guidelines for determining which establishments may be targeted. Further, because the regulatory scheme prescribes no standards or required practices **[*500]** other than the maintenance of a "police book," there are no real *administrative* violations that could be uncovered in a search and, concomitantly, there is nothing inherent in the statutory scheme to limit the scope of the searches it authorizes. Indeed, the only restriction that the statute contains is its requirement that the searches occur during business hours. This restriction is plainly insufficient to provide either a meaningful limitation on the otherwise unlimited discretion **[****52]** the statute affords or a satisfactory means to minimize the risk of arbitrary and/or abusive enforcement. As such, *Vehicle and Traffic Law § 415-a (5) (a)* shares one of the most objectionable characteristics of colonial writs of assistance.

Although the Supreme Court in *Burger* placed great weight on the fact that the statute is supported by a "substantial" governmental interest and that warrantless inspections are " 'necessary to further [the] regulatory scheme' " (*482 US, at 708-710*, quoting *Donovan v Dewey, supra, at 600*), we deem these factors in themselves to be insufficient justification for departing from article I, § 12's general prohibition against warrantless, suspicionless searches. Such arguments are always available when the regulatory activity in question has a law enforcement-related goal. Obviously, the government's interest in law enforcement is always, by definition, "substantial," and tools such as unannounced general inspections, without judicial supervision or regulatory accountability, are always helpful in detecting and deterring crime. If these were the only criteria for determining when citizens' privacy rights may be curtailed there would **[****53]** thus be few, if any, situations in which the protections of article I, § 12 would operate. Indeed, the very purpose of including such protections in our Constitution was to provide a counterbalancing check on what may be done to individual citizens in the name of governmental goals.

For the same reasons, the dissent's reliance on the "staggering" statistics attesting to the growth of automobile theft in New York and the economic burdens such crime imposes are hardly a persuasive ground for relaxing article I, § 12's proscription against unreasonable searches and seizures. The alarming increase of unlicensed weapons on our urban streets and the catastrophic rise in the use of crack cocaine and heroin are also matters of pressing social concern, but few would seriously argue that those unfortunate facets of modern life justify routine searches of pedestrians on the street or any other suspension of the privacy guarantees that are there to protect all of our citizens. The **[**1345]** **[***937]** fact is that, regrettably, there **[*501]** will always be serious crime in our society, and there will always be upsurges in the rate of particular crimes due to changes in the social **[****54]** landscape. Indeed, the writs of assistance were themselves a response of the colonial government to an unprecedented wave of criminal smuggling--a crime that

also led to "intolerable" economic losses *(see,* dissenting opn, at 516-517).

Our responsibility in the judicial branch is not to respond to these temporary crises or to shape the law so as to advance the goals of law enforcement, but rather to stand as a fixed citadel for constitutional rights, safeguarding them against those who would dismantle our system of ordered liberty in favor of a system of well-kept order alone. As has recently been observed, the present crisis will, undoubtedly, abate, but the precedents we create now will long endure *(* Matter of Seelig v Koehler, 76 NY2d 87, 101 [Wachtler, Ch. J., dissenting]). Accordingly, in response to the dissent's appeal to our citizens' legitimate fears about rising crime, it suffices to observe, as Benjamin Franklin did some 200 years ago, that "those who give up essential liberty to purchase a little temporary safety deserve neither liberty nor safety."

We therefore conclude that, in the final analysis, our constitutional privacy guarantee generally requires **[****55]** probable cause and warrants, with their attendant case-by-case judicial oversight, as a condition to official entries on, and searches of, private premises. While we have from time to time been willing to recognize exceptions to these requirements in certain narrowly circumscribed situations, we have never suggested the existence of a generalized, wholesale exception to the warrant and probable cause requirements that may be invoked whenever necessary to enhance the effectiveness of the State's law enforcement efforts. Rather, we have always insisted that there be some additional particularized factor, such as the exigencies of "hot pursuit" or the existence of a business that is truly "closely regulated," in order to justify dispensing with one or both of those constitutional prerequisites. Since none of those special factors is present here, the search of defendant's premises was constitutionally impermissible.

We do not, of course, mean to suggest that the Legislature could never, consistent with article I, § 12, provide for administrative inspections of vehicle dismantling businesses. Unlike the statute before us, however, the inspection provisions must be part of a comprehensive **[****56]** administrative program **[*502]** that is unrelated to the enforcement of the criminal laws. Moreover, the inspections must be pursuant to an administrative warrant issued by a neutral Magistrate, although they need not be based on probable cause in the traditional sense *(see,* Camara v Municipal Ct., supra, at 538-539; Marshall v Barlow's, Inc., supra, at 320-321), or, alternatively, the law must provide for such certainty and regularity of application as to be a constitutionally adequate substitute for a warrant *(see,* Donovan v Dewey, 452 US 594, 603, *supra).* [5] In this case, however, those standards were not satisfied. [6]

[**57]** Accordingly, the order of the Appellate Division should be reversed, the order of **[**1346]** **[***938]** the Supreme Court granting defendant's motion to suppress reinstated and the case remitted to the Appellate Division for consideration of the facts (CPL 470.25 [2] [d]; 470.40 [2] [b]).

Concur by: Kaye, J.

Concur

(Concurring). I concur in the result and in the writing of Judge Hancock in *Scott* and Judge Titone in *Keta.* In both cases, I agree that, under the State Constitution, defendants' reasonable expectation of privacy--not some new privacy right, but the privacy right encompassed within the guarantee against unreasonable searches and seizures, as that guarantee is uniformly defined [*] --has been transgressed. **[*503]**

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[5] Should a regulatory scheme be created consistent with these constitutionally required principles, the prosecution of criminal violations uncovered as an incident to its execution would not offend the Constitution.

[6] We hasten to refute the dissent's suggestion that "random inspections" undertaken pursuant to the challenged statutes would not be constitutionally objectionable if carried out by administrative agents of the Department of Motor Vehicles rather than police officers (dissenting opn, at 515). The dissent posits this distinction in order to argue that our rule leads to "artificial distinctions" and is therefore "unsound." However, the distinction the dissent sets up as a "straw man" is, in fact, nonexistent. Regardless of whether the "inspection" is undertaken by a police officer or an administrative officer, the State Constitution is offended if the standards we have described above are unsatisfied.

[*] Though not expressed in our Federal or State Constitutions, the protection of an individual's reasonable expectation of privacy has consistently been recognized as the core of the constitutional guarantee against unreasonable searches and seizures *(see, e.g.,* Matter of Caruso v Ward, 72 NY2d 432, 437 [search and seizure analysis rests directly on the uniquely private nature of the act and the individual's privacy right]; Matter of Patchogue-Medford Congress of Teachers v Board of Educ., 70 NY2d 57, 66 [article I, § 12 of State Constitution

Moreover, I am satisfied that the grounds recited in both writings for the Court's conclusions are fully in accord with the law and our own precedents.

[**58]** I write separately only to respond to the broader statements and implications of the dissent about State constitutional law, and especially about us.

I.

Perhaps more than any other issue, the State constitutional law cases over the past decade have seemed to fracture the Court. On a Court where more often than not there is consensus, in State constitutional law cases--civil as well as criminal--we have been uncommonly divided *(see, e.g.,* People v Harris, 77 NY2d 434; People v Dunn, 77 NY2d 19; People v Vilardi, 76 NY2d 67; Matter of Patchogue-Medford Congress of Teachers v Board of Educ., 70 NY2d 57; People v P. J. Video, 68 NY2d 296; SHAD Alliance v Smith Haven Mall, 66 NY2d 496; People v Johnson, 66 NY2d 398; People v Class, 63 NY2d 491). A recent decision evoked *four* separate writings *(* Immuno AG. v Moor-Jankowski, 77 NY2d 235). Whether this is a consequence of the "new" judicial federalism and a process of hammering out approaches and methodologies to accommodate it, or the consequence of other factors, is a subject for fuller discourse elsewhere.

What is pertinent to the present case, and significant, is that at least **[****59]** four Judges (not always the same four) in these cases invariably have perceived something distinctive about New York State, or about the particular case, that called upon the Court to differ from the United States Supreme Court. The concurrences and dissents in these cases invariably have contended that there was no unique New York interest warranting greater protection than that afforded by the Supreme Court under the Federal Constitution.

The dissent in this case is distinctive only in the tone of its expression, most especially its accusation that the Court's legal conclusions and analysis are the product of ideology, simply the imposition of a personally preferred view of the constitutional universe. Without engaging those baseless **[*504]** charges directly, I would add two **[**1347]** **[***939]** general observations to those of Judges Titone and Hancock.

First, however much we might consider ourselves dispensing justice strictly according to formula, at some point the decisions we make must come down to judgments as to whether a particular protection is adequate or sufficient, even as to whether constitutional protections we have enjoyed in this State have in **[****60]** fact been diluted by subsequent decisions of a more recent Supreme Court. In that no two cases are identical, it is in the nature of our process that in the end a judgment must be made as to the application of existing precedents to new facts. To some extent that has taken place in the two cases before us--in our reading of *Reynolds, Oliver, Burger* and other precedents--as in cases that have divided us previously. We may disagree in our application of precedents, but our considered judgment hardly justifies attack for lack of principle, or for overthrowing stare decisis.

Second, I disagree with the dissent that, in an evolving field of constitutional rights, a methodology must stand as an ironclad checklist to be rigidly applied on pain of being accused of lack of principle or lack of adherence to stare decisis. We must of course be faithful to our precedents, as I believe we are in the cases now before us. But where we conclude that the Supreme Court has changed course and diluted constitutional principles, I cannot agree that we act improperly in discharging our responsibility to support the State Constitution when we examine whether we should follow along as a matter **[****61]** of State law--wherever that may fall on the checklist.

II.

Despite a reference to independent State constitutional interpretation, the dissent is laced throughout with a sense of discomfort, even impropriety, about the exercise when it involves rejecting United States Supreme Court decisions. The writing, for example, taunts that this Court is declaring independence from the Supreme Law of the Land, cutting its own constitutional path, propelling itself into a kind of Articles of Confederation time warp, declaring New York-style separatism, creating its own constitutional universe, and on and on.

A State court decision that rejects Supreme Court precedent, and opts for greater safeguards as a matter

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and Fourth Amendment designed to protect the personal privacy and dignity of individual against unwarranted State interference]; People v Rodriguez, 69 NY2d 159, 162 [privacy nature of interests protected by Fourth Amendment]; People v John BB., 56 NY2d 482, 486 [State and Federal proscription against unreasonable seizure generally forbids unwarranted intrusion into private affairs]; Mapp v Ohio, 367 US 643, 655, 656 [Fourth Amendment's right of privacy no less important than any other right carefully and particularly reserved to the People]).

of State law, **[*505]** does indeed establish higher constitutional standards locally. But that is a perfectly respectable and legitimate thing to do, and does not in any sense signal a return to the Articles of Confederation. Moreover, with the Federal Bill of Rights having been drawn from State constitutional antecedents, there is naturally some equivalency between charters, but no less reason for courts to enforce the respective constitutional guarantees.

Time and **[****62]** again in recent years, the Supreme Court as well as its individual Justices have reminded State courts not merely of their right but also of their responsibility to interpret their own Constitutions, and where in the State courts' view those provisions afford greater safeguards than the Supreme Court would find, to make plain the State decisional ground so as to avoid unnecessary Supreme Court review.

The Supreme Court is not insulted when we do so. As Justice White wrote in rejecting the contention that an individual's expectation of privacy was violated as a matter of Federal law by a search of discarded trash: "Individual States may surely construe their own constitutions as imposing more stringent constraints on police conduct than does the Federal Constitution." *(California v Greenwood, 486 US 35, 43*.) In admonishing the Massachusetts court for "unwisely and unnecessarily" inviting Supreme Court review by failing to make clear whether the decision rested on State grounds, Justice Stevens in his *Massachusetts v Upton* concurrence (*466 US 727, 737)*--another search and seizure case--restated a fundamental premise of our constitutional system of government, that the States **[****63]** in our Federal system "remain the primary guardian of the liberty of the people" *(id., at 739*; *see also, Michigan **[**1348]** v Long, 463 US 1032*; *PruneYard Shopping Center v Robins, 447 US 74, 81*; *Oregon v Hass, 420 US 714, 719*; Brennan, *State Constitutions and the Protection of Individual Rights,* 90 Harv L Rev 489 [1977]).

The dissent errs in its suggestion that rejecting Supreme Court precedents somehow disdains the Supreme Court. That suggestion shortchanges both the role of the Supreme Court in setting minimal standards that bind courts throughout the Nation, and the role of the State courts in upholding their own Constitutions.

Dual sovereignty has in fact proved itself not a weakness but a strength of our system of government. States, for example, by recognizing greater safeguards as a matter of State law **[*506]** can serve as "laboratories" for national law *(New State Ice Co. v Liebmann, 285 US 262, 311* [Brandeis, J., dissenting]), as was evidenced in the recent overruling of *Swain v Alabama (380 US 202*) and the new nationwide prohibition of racially discriminatory peremptory challenges *(Batson v Kentucky, 476 US 79*). **[****64]** When State courts openly rejected *Swain* as unsound and intolerable, they were neither unduly denigrating nor disdainful of the Supreme Court, but instead discharging their responsibility both to State law and to Federal law.

In those instances where we have gone beyond Supreme Court interpretations of Federal constitutional requirements, our objective has been the protection of fundamental rights, consistent with our Constitution, our precedents and own best human judgments in applying them.

Dissent by: Bellacosa, J.

Dissent

(Dissenting).

I.

In these two cases, the Court [1] cuts its own constitutional path through a commercial marihuana farm nestled in 165 acres of idyllic "open fields" in Chenango County, New York State, to the open yard of an alleged "chop shop", an urban auto dismantling business, in Maspeth, Queens County, New York City. The Court's declaration of independence from the Supreme Law of the Land *(Oliver v United States, 466 US 170*; *New York v Burger, 482 US 691*) and from this Court's own recent noninterpretative constitutional analysis and definitive guidance *(People v Harris, 77 NY2d 434*; *People v Reynolds, 71 NY2d 552*) propels the Court **[****65]** across a jurisprudential Rubicon into a kind of Articles of Confederation time warp. The "movement" has been dubbed the "New Federalism" (Gardner, *The Failed Discourse of State Constitutionalism,* *90 Mich L Rev 761, 762*).

This Court's metaphorical journey is marked by the Court:

[1] For convenience, "the Court" collectively refers to the three opinions aggregating the same majority in each case, except where necessary to refer to a specific opinion.

o Supplanting its own noninterpretative method of constitutional analyses;
o Transforming the essential nature of the constitutional protection against unreasonable searches and siesures;

o Substituting privacy as an abstract desideratum **[*507]** instead of considering the nature and new, sweeping scope of the expectation of privacy interest conferred within its proper contextual criminal jurisprudence framework;
o Rejecting uniformity of Federal and State law in appropriate areas such as are at issue here;

o Discarding the United States **[****66]** Supreme Court's guidance in the two categories of law involved; and
o Undermining stare decises by pulling the analytical props out from under several of this Court's guiding precedents.

The identical constitutional texts at issue in both cases prohibit "unreasonable searches and seizures" (*US Const 4th Amend*; *NY Const, art I, § 12*). Simply **[**1349]** **[***941]** stated, the common issue is whether this Court has a justifiable basis, within its recently rearticulated method of noninterpretative analysis, to apply New York's mirror equivalent of the Fourth Amendment prohibition against unreasonable searches and seizures differently from the United States Supreme Court in these cases. The Court severs the expectation of privacy attribute from its essential unreasonable searches and seizures mooring, and invests both cases in the alluring cloak of a generalized privacy interest, as a matter of unique New York concern. In these cases therefore, we must respectfully dissent and would affirm the orders of the Appellate Division, because no appropriate basis, unique to New York, has been advanced warranting this double-barrelled declaration of peculiar New York-style separatism, bestowing **[****67]** enhanced New York privacy rights on an open fields commercial marihuana grower and on a commercially regulated auto dismantler.
II.

In *People v Scott,* a private citizen, who was bow hunting, wounded a deer and tracked it onto defendant's property. He chanced upon defendant's marihuana farm, carefully tilled within 165 acres of otherwise undeveloped fields, hills and woodlands in Chenango County. The 200 portable marihuana plants were set in burlap pots, with a sophisticated irrigation system, and were camouflaged with netting to obscure aerial observation. The hunter observed the marihuana farm and an armed guard at the site on a subsequent occasion. Months later, the citizen reported the criminal activity to lawful authorities and thereafter reentered the property at the request **[*508]** of and accompanied by a law enforcement officer. They were chased off with shouted curses by an unidentified, armed individual. A search of land records disclosed that defendant Scott owned the land, which he had posted with "No Trespassing" signs also containing his name. Despite the Court's repeated references, the record contains no support that defendant Scott had erected any **[****68]** fences on this large track of land, or that the drugs were being grown near any home, building or curtilage. Later, a judicial warrant was obtained and executed. Scott was eventually arrested and this prosecution ensued. The lower courts denied suppression of the evidence and, after a plea of guilty for criminal possession of marihuana in the first degree, the conviction was appealed and upheld by a unanimous *Appellate Division, Third Department (169 AD2d 1023*). Disregarding the United States Supreme Court ruling in *Oliver v United States (466 US 170*, *supra),* and this Court's rulings in *People v Harris (77 NY2d 434*, *supra),* and *People v Reynolds (71 NY2d 552*, *supra),* the Court now suppresses the evidence as obtained in violation of *New York Constitution, article I, § 12*.

In *People v Keta,* during regular business hours (3:30 P.M.), police officers from the City's Auto Crimes Division randomly selected a Maspeth, Queens, vehicle dismantler ("Jimmy & Son Auto Dismantlers") for a routine administrative inspection. It was among others they visited that day. They asked the proprietor to produce the required operating permits and business license **[****69]** *(see, Vehicle and Traffic Law § 415-a [5] [a]*). The officers also asked to see some auto parts and immediately verified--using portable computers to access stolen car records--that some of the parts were from stolen vehicles. The officers then asked to see the record book, which the statute requires all licensed operators in the auto dismantling business to maintain. Upon discovering that the stolen parts had not been entered in the record book, the officers conducted a

further administrative inspection of the premises, including an open yard. They discovered 35 stolen auto parts. At 5:30 P.M., officers were dispatched to apply for a judicial search warrant. The officers returned at 8:00 P.M. with a warrant, and a complete search and seizure were ultimately effected pursuant to that warrant. That led to the indictment on multiple counts of criminal possession of stolen property in the third **[**1350]** **[***942]** degree of the alleged "chop shop" owner, defendant Keta. Supreme Court suppressed the evidence (*142 Misc 2d 986*) and the Appellate Division, Second Department, in a **[*509]** cogent opinion which faithfully analyzed and applied this Court's governing **[****70]** precedents, reversed, denied suppression and reinstated the criminal charges (*165 AD2d 172*). This Court now nevertheless reverses and suppresses the evidence and declares *Vehicle and Traffic Law § 415-a (5) (a)* unconstitutional on newly discovered generic State "privacy" grounds. It is important to note that no State constitutional grounds, and especially no generalized "privacy" attributes, were used or asserted in this Court's decision in *People v Burger (67 NY2d 338*). The United States Supreme Court, it must be recalled, had previously reversed this Court, finding the same Vehicle and Traffic Law statute constitutional *(New York v Burger, 482 US 691*, *revg 67 NY2d 338*, *supra).*

III.

With respect to the particular subject matter of these cases, the United States Supreme Court has definitively ruled that there is no Fourth Amendment unreasonable search and seizure protection or violation *(Oliver v United States, 466 US 170*, *supra; New York v Burger, 482 US 691*, *supra).*

Analysis starts by recognizing that the Search and Seizure Clauses of the two Constitutions are identical. [2] Indeed, the evidence suggests that the modern State provision, first **[****71]** inserted in our Constitution in 1938, was derived from the *Fourth Amendment of the United States Constitution* *(see, People v P. J. Video, 68 NY2d 296, 304, n 4*; *People v Johnson, 66 NY2d 398, 405- 407)*. Because the language of the two clauses is identical, "it may be assumed" they confer similar rights *(People v Harris, 77 NY2d 434, 437*, *supra; People v Johnson, supra, at 406-407*). Thus, when interpreting our State Constitution, there should be "[s]ufficient reasons", we have said, for disagreeing before we construe the State provision in a manner different from the construction placed on its Federal counterpart by the United States Supreme Court *(see, People v Harris, 77 NY2d 434, 437*, *supra).*

[**72]**

"Sufficient reasons" for disagreeing with the Supreme Court **[*510]** may be found in *" 'preexisting* State statutory or common law defining the scope of *the individual right in question* [--prohibition against "unreasonable searches and seizures"]; the *history* and *traditions* of the State in its protection of *the individual right;* any identification of *the right in the State Constitution* as being one of *peculiar* State or *local* concern; and any *distinctive attitudes* of the State citizenry toward the definition, scope or protection of *the individual right' " (People v Harris, 77 NY2d 434, 438*, [emphasis added], quoting *People v P. J. Video, 68 NY2d 296, 303*, *supra).* To these factors we have added "the practical considerations of the need for Federal-State uniformity, and the sometimes countervailing necessity of a 'bright line' test" in search and seizure cases *(People v Alvarez, 70 NY2d 375, 379)*. When making the analysis, courts unquestionably require something more than mere ideological disagreement, among members **[**1351]** **[***943]** of a State court, with the definitive decisions of the highest Court in the land **[****73]** *(see, People v Vilardi, 76 NY2d 67, 80* [Simons, J., concurring]).

In *People v Harris (77 NY2d 434*, *supra),* for example, on remand after reversal by the United States Supreme Court, this Court linked its independent State constitutional search and seizure interpretation to New York's "unique", " 'cherished principle', rooted in this State's prerevolutionary constitutional law and developed 'independent of its Federal counterpart' ", under which "protection of the right to counsel has become a matter of singular concern in New York" *(id., at 439*;

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[2] The Court makes a diverting reference to New York's electronic eavesdrop protection *(People v Scott,* majority opn, at 486) that has nothing at all to do with these cases and appears to be suggesting, for the first time by anyone, that an *interpretative* constitutional method of analysis might be applicable. Moreover, the allusions to the brilliant and oft-quoted aphorism from *Olmstead v United States* (277 US 438, 485) by Justice Brandeis in dissent are likewise curious in the analytical framework and factual patterns of these two cases. (Majority opn, at 486-487.)

contrast, Immuno AG. v Moor-Jankowski, 77 NY2d 235, 249-250).

The Court today has not articulated "sufficient reasons" under this noninterpretative analysis warranting a departure from the United States Supreme Court's decisions. The test, as the Court now frames it, is not to be found in any settled method of analysis adopted in our prior decisions, but in this Court's new, conclusory view that the United States Supreme Court's rulings do "not adequately protect fundamental constitutional rights" *(People v Scott,* majority opn, at 478, 486), or do not "assure that our State's citizens are adequately protected **[****74]** from unreasonable governmental intrusions" *(People v Keta,* majority opn, at 497). No analytical standard for deciding and choosing among important constitutional rights is provided, and the expectation of privacy element of the unreasonable searches and seizures protection is entirely lost or subsumed within a generalized right to privacy *(see, infra,* at 513-514). Instead, **[*511]** the Court tries to shift its burden of identifying the "unique" predicate under the noninterpretative analysis to us in dissent, charging that we have not been "clear" in our meaning *(People v Scott,* majority opn, at 490). The Court seems to not comprehend what we are objecting to, which is that there must be some disciplined analytical method to provide precedential guidance and to justify the desired outcome by reasoned articulation. We most assuredly do not object to the conferral of State constitutional rights to individuals. The Court repeatedly misstates this key difference. Our view, as contrasted to its characterization by the Court, is not rigid or lockstepped and is premised on traditional, well-settled and well-respected judicial analysis and rubrics. The brief response to **[****75]** the tonal accusations of the concurring opinion is that we have discussed the issues with direct language because the principles and consequences are profound.

The Court's justification centers on the analyses of United States Supreme Court decisions, from which the Court discerns unevenness *(see, People v Scott,* majority opn, at 481-485; *People v Keta,* majority opn, at 493-495). It rejects the United States Supreme Court rulings because in this Court's view there is "uncertainty" and "inconsistency" in that Court *(People v Scott,* majority opn, at 482, 483) and because the history of the administrative search cases in that Court has been "perplexing" *(People v Keta,* majority opn, at 494). The characterizations are surely debatable and of scant significance because the *Oliver* and *Burger* decisions do not conflict with preexisting settled New York law. Indeed, the only prior New York cases addressing the subjects at issue were consistent with the United States Supreme Court's rulings in *Oliver (see, People v Reynolds, 71 NY2d 552*, *supra)* and in *Burger (see, Matter of Glenwood TV v Ratner, 65 NY2d 642*, *affg on opn at App Div 103 AD2d 322 **[****76]** [Titone, J. P.])*. Thus, this Court's ground for **[**1352]** **[***944]** departure from United States Supreme Court rulings is unfounded *(contrast, People v Vilardi, 76 NY2d 67, 75*, *supra; People v Griminger, 71 NY2d 635*; *People v P. J. Video, 68 NY2d 296, 305*, *supra;* and *People v Johnson, 66 NY2d 398, 406-407*, *supra; see, People v Belton, 55 NY2d 49*). Moreover, it is the direct impact of the United States Supreme Court's rulings on New York law that should be significant, not this Court's historical reprises of the United States Supreme Court's own articulations on the particular subject. Inasmuch as the *Oliver* and *Burger* decisions do not unsettle prior New York law, the United States Supreme Court rulings should be **[*512]** given greater respect in the absence of a "unique" New York "cherished principle" for dispatching them *(People v Harris, 77 NY2d 434, 439*, *supra).*

The Court's failure to apply its own noninterpretative analysis creates a sweeping precedential change and a long-term guidance vacuum *(see, People v Alvarez, 70 NY2d 375, 379*, *supra; People v Johnson, 66 NY2d 398, 406*, *supra; People v Ponder, 54 NY2d **[****77]** 160, 165)*. *Johnson* certainly does not stand for anything like the role the three opinions of the Court have variously assigned to it, and *P. J. Video* and *Harris* did not open up the analytical process and choices to the extremes illustrated by the holdings today. Nor is the new approach supported by the litany of New York cases relied upon by the Court, especially in *Scott.* Instead, a parade of readily distinguishable cases are relied on, along with selective secondary authorities and dissenting opinions. Most of the cases cited in *Scott* are not even noninterpretative analysis cases, and the opinion avoids the pointedly relevant cases this dissent cites and which we believe are directly applicable. The breadth of the Court's rationale is further illustrated by the importation of whole portions of New York's Penal Law, the

Environmental Conservation Law and the General Obligations Law. This technique will necessarily allow and even induce uneven, selective importation of many other provisions of New York's Penal Law, plus importation of hundreds of volumes of the other substantive Consolidated Laws. This approach wholly swallows the noninterpretative analytical **[****78]** principle and substitutes a vacuum of guidance to the lower courts in place of the useful and proper guidance that was available.

In *Scott,* moreover, the Court relies on the law of trespass--common to the law of every State and rooted in Anglo-American values as ancient as the genesis of the common law itself *(see,* 3 Blackstone, Commentaries on the Laws of England, ch XII [1768]). That, self-evidently, cannot constitute a "unique" New York interest.

In similar style, the Court in *Keta* diverts the proper focus by expressing concern that the colonial "writs of assistance" will be reinstituted and that our dissenting view of this case violates some constitutional privacy birthright of auto dismantling businesses (majority opn, at 497, 501). However, *Keta* simply involves legitimate and statutorily authorized administrative regulation with reasonable allowance for investigative and prosecutorial follow-ups. Yet, *Keta* rules that enterprises engaged **[*513]** in the dismemberment of hundreds of thousands of stolen vehicles in the State and City of New York were not targeted by the Legislature for intense regulation by a proper statutory regime. This premise **[****79]** then launches a more sweeping jurisprudential holding: that the records and inventories of these 170 registered and licensed enterprises in New York City should be granted "unique New York privacy" protections because they represent a modern, compelling, exceptional local concern. The Court thus, in effect, purports to overrule the United States Supreme Court's pointed reversal of this Court's decision in *New York v Burger (482 US 691, supra)* involving the same statute, *Vehicle and Traffic Law § 415-a*.

[1353]** **[***945]** The failure of the Court to properly apply and follow noninterpretative analysis connotes either a sub silentio overruling of the cases that require it *(see, People v Harris, 77 NY2d 434, supra; People v Reynolds, 71 NY2d 552, supra; People v P. J. Video, 68 NY2d 296, supra; People v Johnson, 66 NY2d 398, supra)*--an undermining of stare decisis--or the adoption of a new, unique, New York ground, i.e., a pervasive, all-encompassing privacy essence, as contrasted with the traditional expectation of privacy attribute of the unreasonable searches and seizures protection in criminal jurisprudence.

This limitless shift in essential **[****80]** focus away from disciplined analysis of the particular "individual right in question" *(People v Harris, 77 NY2d 434, 438, supra)* into a nonspecific, uncharted constitutional privacy ground is effected in *Scott* with an ode to individuality based on New York's devotedness to the "unconventional", "bizarre" and even to the "offensive" *(People v Scott,* majority opn, at 488). The Court, in effect, creates a new echelon of State constitutional analysis which may be deployed whenever any future majority of this Court simply chooses to differ with a particular United States Supreme Court decision and interpretation *(see, Simpson v Loehmann, 21 NY2d 305, 314* [Breitel, J., concurring]; *see also, People v Disbrow, 16 Cal 3d 101, 119, 127 Cal Rptr 360, 372, 545 P2d 272, 284* [Richardson, J., dissenting]; Gardner, *The Failed Discourse of State Constitutionalism, op. cit.,* at 814-822).

IV.

Privacy is, without question, an important constitutional and societal value. However, the nature and scope of the **[*514]** privacy attribute at issue, and the persons or entities entitled or intended to be within the ambit of the new New York protection, should be **[****81]** analyzed in the concrete application and consequences of these peculiar cases. These are not, as the Court boldly proclaims, cases dealing with a general right to privacy and a concomitant right to be left alone *(People v Scott,* majority opn, at 486-487). Rather, these Fourth Amendment cases should be analyzed in their proper analytical framework, namely, the reasonable, legitimate, cognizable expectation of privacy in a traditional criminal jurisprudence context. The Court has failed to analyze the privacy right in this proper setting, and that is one of our principal differences with the Court's approach.

In *Scott,* the Court indicates that the issue does not pertain to the wording or history of the Fourth Amendment or of article I, § 12; rather, it is about New York's fundamental privacy rights. That opinion concludes that the issue is "whether we

should adopt the [Supreme] Court's … categorical holding that an expectation of privacy in land outside the curtilage (manifested by posting or erecting fences) *is not one which society is prepared to recognize as reasonable"* (majority opn, at 486 [emphasis in original]). Indeed, the Court ignores the essential **[****82]** search and seizure nature of the case by asserting that the Court here should be guided by cases involving the bundle of property rights preserved for single-room occupancy building owners *(* Seawall Assocs. v City of New York, 74 NY2d 92), conjugal rights for prison inmates suffering from AIDS *(* Matter of Doe v Coughlin, 71 NY2d 48), and consensual sodomy in an automobile on a city street *(* People v Onofre, 51 NY2d 476).

In *Keta,* the Court likewise ignores the precise constitutional guarantee, which prohibits unreasonable searches and seizures, by framing the issue as "whether an inspection conducted pursuant to Vehicle and Traffic Law § 415-a (5) (a) violates the *privacy rights* encompassed within article I, ***[**1354] [***946]*** § 12 of the New York State Constitution" (majority opn, at 495 [emphasis added]).

These seductively framed issue statements disguise the analytically flawed product within. In another sense, they actually expose the fundamental error. What emerges is an amorphous and all-encompassing "privacy right" that has metamorphosed into the new "individual right in question", in substitution of the unreasonable searches and seizures **[****83]** clause **[*515]** truly at issue *(* People v Harris, 77 NY2d 434, 438, *supra,* quoting People v P. J. Video, 68 NY2d 296, 303, *supra).*

Moreover, the Court disdains uniformity in constitutional adjudication as though it reflects only stubborn rigidity on our part. By its rhetorical device, uniformity is sacrificed along with selectively disfavored United States Supreme Court rulings. However, uniformity endures as an important policy ingredient in constitutional analysis, and serves practical purposes as well, especially in cases marked by joint Federal and State cooperative law enforcement efforts. No better illustrations could be imagined than those present in these two cases: major drug cultivation *(Scott),* and alleged massive theft on a commercial, entrepreneurial level *(Keta).* The calamitous consequences in economics and crimes which will be visited on New York because of the Court's indifference to the jurisprudential and practical benefits of Federal and State uniformity, and the countervailing necessity of some "bright line" guidance in this area of the law *(* People v Alvarez, 70 NY2d 375, 379, *supra; see,* People v Ponder, 54 NY2d 160), **[****84]** should be intuitively obvious. Instead, the decisions in these two cases will inevitably now sow confusion in understanding the law and division in the execution of responsible administrative, investigative and prosecutorial responsibilities.

In *Scott,* for example, had the hunter called the FBI instead of the local Sheriff, and had the case been prosecuted in Federal court instead of State court, the major criminal drug harvester would not be set free to resume the illicit drug enterprise. Indeed, if the State police had "silver- plattered" the information to Federal officials for their use, then the evidence would likely not have been suppressed.

In *Keta,* if State fiscal and personnel resources had allowed Department of Motor Vehicles administrative agents to conduct the initial random inspection, and had they then notified criminal law enforcement authorities of the theft findings, perhaps there would be a different result in this case and the statute might not be declared unconstitutional. The Court's constitutional impediment seems to stem principally from the conclusion that the police are somehow disqualified from initially performing the statutorily regulated **[****85]** inspection function. Such distinctions are artificial and demonstrate the unsoundness of the profound legal consequences wrought by the Court in these cases. **[*516]**

V.

In addition to the analytical and procedural failings, another important defect emerges. To be sure, the Court in Reynolds (71 NY2d 552, *supra)* refrained from presuming to decide more than was before it, leaving the posting-of-open-fields issue for another day. Yet, in *Reynolds,* this Court (1) upheld an aerial search of an "open fields" drug enterprise, in consonance with the principles of Oliver v United States (466 US 170, *supra);* (2) expressly declined to adopt new State constitutional protections in that case and in this search and seizure area; (3) emphasized the identity of purpose of the identical Search and Seizure Clauses in both Constitutions *(*

People v Reynolds, 71 NY2d 552, 557, *supra);* (4) adhered to the important jurisprudential policy of uniformity of interpretation of identical Federal and State constitutional provisions such as the Search and Seizure Clauses involved in these cases **[**1355]** **[***947]** *(id.);* and (5) rejected the expansive notions of **[****86]** the dissent in that very case. Yet, the Court in *Scott* now revives the dissent in *Reynolds* and infers that it is institutionally free to discard those key features of the *Reynolds' ratio decidendi.* It thus weakens the important value of institutional stability and continuity of this Court's decisions, which is supposed to be unaffected by "the accident of a change in its [the Court's] composition" *(see, Simpson v Loehmann, 21 NY2d 305, 314*, [Breitel, J., concurring]).

VI.

The Legislature has determined that the auto dismantling industry needs close administrative supervision and regulation. This is undisputed and understandable. The legislative memorandum filed in support of *Vehicle and Traffic Law § 415-a (5) (a)* clearly reflects the objective underlying the statute: "to provide a system of record keeping so that vehicles can be traced through junk yards and to assure that such junk yards are run by legitimate business[es] rather than by auto theft rings" (1973 NY Legis Ann, at 287, 288). A 1978 Senate Report describes New York's auto theft rate as having reached "horrendous proportions", creating "a low risk, high profit multimillion dollar industry" **[****87]** (Auto Thefts: A Low Risk High Profit Crisis in New York State, Report of NY St Senate Comm on Transp [1978]). The report adds that the New York metropolitan area--in particular--has been targeted by professional auto rings *(id.).* Indeed, in approving certain amendments **[*517]** to this administrative scheme in 1979, then-Governor Carey observed that motor vehicle theft has resulted in "an intolerable *economic burden* on the citizens of New York" (Governor's Approval Mem, 1979 NY Legis Ann, at 416 [emphasis added]). The statistics are revealing. New York ranks first in the per capita vehicle theft rate, with 1,042 thefts per 100,000 people. Auto theft was the fastest growing crime in New York from 1986 through 1990, leaping at an astounding 65.4% rate, far ahead of the second fastest growing crime--homicide (Crime and Justice Trends in New York State: 1986-1990, NY St Div of Crim Just Servs, Off of Just Sys Analysis Bull, Sept. 1991). Yet, the Court overturns the Legislature's enactment of a present remedy to control and to regulate this economic debacle, Vehicle and Traffic Law § 415-a--an enactment entitled to the presumption of constitutionality.

Most other **[****88]** Legislatures have also judged it necessary to adopt similar statutes permitting warrantless inspections of the records and inventories of vehicle dismantlers and automobile junkyards *(see, New York v Burger, 482 US 691, 698, n 11*, *supra).* The Court today points to no history or tradition of this State creating a peculiar State or local concern *warranting extra New York privacy protections* to such commercial operations, or that vehicle dismantlers in New York have historically expected or been accorded greater protection than that afforded by the United States Supreme Court in *New York v Burger (supra)* to the rest of the Nation.

In fact, the opposite is true. There can be no question that vehicle dismantling businesses, like junkyards, are "closely regulated" businesses in this State, and that inspections and searches made pursuant to *Vehicle and Traffic Law § 415-a (5)* clearly fall within the well-established exception identified in *New York v Burger (482 US 691, 703-707*, *supra; see, Matter of Glenwood TV v Ratner, 103 AD2d 322 [Titone, J. P.]*, *affd on opn at App Div 65 NY2d 642*, *supra).* That exception is obliterated by this case. The pervasiveness **[****89]** of the auto theft crisis, the legislative history, the carefully prescribed nature and specifics of the administrative regime adopted, and the history of close governmental oversight of this and related crime-plagued industries support the eminently reasonable conclusion that the operators of these commercial establishments possess a greatly reduced expectation of privacy, especially during regular business hours *(see, Donovan v Dewey, 452 US 594*; **[**1356]** *Marshall v Barlow's, Inc., 436 US 307*; *United States v Biswell, 406 US 311*; *Colonnade Corp. v United States, **[*518]** 397 US 72*). This factor is thoroughly ignored and, indeed, inverted by the Court.

These auto dismantling business yards and the open fields of this vast State plainly do not fit under the proverbial "homes are our castles" mantle, a metaphor that has rightly gained cachet only in its proper application, under the Fourth Amendment and under New York's constitutional equivalent,

article I, § 12.
VII.

The doctrine that State courts should interpret their own State Constitutions, *where appropriate* to supplement rights guaranteed by the Federal Constitution is not in dispute. Indeed, **[****90]** we have shown our support for that doctrine *where appropriate* with our votes in a long line of cases *(see, e.g., Immuno AG. v Moor-Jankowski, 77 NY2d 235, supra; People v Van Pelt, 76 NY2d 156)*. Thus, the Court's accusation of our "distress" with the general proposition is puzzling *(People v Scott,* majority opn, at 490). We do strenuously disagree with the Court, however, that the doctrine is being "cautiously exercised" *(People v Reynolds, 71 NY2d 552, 557, supra)* and believe that the applications of the doctrine here create a sweeping, new and unsettling interpretation--not mere application of settled principles.

Moreover, we are concerned that, inasmuch as the *Supremacy Clause of the United States Constitution* does not apply in these cases, and inasmuch as this Court's self-imposed noninterpretative analysis has now been effectively scuttled by these two cases, New York's adjudicative process is left bereft of any external or internal doctrinal disciplines *(see,* US Const, art VI, P 2; *People v Harris, 77 NY2d 434, supra).* It is that vacuum which we abhor and with which we disagree, respectfully and unabashedly.

After the many words **[****91]** of all the opinions, these two cases reduce to a fairly simple proposition. The common constitutional text and provision at issue in each case is a prohibition against "unreasonable searches and seizures", in which is embedded the attribute of a reasonable expectation of privacy. The United States Supreme Court in recent cases and the Appellate Division in the very cases under review have held definitively that the careful, deliberative police conduct in each case was reasonable. It is not reasonable, therefore, for this Court in these circumstances and on these bases to **[*519]** superimpose its preferred view of the constitutional universe. The Court has elevated subjective expectations of privacy to sovereign status by judicial fiat, thus reducing law to a State of mind rather than a set of reasonable, universal norms. The Court's method alters the words and analysis from the long-prevailing legitimate and reasonable expectations of freedom from unreasonable searches and seizures to purely subjective expectations of privacy. This supervening transformation is, in our view, unsupportable under this Court's own precedents and policies.

In *People v Scott:* Order reversed, **[****92]** guilty plea vacated, defendant's motion to suppress granted and indictment dismissed.

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Campaign for Fiscal Equity v. State

Court of Appeals of New York

February 16, 1995, Argued ; June 15, 1995, Decided

No. 117A

Reporter

86 N.Y.2d 307 *; 655 N.E.2d 661 **; 631 N.Y.S.2d 565 ***; 1995 N.Y. LEXIS 1145 ****

Campaign for Fiscal Equity, Inc., et al., Appellants, v. State of New York et al., Respondents.

Prior History: [**1]** Appeal, on constitutional grounds, from an order of the Appellate Division of the Supreme Court in the First Judicial Department, entered November 15, 1994, which modified, on the law, and, as modified, affirmed an order of the Supreme Court (Leland DeGrasse, J.; opn *162 Misc 2d 493*), entered in New York County, granting a motion by defendants State of New York, Ralph J. Marino as Majority Leader and Temporary President of the Senate, and Clarence D. Rappleyea, Jr., as Minority Leader of the Assembly, to dismiss the complaint to the extent of dismissing so much of the complaint as was brought by 14 community school board districts for lack of legal capacity to sue and dismissing the second cause of action and so much of the fourth cause of action as was based solely upon a statutory violation of the Civil Rights Act of 1964 for failure to state a cause of action. The modification consisted of fully granting defendants' motions to the extent of dismissing the first, third and remainder of the fourth causes of action for failure to state a cause of action.

Campaign for Fiscal Equity v State of New York, 205 AD2d 272, modified.

Campaign for Fiscal Equity v. State, 205 A.D.2d 272, 619 N.Y.S.2d 699, 1994 N.Y. App. Div. LEXIS 11329 (N.Y. App. Div. 1st Dep't, Nov. 15, 1994)

Case Summary

Procedural Posture

Plaintiffs, a non-profit organization of community school boards and others, appealed from the order of the Appellate Division of the Supreme Court (New York) that dismissed claims against defendants, the State of New York and its officials, in a challenge to the constitutionality of the state's public school financing system which allegedly did not provide the opportunity to obtain a proper education to students in the city of New York.

Overview

Plaintiffs, a non-profit organization of community school boards and others, filed an action that sought a declaratory judgment against defendants, the State of New York and its officials. It alleged that the state's public school financing system was unconstitutional because it did not provide school students in the city of New York an opportunity to obtain a sound basic education. The state supreme court dismissed equal protection claims and claims under Title VI of the Civil Rights Act of 1964 (Title VI), *42 U.S.C.S. § 2000d et seq.*, for failure to state a cause of action. The appellate division dismissed the other claims. The court modified the order, holding that plaintiffs pled sustainable claims under the Education Article of *N.Y. Const. art. XI, § 1*, and under the implementing regulations of Title VI, *34 C.F.R. § 100.3(b)(2)*. Plaintiffs alleged gross educational inadequacies that, if proven, could support a finding that the school financing system was unconstitutional under the Education Article. In challenging the allocation of education aid, plaintiffs provided statistical support for the disparity between aid distributed to the city's minority and non-minority students.

Outcome

The court modified the appellate division's dismissal and held that the claims filed by plaintiffs, a non-profit organization of community school boards and others, which challenged the constitutionality of the state's public school financing system were sufficient to survive a motion to dismiss because they alleged gross educational inadequacies and a disparity between the distribution of education aid between minority and non-minority students.

Counsel: *Michael A. Rebell Associates,* New **[****2]** York City *(Michael A. Rebell* and *Robert L. Hughes* of counsel), and *Teitelbaum, Hiller, Rodman, Paden &*

Hibsher, P. C., for appellants. I. Plaintiffs-appellants have alleged a valid claim that thousands of children are being denied a "sound basic education" in violation of the Education Article of the State Constitution. *(Board of Educ. v Nyquist, 57 NY2d 27*.) II. Plaintiffs have alleged valid claims under the Equal Protection Clauses of the Federal and State Constitutions. *(San Antonio School Dist. v Rodriguez, 411 US 1*; *Papasan v Allain, 478 US 265*; *Plyler v Doe, 457 US 202*; *Alevy v Downstate Med. Ctr., 39 NY2d 326*; *Craig v Boren, 429 US 190*; *Lalli v Lalli, 439 US 259*; *Donnell C. v Illinois State Bd. of Educ., 829 F Supp 1016*; *Horton v Marshall Pub. Schools, 769 F2d 1323*; *Major v Nederland Ind. School Dist., 772 F Supp 944*.) III. Plaintiffs have alleged a valid claim under title VI of the 1964 Civil Rights Act and its implementing regulations. *(Guardians Assn. v Civil Serv. Commn., 463 US 582*.) IV. The Legislature's abdication of its responsibility to remedy the inequities in the State educational finance system **[****3]** requires appropriate relief from the court. *(Board of Educ. v Nyquist, 57 NY2d 27*; *Reform Educ. Fin. Inequities Today v Cuomo, 152 Misc 2d 714*; *Bing v Thunig, 2 NY2d 656*; *People v Hobson, 39 NY2d 479*; *People v Bing, 76 NY2d 331*.)

Dennis C. Vacco, Attorney-General, New York City *(Mark G. Peters, Victoria A. Graffeo, Andrea Green, Harvey J. Golubock, Jeffrey I. Slonim* and *Clement J. Colucci* of counsel), for respondents. I. Plaintiffs have not properly alleged a violation of the requirements of the Education Article as defined by this Court in *Levittown. (Board of Educ. v Nyquist, 57 NY2d 27*; *Hope v Perales, 83 NY2d 563*; *Lovelace v Gross, 80 NY2d 419*; *Woe v Cuomo, 638 F Supp 1506, 801 F2d 627*; *Clark v Board of Educ., 374 F2d 569*; *Kemp v Beasley, 352 F2d 14*; *Matter of Anderson v Board of Educ., 77 Misc 2d 904, 46 AD2d 360, 38 NY2d 897*; *Bevan v New York State Teachers' Retirement Sys., 74 Misc 2d 443, 44 AD2d 163, 35 NY2d 641*; *Servomation Corp. v State Tax Commn., 51 NY2d 608*; *Hodgkins v Central School Dist., 78 Misc 2d 91*.) II. Plaintiffs' equal protection claims should be reviewed under **[****4]** the rational basis standard and under this standard are constitutional. *(Kadrmas v Dickinson Pub. Schools, 487 US 450*; *San Antonio School Dist. v Rodriguez, 411 US 1*; *Plyler v Doe, 457 US 202*; *Disabled Am. Veterans v United States Dept. of Veterans Affairs, 962 F2d 136*; *Gwinn Area Community Schools v State of Michigan, 741 F2d 840*; *Matter of Bennett v City School Dist., 114 AD2d 58*; *Schneider v Sobol, 76 NY2d 309*; *Dumain v Carey, 133 AD2d 206, 70 NY2d 926*; *Kneale v Cuomo, 130 AD2d 65*; *Edward B. v Paul, 814 F2d 52*.) III. As a matter of law, plaintiffs cannot show that the State funding system has a disparate impact against minorities or otherwise violates the State's Antidiscrimination Clause or Federal civil rights laws. *(People v Kern, 75 NY2d 638, 498 US 824*; *Dorsey v Stuyvesant Town Corp., 299 NY 512, 339 US 981*; *Groves v Alabama State Bd. of Educ., 776 F Supp 1518*; *Edwards v Johnson County Health Dept., 885 F2d 1215*.)

Donald Shaffer, New York City, *Helen Herskhoff, Arthur Eisenberg* and *Beth Haroules* for American Civil Liberties Union Foundation and others, *amici curiae.* I. The Court **[****5]** below improperly dismissed plaintiffs' claims under the Education Article of the State Constitution. *(Board of Educ. v Nyquist, 57 NY2d 27*; *Metro Broadcasting v FCC, 497 US 547*; *San Antonio School Dist. v Rodriguez, 411 US 1*.) II. The Court below improperly dismissed plaintiffs' claims under the State Equal Protection Clause. *(San Antonio School Dist. v Rodriguez, 411 US 1*; *Papasan v Allain, 478 US 265*; *Plyler v Doe, 457 US 202*; *Kadrmas v Dickinson Pub. Schools, 487 US 450*; *Golden v Clark, 76 NY2d 618*; *People v Barber, 289 NY 378*; *Immuno AG. v Moor-Jankowski, 77 NY2d 235*; *Brandenberg v Ohio, 395 US 444*; *Yick Wo v Hopkins, 118 US 356*.) III. The Court below improperly dismissed plaintiffs' claims under the antidiscrimination provision of the New York Constitution. *(People v Kern, 75 NY2d 638*.) IV. The Court below improperly dismissed plaintiffs' claims under title VI of the Civil Rights Act of 1964 and its implementing regulations. *(Alexander v Choate, 469 US 287*; *Guardians Assn. v Civil Serv. Commn., 463 US 582*; *Groves v Alabama State Bd. of Educ., 776 F Supp 1518*; *Georgia State Conference of* ***[****6]*** *Branches of NAACP v State of Georgia, 775 F2d 1403*; *Bryan v Koch, 627 F2d 1612*; *Meek v Martinez, 724 F Supp 888*.)

DeGraff, Foy, Holt-Harris, Mealey & Kunz, Albany *(Robert E. Biggerstaff* and *Glen P. Doherty* of counsel), for New York State Association of Small City School Districts, Inc., *amicus curiae.* I. The failure of State aid to compensate for the great disparities among school districts in property wealth violates the Education Article of the State Constitution. *(Reform Educ. Fin. Inequities Today v Cuomo, 152 Misc 2d 714*.) II. The failure of State aid to compensate for the great disparities in student needs among districts creates dual education systems and violates the Education Article of the State Constitution. *(McInnis v Shapiro, 293 F Supp 327*, *affd*

sub nom. McInnis v Ogilvie, 397 US 322; Burruss v Wilkerson, 310 F Supp 572, 394 US 44.) III. The Court should not hesitate to declare that the present educational inequities and disparities violate the Educational Article since the educational community of experts and the Governor have acknowledged the failure of the system to educate all children. IV. The Court should **[****7]** reverse the decision of the Court below; failure to reverse would eviscerate the Education Article of all meaning.

Judges: Majority opinion by Judge Ciparick and Judges Simons, Titone, Bellacosa, Smith and Levine concur; Judge Levine concurring in result as to the first cause of action based upon a violation of New York Constitution, article XI, § 1, the Education Article, in a separate opinion; Judge Simons dissenting in part and voting not to reinstate the first cause of action in a separate opinion; Judge Smith dissenting in part and voting to reinstate causes of action on behalf of the municipal plaintiffs as well as the nonmunicipal plaintiffs and to reinstate the second cause of action in its entirety, alleging violations of the Equal Protection Clauses of the Federal and State Constitutions in a separate opinion; and Judge Ciparick dissenting in part and voting to reinstate causes of action on behalf of the municipal plaintiffs as well as the nonmunicipal plaintiffs and to reinstate the second cause of action insofar as it asserts a violation of the Equal Protection Clause of the State Constitution, for reasons stated in Judge Smith's dissenting-in-part opinion; Chief Judge Kaye **[****8]** taking no part.

Opinion by: Ciparick

Opinion

[*312] **[**663]** **[***567]** Ciparick, J.

Thirteen years after we decided Board of Educ., Levittown Union Free School Dist. v Nyquist (57 NY2d 27) (hereinafter *Levittown),* we are again faced with a challenge to the constitutionality of New York State's public school financing system. We are called upon to decide whether plaintiffs' (Campaign for Fiscal Equity *et al.)* complaint pleads viable causes of action under the Education Article of the State Constitution, the Equal Protection Clauses of the State and Federal Constitutions, and title VI of the Civil Rights Act of 1964 and its implementing regulations.

Judges Titone, Bellacosa, Smith and I conclude that the nonschool board plaintiffs plead a sustainable claim under the Education Article. [1] Judge Levine concurs in a separate opinion. The Court is unanimous that, as to the nonschool board plaintiffs, a valid cause of action has been pleaded under title VI's implementing regulations. The remainder of this complaint should be dismissed.

[**9]** I.

Plaintiffs in this case are (1) Campaign for Fiscal Equity, Inc. (CFE), a not-for-profit corporation whose membership consists of community school boards, individual citizens, and a number of parent advocacy organizations; (2) 14 of New York City's 32 school districts; and (3) individual students who attend New York City public schools and their parents. The defendants are New York State, the Governor, the Commissioner of Education, the Commissioner of Taxation and Finance, and the Majority and Minority Leaders of the Senate and Assembly.

Plaintiffs commenced this action seeking a declaratory judgment against the State defendants, claiming that the State's **[*313]** public school financing system is unconstitutional under the Education Article of the State Constitution (art XI, § 1), the Equal Protection Clauses of the State (art I, § 11) and Federal Constitutions (US Const 14th ***[**664]*** ***[***568]*** Amend), the Antidiscrimination Clause of the State Constitution (art I, § 11), [2] and is unlawful under title VI of the Civil Rights Act of 1964 (42 USC § 2000d et seq.) and the United States Department of Education's regulations implementing title VI (34 CFR 100.3 **[****10]** [b] [2]).

Three defendants--the State of New York, the Senate Majority Leader, and the Assembly Minority Leader--brought the instant motion to dismiss under CPLR 3211 (a) (3) and (7), contending "that certain plaintiffs lack the right to bring this action and that the complaint fails to

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[1] Judges Simons, Titone, Bellacosa and Levine have concluded that the community school board plaintiffs lack capacity to bring this suit *(see,* City of New York v State of New York, 86 NY2d 286 [decided today]), a conclusion with which Judge Smith and I respectfully disagree *(see, id.* [Ciparick, J., dissenting]). Consequently, all claims asserted on behalf of the community school board plaintiffs must be dismissed and the ensuing discussion applies only to the remaining plaintiffs in this action.

[2] Plaintiffs have abandoned this claim on this appeal.

state a cause of action."

Supreme Court granted defendants' motion to the extent of dismissing all claims asserted on behalf of the plaintiff school districts on the ground that they lacked the legal capacity to sue. [3] As to the remaining plaintiffs--CFE and the individual students and parents--the court dismissed their equal protection and title VI claims for failure to state a cause of action, but ruled that the complaint stated valid claims under the Education Article, the Antidiscrimination Clause of the State Constitution, and title VI's implementing regulations.

[**11]** The Appellate Division modified the order of Supreme Court by fully granting defendants' motion to dismiss and dismissing the claims made under the Education Article, the Antidiscrimination Clause, and the title VI regulations for failure to state causes of action. The Appellate Division concluded that plaintiffs' allegations that reduced resources have resulted in the failure to provide New York City school children with an opportunity to receive a minimally adequate education were conclusory in nature, and, in any event, embodied a theory "virtually identical to that advanced, fully tried and ultimately rejected on appeal in *Levittown."* (205 AD2d 272, 276.) The Court also concluded that the prohibition in title VI's regulations against methods of administration which have an unlawful impact on racial and ethnic minorities was not violated by the State's role in allocating a lump sum of education aid to the New York City school system.

[*314] II.--Education Article

The first cause of action in plaintiffs' complaint essentially alleges that the State's educational financing scheme fails to provide public school students in the City of New York, including the **[****12]** individual plaintiffs herein, an opportunity to obtain a sound basic education as required by the State Constitution.

Discussion of the constitutional issues raised in this case necessarily takes place against the backdrop of our decision in *Levittown (57 NY2d 27*, *supra).* The *Levittown* plaintiffs consisted of 27 property-poor school districts, boards of education of 4 of the State's 5 largest cities (including New York City), and a number of school children and their parents residing in the property-poor school districts. After a 122-day trial, Supreme Court issued a judgment declaring that the 1974 school financing system violated the Equal Protection Clauses of the Federal and State Constitutions and the Education Article of the State Constitution. The Appellate Division agreed, except as to the Federal equal protection claim. This Court modified, by substituting a declaration "that the present statutory provisions for allocation of State aid to local school districts for the maintenance and support of elementary and secondary public education are not violative of either Federal or State Constitution." *(Id., at 50*.)

We rejected the *Levittown* plaintiffs' **[****13]** Federal equal protection challenge based on the decision of the Supreme Court of the United States in *San Antonio School Dist. v Rodriguez (411 US 1*) *(id., at 41*). The State equal protection challenge was rejected after we applied the rational basis **[**665]** **[***569]** test *(id., at 43-46*). Finally, the Education Article challenge was found lacking, as the plaintiffs advanced no claim of a deprivation of "minimal acceptable facilities and services" or "a sound basic education" *(id., at 47, 48)*.

Article XI, § 1 of the State Constitution, the Education Article, mandates that "[t]he legislature shall provide for the maintenance and support of a system of free common schools, wherein all the children of this state may be educated." In *Levittown,* this Court examined the Education Article's language and history and rejected the plaintiffs' contention that the provision was intended to ensure equality of educational offerings throughout the *State (57 NY2d 17, 47*, *supra).* Rather, we stated, "[w]hat appears to have been contemplated when the Education Article was adopted at the 1894 Constitutional **[*315]** Convention was a State-wide system assuring **[****14]** *minimal acceptable facilities and services* in contrast to the unsystematized delivery of instruction then in existence within the State." *(Id.* [emphasis added].) In order to satisfy the Education Article's mandate, the system in place must at least make available an "education", a term we interpreted to connote "a sound basic education" *(id., at 48*).

The Court in *Levittown* acknowledged the existence of "significant inequalities in the availability of financial support for local school districts, ranging from minor discrepancies to major differences, resulting in significant unevenness in the educational opportunities offered." *(Id., at 38*.) Nonetheless such unevenness of educational opportunity did not render the school

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[3] Supreme Court consolidated this action with *City of New York v State of New York (86 NY2d 286*, *supra* [decided today]). In *City of New York,* essentially, the same challenges were made to the State's education funding system as are made here, and Supreme Court dismissed the entire complaint for lack of legal capacity to sue.

financing system constitutionally infirm, unless it could be shown that the system's funding inequities resulted in the deprivation of a sound basic education *(id., at 47-48*).

The gravamen of the plaintiffs' complaint in *Levittown* was that "property-rich districts have an ability to raise greater local tax revenue enabling them to provide enriched educational programs beyond the fiscal ability of the property-poor districts." **[****15]** (*57 NY2d, at 36*.) Indeed, we specifically noted:

"No claim is advanced in this case, however, by … plaintiffs … that the educational facilities or services provided in the school districts that they represent fall below the State-wide minimum standard of educational quality and quantity fixed by the Board of Regents; their attack is directed at the existing disparities in financial resources which lead to educational unevenness above that minimum standard." *(Id., at 38*.)

We recognized in *Levittown* that the Education Article imposes a duty on the Legislature to ensure the availability of a sound basic education to all the children of the State. Contrary to the dissenting expression of Judge Simons, we are unable to adopt the view that the constitutional language at issue is, in effect, hortatory. Indeed, we should not do so in the face of *Levittown's* unambiguous acknowledgment of a constitutional floor with respect to educational adequacy. We conclude that a duty exists and that we are responsible for adjudicating the nature of that duty.

In this case, the principal premise underlying the Appellate Division's dismissal of plaintiffs' Education Article cause **[****16]** of action--that it is "virtually identical" to the theory tried and **[*316]** rejected in *Levittown*--is flawed and fails. Plaintiffs advance the very claim we specifically stated was not before us in *Levittown,* i.e., that minimally acceptable educational services and facilities are not being provided in plaintiffs' school districts. *Levittown* does not foreclose plaintiffs' Education Article claim. Rather, a fair, contextual reading of that case compels the contrary conclusion. The Court there manifestly left room for a conclusion that a system which failed to provide for a sound basic education would violate the Education Article *(id., at 48*).

Having concluded that *Levittown* is not an obstacle to plaintiffs' Education Article claim, we turn next to the crucial question: whether plaintiffs have properly stated a cause of action under the Education Article.

[666] [***570]** That Article requires the State to offer all children the opportunity of a sound basic education *(id.).* [4] Such an education should consist of the basic literacy, calculating, and verbal skills necessary to enable children to eventually function productively as civic participants **[****17]** capable of voting and serving on a jury. If the physical facilities and pedagogical services and resources made available under the present system are adequate to provide children with the opportunity to obtain these essential skills, the State will have satisfied its constitutional obligation. As we stated in *Levittown,*

"The Legislature has made prescriptions (or in some instances provided means by which prescriptions may be made) with reference to the minimum number of days of school attendance, required courses, textbooks, qualifications of teachers and of certain nonteaching personnel, pupil transportation, and other matters. If what is made available by this system (which is what is to be maintained and supported) may properly be said to constitute an education, the constitutional mandate is satisfied." (*57 NY2d, at 48*.)

[**18] [*317]** The State must assure that some essentials are provided. Children are entitled to minimally adequate physical facilities and classrooms which provide enough light, space, heat, and air to permit children to learn. Children should have access to minimally adequate instrumentalities of learning such as desks, chairs, pencils, and reasonably current textbooks. Children are also entitled to minimally adequate teaching of reasonably up-to-date basic curricula such as reading, writing, mathematics, science, and social studies, by sufficient personnel adequately trained to teach those subject areas.

We note that plaintiffs, throughout their complaint, rely on the minimum State-wide educational standards established by the Board of Regents and the

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[4] Judge Levine, in his concurrence, also concludes, for his own articulated reasons, that the Education Article requires the State to provide the opportunity of a "sound basic education". Contrary to his assertions, however, this decision does not extend the State's funding obligations *(see,* concurring opn, at 325). Judge Simons, in his dissent, also asserts that the majority opinion would compel a funding directive. However, any discussion of funding or reallocation is premature, because the only issue before the Court at this time is whether plaintiffs have pleaded a viable cause of action under the Education Article. The question of remedies is not before the Court.

Commissioner of Education, a reliance directly traceable to certain language in *Levittown (see,* 57 NY2d, at 38). Contrary to Judge Simons, we see no reason to penalize plaintiffs for referencing those standards in this manner. Construing the allegations liberally and in whole, as we must *(see,* Leon v Martinez, 84 NY2d 83, 87-88), there can be no question that the pertinent pivotal claim made here is that the present **[****19]** financing system is not providing City school children with an opportunity to obtain a sound basic education. However, because many of the Regents' and Commissioner's standards exceed notions of a minimally adequate or sound basic education--some are also aspirational--prudence should govern utilization of the Regents' standards as benchmarks of educational adequacy. Proof of noncompliance with one or more of the Regents' or Commissioner's standards may not, standing alone, establish a violation of the Education Article.

Plaintiffs also rely on standardized competency examinations established by the Regents and the Commissioner to measure minimum educational skills *(see,* 8 NYCRR 100.3 [b] [2]; 100.5 [a] [4]). Performance levels on such examinations are helpful but should also be used cautiously as there are a myriad of factors which have a causal bearing on test results.

We do not attempt to definitively specify what the constitutional concept and mandate of a sound basic education entails. Given the procedural posture of this case, an exhaustive discussion and consideration of the meaning of a "sound basic education" is premature. Only after discovery and the **[****20]** development of a factual record can this issue be fully evaluated and resolved. Rather, we articulate a template reflecting our judgment of what the trier of fact must consider in determining **[*318] [**667] [***571]** whether defendants have met their constitutional obligation. The trial court will have to evaluate whether the children in plaintiffs' districts are in fact being provided the opportunity to acquire the basic literacy, calculating and verbal skills necessary to enable them to function as civic participants capable of voting and serving as jurors.

A relevant issue at this point is whether plaintiffs can establish a correlation between funding and educational opportunity. In order to succeed in the specific context of this case, plaintiffs will have to establish a causal link between the present funding system and any proven failure to provide a sound basic education to New York City school children. However, we believe that Judge Simons' extended causation discussion *(see,* dissenting in part opn, at 339-340) is premature given the procedural context of this case.

We turn next more specifically to the complaint. In considering the sufficiency of a **[****21]** pleading subject to a motion to dismiss for failure to state a cause of action under CPLR 3211 (a) (7), our well-settled task is to determine whether, "accepting as true the factual averments of the complaint, plaintiff can succeed upon any reasonable view of the facts stated" *(* People v New York City Tr. Auth., 59 NY2d 343, 348; *see,* Jiggetts v Grinker, 75 NY2d 411, 414-415; *219* Broadway Corp. v Alexander's, Inc., 46 NY2d 506, 509). We are required to accord plaintiffs the benefit of all favorable inferences which may be drawn from their pleading, without expressing our opinion as to whether they can ultimately establish the truth of their allegations before the trier of fact *(see, 219* Broadway, supra, at 509; Underpinning & Found. Constructors v Chase Manhattan Bank, 46 NY2d 459; Morone v Morone, 50 NY2d 481). Only recently we recognized the right of plaintiffs "to seek redress, and not have the courthouse doors closed at the very inception of an action, where the pleading meets a minimal standard necessary to resist dismissal of a complaint." *(* Armstrong v Simon & Schuster, 85 NY2d 373, 379; *see also,* Leon v Martinez, 84 NY2d 83, 87-88, *supra* **[****22]** [court is to "determine only whether the facts as alleged fit within any cognizable legal theory"].) If we determine that plaintiffs are entitled to relief on any reasonable view of the facts stated, our inquiry is complete and we must declare the complaint legally sufficient *(see, 219* Broadway, supra*).*

According to plaintiffs, New York City students are not receiving the opportunity to obtain an education that enables **[*319]** them to speak, listen, read, and write clearly and effectively in English, perform basic mathematical calculations, be knowledgeable about political, economic and social institutions and procedures in this country and abroad, or to acquire the skills, knowledge, understanding and attitudes necessary to participate in democratic self-government (plaintiffs' amended complaint, record on appeal, at 64-65).

Plaintiffs support these allegations with fact-based claims of inadequacies in physical facilities, curricula, numbers of qualified teachers, availability of textbooks, library books, etc. On the basis of these factual allegations, and the inferences to be drawn therefrom, we discern a properly stated cause of action sufficient to

survive a motion **[****23]** to dismiss and to permit this portion of the action to go forward. Taking as true the allegations in the complaint, as we must, plaintiffs allege and specify gross educational inadequacies that, if proven, could support a conclusion that the State's public school financing system effectively fails to provide for a minimally adequate educational opportunity. We think it beyond cavil that the failure to provide the opportunity to obtain such fundamental skills as literacy and the ability to add, subtract and divide numbers would constitute a violation of the Education Article. In our view, plaintiffs have alleged facts which fit within a cognizable legal theory *(see, Leon v Martinez, 84 NY2d 83, 87-88, supra).* **[**668]** **[***572]** Accordingly, plaintiffs' cause of action under the Education Article should be reinstated.

III.--Equal Protection

Judges Simons, Titone, Bellacosa and Levine conclude that the second cause of action alleging that the State's school financing scheme violates the Equal Protection Clauses of the Federal and State Constitutions (*US Const 14th Amend*; *NY Const, art I, § 11*) must be dismissed in light of our decision in *Levittown.* [5] **[****24]**

In *Levittown,* we followed *San Antonio School Dist. v Rodriguez (411 US 1, reh denied 411 US 959, supra)* in holding that education was not a fundamental right under the United States Constitution, and concluded as well that it was not a fundamental right under the State Constitution (*57 NY2d, at 41-43*). **[*320]** Therefore, we held, the rational basis test was the appropriate standard for equal protection analysis under both Constitutions *(id.).* We concluded in *Levittown* that any disparities in educational funding among school districts in the State arising from the State's financing scheme were rationally based upon and reasonably related to a legitimate State interest, "the preservation and promotion of local control **[****25]** of education" *(id., at 44*).

Plaintiffs attempt to distinguish *Levittown* in two ways. First, plaintiffs contend that absent from the pleadings and proof in the *Levittown* case was the claim they make here, that the State's funding methodology deprives New York City school children of a "minimum adequate education." [6] Relying on *Plyler v Doe (457 US 202, reh denied 458 US 1131*), they urge that an intermediate level of scrutiny applies to such a deprivation, thereby shifting the burden to the State to show a substantial relationship of its educational funding scheme to a substantial State interest *(see, id., at 224* [Brennan, J.]; *see also, id., at 239* [Powell, J., concurring]). This Court today finds this argument unpersuasive for the following reasons.

First, *Plyler v Doe* does not stand for the broad proposition that heightened scrutiny applies in all State financing challenges, merely when, as here, the gravamen of the plaintiffs' **[****26]** factual allegations charges violations of the *"state-wide* minimum standard of educational quality and quantity." [7] (Emphasis supplied.) *Plyler* explicitly disclaimed elevating public education to a " 'right' granted to individuals by the Constitution" *(id., at 221*; *see also, id., at 223*). The Court discerns important differences between the instant case and *Plyler,* i.e., the educational deprivation was absolute in *Plyler* and was intentionally discriminatory toward a defined subclass, the blameless children of undocumented alien adults. Moreover, the reach of *Plyler's* holding was specifically clarified in *Kadrmas v Dickinson Pub. Schools (487 US 450*), where the Supreme Court explained:

"We have not extended *[Plyler's* application of a heightened level of equal protection scrutiny] beyond the 'unique circumstances', *[Plyler v Doe, 457 US, at 239*] (Powell, J., concurring), that provoked its 'unique confluence of theories and rationales' " (*487 US, at 459*).

[*321] Thus, as to the claimed violation of the *Equal Protection Clause of the Federal Constitution*, the Court determines that neither *Plyler* nor any Supreme Court case **[****27]** decided after *Levittown* requires reexamination of our holding in that case rejecting heightened scrutiny and finding a rational basis in the State's educational funding scheme.

Alternatively, plaintiffs' claim that heightened scrutiny is required under the Equal Protection Clause of the State Constitution **[**669]** **[***573]** because, unlike the *Levittown* plaintiffs, in this case they have alleged that the State's educational funding methodology has a

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[5] Judge Smith and I respectfully disagree and would sustain the second cause of action under the State Constitution in a separate opinion. Judge Smith, alone, further finds plaintiffs have stated a valid equal protection claim under the Federal Constitution.

[6] Plaintiffs' brief, at 30.

[7] Plaintiffs' brief, at 30.

disparate impact upon African-American and other minority students. The Court rejects this contention, noting plaintiffs' concession that no discriminatory intent has been charged in this case. [8] The Court relies on the case law from our Court and the Supreme Court holding that an equal protection cause of action based upon a disproportionate impact upon a suspect class requires establishment of intentional discrimination *(see, Arlington Hgts. v Metropolitan Hous. Corp., 429 US 252, 264-265*; *Washington v Davis, **[****28]** 426 US 229, 240*; *People v New York City Tr. Auth., 59 NY2d 343, 350*, *supra; Board of Educ. v Nyquist, 57 NY2d, at 43-44*, *supra).*

IV.--Title VI

Plaintiffs also complain that the State public education financing system violates title VI and title VI's implementing regulations. Title VI provides:

"No person in the United States shall, on the ground of race, color, or national origin, be excluded from participation in, be denied the benefits of, or be subjected to discrimination under any program or activity receiving Federal financial assistance" (*42 USC § 2000d*).

Title VI prohibits discrimination on the basis of race or national origin in programs receiving Federal financial assistance *(see,* 42 USC §§ 2000d--2000d-6). The Supreme Court has ruled that there must be a showing of intentional discrimination to succeed on a title VI claim *(see, Guardians Assn. v Civil Serv. Commn., 463 US 582*). *Guardians* involved a challenge to the hiring **[****29]** and firing practices of New York City's police department. The principal issue was whether compensation **[*322]** could be awarded for a violation of title VI in the absence of proof of discriminatory intent. Although the Court was divided and no majority opinion issued, seven Justices concluded that proof of discriminatory intent is required in order to make out a violation of title VI *(see, Alexander v Choate, 469 US 287, 293)*. The instant complaint contains no showing of intentional discrimination.

Plaintiffs also allege a violation of title VI's implementing regulations *(see, 34 CFR 100.3 [b] [2]*), which provide that recipients of Federal funding may not:

"utilize *criteria or methods of administration* which *have the effect* of subjecting individuals to discrimination because of their race, color, or national origin, or *have the effect* of defeating or substantially impairing accomplishment of the objectives of the program as respect individuals of a particular race, color, or national origin." (Emphasis supplied.)

The regulations incorporate a disparate impact standard.

Under title VI's implementing regulations, proof of discriminatory intent **[****30]** is not a prerequisite to a private cause of action against governmental recipients of Federal funds *(see, Choate, supra, at 293-294*). Proof of discriminatory *effect* suffices to establish liability under the regulations promulgated pursuant to title VI: "actions having an unjustifiable disparate impact on minorities [can] be redressed through agency regulations designed to implement the purposes of Title VI" *(id., at 293*).

Federal courts have consistently held that the evidentiary standards developed under title VII govern title VI cases as well *(see, e.g., Georgia State Conference of Branches of NAACP v State of Georgia, 775 F2d 1403, 1417*; *Groves v Alabama State Bd. of Educ., 776 F Supp 1518, 1523)*. Consequently, in order to make out a prima facie case of disparate impact:

"The plaintiff first must show by a preponderance of the evidence that a facially neutral practice has a racially disproportionate effect, whereupon the burden shifts to the defendant to prove a substantial legitimate justification for its practice. The plaintiff then may ultimately prevail by proffering **[**670]** **[***574]** an equally effective alternative practice which results **[****31]** in less racial disproportionality or proof that the legitimate practices are a pretext for **[*323]** discrimination." *(Georgia State Conference, supra, at 1417* [citations omitted].)

A validly stated cause of action under the title VI regulations thus has two components: "whether a challenged practice has a sufficiently adverse racial impact--in other words, whether it falls significantly more harshly on a minority racial group than on the majority--and, if so, whether the practice is nevertheless adequately justified." *(Groves, supra, at 1523*; *see, Georgia State Conference, supra, at 1417*; *Quarles v Oxford Mun. Separate School Dist., 868 F2d 750, 754, n 3*.) Statistics comparing benefit distribution or access patterns among members of the protected class and the over-all population play a key role in demonstrating an adverse racial impact *(see, Georgia State Conference,*

[8] Plaintiffs' brief, at 39.

775 F2d, at 1417 [plaintiffs made prima facie case through statistics showing that the racial composition differed from what would be expected from a random distribution]; *Huntington Branch, NAACP v Town of Huntington, 844 F2d 926, 938*; *Sharif v New York State Educ. Dept., 709* ***[****32]*** *F Supp 345, 362)*.

Once a prima facie case is established, the burden of persuasion shifts to the defendant to affirmatively defend the challenged practice by way of a legitimate nondiscriminatory reason *(see, Larry P. v Riles, 793 F2d 969, 982-983)*. If the defendant meets its burden and demonstrates that the challenged practice is justified or necessary, the plaintiff can still prevail by showing that "less discriminatory alternatives" were available to further the purportedly legitimate interest *(see, Abermarle Paper Co. v Moody, 422 US 405, 425)*.

Applying the foregoing standards to this case, we conclude that plaintiffs have stated a cause of action under title VI's regulations. The Appellate Division dismissed plaintiffs' claim on the ground that the State's role in allocating a lump sum to the New York City school system is not the "function which results in the disparate impact on minority racial or ethnic groups; rather, it is the method by which plaintiff Chancellor of the City School District divides and suballocates those funds that may arguably result in the disparate impact complained of here." (*205 AD2d, at 277*.) The Appellate Division misconstrued the **[****33]** nature of plaintiffs' claim.

Plaintiffs complain that it is the *State's* decisions concerning allocation of education aid which constitute the "criteria or methods of administration which have the effect of subjecting individuals to discrimination because of their race" (*34 CFR* ***[*324]*** *100.3 [b] [2]*). The complaint challenges the manner in which the *State* allocates education aid, alleging that the present methodology has a disparate impact on the State's racial and ethnic minorities, the vast majority of whom attend New York City public schools. [9]

The Appellate Division's reasoning fails to account for the fact that the City can only **[****34]** suballocate what the State allocates to it. If, as alleged, the State allocates only 34% of all State education aid to a school district containing 37% of the State's students (81% of whom are minorities comprising 74% of the State's minority student population), then those minority students will receive less aid as a group and per pupil than their nonminority peers who attend public schools elsewhere in the State, irrespective of how the City suballocates the education aid it receives.

Initially, it is undisputed that New York State is the recipient of Federal funds for education. Moreover, plaintiffs complain of a benefit distribution practice which allegedly has the *effect* of subjecting minority students to discrimination on the basis of their race, color, or national origin. Plaintiffs support their allegations statistically, pointing to the disparity between the total and per capita **[**671]** **[***575]** education aid distributed to the City's predominantly minority student population as opposed to the amount distributed to the State's nonminority students. Since defendants have not yet advanced a substantial justification for the challenged practice at this procedural **[****35]** point, plaintiffs' cause of action under the title VI regulations should be reinstated *(see, Georgia State Conference of Branches of NAACP v State of Georgia, 775 F2d 1403, 1417*, *supra; Groves v Alabama State Bd. of Educ., 776 F Supp 1518, 1523*, *supra).*

The order of the Appellate Division should be modified, without costs, in accordance with the opinion herein and, as so modified, affirmed.

Concur by: Levine

Concur

Levine, J. (Concurring). I join with the majority of this Court in holding that plaintiffs have failed to allege legally sufficient causes of action under the Equal Protection Clauses of the Federal and State Constitutions or under title VI of the Civil Rights Act of 1964, but have pleaded a valid cause of **[*325]** action under the United States Department of Education's regulations implementing title VI. I am also of the view that, under our prevailing liberal pleading standards, the complaint states a cause of action based upon a violation of the Education Article of the State Constitution (*NY Const, art XI, § 1*). The complaint invokes the definition of the State's educational duty under the Constitution set forth in *Board of Educ., Levittown Union* ***[****36]*** *Free School Dist. v Nyquist*

[9] Plaintiffs complain that 74% of the State's minority student population attend City schools, that minorities make up 81% of the City's public school enrollment as compared to 17% of school enrollment outside the City, and that the City's predominantly minority students receive 12% less State aid per pupil ($ 3,000) than the State-wide average ($ 3,400).

(57 NY2d 27) (hereinafter *Levittown)* and alleges that the State's public school financing scheme denies them a "sound basic education" with "minimal acceptable facilities and services" *(id., at 47-48*). The complaint also refers to various specific educational deficiencies and alleges that the State's funding scheme denies New York City public school students the opportunity to achieve even basic literacy. These allegations, in my view, are sufficient to withstand the motion to dismiss, despite the inclusion and heavy reliance upon various other factors which I consider essentially irrelevant to a determination of whether the current State school aid formula violates the Education Article of the State Constitution.

I write separately regarding plaintiff's Education Article claim because the constitutional standard for a sound basic education articulated by the majority may be read to extend the State's funding obligation well beyond that envisaged by the *Levittown* Court or justified by the language or history of the adoption of the Education Article.

I.

Before addressing the errors and deficiencies I perceive in the majority's opinion **[****37]** upholding the sufficiency of plaintiffs' Education Article cause of action, I wish to explain why I am unable to agree with Judge Simons' dissent in this case, although I find much merit in its discussion of the extent of the State's constitutional responsibility for funding the State's public education system and of the inherent limitations of courts in making constitutional decisions on educational quality and quantity. That dissent concludes that it "is for other branches of government, not the courts, to define what constitutes a sound basic education" (Simons, J., dissenting in part opn, at 333). It also finds plaintiffs' Education Article cause of action deficient because their "claim [of a denial of a sound basic education] does not attempt to establish deprivation State-wide; it advances only claims involving some New York **[*326]** City schools". (Simons, J., dissenting in part opn, at 338.) The dissent apparently concludes that the State's mandate to support the system of education is only breached upon proof of a State-wide failure of the system of public education, but not a failure (attributable to inadequate State funding) in any individual school district. I **[****38]** believe this position is inconsistent with the *Levittown* decision. In *Levittown* we explicitly stated that the Education Article (*NY Const, art XI, § 1*) of the Constitution does require the Legislature to put in place and support "a State-wide system *assuring* minimal acceptable facilities and services", although *not* necessarily "a system assuring that all educational facilities and services would be equal throughout the State." (*57 NY2d, at 47*, *supra* [emphasis supplied].) We further defined the "constitutional mandate" as that of providing a "sound basic education" *(id., at 48*).

This Court in *Levittown* viewed from an historical perspective the funding role and responsibility of the State in the constitutional scheme contemplated when article XI, § 1 was adopted. We expressly relied upon the historical description, contained in the *amicus* brief of 85 local school districts, that there has been in this State a nearly 200-year tradition of a dual system of financing public education, already well in place when the Education Article was adopted in 1894, giving local school districts broad autonomy in making policy decisions on the quality and quantity **[****39]** of education and the funding thereof for their respective schools *(see, id., at 46*). We described the State's funding responsibility under the 1894 constitutional scheme as one of *"assuring* that a *basic* education will be provided [through State financial aid to local school districts]" *(id., at 45* [emphasis supplied]).

These observations were historically accurate and are reflected in the history of the adoption of the Education Article. As early as 1795, the Legislature enacted a common school law providing for State aid to counties and cities to support their local schools, contingent upon matching funds raised by local taxation but not otherwise limiting local school educational expenditures; similar legislation was passed in 1812 *(see,* 3 Lincoln, The Constitutional History of New York, at 526-527). As we have discussed more extensively in *Reform Educ. Fin. Inequities Today v Cuomo (86 NY2d 279* [decided today]), the primary purpose of article XI, § 1 was to "constitutionalize the established system of common schools rather **[*327]** than to alter its substance" (*86 NY2d, at 284*). Moreover, the constitutional history of the Education Article **[****40]** shows that the objective was to "make[] it *imperative* on the State to provide *adequate* free common schools for the education of *all* of the children of the State" and that the new provision would have an impact upon "places in the State of New York where the common schools are not adequate" (3 Revised Record of Constitutional Convention of 1894, at 695 [emphasis supplied]).

In my view, the dissent's conclusions that the determination of what constitutes a sound basic education for constitutional purposes is not a judicial responsibility on this constitutional challenge, and that,

in any event, only a State-wide failure to provide funding for a sound basic education will give rise to a constitutional violation, are inconsistent with *Levittown's* description of the State's funding responsibility and with the constitutional history I have cited. The *Levittown* record definitely established, and the courts at all levels recognized that the State's educational aid formula produced significant variations in aggregate per pupil State aid among the various school districts *(see, e.g., Levittown, 94 Misc 2d 466, 502)*. Also established in *Levittown* and found **[****41]** by the trial court was that the cost of the same educational services, resources or facilities varied substantially throughout the State *(see, id., at 503-510)*. If, because of such factors or others, the State aid to an individual school district proved to be insufficient to "assure minimal adequate facilities and services" (*57 NY2d, at 47*, *supra)* or "to assur[e] that a basic education will be provided" *(id., at 45)*, our *Levittown* decision certainly would lead to the conclusion that the State's constitutional educational funding responsibility, couched in those very terms, would have been violated in that school district. Moreover, the notion that only a State-wide failure to provide sufficient State funds for a basic sound education is sufficient to establish a right to relief under the Education Article is inconsistent with the constitutional debate I have previously quoted, in which it was specifically anticipated that its adoption would have an ameliorative effect upon "places … where the common schools are not adequate" *(see, supra).*

Thus, I conclude that we cannot avoid addressing the meaning and content of the constitutional mandate identified in **[****42]** *Levittown,* that the Legislature must support a public school system providing an opportunity for students to receive a *sound basic education.*

[*328] II.

I now turn to a discussion of the serious errors I find in the majority's opinion addressing the meaning and content of that constitutional mandate, to provide school children an opportunity for a sound basic education. Analysis may profitably begin by identifying what the *Levittown* Court most clearly rejected as the constitutional mandate under the Education Article. Contrary to the conclusion of the majority here, the Court in *Levittown* not only had before it the contention that disparities in overall funding and quality of education among local school districts violated the Education Article. The Court also undisputably had before it the claim, supported by findings of fact and conclusions of law by the lower courts, that, irrespective of the existence of disparities, the school children in the plaintiff and intervenor school districts in that case were not receiving the educational opportunities guaranteed by the Education Article. Thus, without reference to disparity, the trial court adopted as the **[****43]** constitutional mandate in New York the construction of a comparable constitutional provision on public education by the New Jersey Supreme Court in *Robinson v Cahill (62 NJ 473, 515, 303 AD2d 273) (Levittown, 94 Misc 2d, at 533*, *supra):*

" 'The Constitution's guarantee must be understood to embrace that educational opportunity which is needed in the contemporary setting to equip a child for his role as a citizen and as a competitor in the labor market'."

The trial court paraphrased that concept of the constitutional obligation as requiring the State to afford all school children the opportunity to acquire those skills "necessary to function as a citizen in a democratic society" *(id.),* and found that the constitutional responsibility of the State was breached by the State's inadequate funding aid to the large city school districts in the State *(id., at 534*).

When the *Levittown* case reached the Appellate Division, the majority in that Court adopted the same approach in defining the basic education guaranteed by article XI, § 1. It quoted (*83 AD2d 217, 249)* from *Seattle School Dist. No. 1 v Washington (90 Wash 2d 476, 517, 585 P2d 71*) that the educational **[****44]** opportunities which are constitutionally required to be furnished are those " 'in the contemporary setting to equip our children for their role as citizens and as potential competitors in today's market as well as in the marketplace of **[*329]** ideas' ". The Appellate Division concluded that "we believe *section 1 of article XI of the New York Constitution* requires no less" (*83 AD2d, at 249*, *supra).* The Appellate Division majority found that the then-current State funding scheme violated the Education Article in failing to provide children in the school districts represented there with the skills required thus "to function in society" (*83 AD2d, at 251*, *supra).*

The majority of this Court in *Levittown* was also directly confronted with the position of the sole dissenter, Judge Fuchsberg, that under the State Constitution, all children "are entitled to an education that prepares today's students to face the world of today and tomorrow." (*57 NY2d, at 60*, *supra.)* The dissent also reminded the majority that both lower courts found as a fact that the State's funding scheme denied such educational

opportunities for the children in the districts involved in the *Levittown* **[****45]** suit. "Those who took and tolled the testimony tell us that, by any standard that counts, for the multitudinous many no such educational opportunity truly exists." *(Id.)*

Despite those findings by the lower courts in *Levittown,* that the children in the subject school districts in that suit were denied the opportunity "to acquire the skills necessary to function as a citizen in a democratic society" (*94 Misc 2d, at 533*, *supra)* or the skills "to function effectively in society" or prepare them for " 'their role as citizens and as potential competitors in today's market place' " (*83 AD2d, at 248-249*, *supra),* this Court held, as a matter of law, that the plaintiffs and intervenors in *Levittown* had not established (indeed, not even claimed) that the State's public education funding scheme failed to provide the educational opportunity mandated by article XI, § 1, i.e., minimal facilities and services needed for a sound basic education.

The conclusion seems to me inescapable that, if we are to faithfully follow the *Levittown* precedent, the concept of a sound basic education as a constitutional mandate is much more circumscribed than the aspirational, largely **[****46]** subjective standards expressed by the lower courts and the dissent in *Levittown,* representing what typically one would desire as the outcome of an entire public education process--to produce useful, functioning citizens in a modern society or, as Judge Fuchsberg put it, preparation of students "to face the world of today and tomorrow".

Thus, in my view, the majority unmistakably and unwisely **[*330]** departs from *Levittown* in the majority's principal holding here that the sound basic education which is the State's funding responsibility under the Education Article includes imparting these skills "necessary to enable children to *eventually function productively as civic participants"* (majority opn, at 316 [emphasis supplied]). In substance and meaning, this objectively unverifiable standard is indistinguishable from the criteria for the constitutional norm expressed by the trial court and Appellate Division in *Levittown.* The majority's error is further compounded and reinforced by the majority's reference to plaintiffs' allegations, which the majority apparently considers relevant on plaintiffs' cause of action under the Education Article, that New York City **[****47]** students are being deprived of the opportunity, among other things, to "be knowledgeable about political, economic and social institutions and procedures in this country and abroad" (majority opn, at 319).

Having demonstrably rejected similar standards, the manifest teaching of *Levittown* is that the State's constitutional educational funding responsibility does not nearly extend to guaranteeing students the opportunity to acquire those skills to "function productively as civic participants", as the majority would have it. The narrower State role, as the *Levittown* decision explains, flows necessarily from New York's historical tradition of dividing responsibility over public education between the State and local school governments, under which the quality of public education necessary to enable students to "function in society" is largely a matter of local decision and control subject to standards and assistance from the appropriate State executive, legislative and administrative bodies *(see, Levittown, 57 NY2d, at 45-46*, *supra).* As previously pointed out, that division of responsibility was constitutionalized in the adoption of article XI, § 1.

That this Court **[****48]** in *Levittown* construed the Constitution as imposing only a drastically limited State funding responsibility for guaranteeing the quality of public school education also stems from the *Levittown* majority's awareness of the inherent and proper limitations of the courts in enforcing the constitutional obligation. The *Levittown* decision cogently pointed to the "enormous practical and political complexity" (*57 NY2d, at 38*, *supra)* of deciding upon educational objectives and providing funding for them which, under our form of government, are legislative and executive prerogatives upon which courts should be especially hesitant to intrude *(id., at 39*; *see also, id., at 49, n 9*). Again, the majority here disregards **[*331]** the prudent and jurisprudential advice of *Levittown* and appears ready to fully enter this arena in delineating a series of "essentials" to which "[c]hildren are entitled" under the Constitution, including such things as "minimally adequate teaching of reasonably up-to-date curricula" on a wide variety of subjects, "reasonably current textbooks" and "minimally adequate" educational physical plant and equipment (majority opn, at 317). Presumably **[****49]** the determination of the adequacy of all such educational resources will be made by the Trial Judge in this case.

The true, far more limited nature of the State's constitutional responsibility to fund a sound basic education can be gleaned, again, from the language of the Education Article itself and the *Levittown* opinion. As is well explained in Judge Simons' dissent, article XI, § 1 does not explicitly designate a State responsibility

regarding any minimum quality of education. It expressly imposes only the duty upon the Legislature to "provide for the maintenance and support of a *system"* of free public education (*NY Const, art XI, § 1* [emphasis supplied]). The *Levittown* Court emphasized that the constitutional mandate is solely to maintain a *system* of education (*57 NY2d, at 48, n 7*). The Court observed that, concededly, a system of public schools did exist in the State through legislation and regulation and appropriations for maintenance of various State-wide minimum educational standards, etc. *(id., at 48*). The Court then identified the only remaining element of the State's constitutional responsibility under article XI, § 1:

"If what is made available **[****50]** by this *system … may properly be said to constitute an education,* the constitutional mandate is satisfied." *(Id.* [emphasis supplied].)

Thus, the sound basic education envisaged by the *Levittown* Court as a constitutional mandate subsume those minimal categories of instruction without which whatever the system provides *cannot* "be said to constitute an education". Historically and traditionally, the essential, universally recognized as indispensable elements, the *sine qua non,* of what legitimately might be called an education are the basic literacy (reading and writing) and computational skills and, in a public educational system, citizenship awareness. A public educational system failing to provide the opportunity to acquire those basic skills would not be worthy of that appellation.

[*332] Of course, almost all of us would hope for, expect and support as voters and taxpayers funding of a system of public education in this State which offers more than those basics in all school districts, including the furnishing of many of those resources and subjects of instruction plaintiffs claim to be constitutionally mandated and those which, regretably, **[****51]** may be implied as required from the majority's interpretation of the Education Article. But *Levittown* held that decisions regarding such concededly worthwhile educational supplements, including the selection thereof and the level of such funding, is to be determined in other forums than by judicial fiat in interpreting the State Constitution. *Levittown* cannot fairly be interpreted as mandating more than the provision of a system in which all children in the State are given an opportunity to acquire basic literacy, computational skills and knowledge of citizenship as the elements of a sound basic education. Deficiencies beyond those basics were certainly established in the *Levittown* record, and were found to exist by both lower courts in that case. Yet this Court in *Levittown* not only found no deprivation of a sound basic education had been proven, *it found none had been claimed.*

The majority's significantly less precise or exacting standard for the sound basic education constitutionally required to be provided invites and inevitably will entail the subjective, unverifiable educational policy making by Judges, unreviewable on any principled basis, which was **[****52]** anathema to the *Levittown* Court.

As I have previously discussed, however, the complaint can be read as alleging that the State's funding scheme denies New York City school pupils the opportunity to acquire the basic literacy and mathematical skills. I, therefore, vote with the majority that plaintiffs' cause of action under the Education Article of the State Constitution is legally sufficient.

Dissent by: Simons; Smith

Dissent

Simons, J. (Dissenting in part). There can be no argument about the importance of educating our children or that there are serious shortcomings in the New York City school system. But it is possible to recognize those serious social concerns and still conclude, as I do, that plaintiffs have not successfully pleaded a cause of action charging defendants with violating the Education Article of the State Constitution.

Plaintiffs allege in their first cause of action that defendants have violated *article XI, § 1 of the New York State Constitution* because children in New York City have been deprived of **[*333]** a sound basic education. They support that conclusion by a number of allegations identifying shortcomings in instruction, facilities and student **[****53]** performance in the City's schools. The majority [1] and Judge Levine in his concurrence conclude this states a cause of action because they interpret the Education Article as containing a qualitative component. In their view, the Constitution guarantees that all school-age children shall receive a sound basic education. They hold that the definition of a sound basic education, and the standard against which the City's schools are to be measured, is to be judicially

[1] Judges Titone, Bellacosa, Smith and Ciparick constitute the majority with respect to this cause of action.

determined. If the instruction, facilities and student performance in New York City schools fail to meet that standard, the State has violated the Constitution and must respond to correct the deficiencies in the City's school system. The majority and Judge Levine differ only on the particulars of the education which the Court should decree necessary.

My review of the history of the Education Article and our *Levittown* decision **[****54]** interpreting it *(Board of Educ., Levittown Union Free School Dist. v Nyquist, 57 NY2d 27*) (hereinafter *Levittown)* leads me to a different conclusion. I believe that the constitutional duty is satisfied if the State creates the structure for a State-wide system of schools in which children are given the opportunity to acquire an education and supports it. It is for other branches of government, not the courts, to define what constitutes a sound basic education and, assuming the State has not defaulted on its duty to establish a State-wide system and provide financial support, to ensure that the opportunity to be educated is available to all. In my view, plaintiffs have not successfully pleaded that the State has violated that duty.

I therefore dissent from so much of the majority's decision as sustains plaintiffs' first cause of action alleging a violation of *article XI, § 1 of the New York State Constitution.*

I

At the outset, it is helpful to remember that the responsibility for primary and secondary education in New York has been historically, and is by law, a joint undertaking of the State and local school districts. The State, acting through the Legislature **[****55]** and the constitutionally created Board of Regents, establishes standards for curricula, faculty and facilities and **[*334]** annually provides financial aid to the local districts. In 1994-1995 the State distributed almost $ 10 billion in State funds to school districts in New York State. The New York City School District received over one third of that sum *(see,* Report of Education Unit, New York State Div of Budget, Oct. 31, 1994, at 16-17, 26-27). Although individual districts no longer enjoy the power to establish the criteria for instruction and facilities they once had, they remain charged with administering the schools in their districts and possess broad powers for that purpose. They also supply a major part of the funding necessary to support and maintain their schools. They do so by determining annual expenses and, after crediting that sum with State and Federal aid, raising the balance by local taxation.

In the past, the financial needs of the New York City School District were supported by a greater proportion of local funds than State funds. Since 1983, however, the amount of money contributed by the City has steadily declined while the amount contributed **[****56]** by the State has increased. The State now contributes more to the funding of City schools than does the City. This increase in State aid has not, however, resulted in increased or improved services, only in a reduction in City appropriations for education *(see,* Chancellor's Budget Estimate, 1995-1996, Board of Educ of City of NY, at 14). The question before the Court on this appeal, broadly stated, is whether the Constitution requires the State to provide an even greater share of the funds than it now does to defray the cost of operating the New York City schools.

A

Analysis begins with the language of the Constitution. The Education Article provides:

"The legislature shall provide for the maintenance and support of a system of free common schools, wherein all the children of this state may be educated." (*NY Const, art XI, § 1*.)

The words, with utter simplicity, impose a duty on the State to create a "system" for free public education available to all children and to support it. Conspicuously absent are descriptive words, establishing a qualitative or quantitative standard for the education the State must provide. Thus, if the drafters intended to impose on the State **[****57]** a substantive requirement for instruction and facilities, or provide that the State is ultimately **[*335]** responsible for any shortage of funds in individual school districts, it must be found in the history of the Article, not its words.

The section was adopted in 1894 at a time when there were more than 11,000 independent school districts in the State offering vastly different educational opportunities *(see,* 3 Lincoln, Constitutional History of New York, at 550-551). The Convention record reveals that the section was proposed to "express[] the principle of universal education, and direct[] the Legislature to use the power of the State to foster that principle" (3 Revised Record of Constitutional Convention of 1894, at 691). Its "evident purpose [was] to impose on that body the absolute duty to provide a general system of common schools" (3 Lincoln, Constitutional History, *op. cit.,* at 554). Thus, it was said the Legislature must

provide "not simply schools, but a system; not merely that they shall be common, but free, and not only that they shall be numerous, but that they shall be sufficient in number, so that all the children of the State may … receive **[****58]** in them their education" *(id., at 555*). The delegates' concern was focused on establishing a State-wide system of free education. The quality of that education was mentioned only in passing, a delegate stating that it should be "adequate" (3 Revised Record on Constitutional Convention, *op. cit.,* at 695). I find no indication that the drafters intended to go beyond this and impose a qualitative component within the Education Article, or to hold the State liable to make up a shortage of funds in particular school districts.

B

Reviewing this history in *Levittown (57 NY2d 27*, *supra),* we concluded that the section was intended to require "a Statewide system assuring minimal acceptable facilities and services in contrast to the unsystematic delivery of instruction" which existed when the Constitution was adopted *(Levittown, supra, at 47*).

Levittown, of course, involved a different claim than is asserted here: it dealt with the inequality or disparity of the education offered in various districts of the State whereas plaintiffs here assert that the students of New York City's schools have been deprived of an education meeting constitutional standards. Nevertheless, **[****59]** the *Levittown* Court interpreted the Education Article and the majority, Judge Levine **[*336]** and I all rely on that interpretation to support our differing views. The majority and the concurrence conclude that the *Levittown* decision does not foreclose the courts from defining the ingredients of a sound basic education and ordering the State to assume responsibility for providing it. They find in *Levittown* an "unambiguous acknowledgement of a constitutional floor with respect to educational adequacy," and from that, assume the power of the courts to override the legislative and executive determinations of what and how much the system must provide (majority opn, at 315). The majority believes that the *Levittown* Court analyzed the article only so far as was necessary to address inequality and maintains that it is acting consistently with that precedent and only resolving issues the *Levittown* Court left unanswered. I conclude that the *Levittown* Court fully considered and determined the scope of the constitutional duty. Our differing interpretations of the same opinion requires a detailed consideration of it.

The decision is best understood by first reviewing **[****60]** the analysis made by the Appellate Division and then this Court's disposition of the matter. The Appellate Division unanimously agreed in *Levittown,* though for different reasons, that the Education Article had been violated (*83 AD2d 217*). Three Justices, speaking through Justice Lazer, stated that the State's educational finance system was unconstitutional because it created interdistrict variances in educational quality which disadvantaged urban children *(id., at 247-251*). Acknowledging that article XI, § 1 was "devoid of semantic adornments", the Court nevertheless amplified its wording to attribute to the section concepts of a "thorough and efficient" school system and an "ample" education, importing qualifying words found in the Constitutions of the States of New Jersey and Washington but not found in the Constitution of New York *(id., at 248*). Though acknowledging that our Constitution did not explicitly mention a quantitative and qualitative standard, the Appellate Division nevertheless added one, requiring the State to insure that all children are equipped with "certain basic educational skills necessary to function effectively in society" *(id., at 248*). **[****61]** The Appellate Division looked to statutes *(e.g., Education Law § 3204*) and to the Regulations of the Commissioner of Education (8 NYCRR part 100) defining the approved curricula to determine the scope of a constitutional guarantee. The mere existence of these standards did not satisfy the Constitution they said; student performance must meet the Commissioner's standards (*83 AD2d, at 249-250*). **[*337]** In sum, the Court made a qualitative analysis of the State educational system based upon the degree to which the Commissioner's standards were fulfilled and, finding performance levels below those standards in some districts, concluded the cause was insufficient State funding. Accordingly, the Appellate Division held the State had failed to "support and maintain" a State-wide system of schools.

Justice Hopkins agreed that the Education Article had been violated but he analyzed the constitutional mandate differently (*83 AD2d, at 266-269*). He found three key ideas conveyed in the language of article XI: first, a duty was imposed on the Legislature; two, the duty included maintenance and support of a system of common schools; and third, the system had to be available to all **[****62]** children of the State. He found the Legislature had failed to "support and maintain a system of free common schools" because the statutes distributing State aid had become irrational, a "patchwork mounted on patchwork", a "maze of convoluted intricacies." He concluded the financing was unconstitutional because it was unsystematic *(id., at*

268-269).

When the matter reached this Court, we modified the determination of the Appellate Division, construing the Education Article more narrowly and concluding that the Legislature had not violated it. The Appellate Division read a qualitative component into the Education Article because, it said, absent such a component the clause would be "without parameters" (83 AD2d, at 248). We had no difficulty identifying the substance of the provision, however, concluding that it mandated only that the State support and maintain a system of free schools available to all children. We held that the guarantees of the Article had been satisfied because, in the words of the Court, "[t]he Legislature has made prescriptions … with reference to the minimum number of days of school attendance, required courses, textbooks, qualifications of teachers **[****63]** and certain nonteaching personnel, pupil transportation, and other matters. If what is available by this system … may properly be said to constitute an education, the constitutional mandate is satisfied." (57 NY2d, at 48.) In other words, the *Levittown* Court concluded that the system of which the Constitution speaks is a framework of educational programming and, implicitly, regulatory oversight of compliance with that framework. We concluded further that the State manifestly had "supported and maintained" the system because State appropriations for the New York public school system, **[*338]** judged by the fiscal contributions of other States, far exceeded those of all but two others. Based upon those determinations, we held that "a sound basic education" was available for all children in the State and thus the constitutional mandate was satisfied. We rejected the extensive qualitative analysis of the lower courts, holding that the courts were not free to review the adequacy of the appropriations, except, "possibly", in the case "of gross and glaring inadequacy" of State funding (57 NY2d, at 48-49). In sum, we fully interpreted the Education Article, concluding that **[****64]** the State had met its constitutional obligation because it had created a system--it had defined a sound basic education and the facilities necessary to provide it--and appropriated substantial financial aid to local school districts to support and maintain that system.

The plaintiffs in this action do not contend that the State has defaulted in defining the ingredients of the State-wide system, nor do they allege that the State funding to maintain and support it is grossly inadequate. The position of plaintiffs, the majority and the concurrence is that the State must do more. It must not only set up the structures of a State-wide system, define the ingredients and provide aid to local districts, it must step in with additional financing to ensure that an "education", as defined by the courts, is fully developed and successful in each of the local school districts. The *Levittown* Court had before it the same analysis adopted by the majority here, in Judge Fuchsberg's dissent and in the opinion of the Appellate Division majority, and rejected it *(see,* 57 NY2d, at 49, n 9).

C

Plaintiffs have not and cannot successfully plead that the present statutory provisions for allocation **[****65]** of State aid to local school districts for the maintenance and support of elementary and secondary education violate the State Constitution as we interpreted them in *Levittown.*

First, plaintiffs' claim does not attempt to establish deprivation State-wide; it advances only claims involving some New York City schools. They contend, and the majority and concurrence agree, that the State's duty is to be measured district by district and requires the State to provide additional funding to rehabilitate ailing districts even though the constitutional obligation is met State-wide. The concurrence supports that position by relying on language from the constitutional debates **[*339]** to the effect that the new duty would ameliorate conditions in places " 'where the common schools are not adequate' " (concurring opn, at 327 [quoting from 3 Revised Record of Constitutional Convention of 1894, at 695]). But the constitutional mandate to support the system of common schools is general in its terms and there is nothing in the debates to suggest that the quoted language meant more than that the Legislature should prescribe standards for a State-wide curricula and facilities to upgrade **[****66]** common schools with inferior standards. Certainly, nothing in the historical materials suggests that the State must step in when a district fails to meet statewide standards and increase State funding to that locality until a satisfactory performance level is achieved.

Confining their argument to New York City's schools, plaintiffs claim deprivation because selected community school districts in the City have inadequate facilities, low student performance ratios and high dropout rates. They have stated those claims by comparing their circumstances to the rest of the State and by comparing the condition of their schools and the performance of City students to the Regents' standards for school

registration. [2] Their complaint sounds remarkably similar to the complaint of the *Levittown* plaintiffs and, as a unanimous Appellate Division held, states no more than a claim based on interdistrict disparity.

[**67]** Plaintiffs further support their claims by assertions that students in New York City make less than "normal progress" than students in other parts of the State, that they perform poorly on achievement tests, and that City children earn fewer Regents' diplomas than students elsewhere in the State. The failure to6 make "normal progress" does not constitute deprivation and, as plaintiffs' own statistics prove, *most* students, even in New York City, perform at acceptable levels. **[*340]** Manifestly, then, the State is providing children with the opportunity for a sound basic education.

II

Having determined that there is a qualitative component in the Education Article, and that the allegations of subpar performance and facilities in New York City alone state a cause of action, the majority approve judicial review of the State funding scheme. But this Court in *Levittown* clearly stated that judicial review of the State funding scheme would only be warranted if it appeared there had been a "gross and glaring inadequacy" in State funding *(Levittown, 57 NY2d, at 48, supra).* In holding that plaintiffs here have stated a cause of action, the majority simply ignores **[****68]** this limitation on our powers.

Thus, even if I were to accept the majority's analysis that the Constitution guarantees a certain level of instruction and performance and assume that plaintiffs have sufficiently alleged that it has not been satisfied, I still believe plaintiffs have failed to state a cause of action because they have failed to sufficiently plead that State aid to education is grossly inadequate. Unless they can sustain that element, we have no power to declare that defendants must accept responsibility for and cure the shortcomings of the New York City School District.

Plaintiffs allege only in the most conclusory form, and the majority assume without discussion, that the State funding is grossly inadequate and that there is a causal connection between it and the instruction and facilities provided New York City school children and their performance. But the State appropriates almost $ 10 billion for school aid State-wide--approximately one sixth of the money appropriated for all State purposes--and the New York City School District receives more than a third of it. Even if the State's obligation were imposed district by district, current State appropriations **[****69]** to New York City do not approach a "gross inadequacy" in State funding.

Plaintiffs also complain that they enroll 37% of the State's public school population but receive slightly less than 35% of the total State aid distributed. There is no constitutional requirement, however, that the State maintain exact parity in the financial aid distributed to the several thousand school districts. Insofar as plaintiffs attack the formula by which **[*341]** State aid is calculated, or allege that it is inequitable, their claim is similar to the claim Justice Hopkins accepted in *Levittown* (*83 AD2d, at 266*). It was rejected by this Court *(see, 57 NY2d, at 48, n 7*).

Moreover, there is serious doubt that plaintiffs can establish that any claimed deficiency in the State funding scheme has caused a deprivation of educational opportunity to City students. These claims against the State are presented at a time when New York City is reducing its funding to the City School District when measured both in terms of the dollars appropriated and the percentage of its municipal budget allocated to education *(see,* Chancellor's Budget Estimate, 1995-1996, *op. cit.,* at 14). And these **[****70]** reductions have occurred even though the City is among municipalities having the lowest residential property tax rate for school purposes in the State and devotes the lowest percentage of its tax revenue to education. The Chancellor of the City School District has stated that the City contributes approximately 20% of its revenues to education, whereas the percentage contributed to education by other localities in the State is almost twice as much *(see,* Chancellor's Budget Estimate, 1995-

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[2] The regulations provide an extensive list of criteria which must be maintained by schools registered in the State. If an individual schools falls below these standards, the Commissioner may review the school's registration, develop and implement a "comprehensive school improvement plan" and, if improvement is not satisfactory, may revoke the registration which is required of all public schools in the State *(see, 8 NYCRR 100.2*). The pleadings do not allege that the Commissioner has taken or threatens to take any of these steps with respect to any of the City's schools.

Significantly, many figures relied upon by plaintiffs to prove their point that an adequate education had not been provided are less substantial than figures relied upon by the Appellate Division and Judge Fuchsberg in *Levittown (see, 83 AD2d 217, 250, 57 NY2d 27, 50, supra).*

1996, *op. cit.,* at 14). Based upon this evidence, a court could justifiably conclude as a matter of law that the shortcomings in the City schools are caused by the City's failure to adequately fund City schools, not from any default by the State of its constitutional duty.

III

Of course, the majority may interpret the State Constitution, or our *Levittown* decision, as mandating a level of student performance and authorizing judicial determination of the curriculum and facilities and State funding necessary to achieve that level if it chooses, but I believe it unwise to do so for several reasons.

The first was stated by the *Levittown* Court. In an opinion fully sensitive to the **[****71]** political process by which we are governed and the separation of powers concerns which restrain courts from interfering with responsibilities resting elsewhere, *Levittown* defined the standard for measuring the constitutional requirement and properly avoided a judicial determination of the highly subjective and policy-laden questions of how much (or little) students must be taught or how well (or poorly) they must perform before a court should intervene. The courts, we held, were not to interfere in constitutional **[*342]** responsibilities assigned to other branches of government unless the executive and legislative branches had, in effect, defaulted on their duty to establish a State-wide system of education and fund it. I find that reasoning persuasive.

The State Legislature, in which New York City is amply represented, annually investigates and reviews the educational needs of the various school districts, and may conduct hearings to solicit further views if it deems them necessary. Based upon the information available to it, the Legislature distributes billions of dollars of educational aid throughout the State. Surely the legislators are aware that the quality of the **[****72]** educational opportunity in some districts in New York City is inferior to the opportunity in other districts in the City and State. If they conclude that resources of the State call for a certain level of funding notwithstanding those problems and if that funding is not "grossly inadequate", it is not for us to force the State to do more. The Legislature is far more able than the courts to balance and determine State-wide needs and equities and, I need hardly mention, such determinations are well within *its* constitutional domain.

The majority apparently view the constitutional provision as establishing an entitlement to receive an adequate education. It assumes that there is a point at which the education available is so palpably inadequate that the courts must intervene, determine the extent of the inadequacy and order the problem solved at State expense. And the courts may impose this duty on the State, the majority holds, even though the State has established a structure for the school system and provided adequate funding for it as measured by the State's resources.

If we were dealing with a constitutional right personal to each child in New York, then the Court's power **[****73]** to override the majority's will to protect those rights might be justified. But the Education Article states a general duty. The Constitution is satisfied if the majority has worked its will through its elected officials and their action represents a reasonable response to the duty imposed. The courts have the power to see that the legislative and executive branches of government address their responsibility to provide the structure for a State-wide school system and support it but we have no authority, except in the most egregious circumstances, to tell them that they have not done enough.

Finally, it is not clear whether increased State aid to New **[*343]** York City is to be provided by increasing appropriations for education generally, or reallocating the current State-wide appropriations so that New York City schools receive a greater share of the aid appropriated. [3] If State aid to education is to be generally increased, the increase will necessarily be achieved at the expense of other equally meritorious programs deprived of some portion of the State resources previously used to fund their activities. If there is to be a reallocation of State aid to provide greater **[****74]** funding for New York City--or a reconstruction of the State aid formula for that purpose--the reallocation will be achieved at the expense of other school districts in the State. They will then be forced to increase local taxes to fund education for their districts and to do so at a time when New York City is reducing its municipal appropriations for education. Judicially compelling either course encroaches on the

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[3] The majority questions this writing for discussing additional funding for the City School District, claiming that issue is not before the Court at this time *(see,* majority opn, at 316, n 4). I am at a loss to know what this litigation is about if it is not about additional funding for the City schools. Plaintiffs' complaint refers continually to the unfair and inadequate amount of State aid the New York City School District presently receives and certainly they will seek to receive more State aid to solve their local problems if they prevail in this litigation.

Legislature's power to order State priorities and allocate the State's limited resources.

[**75]** This assumption of power in the field of education sets a precedent for other areas that will be hard for the courts to resist in the future. The State Constitution is a voluminous document covering not only the distribution and scope of power, but also addressing dozens of other matters as diverse as public housing, nursing homes, canals, ski trails and highways. The State, to a greater or lesser degree, is directed to maintain and protect all those services and facilities. It cannot be that each of them are matters calling for quantitative and qualitative judicial oversight in their funding and operation.

To explore just one example, the New York State Constitution provides, in language similar to that contained in article XI, § 1, that the State "shall" provide "aid, care and support of the needy" (*NY Const, art XVII, § 1*). There is, and probably always will be, a profound public debate over who should be eligible for public assistance and whether the levels of assistance are too high or too low. We have assiduously avoided making quantitative and qualitative determinations in this area in the past, concluding that those are questions for the **[*344]** legislative and **[****76]** executive branches to decide *(see, Hope v Perales, 83 NY2d 563, 578*; *Matter of Barie v Lavine, 40 NY2d 565*; *Matter of Bernstein v Toia, 43 NY2d 437*). If the Court is to assume the responsibility of determining what level of educational services and student performance must be achieved under the Constitution, I know of no legal answer for those who will contend that we must resolve similar questions challenging compliance with the Social Welfare Article or other sections of the Constitution.

The temptation to address these school problems judicially is understandable. But the Constitution provides for particularized areas of responsibility and it is not for the courts to mandate that the State must spend more of its finite resources for education and less, say, for housing the poor or healing the sick. Nor is it for us to say that the current resources devoted to education are to be transferred to one part of the State to the loss of others. Those are choices delegated to the people's elected representatives, not Judges, and in the absence of their manifest failure to address the problem, the judiciary should refrain from interfering.

Accordingly, I would dismiss **[****77]** plaintiffs' first cause of action asserting defendants have violated article XI of the State Constitution.

Smith, J. (Dissenting in part). I agree with and join the majority opinion in upholding the causes of action based on the Education Article of the New York State Constitution and on a violation of title VI's regulations. I conclude, in addition, that the complaint states a valid equal protection claim under both the Federal and State Constitutions. I would, therefore, reverse this aspect of the Appellate Division decision and deny the motion to dismiss the equal protection claims.

Judge Ciparick agrees only that plaintiffs have made a valid State equal protection claim.

THE FEDERAL EQUAL PROTECTION CLAIM

Introduction

The present case should be viewed in its historical context. At least since the latter part of the nineteenth century, African-Americans in New York State have sought equality of education. Like many other parts of the Nation, New York segregated its schools on the basis of race. The end of segregation by law did not end efforts to exclude African-Americans **[*345]** from equal educational opportunities. Much of the twentieth century **[****78]** has been spent by African-American parents and students fighting for equality of education.

Plaintiffs have a right to demonstrate that they are receiving less than a minimal basic education. The Equal Protection Clauses of both the Federal and State Constitutions stand for the proposition that State action, through selective and biased funding, cannot be used to condemn African-American, Latino or other children to an education which is inherently inferior.

While the thrust of the decision in *Brown v Board of Educ. (347 US 483*) was that separate facilities, no matter how similar in terms of resources, were inherently unequal, one underlying fact in those cases was that the resources of the separate schools were unequal. And that fact led to the argument of a denial of equal protection.

The Historical Setting

New York State, like many other States, had a history of segregated schools required by law. In 1864, New York State enacted the "Common School Act" (L 1864, ch 555, tit 10, § 1), which authorized school authorities in cities and incorporated villages to establish separate schools for the education of the "colored" race. This Act empowered school authorities **[****79]** to establish schools for the exclusive use of colored children and

authorized such authorities to exclude colored children from schools provided for white children. In 1873, the State enacted the Civil Rights Act (L 1873, ch 186) providing that persons of color shall have full and equal enjoyment of any accommodation, advantage, facility or privilege furnished by teachers and other officers of common schools and public institutions of learning.

Chapter 556 of the Laws of 1894 (art 11, tit 15, §§ 28-30), again provided for the organization and creation of separate schools for colored children in cities, villages, union districts and school districts organized under a special act. The language of section 31 of that same article provided that colored schools in the City of New York "shall be open for the education of pupils for whom admission is sought, without regard to race or color."

Chapter 492 (§ 1) of the Laws of 1900 expressly provided that "[n]o person shall be refused admission into or be excluded from any public school in the state of New York on account of race or color." Further, section 2 of that chapter repealed section 28 (art 11, tit 15) of chapter 556 of the **[****80]** Laws **[*346]** of 1894 regarding the establishment of separate schools with equal facilities for colored children in any city or incorporated village.

Under chapter 140 of the Laws of 1910, *section 920 of the Education Law* provided that "no person shall be refused admission into or be excluded from any public school in the state of New York on account of race or color." However, section 921 of that same chapter again expressly provided for separate schools for colored children should the inhabitants of any district determine. This apparent inconsistency in the law, of generally prohibiting exclusion from public schools on account of race, but expressly making available the option to establish separate schools, permitted the continuance of segregated schools by law. The gravamen of such disparity resulted in the disparate impact upon the education of children, detrimentally and adversely affecting children of color.

Such dissimilar treatment in education of children was supported by decisions of this Court. *People ex rel. King v Gallagher (93 NY 438* [1883]) involved the denial of admission of a 12-year-old black girl to a local public school in Brooklyn because of her **[****81]** race. The majority affirmed the lower court's denial of admission to the school because the school was open only to white children. The Court determined that the principal of the school, as administrator, was within his discretion to deny the child admission because she was black. Citing the Common School Act of 1864, which authorized the establishment of separate schools for the education of the colored race within the State, the Court held that such separate schools were not an abrogation of the Privileges and Immunities Clause of the *Fourteenth Amendment of the United States Constitution*. No impairment was found by the City of Brooklyn requiring separate but equal educational facilities. The Court further determined that notwithstanding the Civil Rights Act of 1873 (L 1873, ch 186), repealing and annulling any statute which discriminated against persons of color (*93 NY, at 456*), the establishment of separate schools for black and white children was not discriminatory. Judge Danforth dissented, finding the requirement that black children attend schools designated only for black children was unequal and in violation of the laws protecting equal rights.

Further, in *People **[****82]** ex rel. Cisco v School Bd. (161 NY 598* [1900]), this Court similarly held that the School Board of Queens was authorized to maintain separate schools for the education of "colored" children and to exclude such children **[*347]** from schools designated for "white" children only. Citing its earlier holding in *Gallagher (supra)* the Court reasoned that the Civil Rights Act of 1873 required that equal school facilities and accommodations be furnished, not equal social opportunities.

With the passage of legislation prohibiting the exclusion of blacks from schools on the basis of race, the official policy of the State became one of nondiscrimination against black children. Nevertheless, as several cases have shown, the efforts of some governmental officials have continued the previous State policy of racial exclusion. Thus, over the years, a number of lawsuits have been brought to eliminate the exclusion of blacks from white schools *(see, for example, Taylor v Board of Educ., 191 F Supp 181, 195 F Supp 231*, *affd 294 F2d 36*, *cert denied 368 US 940*, *decree mod 221 F Supp 275*; *United States v Yonkers Bd. of Educ., 837 F2d 1181*; *Hart v Community **[****83]** School Bd. of Educ., 512 F2d 37*).

While the major thrust of efforts to fight unequal treatment of black students has been desegregation, at the same time black parents and pupils have insisted that the facilities and opportunities available to black students have been grossly inferior to those available to white students and have challenged that state of affairs on equal protection grounds. Thus, *Brown v Board of Educ. (347 US 483*, *supra)* was clearly decided on the assumption that facilities and other tangible factors of

segregated schools were equal even though it was clear that in many instances, the segregated schools were unequal. The Court stated:

"We come then to the question presented: Does segregation of children in public schools solely on the basis of race, even though the physical facilities and other 'tangible' factors may be equal, deprive the children of the minority group of equal educational opportunities? We believe that it does." (*347 US, at 493*.)

Despite this assumption by the Supreme Court in *Brown,* at least two of the complaints in the five cases decided there attacked the inequality in black schools when compared to white schools. **[****84]** The allegations of inadequate education made against the State here are similar to claims of inadequacy made in *Brown.* To the extent that such claims are alleged to be based upon the deliberate action of the State, plaintiffs should be given the opportunity to prove their assertions.

[*348] In their complaint in *Brown,* plaintiffs questioned "whether the denial to infant plaintiffs, solely because of race, of educational opportunities equal to those afforded white children was in contravention of the *Fourteenth Amendment of the United States Constitution* as being a denial of the equal protection of the laws." In *Briggs v Elliott,* another case reversed in *Brown,* the plaintiffs similarly alleged in their complaint that the "public schools of Clarendon County, South Carolina set apart for white students and from which all Negro students are excluded were superior in plant, equipment, curricula, and in all other material respects to the schools set apart for Negro students." Plaintiffs argued further that "the defendants by enforcing the provision of the Constitution and laws of South Carolina excluded all Negro students from the 'white' public schools and thereby **[****85]** deprived plaintiffs and others on whose behalf the action is brought solely because of race and color, of the opportunity of attending the only public schools in Clarendon County where they can obtain an education equal to that offered all qualified students who are not of Negro descent" *(see also, Davis v County School Bd., 103 F Supp 337, 340-341)*.

In *Gebhart v Belton (32 Del Ch 343, 87 A2d 862*), another case decided in *Brown,* the plaintiffs, elementary and high school Negro children, brought an action in the Delaware Court of Chancery seeking to enjoin enforcement of provisions of that State's constitutional and statutory code requiring segregation in the public schools. The court found for the plaintiffs and ordered the immediate admission of the Negro children into schools that were formerly for white children only. The court determined that the separate educational facilities were inherently unequal, finding the white schools superior to the Negro schools with respect to pupil-teacher ratio, physical plants, teacher training, aesthetic considerations, extracurricular activities, and time and distance involved in the student's travel to and from school. The **[****86]** court concluded that the State, through its agencies, had violated the plaintiffs' rights under the Equal Protection Clause of the Fourteenth Amendment, by pursuing a policy of segregation in education which resulted in Negro children, as a class, receiving educational opportunities substantially inferior to those available to white children otherwise similarly situated.

The plaintiffs in the New Rochelle school case also alleged a disparity in the quality of education available to black and **[*349]** white students. [1] The court found it unnecessary to consider those claims in the light of *Brown.*

The Present Allegations and Federal Law

One of the major issues here is what level of scrutiny the courts must give to the plaintiffs' equal protection claims--minimal or rational basis, intermediate or strict. The minimal level of scrutiny tests whether a classification or statute "bears some fair relationship to a legitimate **[****87]** public purpose" *(Plyler v Doe, 457 US 202, 216* [1982]; *see also, Alevy v Downstate Med. Ctr., 39 NY2d 326, 332)*. This standard has often been applied in cases dealing with economics and social welfare *(id.).* Strict scrutiny applies where a law operates to the disadvantage of a suspect class, or a fundamental constitutional interest is alleged to have been violated *(Plyler v Doe, supra, at 216-217*; *San Antonio School Dist. v Rodriguez, 411 US 1, 18- 44*; *Alevy v Downstate Med. Ctr., supra, at 332*). An intermediate level of scrutiny has been applied to legislative classifications which are not "facially invidious" which, nevertheless, "give rise to recurring constitutional difficulties" and require "the assurance that the classification reflects a reasoned judgment consistent with the ideal of equal protection by inquiring whether it may fairly be viewed as furthering a substantial interest of the State." *(Plyler v Doe, supra,*

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[1] *See, Taylor v Board of Educ., 191 F Supp, at 198, n 4, supra).*

at 217-218; *Alevy v Downstate Med. Ctr., supra.*) Plaintiffs assert that intermediate scrutiny should be the standard used here. I conclude that the facts alleged require at least a standard of intermediate scrutiny.

[**88]** Defendants rely essentially on three cases in concluding that the Equal Protection Clause of the Fourteenth Amendment is not violated--(1) *San Antonio School Dist. v Rodriguez (supra),* (2) *Plyler v Doe (supra)* and (3) *Board of Educ., Levittown Union Free School Dist. v Nyquist (57 NY2d 27* [1982]) (hereinafter *Levittown).*

Plaintiffs' basic contention, distinguishing this case from *Rodriguez* and *Levittown,* is the assertion that the pupils in question are not receiving a minimal basic education sufficient to prepare them for contemporary society including, but not limited to, basic literacy, calculating and verbal skills. If such allegations can be proved and it can further be shown that (1) the property tax funding of schools and or (2) the State allocation of its resources is discriminatory, plaintiffs may be **[*350]** entitled to a decision in their favor, in my view, on Federal equal protection grounds as well as on the Education Article ground which a majority of the Court upholds.

In the complaint here, plaintiffs allege that they are not receiving a minimal basic education as the result of the funding system in the State and further buttress **[****89]** that claim with specific allegations. In addition, the complaint addresses the disparate impact of the funding system on minorities.

It is clear that the Supreme Court has not decided the issue raised here, that a minimal basic education is fundamental and should receive heightened scrutiny. The Court noted such in *Papasan v Allain (478 US 265*), where it stated:

"The complaint in this case asserted not simply that the petitioners had been denied their right to a minimally adequate education but also that such a right was fundamental and that because that right had been infringed the State's action here should be reviewed under strict scrutiny. App. 20. As *Rodriguez* and *Plyler* indicate, *this Court has not yet definitively settled the questions whether a minimally adequate education is a fundamental right and whether a statute alleged to discriminatorily infringe that right should be accorded heightened equal protection review."* (*478 US, at 285* [emphasis supplied].)

The *Rodriguez* case also does not preclude the claims made here. In *Rodriguez,* the Supreme Court held that the Texas system of funding education did not violate the Equal Protection Clause **[****90]** of the Fourteenth Amendment. There, Mexican-American parents brought a class action attacking the funding of the Texas educational system. One main difference between that case and this is that *Rodriguez* involved no allegation that the education of the children was inadequate. [2]

[**91]** **[*351]** A second point in *Rodriguez* was that there was no showing that the Texas system of financing schools operated to the disadvantage of a suspect class. If it did, the Court noted, the financing scheme would come under strict scrutiny. Instead, the Court concluded that rational basis was the appropriate test. The Court stated:

"This, then, establishes the framework for our analysis. *We must decide, first, whether the Texas system of financing public education operates to the disadvantage of some suspect class or impinges upon a fundamental right explicitly or implicitly protected by the Constitution, thereby requiring strict judicial scrutiny. If so, the*

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[2] The Court in *Rodriguez* stated: "Texas asserts that the Minimum Foundation Program provides an 'adequate' education for all children in the State. By providing 12 years of free public-school education, and by assuring teachers, books, transportation, and operating funds, the Texas Legislature has endeavored to 'guarantee, for the welfare of the state as a whole, that all people shall have at least an adequate program of education. This is what is meant by "A Minimum Foundation Program of Education." ' The State repeatedly asserted in its briefs in this Court that it has fulfilled this desire and that it now assures *'every child in every school district an adequate education.' No proof was offered at trial persuasively discrediting* or refuting the State's assertion." (*411 US, at 24* [emphasis supplied].)

At another point in *Rodriguez,* the Court stated: "Even if it were conceded that some identifiable quantum of education is a constitutionally protected prerequisite to the meaningful exercise of either right, we have no indication that the present levels of educational expenditures in Texas provide an education that falls short. Whatever merit appellees' argument might have if a State's financing system occasioned an absolute denial of educational opportunities to any of its children, that argument provides no basis for finding an interference with fundamental rights where only relative differences in spending levels are involved and where-- as is true in the present case--no charge fairly could be made that the system fails to provide each child with an opportunity to acquire *the basic minimal skills necessary for the enjoyment of the rights of speech and of full participation in the political process."* (*411 US, at 36-37* [emphasis supplied].)

judgment of the District Court should be affirmed. If not, the Texas scheme must still be examined to determine whether it rationally furthers some legitimate, articulated state purpose and therefore does not constitute an invidious discrimination in violation of the Equal Protection Clause of the Fourteenth Amendment." (411 US, at 17 [emphasis supplied].)

In *Plyler,* the Supreme Court held that the Equal Protection Clause of the Fourteenth Amendment was violated by denying children of illegal aliens **[****92]** a basic education. [3] While the Court found in *Plyler* that there was no fundamental right to an **[*352]** education, it applied an intermediate level of scrutiny and held that where a discrete group (children of illegal aliens) was being denied the right to an education, the State had to show a compelling State interest. The Court stated:

[**93]** "If the State is to deny a discrete group of innocent children the free public education that it offers to other children residing within its borders, that denial must be justified by a showing that it furthers some substantial state interest. No such showing was made here." (457 US, at 230.)

To prove a violation of the Equal Protection Clause of the Fourteenth Amendment, the plaintiffs must prove intentional discrimination. This intent does not have to be overt and express. It is clear that the complaint alleges that the educational funding by the State has a disparate impact on minority students. The complaint also sufficiently alleges intentional discrimination. [4] After addressing the disparities and inequalities of education for minority students, the complaint states the following:

"76. Over the past ten years, despite knowledge of the facts set forth in the preceding paragraphs, and despite recommendations for major reforms in official reports issued by commissions created by the defendants themselves, the defendants have reenacted the inequitable state aid scheme without substantial modification to address the blatant inequities and their disproportionate impact **[****94]** on minority students, or to ensure that all students throughout the state of New York have available to them the resources necessary to obtain an education **[*353]** meeting or exceeding the Regents' minimum statewide standards. Defendants have refused to act, even though the detrimental impact of their failure to provide equitable levels of funding on minority students was well-recognized and reasonably foreseeable."

It is also important to note that intent need not be shown on the face of legislation and that disparate impact is only one of the factors by which intent is shown. This is clear in quotations from both Washington v Davis (426 US 229 [1976]) and Arlington Hgts. v Metropolitan Hous. Dev. Corp. (429 US 252 [1977]). In *Washington v Davis* **[****95]** the Supreme Court stated:

"The central purpose of the Equal Protection Clause of the Fourteenth Amendment is the prevention of official conduct discriminating on the basis of race. It is also true that the Due Process Clause of the Fifth Amendment contains an equal protection component prohibiting the United States from invidiously discriminating between individuals or groups. Bolling v Sharpe, 347 US 497 (1954). But our cases have not embraced the proposition that a law or other official act, without regard to whether it reflects a racially discriminatory purpose, is unconstitutional *solely* because it has a racially disproportionate impact ….

"This is not to say that the necessary discriminatory racial purpose must be express or appear on the face of

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[3] In speaking of the effect of the denial of a basic education, the Court stated: "These well-settled principles allow us to determine the proper level of deference to be afforded § 21.031. Undocumented aliens cannot be treated as a suspect class because their presence in this country in violation of federal law is not a 'constitutional irrelevancy.' Nor is education a fundamental right; a State need not justify by compelling necessity every variation in the manner in which education is provided to, its population. See San Antonio Independent School Dist. v Rodriguez, supra, at 28-39. But more is involved in these cases than the abstract question whether § 21.031 discriminates against a suspect class, or whether education is a fundamental right. Section 21.031 imposes a lifetime hardship on a discrete class of children not accountable for their disabling status. The stigma of illiteracy will mark them for the rest of their lives. By denying these children a basic education, we deny them the ability to live within the structure of our civic institutions, and foreclose any realistic possibility that they will contribute in even the smallest way to the progress of our Nation. In determining the rationality of § 21.031, we may appropriately take into account its costs to the Nation and to the innocent children who are its victims. In light of these countervailing costs, the discrimination contained in § 21.031 can hardly be considered rational unless it furthers some substantial goal of the State." (457 US, at 223-224.)

[4] It should be noted that the plaintiffs in CFE assert that they are not alleging the intentional discrimination that would require strict scrutiny. I read that statement to mean that they are not alleging overt, express discrimination.

the statute, or that a law's disproportionate impact is irrelevant in cases involving Constitution-based claims of racial discrimination. A statute, otherwise neutral on its face, must not be applied so as invidiously to discriminate on the basis of race ….

"Necessarily, an invidious discriminatory purpose may often be inferred from the totality of the relevant facts, including the fact, if it is true, that the law **[****96]** bears more heavily on one race than another. It is also not infrequently true that the discriminatory impact--in the jury cases for example, the total or seriously disproportionate exclusion of Negroes from jury venires--may for all practical purposes demonstrate unconstitutionality because in various circumstances the discrimination **[*354]** is very difficult to explain on nonracial grounds. Nevertheless, we have not held that a law, neutral on its face and serving ends otherwise within the power of government to pursue, is invalid under the Equal Protection Clause simply because it may affect a greater proportion of one race than of another. Disproportionate impact is not irrelevant, but it is not the sole touchstone of an invidious racial discrimination forbidden by the Constitution. Standing alone, it does not trigger the rule, *McLaughlin v Florida, 379 US 184 (1964)*, that racial classifications are to be subjected to the strictest scrutiny and are justifiable only by the weightiest of considerations." (*426 US, at 239, 241- 242*.)

In *Arlington Hgts.* (*429 US, at 264-268*), the Court stressed factors which indicate circumstantial and direct evidence of intent, including, **[****97]** whether the action bears more heavily on one race than another, a clear pattern, historical background, a sequence of events, statements of members of the decision-making body, minutes, and testimony of officials. Where the ultimate proof shows intentional discrimination through historical background, a pattern, disparate impact or other factors, plaintiffs would be entitled to relief. [5]

The *Levittown* Decision

In *Levittown,* this Court relied on the *Rodriguez* decision in applying a minimal or rational basis standard of review and in rejecting the claims of the plaintiffs that the Equal Protection Clause of the Fourteenth Amendment had been violated. Moreover, in *Levittown,* **[****98]** this Court noted the absence of any allegation that educational facilities or services fell below the minimum standard set by the Board of Regents. This Court stated:

"No claim is advanced in this case, however, by either the original plaintiffs or the intervenors that the educational facilities or services provided in the school districts that they represent fall below the State-wide minimum standard of educational **[*355]** quality and quantity fixed by the Board of Regents; their attack is directed at the existing disparities in financial resources which lead to educational unevenness above that minimum standard." (*57 NY2d, at 38*.)

The difference between this case and *Levittown* is clear. In *Levittown,* there was no allegation that African-American, Latino or other students were receiving an education which was below the minimum standard. Here, the allegation of the lack of a minimal basic education is at the heart of the action as to all City public school students and that is why a majority upholds the Education Article cause of action.

In sum, I conclude that the plaintiffs have adequately stated a claim under the Equal Protection Clause of the Fourteenth Amendment. **[****99]** I also conclude that this Court is free to adopt a heightened scrutiny standard in dealing with the allegations of denial of a basic minimal education.

THE STATE EQUAL PROTECTION CLAIM

A.

Judge Ciparick and I conclude that the plaintiffs have stated a valid State equal protection claim. New York's historical and constitutional commitment to public education establishes education as an integral and substantial right of every citizen in our State, and a heightened level of scrutiny should be applied to review the current system of financing public education. In the procedural posture of this case, the allegations of the amended complaint are sufficient to allege that plaintiffs' equal protection rights, guaranteed by *article I, § 11 of the New York State Constitution*, have been violated by the State's funding methodology which denies New York City public school students a minimum adequate education. Therefore, for the current educational aid scheme to withstand intermediate review, defendants must demonstrate that the State's method of funding public education is substantially related to the important

[5] In his concurrence in *Washington v Davis,* Justice Stevens noted that the line between purposeful discrimination and disparate impact was not always bright, and, in some instances, where the disproportionate impact is great, the difference between purpose and effect would be "irrelevant" (*426 US, at 253- 254*).

educational needs of its public school students.

While Judge Ciparick **[****100]** and I recognize that the distribution of educational aid is traditionally the bastion of the Legislature, we cannot overlook the allegations of the deleterious consequences of years of inequitable funding which have led to inadequate and substandard educational services. The allegation **[*356]** is that a substantial number of New York City public school students do not receive the type of basic education necessary to equip them to exercise all of their established rights under the Federal and State Constitutions and to adequately function in society. In the 13 years since this Court's decision in *Levittown,* the gross disparities presaged by the *Levittown* majority are, allegedly, now a reality, [6] and, plaintiffs argue, it is painfully apparent that the Legislature refuses to address what has evolved into an epic constitutional problem, [7] rendering the application of heightened scrutiny particularly appropriate in this case *(see,* San Antonio School Dist. v Rodriguez, 411 US, at 99, 108 [Marshall, J., dissenting], *supra;* Dandridge v Williams, 397 US 471, 519-521 [Marshall, J., dissenting], *reh denied 398 US 914*; Bismarck Pub. School Dist. No. 1 v State **[****101]** of North Dakota, 511 NW2d 247, 259; Hubsch, *The Emerging Right to Education Under State Constitutional Law,* 65 Temp L Rev 1325 [1992]; *accord,* Levittown, 57 NY2d, at 39, *supra; but see,* Levittown, 57 NY2d, at 50, n 9, *supra).*

[**102]** Assuming the truth of plaintiffs' allegations that New York City public school students are receiving an education below minimum standards because of an educational aid scheme that disparately impacts minority students through an inequitable **[*357]** distribution of public moneys, [8] the focus of the inquiry of our dissent in this aspect of the case is whether New York's funding scheme which includes direct State funding and property-based funding furthers a substantial or important State interest to justify the discriminatory effects. It is alleged that the disparities in educational opportunities for urban public school children are a reality because the State's method of distributing aid bears no relationship, substantial or rational, to the educational needs of students or the costs of educating students in a particular district.

[**103]** Since the State is constitutionally charged with providing an educational system that offers "a sound basic education" *(* Levittown, 57 NY2d, at 48, *supra;* NY Const, art XI, § 1), the failure to adequately fund New York City schools allegedly denies New York City public school students equal protection of the laws of this State in contravention of *article I, § 11 of the New York State Constitution*, [9] **[****104]** by depriving them of equal access to educational opportunities. [10] Under the

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[6] Scholarly commentary has long criticized the inadequate educational services the inequitable distribution of resources has established as a legacy in urban centers in this State. The *amici* refer to the 1993 findings of the Swygert Commission which report that New York has created a dual system of education *(see,* brief of *amici curiae,* American Civil Liberties Union *et al.,* at 2, citing Swygert, *Putting Children First, New York State Special Commission on Educational Structures, Policies and Practices* [1993]). It should come as no surprise that the austere fiscal policies of the past decade have only exacerbated the inequities wrought by the school funding scheme *(see,* Newman, *Essentials Become Luxuries as Schools Cope with Budget Cuts,* New York Times, Jan. 16, 1995, at B1, col 2).

[7] Plaintiffs allege that "[o]ver the past ten years, despite knowledge of the [gross disparities and glaring inadequacies], and despite recommendations for major reforms in official reports issued by commissions created by the defendants themselves, the defendants have re-enacted the inequitable state aid scheme without substantial modification to address the blatant inequities and their disproportionate impact on minority students, or to ensure that all students throughout the state of New York have available to them the resources necessary to obtain an education meeting or exceeding the Regents' minimum statewide standards. Defendants have refused to act, even though the detrimental impact of their failure to provide equitable levels of funding [to] minority students was well-recognized and reasonably foreseeable."

[8] Plaintiffs allege that approximately 74% of the minority public school population attend school in New York City and that minorities comprise 81% of the City's public school enrollment, compared with 17% in public schools outside New York City (record on appeal, at 71-72). Plaintiffs assert that educational services provided in New York City public schools fall below Regents' standards (record on appeal, at 72), and that New York City public school minority students receive below average scores on State-wide achievement tests in numbers disproportionate to nonminority students *(id.).* Therefore, plaintiffs charge that there is a racial dimension to this State's public school funding policy which impermissibly disadvantages minority students.

[9] The equal protection prong of this provision provides that "No person shall be denied the equal protection of the laws of this state or any subdivision thereof."

[10] Short of a fundamental right, education has nevertheless been hailed as "perhaps the most important function of state and local governments" *(* Brown v Board of Educ., 347 US 483, 493, *supra),* and that "New York has long been regarded

current financing methodology, the quantum of taxable property in a school district bears an immediate and direct correlation to the student's access to education. Yet, according to plaintiffs, it is not the existence of disparities among districts that produces the unconstitutional inequity, but the fact that the financing scheme employed by the State to fund the system of free common schools perpetuates profound inequality of educational opportunity. Equal protection "is not addressed to the minimal sufficiency but rather to the unjustifiable inequalities **[*358]** of state action." *(San Antonio School Dist. v Rodriguez, 411 US, at 89* [Marshall, J., dissenting], *supra.)*

Pointing to *Levittown,* respondents contend that the disparities in funding among districts is the justifiable consequence of local control, [11] **[****106]** long recognized as the legitimate State interest underlying the complex school aid allocation formula. [12] However, these disparities, it is alleged, directly translate into a constitutionally unacceptable result--disparate and diminished educational opportunities for school children who, to their misfortune, reside in districts penalized under the current school aid allocation formula. It is this result--lesser educational opportunity which denies a sound, basic education, based on wealth discrimination--that allegedly transgresses the Equal Protection Clause of the State Constitution, and would require respondents to **[****105]** demonstrate at trial that the current school funding scheme bears an important and substantial relationship to the State's interest in preserving the current funding scheme and its rationale, which interest cannot be achieved through a less intrusive alternative *(see, e.g., Montgomery v Daniels, 38 NY2d 41, 61*; *Matter of Lalli, 43 NY2d 65*, *affd sub nom. Lalli v Lalli, 439 US 259*; *People v Whidden, 51 NY2d 457, 460*; *Califano v Webster, 430 US 313, 316-317*; *Craig v Boren, 429 US 190, 197*, *reh denied 429 US 1124*; *Alevy v Downstate Med. Ctr., 39 NY2d 326, 336*, *supra).*

This would be no easy task for respondents, complicated by strongly conflicted viewpoints and policies among the very agents who administer educational policy in New York. The **[*359]** Commissioner of Education and the Board of Regents have characterized the school funding scheme as inequitable, charging that it undermines New York's educational policies. The Commissioner and Board of Regents have assailed the current financing formula for its arbitrariness, asserting that the current methods for allocating State education aid are **[****107]** ineffective and preclude attainment of proposed educational goals. [13]

[**108]** Even under the benign gaze of rational

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as a leader in free public education" *(Levittown, 57 NY2d, at 48*, *supra).*

[11] In rejecting the State's contention that local independence of choice is supported by the current educational funding scheme, Justice Lazer observed: "[T]he quality of the educational opportunity offered by any particular district is largely determined by the amount of taxable property in the district. For the property-poor, local control of education is more illusory than real, for it cannot be utilized to produce the educational output local authorities perceive as appropriate but only what a limited local tax base will permit. … '[a] general policy of local control affords no real justification for maintaining a school finance ghetto' (Carrington, Financing the American Dream: Equality and School Taxes, 73 Col L Rev 1227, 1259)" *(Levittown, 83 AD2d 217, 243)*.

[12] Plaintiffs characterize defendants' methodology for allocating State education aid as "an incoherent, unsystematic aggregation of 50 different formulas, categorical program fundings, flat grants, minimum aid ratios, caps, hold harmless guarantees and other inconsistent provisions which have emerged from decades of political compromises based on considerations unrelated to educational need or any principles of equity," that are inevitably renegotiated every year depending on the political winds *(see,* record on appeal, at 58, amended complaint P 25).

[13] The Commissioner and Board of Regents have specifically discredited the current financing scheme because its formulation

"a. do[es] not provide adequately for all students, especially the most needy;

"b. [is] unduly complicated, with 53 separate formulas governing the distribution of aid;

"c. inhibit[s] local flexibility, since many kinds of aid require specific programs whether or not such programs are the best use of the money;

"d. entail[s] no accountability for results, because districts continue to receive the money no matter what;

"e. do[es] not deal adequately with local differences in wealth and cost;

"f. do[es] not adequately support needed improvements in teaching and learning …

"g. do[es] not foster interagency collaboration, since funds are allocated agency by agency, and rules for their distribution are separately defined;

"h. lack[s] public credibility, for all of these reasons" (record on appeal, at 59-60).

review, the discriminatory impact of the current financing scheme on school children who reside in districts unable to commit substantial tax dollars to education, a fact exacerbated under the current school aid allocation formula, if proved, could not rationally be countenanced as furthering a legitimate State interest. Plaintiffs should be given the opportunity to prove their allegations in this aspect of the case as well as the one sustained by a majority of the Court.

Accordingly, I would reinstate the second cause of action alleging a violation of the *Equal Protection Clause of the Fourteenth Amendment of the Federal Constitution*. Judge Ciparick and I would reinstate the second cause of action insofar as it asserts a violation of the Equal Protection Clause of the State Constitution.

Majority opinion by Judge Ciparick and Judges Simons, Titone, Bellacosa, Smith and Levine concur; Judge Levine concurring in result as to the first cause of action based upon a violation of *New York Constitution, article XI, § 1*, the Education Article, in a separate opinion; Judge Simons dissenting in part and voting not to reinstate the first cause **[****109]** of **[*360]** action in a separate opinion; Judge Smith dissenting in part and voting to reinstate causes of action on behalf of the municipal plaintiffs as well as the nonmunicipal plaintiffs and to reinstate the second cause of action in its entirety, alleging violations of the Equal Protection Clauses of the Federal and State Constitutions in a separate opinion; and Judge Ciparick dissenting in part and voting to reinstate causes of action on behalf of the municipal plaintiffs as well as the nonmunicipal plaintiffs and to reinstate the second cause of action insofar as it asserts a violation of the Equal Protection Clause of the State Constitution, for reasons stated in Judge Smith's dissenting-in-part opinion; Chief Judge Kaye taking no part.

Order modified, without costs, in accordance with the opinion herein and, as so modified, affirmed.

Gasperini v. Ctr. for Humanities

Supreme Court of the United States

April 16, 1996, Argued ; June 24, 1996, Decided

No. 95-719

Reporter
518 U.S. 415 *; 116 S. Ct. 2211 **; 135 L. Ed. 2d 659 ***; 1996 U.S. LEXIS 4051 ****; 64 U.S.L.W. 4607; 96 Cal. Daily Op. Service 4548; 96 Daily Journal DAR 7338; 10 Fla. L. Weekly Fed. S 26

WILLIAM GASPERINI, PETITIONER v. CENTER FOR HUMANITIES, INC.

Prior History: [**1]** ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT.

Disposition: *66 F.3d 427*, vacated and remanded.

Case Summary

Procedural Posture

Petitioner journalist challenged a decision of the United States Court of Appeals for the Second Circuit which set aside a $ 450,000 verdict in his favor as excessive pursuant to *N.Y. C.P.L.R. § 5501(c)* (McKinney 1995).

Overview

Petitioner journalist was awarded $ 450,000 in compensatory damages by a federal court jury for the loss of 300 slide transparencies. Respondent's motion for a new trial was denied. The appellate court set aside the verdict as excessive, relying on *N.Y. C.P.L.R. § 5501(c)* (McKinney 1995) which empowered New York appellate courts to review the size of jury verdicts and to order new trials when the award was unreasonable. The United States Supreme Court vacated the judgment with instructions to the appellate court to remand the case to the district court to revisit the motion for a new trial. The Court determined that the New York statute could properly be given effect in federal court, without detriment to *U.S. Const. amend VII*, if the statutory review standard was applied by the federal trial court judge, with appellate control of the trial court's ruling limited to review for abuse of discretion.

Outcome

The appeals court's judgment setting aside the verdict as excessive pursuant state statute was vacated.

Syllabus

Under the law of New York, appellate courts are empowered to review the size of jury verdicts and to order new trials when the jury's award "deviates materially from what would be reasonable compensation." N. Y. Civ. Prac. Law and Rules (CPLR) *§ 5501(c)*. Under the *Seventh Amendment*, which governs proceedings in federal court, but not in state court, "the right of trial by jury shall be preserved, and no fact tried by a jury, shall be otherwise re-examined in any Court of the United States, than according to the rules of the common law." The compatibility of these provisions, in an action based on New York law but tried in federal court by reason of the parties' diverse citizenship, **[****2]** is the issue the Court confronts in this case.

Petitioner Gasperini, a journalist and occasional photographer, loaned 300 original slide transparencies to respondent Center for Humanities, Inc. When the Center lost the transparencies, Gasperini commenced suit in the United States District Court for the Southern District of New York, invoking the court's diversity jurisdiction. The Center conceded liability. After a trial on damages, a jury awarded Gasperini $ 1,500 per transparency, the asserted "industry standard" of compensation for a lost transparency. Contending, *inter alia*, that the verdict was excessive, the Center moved for a new trial. The District Court, without comment, denied the motion.

The Court of Appeals for the Second Circuit, observing that New York law governed the controversy, endeavored to apply *CPLR § 5501(c)* to evaluate the Center's contention that the verdict was excessive. Guided by New York Appellate Division decisions reviewing damage awards for lost transparencies, the Second Circuit held that the $ 450,000 verdict "materially deviates from what is reasonable

compensation." The court vacated the judgment entered on the jury verdict and ordered **[****3]** a new trial, unless Gasperini agreed to an award of $ 100,000.

Held: New York's law controlling compensation awards for excessiveness or inadequacy can be given effect, without detriment to the *Seventh Amendment*, if the review standard set out in *CPLR § 5501(c)* is applied by the federal trial court judge, with appellate control of the trial court's ruling confined to "abuse of discretion." Pp. 422-439.

(a) To heighten the judicial check on the size of jury awards, New York codified the "deviates materially" standard of review, replacing the judge-made "shock the conscience" formulation previously used in New York courts. In design and operation, *§ 5501(c)* influences outcomes by tightening the range of tolerable awards. Although phrased as a direction to New York's intermediate appellate courts, *§ 5501(c)*'s "deviates materially" standard, as construed by New York's courts, instructs state trial judges as well. Pp. 422-425.

(b) In cases like Gasperini's, in which New York law governs the claims for relief, the Court must determine whether New York law also supplies the test for federal-court review of the size of the verdict. Federal diversity jurisdiction provides **[****4]** an alternative forum for the adjudication of state-created rights, but it does not carry with it generation of rules of substantive law. Under the doctrine of *Erie R. Co. v. Tompkins, 304 U.S. 64*, federal courts sitting in diversity apply state substantive law and federal procedural law. Classification of a law as "substantive" or "procedural" for *Erie* purposes is sometimes a challenging endeavor. *Guaranty Trust Co. v. York, 326 U.S. 99*, an early interpretation of *Erie*, propounded an "outcome-determination" test: "Does it significantly affect the result of a litigation for a federal court to disregard a law of a State that would be controlling in an action upon the same claim by the same parties in a State court?" *Id., at 109*. A later pathmarking case, qualifying *Guaranty Trust*, explained that the "outcome-determination" test must not be applied mechanically to sweep in all manner of variations; instead, its application must be guided by "the twin aims of the *Erie* rule: discouragement of forum-shopping and avoidance of inequitable administration of the laws." *Hanna v. Plumer, 380 U.S. 460, 468*.

[**5]** Informed by these decisions, the Court concludes that, although *§ 5501(c)* contains a procedural instruction assigning decisionmaking authority to the New York Appellate Division, the State's objective is manifestly substantive. More rigorous comparative evaluations attend application of *§ 5501(c)*'s "deviates materially" standard than the common-law "shock the conscience" test. If federal courts ignore the change in the New York standard and persist in applying the "shock the conscience" test to damage awards on claims governed by New York law, "'substantial' variations between state and federal [money judgments]" may be expected. See *id., at 467-468*. The Court therefore agrees with the Second Circuit that New York's check on excessive damages warrants application in federal court, for *Erie*'s doctrine precludes a recovery in federal court significantly larger than the recovery that would have been tolerated in state court. Pp. 426-431.

(c) Nonetheless, when the Second Circuit used *§ 5501(c)* as the standard for federal appellate review, it did not attend to "an essential characteristic of [the federal court] system." *Byrd v. Blue Ridge Rural Elec. Cooperative, Inc., 356 U.S. 525, 537.* **[****6]** The *Seventh Amendment*, which governs proceedings in federal court, but not in state court, bears not only on the allocation of trial functions between judge and jury, the issue in *Byrd;* it also controls the allocation of authority to review verdicts, the issue of concern here. In keeping with the historic understanding, the *Seventh Amendment's* Reexamination Clause does not inhibit the authority of trial judges to grant new trials "for any of the reasons for which new trials have heretofore been granted in actions at law in the courts of the United States." *Fed. Rule Civ. Proc. 59(a)*. In contrast, appellate review of a federal trial court's denial of a motion to set aside a jury's verdict as excessive is a relatively late, and less secure, development. Such review, once deemed inconsonant with the *Seventh Amendment's* Reexamination Clause, has not been expressly approved by this Court before today. See, *e. g., Browning-Ferris Industries of Vt., Inc. v. Kelco Disposal, Inc., 492 U.S. 257, 279, n. 25*. Circuit decisions unanimously recognize, however, that appellate review, confined to abuse of discretion, is reconcilable with the *Seventh Amendment* as a control **[****7]** necessary and proper to the fair administration of justice. The Court now approves this line of decisions. Pp. 431-436.

(d) In this case, the principal state and federal interests can be accommodated. New York's dominant interest in having its substantive law guide the allowable damages arising out of a state-law claim for relief can be respected, without disrupting the federal system, once it is recognized that the federal district court is capable of

applying the State's "deviates materially" standard. The Court recalls, in this regard, that the "deviates materially" standard serves as the guide to be applied in trial as well as appellate courts in New York. Within the federal system, practical reasons combine with *Seventh Amendment* constraints to lodge in the district court, not the court of appeals, primary responsibility for application of *§ 5501(c)*'s check. District court applications of the "deviates materially" standard would be subject to appellate review under the standard the Circuits now employ when inadequacy or excessiveness is asserted on appeal: abuse of discretion. Pp. 436-439.

(e) It does not appear that the District Court checked the jury's **[****8]** verdict against the relevant New York decisions. Accordingly, the Court vacates the judgment of the Court of Appeals and instructs that court to remand the case to the District Court so that the trial judge, revisiting his ruling on the new trial motion, may test the jury's verdict against *CPLR § 5501(c)*'s "deviates materially" standard. P. 439.

Judges: GINSBURG, J., delivered the opinion of the Court, in which O'CONNOR, KENNEDY, SOUTER, and BREYER, JJ., joined. STEVENS, J., filed a dissenting opinion, post, p. 439. SCALIA, J., filed a dissenting opinion, in which REHNQUIST, C. J., and THOMAS, J., joined, post, p. 448.

Opinion by: GINSBURG

Opinion

[*668] [**2215] [*418]** JUSTICE GINSBURG delivered the opinion of the Court.

[1A] [2A] [3A]Under the law of New York, appellate courts are empowered to review the size of jury verdicts and to order new trials when the jury's award "deviates materially from what would be reasonable compensation." N. Y. Civ. Prac. Law and Rules (CPLR) *§ 5501(c)* (McKinney 1995). Under the *Seventh Amendment*, which governs proceedings in federal court, but not in state court, "the right of trial by jury shall be preserved, and no fact tried by a jury, shall **[****9]** be otherwise re-examined in any Court of the United States, than according to the rules of the common law." *U.S. Const., Amdt. 7*. **[*419]** The compatibility of these provisions, in an action based on New York law but tried in federal court by reason of the parties' diverse citizenship, is the issue we confront in this case. We hold **[***669]** that New York's law controlling compensation awards for excessiveness or inadequacy can be given effect, without detriment to the *Seventh Amendment*, if the review standard set out in *CPLR § 5501(c)* is applied by the federal trial court judge, with appellate control of the trial court's ruling limited to review for "abuse of discretion."

I

Petitioner William Gasperini, a journalist for CBS News and the Christian Science Monitor, began reporting on events in Central America in 1984. He earned his living primarily in radio and print media and only occasionally sold his photographic work. During the course of his seven-year stint in Central America, Gasperini took over 5,000 slide transparencies, depicting active war zones, political leaders, and scenes from daily life. In 1990, Gasperini agreed to supply his original color transparencies to **[****10]** The Center for Humanities, Inc. (Center) for use in an educational videotape, Conflict in Central America. Gasperini selected 300 of his slides for the Center; its videotape included 110 of them. The Center agreed to return the original **[**2216]** transparencies, but upon the completion of the project, it could not find them.

Gasperini commenced suit in the United States District Court for the Southern District of New York, invoking the court's diversity jurisdiction pursuant to *28 U.S.C. § 1332*. [1] He alleged several state-law claims for relief, including breach of contract, conversion, and negligence. See App. 5-6. The Center conceded liability for the lost transparencies and the issue of damages was tried before a jury.

[*420] At trial, Gasperini's expert witness testified that the "industry standard" within **[****11]** the photographic publishing community valued a lost transparency at $ 1,500. See *id.*, at 227. This industry standard, the expert explained, represented the average license fee a commercial photograph could earn over the full course of the photographer's copyright, *i. e.*, in Gasperini's case, his lifetime plus 50 years. See *id.*, at 228; see also *17 U.S.C. § 302(a)*. Gasperini estimated that his earnings from photography totaled just over $ 10,000 for the period from 1984 through 1993. He also testified that he intended to produce a book containing his best photographs from Central America. See App. 175.

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[1] Plaintiff Gasperini, petitioner here, is a citizen of California; defendant Center, respondent here, is incorporated, and has its principal place of business, in New York.

After a three-day trial, the jury awarded Gasperini $ 450,000 in compensatory damages. This sum, the jury foreperson announced, "is [$] 1500 each, for 300 slides." *Id., at 313*. Moving for a new trial under *Federal Rule of Civil Procedure 59*, the Center attacked the verdict on various grounds, including excessiveness. Without comment, the District Court denied the motion. See App. to Pet. for Cert. 12a.

The Court of Appeals for the Second Circuit vacated the judgment entered on the jury's verdict. *66 F.3d 427 (1995)*. Mindful that **[****12]** New York law governed the controversy, the Court of Appeals endeavored to apply *CPLR § 5501(c)*, which instructs that, when a jury returns an itemized verdict, as the jury did in this case, the New York Appellate Division "shall determine that an award is excessive or inadequate if it **[***670]** deviates materially from what would be reasonable compensation." The Second Circuit's application of *§ 5501(c)* as a check on the size of the jury's verdict followed Circuit precedent elaborated two weeks earlier in *Consorti v. Armstrong World Industries, Inc., 64 F.3d 781*, superseded, *72 F.3d 1003 (1995)*. Surveying Appellate Division decisions that reviewed damage awards for lost transparencies, the Second Circuit concluded that testimony on industry standard alone was insufficient to justify a verdict; prime among other factors **[*421]** warranting consideration were the uniqueness of the slides' subject matter and the photographer's earning level. [2]

[**13]** Guided by Appellate Division rulings, the Second Circuit held that the $ 450,000 verdict "materially deviates from what is reasonable compensation." *66 F.3d, at 431*. Some of Gasperini's transparencies, the Second Circuit recognized, were unique, notably those capturing combat situations in which Gasperini was the only photographer present. *Id., at 429*. But others "depicted either generic scenes or events at which other professional photojournalists were present." *Id., at 431*. No more than 50 slides merited a $ 1,500 award, the court concluded, after "giving Gasperini every benefit of the doubt." *Ibid.* Absent evidence showing significant earnings **[**2217]** from photographic endeavors or concrete plans to publish a book, the court further determined, any damage award above $ 100 each for the remaining slides would be excessive. Remittiturs "present difficult problems for appellate courts," the Second Circuit acknowledged, for court of appeals judges review the evidence from "a cold paper record." *Ibid*. Nevertheless, the Second Circuit set aside the $ 450,000 verdict and ordered a new trial, unless Gasperini agreed to an award **[****14]** of $ 100,000.

[*422] This case presents an important question regarding the standard a federal court uses to measure the alleged excessiveness of a jury's verdict in an action for damages based on state law. We therefore granted certiorari. *516 U.S. 1086 (1996)*.

II

Before 1986, state and federal courts in New York generally invoked the same judge-made formulation in responding to excessiveness attacks on jury verdicts: courts would not disturb an award unless the amount was so exorbitant that it "shocked the conscience of the court." See *Consorti*, 72 F.3d, at 1012-1013 (collecting cases). As described by the Second Circuit:

> "The standard for determining excessiveness and the appropriateness of remittitur in New York is somewhat ambiguous. Prior to **[***671]** 1986, New York law employed the same standard as the federal courts, *see Matthews v. CTI Container Transport Int'l Inc., 871 F.2d 270, 278 (2d Cir. 1989)*, which authorized remittitur only if the jury's verdict was so excessive that it 'shocked the conscience of the court.'" *Id., at 1012*.

See also D. Siegel, Practice Commentaries C5501:10, reprinted in 7B **[****15]** McKinney's Consolidated Laws of New York Ann., p. 25 (1995) ("conventional standard for altering the verdict was that its sum was so great or so small that it 'shocked the conscience' of the court").

[4]In both state and federal courts, trial judges made the excessiveness assessment in the first instance, and

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[2] See ***Blackman v. Michael Friedman Publishing Group, Inc., 201 App. Div. 2d 328, 328-329, 607 N. Y. S. 2d 43, 44 (1st Dept. 1994)*** (award reduced from $ 1,000 to $ 400 per transparency in the absence of evidence to establish uniqueness); *Nierenberg v. Wursteria, Inc., 189 App. Div. 2d 571, 571-572, 592 N. Y. S. 2d 27, 27-28 (1st Dept. 1993)* (award reduced from $ 1,500 to $ 500 per slide because evidence showed photographer earned little from slide sales); *Alen MacWeeney, Inc. v. Esquire Assocs., 176 App. Div. 2d 217, 218*; *574 N. Y. S. 2d 340, 341 (1st Dept. 1991)* (award reduced from $ 1,500 to $ 159 per transparency because evidence indicated that images were generic; court distinguished prior ruling in ***Girard Studio Group, Ltd. v. Young & Rubicam, Inc., 147 App. Div. 2d 357, 536 N. Y. S. 2d 790 (1st Dept. 1989)***, permitting an award reduced from $ 3,000 to $ 1,500 per slide where evidence showed that "the lost slides represented classics from a long career").

appellate judges ordinarily deferred to the trial court's judgment. See, *e. g.*, *McAllister v. Adam Packing Corp., 66 App. Div. 2d 975, 976, 412 N. Y. S. 2d 50, 52 (3d Dept. 1978)* ("The trial court's determination as to the adequacy of the jury verdict will only be disturbed by an appellate court where it can be said that the trial court's exercise of discretion was not reasonably grounded."); *Martell v. Boardwalk Enterprises, **[*423]** Inc., 748 F.2d 740, 750 (CA2 1984)* ("The trial court's refusal to set aside or reduce a jury award will be overturned only for abuse of discretion.").

In 1986, as part of a series of tort reform measures, [3] New York codified a standard for judicial review of the size of jury awards. Placed in *CPLR § 5501(c)*, the prescription reads:

> "In reviewing a money judgment . . . in which it is contended **[****16]** that the award is excessive or inadequate and that a new trial should have been granted unless a stipulation is entered to a different award, the appellate division shall determine that an award is excessive or inadequate if it deviates materially from what would be reasonable compensation." [4]

[**17]** As stated in Legislative Findings and Declarations accompanying New York's adoption of the "deviates materially" formulation, the lawmakers found the "shock the conscience" **[**2218]** test an insufficient check on damage awards; the legislature therefore installed a standard "inviting more careful appellate scrutiny." Ch. 266, 1986 N. Y. Laws 470 (McKinney). At the same time, the legislature instructed the Appellate Division, in amended *§ 5522*, to state the reasons for the court's rulings on the size of verdicts, and the factors the **[*424]** court considered in complying with *§ 5501(c)*. [5] In his signing statement, then-Governor Mario Cuomo emphasized that the CPLR amendments **[***672]** were meant to rachet up the review standard: "This will assure greater scrutiny of the amount of verdicts and promote greater stability in the tort system and greater fairness for similarly situated defendants throughout the State." Memorandum on Approving L. 1986, Ch. 682, 1986 N. Y. Laws, at 3184; see also Newman & Ahmuty, Appellate Review of Punitive Damage Awards, in Insurance, Excess, and Reinsurance Coverage Disputes 1990, p. 409 (B. Ostrager & T. Newman eds. 1990) (review standard prescribed **[****18]** in *§ 5501(c)* "was intended to . . . encourage Appellate Division modification of excessive awards").

New York state-court opinions confirm that *§ 5501(c)*'s "deviates materially" standard calls for closer surveillance than "shock the conscience" oversight. See, *e. g.*, *O'Connor v. Graziosi, 131 App. Div. 2d 553, 554, 516 N. Y. S. 2d 276, 277 (2d Dept. 1987)* ("apparent intent" of 1986 legislation was "to facilitate appellate changes in verdicts"); *Harvey v. Mazal American Partners, 79 N. Y. 2d 218, 225, 590 N. E. 2d 224, 228, 581 N.Y.S.2d 639 (1992)* (instructing Appellate Division to use, in setting remittitur, only the "deviates **[****19]** materially" standard, and not the "shock the conscience" test); see also *Consorti*, 72 F.3d, at 1013 ("Material deviation from reasonableness is less than that deviation required to find an award so excessive as to 'shock the conscience.'"); 7 J. Weinstein, H. Korn, & A. Miller, *New York Civil Practice P5501.21*, p. 55-64 (1995) ("Under *[§ 5501(c)*'s] new standard, the reviewing court is given greater power to review the size of a jury award than had heretofore been afforded . . . .").

[*425] Although phrased as a direction to New York's intermediate appellate courts, *§ 5501(c)*'s "deviates materially" standard, as construed by New York's courts, instructs state trial judges as well. See, *e. g., Inya v. Ide Hyundai, Inc., 209 App. Div. 2d 1015, 619 N.*

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[3] The legislature sought, particularly, to curtail medical and dental malpractice, and to contain "already high malpractice premiums." Legislative Findings and Declaration, Ch. 266, 1986 N. Y. Laws 470 (McKinney).

[4] In full, *CPLR § 5501(c)* provides:

"The appellate division shall review questions of law and questions of fact on an appeal from a judgment or order of a court of original instance and on an appeal from an order of the supreme court, a county court or an appellate term determining an appeal. In reviewing a money judgment in an action in which an itemized verdict is required by rule fortyone hundred eleven of this chapter in which it is contended that the award is excessive or inadequate and that a new trial should have been granted unless a stipulation is entered to a different award, the appellate division shall determine that an award is excessive or inadequate if it deviates materially from what would be reasonable compensation."

[5] *CPLR § 5522(b)* provides:

"In an appeal from a money judgment in an action . . . in which it is contended that the award is excessive or inadequate, the appellate division shall set forth in its decision the reasons therefor, including the factors it considered in complying with subdivision (c) of section fifty-five hundred one of this chapter."

Y. S. 2d 440 (4th Dept. 1994) (error for trial court to apply "shock the conscience" test to motion to set aside damages; proper standard is whether award "materially deviates from what would be reasonable compensation"); *Cochetti v. Gralow, 192 App. Div. 2d 974, 975, 597 N. Y. S. 2d 234, 235 (3d Dept. 1993)* ("settled law" that trial courts conduct "materially deviates" **[****20]** inquiry); *Shurgan v. Tedesco, 179 App. Div. 2d 805, 806, 578 N. Y. S. 2d 658, 659 (2d Dept. 1992)* (approving trial court's application of "materially deviates" standard); see also *Lightfoot v. Union Carbide Corp., 901 F. Supp. 166, 169 (SDNY 1995)* (*CPLR 5501(c)*'s "materially deviates" standard "is pretty well established as applicable to [state] trial and appellate courts."). Application of *§ 5501(c)* at the trial level is key to this case.

To determine whether an award "deviates materially from what would be reasonable compensation," New York state courts look to awards approved in similar cases. See, *e. g., Leon v. J & M Peppe Realty Corp., 190 App. Div. 2d 400, 416, 596 N. Y. S. 2d 380, 389 (1st Dept. 1993)* ("These awards . . . are not out of line with recent awards sustained by appellate courts."); *Johnston v. Joyce, 192 App. Div. 2d 1124, 1125, 596 N. Y. S. 2d 625, 626 (4th Dept. 1993)* (reducing award to maximum amount previously allowed for similar type of **[***673]** harm). Under New York's former "shock the conscience" test, courts also referred to analogous cases. See, *e. g., Senko v. Fonda, 53 App. Div. 2d 638, 639, 384 N. Y. S. 2d 849, 851 (2d Dept. 1976)*. **[****21]** The "deviates materially" standard, however, in design and operation, influences outcomes by tightening the range **[**2219]** of tolerable awards. See, *e. g., Consorti*, 72 F.3d, at 1013, and n. 10, 1014-1015, and n. 14.

[*426] III

[1B] [5A]In cases like Gasperini's, in which New York law governs the claims for relief, does New York law also supply the test for federal-court review of the size of the verdict? The Center answers yes. The "deviates materially" standard, it argues, is a substantive standard that must be applied by federal appellate courts in diversity cases. The Second Circuit agreed. See *66 F.3d, at 430*; see also *Consorti*, 72 F.3d, at 1011 ("[*CPLR § 5501(c)*] is the substantive rule provided by New York law."). Gasperini, emphasizing that *§ 5501(c)* trains on the New York Appellate Division, characterizes the provision as procedural, an allocation of decisionmaking authority regarding damages, not a hard cap on the amount recoverable. Correctly comprehended, Gasperini urges, *§ 5501(c)*'s direction to the Appellate Division cannot be given effect by federal appellate courts without violating the *Seventh Amendment's* Reexamination **[****22]** Clause.

As the parties' arguments suggest, *CPLR § 5501(c)*, appraised under *Erie R. Co. v. Tompkins, 304 U.S. 64, 82 L. Ed. 1188, 58 S. Ct. 817 (1938)*, and decisions in *Erie*'s path, is both "substantive" and "procedural": "substantive" in that *§ 5501(c)*'s "deviates materially" standard controls how much a plaintiff can be awarded; "procedural" in that *§ 5501(c)* assigns decisionmaking authority to New York's Appellate Division. Parallel application of *§ 5501(c)* at the federal appellate level would be out of sync with the federal system's division of trial and appellate court functions, an allocation weighted by the *Seventh Amendment*. The dispositive question, therefore, is whether federal courts can give effect to the substantive thrust of *§ 5501(c)* without untoward alteration of the federal scheme for the trial and decision of civil cases.

A

[6]Federal diversity jurisdiction provides an alternative forum for the adjudication of state-created rights, but it does not carry with it generation of rules of substantive law. As **[*427]** *Erie* read the Rules of Decision Act: [6] "Except in matters governed by the Federal Constitution or by Acts of Congress, **[****23]** the law to be applied in any case is the law of the State." *304 U.S. at 78*. Under the *Erie* doctrine, federal courts sitting in diversity apply state substantive law and federal procedural law.

[5B] [7A]Classification of a law as "substantive" or "procedural" for *Erie* purposes is sometimes a challenging **[***674]** endeavor.[7] *Guaranty Trust Co. v.*

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[6] Originally § 34 of the Judiciary Act of 1789, the Rules of Decision Act, now contained in *28 U.S.C. § 1652*, reads: "The laws of the several states, except where the Constitution or treaties of the United States or Acts of Congress otherwise require or provide, shall be regarded as rules of decision in civil actions in the courts of the United States, in cases where they apply."

[7] [7B]

Concerning matters covered by the Federal Rules of Civil Procedure, the characterization question is usually unproblematic: It is settled that if the Rule in point is consonant with the Rules Enabling Act, *28 U.S.C. § 2072*, and the Constitution, the Federal Rule applies regardless of contrary state law. See *Hanna v. Plumer, 380 U.S. 460, 469-474, 14 L.*

York, 326 U.S. 99, 89 L. Ed. 2079, 65 S. Ct. 1464 (1945), an early interpretation of *Erie*, propounded an "outcome-determination" test: "Does it significantly affect the result of a litigation for a federal court to disregard a **[****24]** law of a State that would be controlling in an action upon the same **[**2220]** claim by the same parties in a State court?" 326 U.S. at 109. Ordering application of a state statute of limitations to an equity proceeding in federal court, the Court said in *Guaranty* **[*428]** *Trust:* "Where a federal court is exercising jurisdiction solely because of the diversity of citizenship of the parties, the outcome of the litigation in the federal court should be substantially the same, so far as legal rules determine the outcome of a litigation, as it would be if tried in a State court." *Ibid.;* see also Ragan v. Merchants Transfer & Warehouse Co., 337 U.S. 530, 533, 93 L. Ed. 1520, 69 S. Ct. 1233 (1949) (when local law that creates the cause of action qualifies it, "federal court must follow suit," for "a different measure of the cause of action in one court than in the other [would transgress] the principle of *Erie*"). A later pathmarking case, qualifying *Guaranty Trust*, explained that the "outcome-determination" test must not be applied mechanically to sweep in all manner of variations; instead, its application must be guided by "the **[****25]** twin aims of the *Erie* rule: discouragement of forumshopping and avoidance of inequitable administration of the laws." Hanna v. Plumer, 380 U.S. 460, 468, 14 L. Ed. 2d 8, 85 S. Ct. 1136 (1965).

[**26]** [5C]Informed by these decisions, we address the question whether New York's "deviates materially" standard, codified in CPLR § 5501(c), is outcome affective in this sense: Would "application of the [standard] . . . have so important an effect upon the fortunes of one or both of the litigants that failure to [apply] it would [unfairly discriminate against citizens of the forum State, or] be likely to cause a plaintiff to choose the federal court"? Id., at 468, n. 9. [8]

[**27]** We start from a point the parties do not debate. Gasperini acknowledges that a statutory cap on damages would supply substantive law **[***675]** for *Erie* purposes. See Reply Brief for **[*429]** Petitioner 2 ("The state as a matter of its substantive law may, among other things, eliminate the availability of damages for a particular claim entirely, limit the factors a jury may consider in determining damages, or place an absolute cap on the amount of damages available, and such substantive law would be applicable in a federal court sitting in diversity."); see also Tr. of Oral Arg. 4-5, 25; *Consorti*, 72 F.3d, at 1011. [9] Although CPLR § 5501(c) is less readily classified, it was designed to provide an analogous control.

[**28]** New York's Legislature codified in § 5501(c) a new standard, one that requires closer court review than the commonlaw "shock the conscience" test. See supra, at 422-423. More rigorous comparative evaluations attend application of § 5501(c)'s "deviates materially" standard. See supra, at 423-425. To foster predictability, the legislature required the reviewing court, when overturning a verdict under § 5501(c), to state its reasons, including the factors it considered relevant. See CPLR § 5522(b); supra, at 423-424. We think it a fair conclusion that CPLR § 5501(c) differs from a statutory cap principally "in that the maximum amount recoverable is not set forth by statute, but rather is

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Ed. 2d 8, 85 S. Ct. 1136 (1965); Burlington Northern R. Co. v. Woods, 480 U.S. 1, 4-5, 94 L. Ed. 2d 1, 107 S. Ct. 967 (1987). Federal courts have interpreted the Federal Rules, however, with sensitivity to important state interests and regulatory policies. See, *e. g.,* Walker v. Armco Steel Corp., 446 U.S. 740, 750-752, 64 L. Ed. 2d 659, 100 S. Ct. 1978 (1980) (reaffirming decision in Ragan v. Merchants Transfer & Warehouse Co., 337 U.S. 530, 93 L. Ed. 1520, 69 S. Ct. 1233 (1949), that state law rather than Rule 3 determines when a diversity action commences for the purposes of tolling the state statute of limitations; Rule 3 makes no reference to the tolling of state limitations, the Court observed, and accordingly found no "direct conflict"); S. A. Healy Co. v. Milwaukee Metropolitan Sewerage Dist., 60 F.3d 305, 310-312 (CA7 1995) (state provision for offers of settlement by plaintiffs is compatible with Federal Rule 68, which is limited to offers by defendants).

[8] *Hanna* keyed the question to *Erie*'s "twin aims"; in full, *Hanna* instructed federal courts to ask "whether application of the [State's] rule would make so important a difference to the character or result of the litigation that failure to enforce it would unfairly discriminate against citizens of the forum State, or whether application of the rule would have so important an effect upon the fortunes of one or both of the litigants that failure to enforce it would be likely to cause a plaintiff to choose the federal court." 380 U.S. at 468, n. 9.

[9] While we have not specifically addressed the issue, courts of appeals have held that district court application of state statutory caps in diversity cases, postverdict, does not violate the Seventh Amendment. See Davis v. Omitowoju, 883 F.2d 1155, 1161-1165 (CA3 1989) (Reexamination Clause of Seventh Amendment does not impede federal court's postverdict application of statutory cap); Boyd v. Bulala, 877 F.2d 1191, 1196 (CA4 1989) (postverdict application of statutory cap does not violate Seventh Amendment right of trial by jury).

determined by case law." Brief for City of New York as *Amicus Curiae* 11. In sum, § 5501(c) contains a procedural instruction, see *supra, at 426*, but the State's objective is manifestly substantive. Cf. *S. A. Healy Co. v. Milwaukee Metropolitan Sewerage Dist., 60 F.3d 305, 310 (CA7 1995)*.

[5D] [8A] [9] **[**2221]** It thus appears that if federal courts ignore the change in the New York standard and persist in applying the "shock **[*430]** the conscience" test to damage **[****29]** awards on claims governed by New York law, [10] **[****30]** "'substantial' variations between state and federal [money judgments]" may be expected. See *Hanna, 380 U.S. at 467-468*. [11] We therefore agree with the Second Circuit that New York's check on excessive damages implicates what we have called *Erie*'s **[***676]** "twin aims." See *supra, at 428*. [12]

Just as the *Erie* principle precludes a federal court from giving a state-created claim "longer life . . . than [the claim] would have had in the state court," *Ragan, **[*431]** 337 U.S. at 533-534*, so *Erie* precludes a recovery in federal court significantly larger than the recovery that would have been tolerated in state court.

[**31]** B

[1C]*CPLR § 5501(c)*, as earlier noted, see *supra, at 425, 426*, is phrased as a direction to the New York Appellate Division. Acting essentially as a surrogate for a New York appellate forum, the Court of Appeals reviewed Gasperini's award to determine if it "deviated materially" from damage awards the Appellate Division permitted in similar circumstances. The Court of Appeals performed this task without benefit of an opinion from the District Court, which had denied "without comment" the Center's *Rule 59* motion. *66 F.3d, at 428*. Concentrating on the authority *§ 5501(c)* gives to the Appellate Division, Gasperini urges that the provision shifts factfinding responsibility from the jury and the trial judge to the appellate court. Assigning such responsibility to an appellate court, he maintains, is incompatible with the *Seventh Amendment's* Reexamination Clause, and therefore, Gasperini concludes, *§ 5501(c)* cannot be given effect in federal court. Brief for Petitioner 19-20. Although we reach a different conclusion than Gasperini, we agree that the Second Circuit did not attend to "an essential characteristic of [the federal-court] system," *Byrd v. Blue Ridge Rural Elec. Cooperative, Inc., 356 U.S. 525, 537, 2 L. Ed. 2d 953, 78 S. Ct. 893 (1958)*, **[****32]** when it used *§ 5501(c)* as "the standard for [federal] appellate review," *Consorti*, 72 F.3d, at 1013; see also *66 F.3d, at 430*.

That "essential characteristic" was described in *Byrd*, a diversity suit for negligence in which a pivotal issue of fact would have been tried by a judge were the case in state court. The *Byrd* Court held that, despite **[**2222]** the state practice, [13] the plaintiff was entitled to a jury

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[10] [8B]

JUSTICE SCALIA questions whether federal *district* courts in New York "actually apply" or "*ought*" to apply the "shock the conscience" test in assessing a jury's award for excessiveness. *Post*, at 465-466 (collecting various formulations of review standard). If there is a federal district court standard, it must come from the Court of Appeals, not from the over 40 district court judges in the Southern District of New York, each of whom sits alone and renders decisions not binding on the others. Indeed, in *Ismail v. Cohen, 899 F.2d 183 (1990)*, the authority upon which JUSTICE SCALIA relies, the Second Circuit stated that district courts test damage awards for excessiveness under the "shock the conscience" standard. See *id., at 186* ("A remittitur, in effect, is a statement by the court that it is shocked by the jury's award of damages."); see also ***Scala v. Moore McCormack Lines, Inc., 985 F.2d 680, 683 (CA2 1993)*** ("In the federal courts, a judgment cannot stand where the damages awarded are so excessive as to shock the judicial conscience.") (internal quotation marks and citation omitted).

[11] JUSTICE SCALIA questions whether application of *CPLR § 5501(c)*, in lieu of the standard generally used by federal courts within the Second Circuit, see *supra, at 422*, will in fact yield consistent outcome differentials, see *post*, at 465, 466. The numbers, as the Second Circuit believed, are revealing. See *66 F.3d 427, 430 (1995)*. Is the difference between an award of $ 450,000 and $ 100,000, see *supra, at 421*, or between $ 1,500 per transparency and $ 500, see *supra, at 421, n. 2*, fairly described as insubstantial? We do not see how that can be so.

[12] [5E]

For rights that are state created, state law governs the amount properly awarded as punitive damages, subject to an ultimate federal constitutional check for exorbitancy. See *BMW of North America, Inc. v. Gore, 517 U.S. 559, 568, 134 L. Ed. 2d 809, 116 S. Ct. 1589 (1996)*; *Browning-Ferris Industries of Vt., Inc. v. Kelco Disposal, Inc., 492 U.S. 257, 278-279, 106 L. Ed. 2d 219, 109 S. Ct. 2909 (1989)*. An evenhanded approach would require federal court deference to endeavors like New York's to control compensatory damages for excessiveness. See *infra*, at 435, n. 18.

[13] The defendant argued in *Byrd* that although the personal injury plaintiff was employed by an independent contractor, the work plaintiff was engaged to perform was the same as work

trial in federal court. **[*432]** In so ruling, the Court said that the *Guaranty Trust* "outcome-determination" test was an insufficient guide in cases presenting countervailing federal interests. See *Byrd, 356 U.S. at 537*. The Court described the countervailing federal interests present in *Byrd* this way:

> **[***677]**
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> "The federal system is an independent system for administering justice to litigants who properly invoke its jurisdiction. An essential characteristic of that system is the manner in which, in civil common-law actions, it distributes trial functions between judge and jury and, under the influence -- if not the command -- of the *Seventh Amendment*, assigns the decisions of disputed questions **[****33]** of fact to the jury." *Ibid*. (footnote omitted).

[3B] [10A] [11A]The *Seventh Amendment*, which governs proceedings in federal court, but not in state court, [14] bears not only on the allocation of trial functions between judge and jury, the issue in *Byrd;* it also controls the allocation of authority to review verdicts, the issue of concern here. The Amendment reads:

> "In Suits at common law, where the value in controversy shall exceed twenty dollars, the right of trial **[****34]** by jury shall be preserved, and no fact tried by a jury, shall be otherwise re-examined in any Court of the United States, than according to the rules of the common law." *U.S. Const., Amdt. 7*.

[10B] [11B] [12]*Byrd* involved the first Clause of the Amendment, the "trial by jury" Clause. This case involves the second, the "re-examination" Clause. In keeping with the historic understanding, [15] **[*433]** the Reexamination Clause does not inhibit the authority of trial judges to grant new trials "for any of the reasons for which new trials have heretofore been granted in actions at law in the courts of the United States." *Fed. Rule Civ. Proc. 59(a)*. That authority is large. See 6A Moore's Federal Practice P59.05[2], pp. 59-44 to 59-46 (2d ed. 1996) ("The power of the English common law trial courts to grant a new trial for a variety of reasons with a view to the attainment of justice was well established prior to the establishment **[****35]** of our Government."); see also *Aetna Casualty & Surety Co. v. Yeatts, 122 F.2d 350, 353 (CA4 1941)* ("The exercise of [the trial court's power to set aside the jury's verdict and grant a new trial] is not in derogation of the right of trial by jury but is one of the historic safeguards of that right."); *Blunt v. Little, 3 F. Cas. 760, 761-762* (No. 1,578) (CC Mass. 1822) (Story, J.) ("If it should clearly appear that the jury have committed a gross error, or have acted from improper motives, or have given damages excessive in relation to the person or the injury, it is as much the duty of the court to interfere, to prevent the wrong, as in any other case."). "The trial judge in the federal system," we have reaffirmed, "has . . . discretion to grant a new trial if the verdict appears to [the judge] to be against the weight of the evidence." *Byrd, 356 U.S. at 540*. This discretion includes overturning verdicts for excessiveness and ordering a new trial without qualification, or conditioned on the verdict winner's refusal to agree to a reduction (remittitur). See *Dimick v. Schiedt, 293 U.S. 474, 486-487, 79 L. Ed. 603, 55 S. Ct. 296 (1935)* **[****36]** (recognizing that remittitur withstands *Seventh Amendment* **[***678]** attack, but rejecting additur as unconstitutional). [16]

[13A] **[*434]** **[**2223]** In contrast, appellate review of a federal trial court's denial of a motion to set aside a jury's verdict as excessive is a relatively late, and less secure, development. **[****37]** Such review was once deemed inconsonant with the *Seventh Amendment's* Reexamination Clause. See, *e. g., Lincoln v. Power,*

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done by defendant's own employees. Therefore, defendant maintained, the plaintiff ranked as a "statutory employee" whose sole remedy was under the State's workers' compensation law. The sameness of the work plaintiff and defendant's own employees performed presented a fact question, but in state court, a jury trial would not have been available to resolve it.

[14] See *Walker v. Sauvinet, 92 U.S. 90, 92, 23 L. Ed. 678 (1876)*.

[15] See 6A Moore's Federal Practice P59.05[1], pp. 59-38 to 59-40 (2d ed. 1996) (common-law origin of trial court power to grant or deny a new trial).

[16] Inviting rethinking of the additur question on a later day, Justice Stone, joined by Chief Justice Hughes and Justices Brandeis and Cardozo, found nothing in the history or language of the *Seventh Amendment* forcing the "incongruous position" that "a federal trial court may deny a motion for a new trial where the plaintiff consents to decrease the judgment to a proper amount," but may not condition denial of the motion on "the defendant's consent to a comparable increase in the recovery." *Dimick v. Schiedt, 293 U.S. at 495*.

151 U.S. 436, 437-438, 38 L. Ed. 224, 14 S. Ct. 387 (1894); Williamson v. Osenton, 220 F. 653, 655 (CA4 1915); see also 6A Moore's Federal Practice P59.08[6], at 59-167 (collecting cases). We subsequently recognized that, even in cases in which the *Erie* doctrine was not in play -- cases arising wholly under federal law -- the question was not settled; we twice granted certiorari to decide the unsettled issue, but ultimately resolved the cases on other grounds. See Grunenthal v. Long Island R. Co., 393 U.S. 156, 158, 21 L. Ed. 2d 309, 89 S. Ct. 331 (1968); Neese v. Southern R. Co., 350 U.S. 77, 100 L. Ed. 60, 76 S. Ct. 131 (1955). [17]

[**38]** [14A]Before today, we have not "expressly [held] that the Seventh Amendment allows appellate review of a district court's denial of a motion to set aside an award as excessive." Browning-Ferris Industries of Vt., Inc. v. Kelco Disposal, Inc., 492 U.S. 257, 279, n. 25, 106 L. Ed. 2d 219, 109 S. Ct. 2909 (1989). But in successive reminders that the question was worthy of this Court's attention, we noted, without disapproval, that courts of appeals engage in review of district court excessiveness determinations, **[*435]** applying "abuse of discretion" as their standard. See Grunenthal, 393 U.S. at 159. We noted the Circuit decisions in point, id., at 157, n. 3, and, in *Browning-Ferris*, we again referred to appellate court abuse-of-discretion review:

> "The role of the district court is to determine whether the jury's verdict is within the confines set by state law, and to determine, by reference to federal standards developed under Rule 59, whether a new trial or remittitur should be ordered. The court of appeals should then review the district court's determination under an abuse-of-discretion standard." 492 U.S. at 279. **[****39]** [18]

[13B]As the Second Circuit explained, **[***679]** appellate review for abuse of discretion is reconcilable with the Seventh Amendment as a control necessary and proper to the fair administration of justice: "We must give the benefit of every doubt to the judgment of the trial judge; but surely there must be an upper limit, and whether that has been surpassed is not a question of fact with respect to which reasonable men may differ, but a question of law." Dagnello v. Long Island R. Co., 289 F.2d 797, 806 (CA2 1961) (quoted **[****40]** in Grunenthal, 393 U.S. at 159). All other Circuits agree. See, *e. g.*, Holmes v. Elgin, Joliet & Eastern R. Co., 18 F.3d 1393, 1396 (CA7 1994); 11 C. Wright, A. Miller, & M. Kane, Federal Practice and Procedure § 2820, p. 209 (2d ed. 1995) ("Every circuit has said that there are circumstances in which it can reverse the denial of a new trial if the size of the verdict seems to be too far out of line."); 6A Moore's Federal Practice **[*436]** P59.08[6], at **[**2224]** 59-177 to 59-185 (same). [19] **[****41]** We now approve this line of decisions, and thus make explicit what Justice Stewart thought implicit in our *Grunenthal* disposition: "Nothing in the Seventh Amendment . . . precludes appellate review of the trial judge's denial of a motion to set aside [a jury verdict] as excessive." 393 U.S. at 164 (Stewart, J., dissenting) (internal quotation marks and footnote omitted). [20]

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[17] Dissenting from the Court's professed refusal to answer the question presented in *Grunenthal* v. *Long Island R. Co.*, Justices Harlan and Stewart observed that in *Grunenthal* itself, this Court indeed had reviewed the refusal of the District Court to set aside a jury verdict for excessiveness. 393 U.S. at 163 (Harlan, J., dissenting); id., at 164-165 (Stewart, J., dissenting). Justice Harlan commented: "Like my Brother STEWART, I am at an utter loss to understand how the Court manages to review the District Court's decision and find it proper while at the same time proclaiming that it has avoided decision of the issue whether appellate courts ever may review such actions." Id., at 163.

[18] [14B]

Browning-Ferris concerned punitive damages. We agree with the Second Circuit, however, that "for purposes of deciding whether state or federal law is applicable, the question whether an award of *compensatory* damages exceeds what is permitted by law is not materially different from the question whether an award of *punitive* damages exceeds what is permitted by law." Consorti v. Armstrong World Industries, Inc., 72 F.3d 1003, 1012 (1995).

[19] JUSTICE SCALIA disagrees. Ready to "destroy the uniformity of federal practice" in this regard, cf. *post*, at 467, he would render a judgment described as "astonishing" by the very authority upon which he relies. Compare *post*, at 460, with 11 C. Wright, A. Miller, & M. Kane, Federal Practice and Procedure § 2820, p. 212 (2d ed. 1995) ("it would be astonishing if the Court, which has passed up three opportunities to do so, should ultimately reject" the unanimously held view of the courts of appeals).

[20] [13C]

If the meaning of the Seventh Amendment were fixed at 1791, our civil juries would remain, as they unquestionably were at common law, "twelve good men and true," 3 W. Blackstone, Commentaries * 349; see Capital Traction Co. v. Hof, 174 U.S. 1, 13, 43 L. Ed. 873, 19 S. Ct. 580 (1899) ("'Trial by jury,' in the primary and usual sense of the term at the common law

[**42]** C

[1D] [15] [16]In *Byrd*, the Court faced a one-or-the-other choice: trial by judge as in state court, or trial by jury according to the federal practice. [21] In the case before us, a choice of that **[*437]** order is not required, for the principal state and federal interests **[***680]** can be accommodated. The Second Circuit correctly recognized that when New York substantive law governs a claim for relief, New York law and decisions guide the allowable damages. See *66 F.3d, at 430*; see also *Consorti, 72 F.3d, at 1011*. But that court did not take into account the characteristic of the federal-court system that caused us to reaffirm: "The proper role of the trial and appellate courts in the federal system in reviewing the size of jury verdicts is . . . a matter of federal law." *Donovan v. Penn Shipping Co., 429 U.S. 648, 649, 51 L. Ed. 2d 112, 97 S. Ct. 835 (1977)* *(per curiam);* see also *Browning-Ferris, 492 U.S. at 279* ("The role of the district court is to determine whether the jury's verdict is within the confines set by state law . . . . The court of appeals should then review the district court's determination under **[****43]** an abuse-of-discretion standard.").

[1E]New York's dominant interest can be respected, without disrupting the federal system, once it is recognized that the federal district court is capable of performing the checking function, *i. e.*, that court can apply the State's "deviates materially" standard in line with New York case law evolving under *CPLR § 5501(c)*. [22] We recall, in this regard, **[**2225]** that the **[*438]** "deviates materially" standard serves as the guide to be applied in trial as well as appellate courts in New York. See *supra, at 425*.

[**44]** [1G]Within the federal system, practical reasons combine with *Seventh Amendment* constraints to lodge in the district court, not the court of appeals, primary responsibility for application of *§ 5501(c)*'s "deviates materially" check. Trial judges have the "unique opportunity to consider the evidence in the living courtroom context," *Taylor v. Washington Terminal Co., 133 U.S. App. D.C. 110, 409 F.2d 145, 148 (CADC 1969)*, while appellate judges see only the "cold paper record," *66 F.3d, at 431*.

District court applications of the "deviates materially" standard would be subject to appellate review under the standard the Circuits now employ when inadequacy or excessiveness is asserted on appeal: abuse of discretion. See 11 Wright & Miller, Federal Practice and

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and in the American constitutions . . . is a trial by a jury of twelve men."). But see *Colgrove v. Battin, 413 U.S. 149, 160, 37 L. Ed. 2d 522, 93 S. Ct. 2448 (1973)* (six-member jury for civil trials satisfies *Seventh Amendment's* guarantee). Procedures we have regarded as compatible with the *Seventh Amendment*, although not in conformity with practice at common law when the Amendment was adopted, include new trials restricted to the determination of damages, *Gasoline Products Co. v. Champlin Refining Co., 283 U.S. 494, 75 L. Ed. 1188, 51 S. Ct. 513 (1931)*, and *Federal Rule of Civil Procedure 50(b)*'s motion for judgment as a matter of law, see 9A C. Wright & A. Miller, Federal Practice and Procedure § 2522, pp. 244-246 (2d ed. 1995). See also *Parklane Hosiery Co. v. Shore, 439 U.S. 322, 335-337, 58 L. Ed. 2d 552, 99 S. Ct. 645 (1979)* (issue preclusion absent mutuality of parties does not violate *Seventh Amendment*, although common law as it existed in 1791 permitted issue preclusion only when there was mutuality).

[21] The two-trial rule posited by JUSTICE SCALIA, *post*, at 467, surely would be incompatible with the existence of "the federal system [as] an independent system for administering justice," *Byrd v. Blue Ridge Rural Elec. Cooperative, Inc., 356 U.S. 525, 537, 2 L. Ed. 2d 953, 78 S. Ct. 893 (1958)*. We discern no disagreement on such examples among the many federal judges who have considered this case.

[22] [1F]

JUSTICE SCALIA finds in *Federal Rule of Civil Procedure 59* a "federal standard" for new trial motions in "'direct collision'" with, and "'leaving no room for the operation of,'" a state law like *CPLR § 5501(c)*. *Post*, at 468 (quoting *Burlington Northern R. Co., 480 U.S. at 4-5*). The relevant prescription, *Rule 59(a)*, has remained unchanged since the adoption of the Federal Rules by this Court in 1937. ***302 U.S. 783***. *Rule 59(a)* is as encompassing as it is uncontroversial. It is indeed "Hornbook" law that a most usual ground for a *Rule 59* motion is that "the damages are excessive." See C. Wright, Law of Federal Courts 676-677 (5th ed. 1994). Whether damages are excessive for the claim-in-suit must be governed by *some law*. And there is no candidate for that governance other than the law that gives rise to the claim for relief -- here, the law of New York. See *28 U.S.C. §§ 2072(a)* and *(b)* ("Supreme Court shall have the power to prescribe general rules of . . . procedure"; "such rules shall not abridge, enlarge or modify any substantive right"); *Browning-Ferris, 492 U.S. at 279* ("standard of excessiveness" is a "matter of state, and not federal, common law"); see also R. Fallon, D. Meltzer, & D. Shapiro, Hart and Wechsler's The Federal Courts and the Federal System 729-730 (4th ed. 1996) (observing that Court "has continued since [*Hanna v. Plumer, 380 U.S. 460, 14 L. Ed. 2d 8, 85 S. Ct. 1136 (1965)*,] to interpret the federal rules to avoid conflict with important state regulatory policies," citing *Walker v. Armco Steel Corp., 446 U.S. 740, 64 L. Ed. 2d 659, 100 S. Ct. 1978 (1980)*).

Procedure § 2820, at 212-214, and n. 24 (collecting cases); see 6A Moore's Federal Practice **[***681]** P59.08[6], at 59-177 to 59-185 (same). In light of *Erie*'s doctrine, the federal appeals court must be guided by the damage-control standard state law supplies, [23] but as the Second Circuit itself has said: "If we reverse, it must be because of an abuse of discretion. . . . The very nature **[****45]** of the problem counsels restraint. . . . We must give the benefit of **[*439]** every doubt to the judgment of the trial judge." *Dagnello, 289 F.2d, at 806*.

IV

[2B]It does not appear that the District Court checked the jury's verdict against the relevant New York decisions demanding more than "industry standard" testimony to support an award of the size the jury returned in this case. As the Court of Appeals recognized, see *66 F.3d, at 429*, the uniqueness of the photographs and the plaintiff's earnings as photographer -- past and reasonably projected -- are factors relevant **[****46]** to appraisal of the award. See, *e. g., Blackman v. Michael Friedman Publishing Group, Inc., 201 App. Div. 2d 328, 607 N. Y. S. 2d 43, 44 (1st Dept. 1994)*; *Nierenberg v. Wursteria, Inc., 189 App. Div. 2d 571, 571-572, 592 N. Y. S. 2d 27, 27-28 (1st Dept. 1993)*. Accordingly, we vacate the judgment of the Court of Appeals and instruct that court to remand the case to the District Court so that the trial judge, revisiting his ruling on the new trial motion, may test the jury's verdict against *CPLR § 5501(c)*'s "deviates materially" standard.

It is so ordered.

Dissent by: STEVENS; SCALIA

Dissent

JUSTICE **STEVENS**, dissenting.

While I agree with most of the reasoning in the Court's opinion, I disagree with its disposition of the case. I would affirm the judgment of the Court of Appeals. I would also reject the suggestion that the *Seventh Amendment* limits the power of a federal appellate court sitting in diversity to decide whether a jury's award of damages exceeds a limit established by state law.

I

The Court correctly explains why the 1986 enactment of *§ 5501(c) of the N. Y. Civ. Prac. Law* and Rules (McKinney 1995) **[****47]** changed the substantive law of the State. A state-law ceiling on allowable damages, whether fixed by a dollar limit or by a standard that forbids **[**2226]** any award that "deviates materially **[*440]** from what would be reasonable compensation," *ibid.*, is a substantive rule of decision that federal courts must apply in diversity cases governed by New York law.

I recognize that state rules of appellate procedure do not necessarily bind federal appellate courts. The majority persuasively shows, however, that New York has not merely adopted a new procedure for allocating the decisionmaking function between trial and appellate courts. *Ante*, at 422-425. Instead, New York courts have held that all jury awards, not only those reviewed on appeal, must conform to the requirement that they **[***682]** not "deviate materially" from amounts awarded in like cases. *Ante*, at 425. That New York has chosen to tie its damages ceiling to awards traditionally recovered in similar cases, rather than to a legislatively determined but inflexible monetary sum, is none of our concern.

Given the nature of the state-law command, the Court of Appeals for the Second Circuit correctly concluded **[****48]** in *Consorti v. Armstrong World Industries, Inc., 64 F.3d 781*, superseded, *72 F.3d 1003 (1995)*, that New York's excessiveness standard applies in federal court in diversity cases controlled by New York law. *Consorti* erred in basing that conclusion in part on the fact that a New York statute requires that State's appellate division to apply the standard, but it was nevertheless faithful to the Rules of Decision Act, as construed in *Erie R. Co. v. Tompkins, 304 U.S. 64, 82 L. Ed. 1188, 58 S. Ct. 817 (1938)*, in holding that a state-law limitation on the size of a judgment could not be ignored. [1] Similarly, the Court of Appeals **[*441]**

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[23] If liability and damage-control rules are split apart here, as JUSTICE SCALIA says they must be to save the *Seventh Amendment*, then Gasperini's claim and others like it would be governed by a most curious "law." The sphinx-like, damage-determining law he would apply to this controversy has a state forepart, but a federal hindquarter. The beast may not be brutish, but there is little judgment in its creation.

[1] Because there is no conceivable conflict between *Federal Rule of Civil Procedure 59* and the application of the New York damages limit, this case is controlled by *Erie* and the Rules of Decision Act, rather than by the Rules Enabling Act's limitation

correctly followed *Consorti* in this case and considered whether the damages awarded materially deviated from damages awarded in similar cases. 66 F.3d 427, 431 (CA2 1995). I endorse both opinions in these respects.

[**49]** Although the majority agrees with the Court of Appeals that New York law establishes the size of the damages that may be awarded, it chooses to vacate and remand. The majority holds that a federal court of appeals should review for abuse of discretion a district court's decision to deny a motion for new trial based on a jury's excessive award. As a result, it concludes that the District Court should be given the opportunity to apply in the first instance the "deviates materially" standard that New York law imposes. *Ante*, at 439.

The District Court had its opportunity to consider the propriety of the jury's award, and it erred. The Court of Appeals has now corrected that error after "drawing all reasonable inferences in favor of" petitioner. 66 F.3d, at 431. As there is no reason to suppose that the Court of Appeals has reached a conclusion with which the District Court could permissibly disagree on remand, I would not require the District Court to repeat a task that has already been well performed by the reviewing court. I therefore would affirm the judgment of the Court of Appeals.

II

Although I have addressed the question presented as if our decision in *Erie* **[****50]** alone controlled its outcome, petitioner argues that the second clause of the Seventh Amendment, which states that "no fact tried by jury, shall be otherwise re-examined in any Court of the United States, **[***683]** than according to the rules of the common law," U.S. Const., Amdt. 7, **[*442]** bars the procedure followed by the Court of Appeals. There is no merit to that position.

[2227]** Early cases do state that the Reexamination Clause prohibits appellate review of excessive jury awards, but they do not foreclose the practice altogether. See, *e. g.,* Southern Railway-Carolina Div. v. Bennett, 233 U.S. 80, 87, 58 L. Ed. 860, 34 S. Ct. 566 (1914) ("It may be admitted that if it were true that the excess appeared as [a] matter of law; that if, for instance, the statute fixed a maximum and the verdict exceeded it, a question might arise for this court"); 11 C. Wright, A. Miller, & M. Kane, Federal Practice and Procedure § 2820, pp. 207-209 (2d ed. 1995). Indeed, for the last 30 years, we have consistently reserved the question whether the Constitution permits such review, *ante*, at 434-435, and, in the meantime, every Court of Appeals has agreed that **[****51]** the Seventh Amendment establishes no bar. 11 Wright & Miller § 2820, at 209.

Taking the question to be an open one, I start with certain basic principles. It is well settled that jury verdicts are not binding on either trial judges or appellate courts if they are unauthorized by law. A verdict may be insupportable as a matter of law either because of deficiencies in the evidence or because an award of damages is larger than permitted by law. If an award is excessive as a matter of law -- in a diversity case if it is larger than applicable state law permits -- a trial judge has a duty to set it aside. A failure to do so is an error of law that the court of appeals has a duty to correct on appeal.

These principles are sufficiently well established that no Seventh Amendment issue would arise if an appellate court ordered a new trial because a jury award exceeded a monetary cap on allowable damages. That New York has chosen to define its legal limit in less mathematical terms does not require a different constitutional conclusion.

New York's limitation requires a legal inquiry that cannot be wholly divorced from the facts, but that quality does not necessarily make the question one **[****52]** for the factfinder rather **[*443]** than the reviewing court. Three times this Term we have assigned appellate courts the task of independently reviewing similarly mixed questions of law and fact. See Ornelas v. United States, 517 U.S. 690, 696-697, 134 L. Ed. 2d 911, 116 S. Ct. 1657 (1996); Markman v. Westview Instruments, Inc., 517 U.S. 370, 388-390, 134 L. Ed. 2d 577, 116 S. Ct. 1384 (1996); Thompson v. Keohane, 516 U.S. 99, 133 L. Ed. 2d 383, 116 S. Ct. 457 (1995) (slip op., at 12-16). Such appellate review is proper because mixed questions require courts to construe all record inferences in favor of the factfinder's decision and then

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on federal procedural rules that conflict with state substantive rights. See Ely, The Irrepressible Myth of Erie, 87 Harv. L. Rev. 693, 698 (1974); see also Sibbach v. Wilson & Co., 312 U.S. 1, 85 L. Ed. 479, 61 S. Ct. 422 (1941). The Rule does state that new trials may be granted "for any of the reasons for which new trials have heretofore been granted in actions at law in the courts of the United States," but that hardly constitutes a command that federal courts must always substitute federal limits on the size of judgments for those set by the several States in cases founded upon state-law causes of action. Even at the time of the Rule's adoption, federal courts were bound to apply state statutory law in such cases.

to determine whether, on the facts as found below, the legal standard has been met. See *Ornelas, 517 U.S. at 696-697* (quoting *Pullman-Standard v. Swint, 456 U.S. 273, 289, n. 19, 72 L. Ed. 2d 66, 102 S. Ct. 1781 (1982)*). In following that procedure here, the Court of Appeals did not reexamine any fact determined by a jury. *66 F.3d, at 431*. It merely identified that portion of the judgment that constitutes "unlawful excess." See *Dimick v. Schiedt, 293 U.S. 474, 486, **[***684]** 79 L. Ed. 603, 55 S. Ct. 296 (1935)*. **[****53]** [2]

Even if review by the Court of Appeals implicates the Reexamination Clause, it was "according to the rules of the common law." *U.S. Const., Amdt. 7*. At common law, the trial judge sitting *nisi prius* recommended whether a judicial panel sitting en banc at Westminster should accept the jury's award. The en banc court then ruled on the motion for new trial and entered judgment. 11 Wright & Miller § 2819, at 203.

Petitioner correctly points out that under this procedure motions for new trial based on excessiveness were not technically **[****54]** subject to appellate review. Riddell, New Trial at the Common Law, 26 Yale L. J. 49, 57 (1916) ("It seems clear that in criminal as in civil cases, the trial Judge had not the **[*444]** power to grant **[**2228]** a new trial, but that recourse must be had to 'the Court above'"); *id.*, at 60. However, because the *nisi prius* judge often did not serve on the en banc court, the "court above" was in essentially the same position as a modern court of appeals. It considered the legality of the jury's award in light of the trial judge's opinion, but without any firsthand knowledge of what had transpired below. See Blume, Review of Facts in Jury Cases -- The *Seventh Amendment*, 20 J. Am. Jud. Soc. 130, 131 (1936). [3]

[**55]** Petitioner also contends that at common law the en banc court could only grant a new trial if the trial judge so recommended. That contention is undermined by numerous cases in which the "court above" granted new trials without making any reference to the trial judge's view of the damages. See, *e. g., Honda Motor Co. v. Oberg, 512 U.S. 415, 422-425, 129 L. Ed. 2d 336, 114 S. Ct. 2331 (1994)* (citing cases). [4] **[****56]** Moreover, early English cases repeatedly state that the power to order a new trial when the jury returned an excessive award rested with "the Court," rather than the judge below, [5] and Blackstone identifies excessive **[*445]** damages as an independent basis on which the "court **[***685]** above" may grant a new trial but makes no mention of a requirement that the trial judge must so recommend. 3 W. Blackstone, Commentaries * 387.

Even when read most favorably to petitioner, therefore, no meaningful distinction exists between the common-law practice by which the "court above" considered a new trial motion in the first instance, and the practice challenged here, by which an appellate court reviews a district court's ruling on a new trial motion. See Riddell, 26 Yale L. J., at 57. As Justice Stone explained, in a dissenting opinion **[****57]** joined by Chief Justice Hughes, Justice Brandeis, and Justice Cardozo:

> "[The *Seventh Amendment*], intended to endure for unnumbered generations, is concerned with substance and not with form. There is nothing in its

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[2] I thus disagree with JUSTICE SCALIA'S view that there is a separate federal standard to "determine whether the award exceeds what is lawful to such degree that it may be set aside by order for new trial or remittitur." *Post*, at 464. In my view, if an award "exceeds what is lawful," *ibid.*, legal error has occurred and may be corrected. Certainly *Dimick* does not premise a court's power to overturn an award that exceeds lawful limits on the degree of the excess.

[3] For that reason, JUSTICE SCALIA is wrong to contend that the court at Westminster acted in no more of an appellate fashion when it entertained motions for new trials in causes tried at bar than when it entertained them in causes tried at *nisi prius. Post*, at 456. In the former cases, the en banc court would entertain a motion for new trial after having heard the evidence itself. In the latter, it would sometimes entertain the motion only after having heard the report on the evidence of the *nisi prius* judge.

[4] Although *Honda* itself involved review of punitive damages awards, we expressly noted that there was no basis for suggesting "that different standards of judicial review were applied for punitive and compensatory damages before the 20th century," *512 U.S. at 422, n. 2*. Indeed, many of the decisions we relied upon in *Honda* involved compensatory damages, and there is some authority to suggest that judicial review of the former has a more secure historical pedigree than does judicial review of the latter.

[5] See, *e. g., Bright* v. *Eynon*, 1 Burr. 390, 97 Eng. Rep. 365, 368 (K. B. 1757) (Denison, J., concurring) ("The granting a new trial, or refusing it, must depend upon the legal discretion of the Court; guided by the nature and circumstances of the particular case, and directed with a view to the attainment of justice"); *Wood* v. *Gunston*, Sty. 466, 82 Eng. Rep. 867 (K. B. 1655) ("It is in the discretion of the Court in some cases to grant a new tryal, but this must be a judicial, and not an arbitrary discretion, and it is frequent in our books for the Court to take notice of miscarriages of juries, and to grant new tryals upon them . . .").

history or language to suggest that the Amendment had any purpose but to preserve the essentials of the jury trial as it was known to the common law before the adoption of the Constitution. For that reason this Court has often refused to construe it as intended to perpetuate in changeless form the *minutiae* of trial practice as it existed in the English courts in 1791. From the beginning, its language has been regarded as but subservient to the single purpose of the Amendment, to preserve the essentials of the jury trial in actions at law, serving to distinguish them from suits in equity and admiralty, see *Parsons v. Bedford, 3 Pet. 433, 446*, and to safeguard the jury's function from any encroachment which the common law did not permit.

[*446] "Thus interpreted, the *Seventh Amendment* guarantees that suitors in actions at law shall have the benefits of trial of issues of fact by a jury, but it does not **[**2229]** prescribe any particular **[****58]** procedure by which these benefits shall be obtained, or forbid any which does not curtail the function of the jury to decide questions of fact as it did before the adoption of the Amendment. It does not restrict the court's control of the jury's verdict, as it had previously been exercised, and it does not confine the trial judge, in determining what issues are for the jury and what for the court, to the particular forms of trial practice in vogue in 1791." *Dimick v. Schiedt, 293 U.S. at 490-491*.

Because the Framers of the *Seventh Amendment* evinced no interest in subscribing to every procedural nicety of the notoriously complicated English system, see Henderson, The Background of the *Seventh Amendment*, 80 Harv. L. Rev. 289, 290 (1966), the common-law practice certainly does not demonstrate that the Reexamination Clause prohibits federal appellate courts from ensuring compliance with statelaw limits on jury awards.

Nor does early and intricate English history justify the more limited assertion that federal appellate courts must be limited to a particular, highly deferential standard of excessiveness review. Common-law courts were hesitant **[****59]** to disturb jury awards, but less so in cases in which "a reasonably certain measure of damages is afforded." 1 D. Graham, Law of New Trials in Cases Civil and Criminal 452 (2d ed. 1855); G. Washington, **[***686]** Damages in Contract at Common Law, 47 L. Q. Rev. 345, 363-364 (1931).

Here, New York has prescribed an objective, legal limitation on damages. If an appellate court may reverse a jury's damages award when its own conscience has been shocked, *66 F.3d, at 430*, or its sense of justice outraged, *Dagnello v. Long Island R. Co., 289 F.2d 797, 802 (CA2 1961)*; cf. *Honda Motor Co. v. Oberg, 512 U.S. at 422-424* (citing English **[*447]** cases), it may surely follow a sovereign's command that it do so when a jury has materially deviated from awards granted by other juries. If anything, the New York standard, though less deferential, is more certain. [6]

[**60]** III

For the reasons set forth above, I agree with the majority that the Reexamination Clause does not bar federal appellate courts from reviewing jury awards for excessiveness. I confess to some surprise, however, at its conclusion that "'the influence -- if not the command -- of the *Seventh Amendment*,'" *ante*, at 432 (quoting *Byrd v. Blue Ridge Rural Elec. Cooperative, Inc., 356 U.S. 525, 537, 2 L. Ed. 2d 953, 78 S. Ct. 893 (1958)* (footnote omitted)), requires federal courts of appeals to review district court applications of state-law excessiveness standards for an "abuse of discretion." *Ante*, at 438.

The majority's persuasive demonstration that New York law sets forth a substantive limitation on the size of jury awards seems to refute the contention that New York has merely asked appellate courts to reexamine facts. The majority's analysis would thus seem to undermine the conclusion that the Reexamination Clause is relevant to this case.

Certainly, our decision in *Byrd* does not make the Clause relevant. There, we considered only whether the Seventh *Amendment's first* clause should influence our

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[6] Our *per curiam* decision in *Donovan v. Penn Shipping Co., 429 U.S. 648, 51 L. Ed. 2d 112, 97 S. Ct. 835 (1977)*, provides no support for the proposition that federal appellate courts are confined to a federal standard of excessiveness. That case held only that a plaintiff who had consented to a remittitur could not challenge its adequacy on appeal. *Id., at 649*. Although we stated in dicta that "the proper role of the trial and appellate courts in the federal system in reviewing the size of jury verdicts is, however, a matter of federal law," *ibid.*, that broad statement was supported by citation to two cases, *Hanna v. Plumer, 380 U.S. 460, 14 L. Ed. 2d 8, 85 S. Ct. 1136 (1965)*, and *Byrd v. Blue Ridge Rural Elec. Cooperative, Inc., 356 U.S. 525, 2 L. Ed. 2d 953, 78 S. Ct. 893 (1958)*, which did not involve the review of jury awards.

decision to give effect to a state-law rule denying **[****61]** the right to a jury **[*448]** altogether. 356 U.S. at 537. That holding in no way requires us to consult the Amendment's second clause to determine the standard of review for a district court's application of state substantive law.

[2230]** My disagreement is tempered, however, because the majority carefully avoids defining too strictly the abuse-of-discretion standard it announces. To the extent that the majority relies only on "practical reasons" for its conclusion that the Court of Appeals should give some weight to the District Court's assessment in determining whether state substantive law has been properly applied, *ante*, at 438, I do not disagree with its analysis.

As a matter of federal court administration, we have recognized in other **[***687]** contexts the need for according some deference to the lower court's resolution of legal, yet factintensive, questions. See Ornelas v. United States, 517 U.S. at 699; Pierce v. Underwood, 487 U.S. 552, 558, n. 1, 101 L. Ed. 2d 490, 108 S. Ct. 2541 (1988). Indeed, it is a familiar, if somewhat circular, maxim that deems an error of law an abuse of discretion.

In the **[****62]** end, therefore, my disagreement with the label that the majority attaches to the standard of appellate review should not obscure the far more fundamental point on which we agree. Whatever influence the Seventh Amendment may be said to exert, *Erie* requires federal appellate courts sitting in diversity to apply "the damage-control standard state law supplies." *Ante*, at 438.

IV

Because I would affirm the judgment of the Court of Appeals, and because I do not agree that the Seventh Amendment in any respect influences the proper analysis of the question presented, I respectfully dissent.

JUSTICE SCALIA, with whom THE CHIEF JUSTICE and JUSTICE THOMAS join, dissenting.

Today the Court overrules a longstanding and wellreasoned line of precedent that has for years prohibited federal **[*449]** appellate courts from reviewing refusals by district courts to set aside civil jury awards as contrary to the weight of the evidence. One reason is given for overruling these cases: that the Courts of Appeals have, for some time now, decided to ignore them. Such unreasoned capitulation to the nullification of what was long regarded as a core component of the Bill of Rights -- the Seventh **[****63]** Amendment's prohibition on appellate reexamination of civil jury awards -- is wrong. It is not for us, much less for the Courts of Appeals, to decide that the Seventh Amendment's restriction on federal-court review of jury findings has outlived its usefulness.

The Court also holds today that a state practice that relates to the division of duties between state judges and juries must be followed by federal courts in diversity cases. On this issue, too, our prior cases are directly to the contrary.

As I would reverse the judgment of the Court of Appeals, I respectfully dissent.

I

Because the Court and I disagree as to the character of the review that is before us, I recount briefly the nature of the New York practice rule at issue. Section 5501(c) of the N. Y. Civ. Prac. Law and Rules (CPLR) (McKinney 1995) directs New York intermediate appellate courts faced with a claim "that the award is excessive or inadequate and that a new trial should have been granted" to determine whether the jury's award "deviates materially from what would be reasonable compensation." In granting respondent a new trial under this standard, the Court of Appeals necessarily engaged in a two-step process. **[****64]** As it has explained the application of § 5501(c), that provision "requires the reviewing court to determine the range it regards as reasonable, and to determine whether the particular jury award deviates materially from that range." Consorti v. Armstrong World Industries, **[***688]** Inc., 72 F.3d 1003, 1013 (CA2 1995) (amended). The first of these two steps -- the determination as to "reasonable" **[*450]** damages -- plainly requires the reviewing court to reexamine a factual matter tried by the jury: the appropriate measure of damages, on the evidence presented, under New York law. The second step -- the determination as to the degree of difference between "reasonable" damages and the damages found by the jury (whether the latter "deviates materially" from the former) -- establishes the degree of judicial tolerance **[**2231]** for awards found not to be reasonable, whether at the trial level or by the appellate court. No part of this exercise is appropriate for a federal court of appeals, whether or not it is sitting in a diversity case.

A

Granting appellate courts authority to decide whether an award is "excessive or inadequate" in the manner of CPLR **[****65]** § 5501(c) may reflect a sound understanding of the capacities of modern juries and trial judges. That is to say, the people of the State of New York may well be correct that such a rule contributes to a more just legal system. But the practice of *federal* appellate reexamination of facts found by a jury is precisely what the People of the several States considered *not* to be good legal policy in 1791. Indeed, so fearful were they of such a practice that they constitutionally prohibited it by means of the Seventh Amendment.

That Amendment was Congress's response to one of the principal objections to the proposed Constitution raised by the Anti-Federalists during the ratification debates: its failure to ensure the right to trial by jury in civil actions in federal court. The desire for an explicit constitutional guarantee against reexamination of jury findings was explained by Justice Story, sitting as Circuit Justice in 1812, as having been specifically prompted by Article III's conferral of "appellate Jurisdiction, both as to Law and Fact" upon the Supreme Court. "One of the most powerful objections urged against [the Constitution]," he recounted, was that this authority **[****66]** **[*451]** "would enable that court, with or without a new jury, to re-examine the whole facts, which had been settled by a previous jury." United States v. Wonson, 1 Gall. 5, 28 F. Cas. 745, 750 (No. 16,750) (CC Mass.). [1]

[**67]** The second clause of the Amendment responded to that concern by providing that "in suits at common law . . . no fact tried by a jury, shall be otherwise re-examined in any Court of the United States, than according to the rules of the common law." U.S. Const., Amdt. 7. The Reexamination Clause put to rest "apprehensions" of "new trials by the appellate courts," Wonson, 28 F. Cas. at 750, **[***689]** by adopting, in broad fashion, "the rules of the common law" to govern federal-court interference with jury determinations. [2] The **[*452]** content of that law was familiar and fixed. See, *e. g., ibid.* ("The common law here alluded to is not the common law of any individual state, (for it probably differs in all), but it is the common law of England, the grand reservoir of all our jurisprudence"); Dimick v. Schiedt, 293 U.S. 474, 487, 79 L. Ed. 603, 55 S. Ct. 296 (1935) (Seventh Amendment "in effect adopted the rules of the common law, in respect of trial by jury, as these rules existed in 1791"). It quite plainly barred reviewing courts from entertaining claims that the jury's verdict was contrary to the evidence.

[**68]** At common law, review of judgments was had only on writ of error, limited to questions **[**2232]** of law. See, *e. g.,* Wonson, supra, at 748; 3 W. Blackstone, Commentaries on the Laws of England 405 (1768) ("The writ of error only lies upon matter of *law* arising upon the face of the proceedings; so that no evidence is required to substantiate or support it"); 1 W. Holdsworth, History of English Law 213-214 (7th ed. 1956); cf. Ross v. Rittenhouse, 2 U.S. 160, 2 Dall. 160, 163, 1 L. Ed. 331 (Pa. 1792) (McKean, C. J.). That principle was expressly acknowledged by this Court as governing federal practice in Parsons v. Bedford, 3 Pet. 433 (1830) (Story, J.). There, the Court held that no error could be assigned to a district court's refusal to allow transcription of witness testimony "to serve as a statement of facts in case of appeal," notwithstanding

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[1] This objection was repeatedly made following the Constitutional Convention, see, *e. g.*, Martin, Genuine Information, in 3 Records of the Federal Convention of 1787, pp. 172, 221-222 (M. Farrand ed. 1911); Gerry, Reply to a Landholder, *id.*, at 298, 299, and at the ratifying conventions in the States, see, *e. g.*, 3 J. Elliot, Debates on the Federal Constitution 525, 540-541, 544-546 (1863) (Virginia Convention, statements of Mr. Mason and Mr. Henry); 4 *id., at 151, 154* (North Carolina Convention, statements of Mr. Bloodworth and Mr. Spencer).

Prior to adoption of the Amendment, these concerns were addressed by Congress in the Judiciary Act of 1789, 1 Stat. 73, which expressly directed, in providing for "reexamin[ation]" of civil judgments "upon a writ of error," that "there shall be no reversal in either [the Circuit or Supreme Court] . . . for any error of fact." § 22, 1 Stat. 84-85. That restriction remained in place until the 1948 revisions of the Judicial Code. See 62 Stat. 963, 28 U.S.C. § 2105 (1946 ed., Supp. II).

[2] The Amendment was relied upon at least twice to prevent actual new trials. In *Wonson* itself, Justice Story rejected the United States' claim of right to retry, on appeal, a matter unsuccessfully put before a jury in the District Court -- notwithstanding acceptance of such a practice under local law. The court based its ruling on statutory grounds, but its interpretation of its statutory jurisdiction was dictated by its view that a contrary interpretation would contravene the Seventh Amendment. 28 F. Cas., at 750. And in Justices v. Murray, 76 U.S. 274, 9 Wall. 274, 281, 19 L. Ed. 658 (1870), this Court relied on *Wonson* in invalidating under the Seventh Amendment a federal habeas statute that provided for removal of certain judgments from state courts for purposes of retrial in federal court.

the right to such transcription under state practices made applicable to federal courts by Congress. *Id., at 443* (emphasis deleted). This was so, the Court explained, because "the whole object" of the transcription was "to present the evidence here in order **[****69]** to establish the error of the verdict in matters of fact," *id., at 445* -- a mode of review simply unavailable on writ of error, see *id., at 446, 448*. The Court concluded that Congress had not directed federal courts to follow state practices that would change "the effect or conclusiveness of the verdict of the jury upon the facts litigated at the trial," *id., at 449*, because it had "the most serious doubts whether **[*453]** [that] would not be unconstitutional" under the *Seventh Amendment*, *id., at 448*.

> "This is a prohibition to the courts of the United States to re-examine any facts tried by a jury in any other manner. The only modes known to the common law to re-examine such facts, are the granting of a new trial by the court where the issue was tried, or to which the record was properly returnable; or the award of a venire facias de novo, by an appellate court, for some error of law which intervened in the proceedings.
> . . . .
>
> "If the evidence were now before us, it would not be competent for **[***690]** this court to reverse the judgment for any error in the verdict of the jury at the trial . . **[****70]** . ." *Id., at 447-449*.

Nor was the common-law proscription on reexamination limited to review of the correctness of the jury's determination of liability on the facts. No less than the existence of liability, the proper measure of damages "involves only a question of fact," *St. Louis, I. M. & S. R. Co. v. Craft, 237 U.S. 648, 661, 59 L. Ed. 1160, 35 S. Ct. 704 (1915)*, as does a "motion for a new trial based on the ground that the damages . . . are excessive," *Metropolitan R. Co. v. Moore, 121 U.S. 558, 574, 30 L. Ed. 1022, 7 S. Ct. 1334 (1887)*. As appeals from denial of such motions necessarily pose a factual question, courts of the United States are constitutionally forbidden to entertain them.

> "No error of law appearing upon the record, this court cannot reverse the judgment because, upon examination of the evidence, we may be of the opinion that the jury should have returned a verdict for a less amount. If the jury acted upon a gross mistake of facts, or were governed by some improper influence or bias, the remedy therefore rested with the court below, under its general **[*454]** power to set aside the verdict. **[****71]** . . . Whether [the refusal to exercise that power] was erroneous or not, our power is restricted by the Constitution to the determination of the questions of law arising upon the record. Our authority does not extend to a re-examination of facts which have been tried by the jury under instructions correctly defining the legal rights of parties. *Parsons* v. *Bedford*, [*supra*] . . . ." *Railroad Co. v. Fraloff, 100 U.S. 24, 31-32, 25 L. Ed. 531 (1879)*.

This view was for long years not only unquestioned in our cases, but repeatedly affirmed. [3]

[**72]** **[*455]** **[**2233]** B

Respondent's principal response to these cases, which

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[3] See, *e. g.*, *Wabash R. Co. v. McDaniels, 107 U.S. 454, 456, 27 L. Ed. 605, 2 S. Ct. 932 (1883)* ("That we are without authority to disturb the judgment upon the ground that the damages are excessive cannot be doubted. Whether the order overruling the motion for a new trial based upon that ground was erroneous or not, our power is restricted to the determination of questions of law arising upon the record. *Railroad Company v. Fraloff, 100 U.S. 24, 25 L. Ed. 531* [(1879)]"); *Arkansas Valley Land & Cattle Co. v. Mann, 130 U.S. 69, 75, 32 L. Ed. 854, 9 S. Ct. 458 (1889)* ("[H]owever it was ascertained by the court that the verdict was too large . . ., the granting or refusing a new trial in a Circuit Court of the United States is not subject to review by this court") (citing *Parsons v. Bedford, 3 Pet. 433 (1830)*; *Railroad Co. v. Fraloff, 100 U.S. 24, 25 L. Ed. 531 (1879)*); *Lincoln v. Power, 151 U.S. 436, 437-438, 38 L. Ed. 224, 14 S. Ct. 387 (1894)* ("It is not permitted for this court, sitting as a court of errors, in a case wherein damages have been fixed by the verdict of a jury, to take notice of [a claim of excessive damages] where the complaint is only of the action of the jury. . . . Where there is no reason to complain of the instructions, an error of the jury in allowing an unreasonable amount is to be redressed by a motion for a new trial") (citing *Parsons, supra*; *Fraloff, supra*); *Chicago, B. & Q. R. Co. v. Chicago, 166 U.S. 226, 242-246, 41 L. Ed. 979, 17 S. Ct. 581 (1897)*; *Southern Railway-Carolina Div. v. Bennett, 233 U.S. 80, 87, 58 L. Ed. 860, 34 S. Ct. 566 (1914)* ("[A] case of mere excess upon the evidence is a matter to be dealt with by the trial court. It does not present a question for reexamination here upon a writ of error") (citing *Lincoln, supra*); *Fairmount Glass Works v. Cub Fork Coal Co., 287 U.S. 474, 481-482, 77 L. Ed. 439, 53 S. Ct. 252 (1933)* ("The rule that this Court will not review the action of a federal trial court in granting or denying a motion for a new trial for error of fact has been settled by a long and unbroken line of decisions; and has been frequently applied where the ground of the motion was that the damages awarded by the jury were excessive or were inadequate") (footnotes omitted).

is endorsed by **[***691]** JUSTICE STEVENS, see *ante*, at 443-445, is that our forebears were simply wrong about the English common law. The rules of the common-law practice incorporated in the *Seventh Amendment*, it is claimed, did *not* prevent judges sitting in an appellate capacity from granting a new trial on the ground that an award was contrary to the weight of the evidence. This claim simply does not with-stand examination of the actual practices of the courts at common law. The weight of the historical record strongly supports the view of the common law taken in our early cases.

At common law, all major civil actions were initiated before panels of judges sitting at the courts of Westminster. Trial was not always held at the bar of the court, however. The inconvenience of having jurors and witnesses travel to Westminster had given rise to the practice of allowing trials to be held in the countryside, before a single itinerant judge. This *nisi prius* trial, as it was called, was limited to the jury's deciding a matter of fact in dispute; once that was accomplished, the verdict was entered **[****73]** on the record which -- along with any exceptions to the instructions or rulings of the *nisi prius* judge -- was then returned to the en banc court at Westminster. See generally 1 Holdsworth, History of English Law, at 223-224, 278-282; G. Radcliffe & G. Cross, The English Legal System 90-91, 183-186 (3d ed. 1954). Requests for new trials were made not to the *nisi prius* judge, but to the en banc court, prior to further proceedings and entry of judgment. See 1 Holdsworth, *supra*, at 282; Riddell, New Trial at the Common Law, 26 Yale L. J. 49, 53, 57 (1916). Such motions were altogether separate from appeal on writ of error, which followed the entry of judgment. **[*456]** 1 Holdsworth, *supra*, at 213-214; Radcliffe & Cross, *supra*, at 210-212. [4]

[**74]** Nonetheless, respondent argues, the role of the en banc court at Westminster was essentially that of an appellate body, reviewing the proceedings below; and those appellate judges *were* capable of examining the evidence, and of granting a new trial when, in their view, the verdict was contrary to the weight of the evidence. See Blume, Review of Facts in Jury Cases -- The *Seventh Amendment*, 20 J. Am. Jud. Soc. 130, 131 (1936); Riddell, *supra*, at 55-57, 60. There are two difficulties with this argument. The first is the characterization of the court at Westminster as an appellate body. The **[**2234]** court's role with respect to the initiation of the action, the entertaining of motions for new trial, and the entry of judgment was the same in all cases -- whether the cause was tried at the bar or at *nisi prius*. To regard its actions in deciding a motion for a new trial as "appellate" in the latter instance supposes a functional distinction where none existed. The second difficulty is that when the trial had been held at *nisi prius*, the judges of the en banc court apparently would order a new trial only if **[***692]** the *nisi prius* judge certified that he was dissatisfied **[****75]** with the verdict. To be sure, there are many cases where no mention is made of the judge's certificate, but there are many indications that it was a required predicate to setting aside a verdict rendered at *nisi prius*, and respondent has been unable to identify a single case where a new trial was granted in the absence of such certification. In short, it would seem that a new trial could not **[*457]** be had except upon the approval of the judge who presided over the trial and heard the evidence. [5]

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[4] The grounds for granting a new trial were "want of notice of trial; or any flagrant misbehavior of the party prevailing towards the jury, which may have influenced their verdict; or any gross misbehavior of the jury among themselves: also if it appears by the judge's report, certified to the court, that the jury have brought in a verdict without or contrary to evidence, so that he is reasonably dissatisfied therewith; or if they have given exorbitant damages; or if the judge himself has misdirected the jury, so that they found an unjustifiable verdict." 3 W. Blackstone, Commentaries on the Laws of England 387 (1768) (footnotes omitted; emphases deleted).

[5] See *ibid.* (new trial would be granted "if it appears by the judge's report, certified to the court, that the jury have brought in a verdict without or contrary to evidence, so that he is reasonably dissatisfied therewith"). See, *e. g., Berks* v. *Mason*, Say. 264, 265, 96 Eng. Rep. 874, 874-875 (K. B. 1756); *Bright* v. *Eynon*, 1 Burr. 390, 97 Eng. Rep. 365 (K. B. 1757); see also Note, Limitations on Trial by Jury in Illinois, 19 Chi.-Kent L. Rev. 91, 92 (1940) ("An exhaustive examination of the early English cases has revealed not a single case where an English court at common law ever granted a new trial, as being against the evidence, unless the judge or judges who sat with the jury stated in open court, or certified, that the verdict was against the evidence and he was dissatisfied with the verdict").

JUSTICE STEVENS understands Blackstone to say that new trials were granted for *excessiveness* even where the *nisi prius* judge was not dissatisfied with the damages awarded, see *ante*, at 444-445. Blackstone's phrasing certainly allows for this reading, see n. 4, *supra*, but what indications we have suggest that the dissatisfaction of the presiding judge played the same role where the motion for new trial was based on a claim of excessive damages as where based on a claim of an erroneous verdict. See, *e. g., Boulsworth* v. *Pilkington*, Jones,

[**76]** I am persuaded that our prior cases were correct that, at common law, "reexamination" of the facts found by a jury could be undertaken only by the trial court, and that appellate review was restricted to writ of error which could challenge the judgment only upon matters of law. Even if there were some doubt on the point, we should be hesitant to advance our view of the common law over that of our forbears, who were far better acquainted with the subject than we are. But in any event, the question of how to apply the "rules of the common law" to federal appellate consideration of motions **[*458]** for new trials is one that has already been clearly and categorically answered, by our precedents. As we said in *Dimick v. Schiedt, 293 U.S. 474, 79 L. Ed. 603, 55 S. Ct. 296 (1935)*, in discussing the status of remittitur under "the rules of the common law," a doctrine that "has been accepted as the law for more than a hundred years and uniformly applied in the federal courts during that time" and "finds some support in the practice of the English courts prior to the adoption of the Constitution" will not lightly "be reconsidered or disturbed," *id., at 484-485*. **[****77]** The time to question whether orders on motions for a new trial were in fact reviewable at common law has long since passed. Cases of this Court reaching back into the early 19th century establish that the Constitution forbids federal appellate courts to "reexamine" a fact found by the jury at trial; and that this prohibition encompasses review of a district **[***693]** court's refusal to set aside a verdict as contrary to the weight of the evidence.

C

The Court, as is its wont of late, all but ignores the relevant history. It acknowledges that federal appellate review of district-court refusals to set aside jury awards **[**2235]** as against the weight of the evidence was "once deemed inconsonant with the *Seventh Amendment's* Reexamination Clause," *ante*, at 434, but gives no indication of why ever we held that view; and its citation of only one of our cases subscribing to that proposition fails to convey how long and how clearly it was a fixture of federal practice, see *ibid.* (citing only *Lincoln v. Power, 151 U.S. 436, 38 L. Ed. 224, 14 S. Ct. 387 (1894)*). That our earlier cases are so poorly recounted is not surprising, however, given the scant analysis devoted to **[****78]** the conclusion that "appellate review for abuse of discretion is reconcilable with the *Seventh Amendment*," *ante*, at 435.

No precedent of this Court affirmatively supports that proposition. The cases upon which the Court relies neither **[*459]** affirmed nor rejected the practice of appellate weight-of-the-evidence review that has been adopted by the courts of appeals -- a development that, in light of our past cases, amounts to studied waywardness by the intermediate appellate bench. Our unaccountable reluctance, in *Grunenthal v. Long Island R. Co., 393 U.S. 156, 158, 21 L. Ed. 2d 309, 89 S. Ct. 331 (1968)*, and *Neese v. Southern R. Co., 350 U.S. 77, 100 L. Ed. 60, 76 S. Ct. 131 (1955)*, to stand by our precedents, and the undeniable illogic of our disposition of those two cases -- approving ourselves a district court denial of a new trial motion, so as not to have to confront the lawfulness of reversal by the court of appeals -- is authority of only the weakest and most negative sort. Nor can any weight be assigned to our statement in *Browning-Ferris Industries of Vt., Inc. v. Kelco Disposal, Inc., 492 U.S. 257, 279, 106 L. Ed. 2d 219, 109 S. Ct. 2909 (1989)*, **[****79]** seemingly approving appellate abuse-of-discretion review of denials of new trials where punitive damages are claimed to be excessive. *Browning-Ferris*, like *Grunenthal* and *Neese*, explicitly avoided the question that is before us today, see *492 U.S. at 279, n. 25*. Even more significantly, *Browning-Ferris* involved review of a jury's *punitive* damages award. Unlike the measure of actual damages suffered, which presents a question of historical or predictive fact, see, *e. g., Craft, 237 U.S. at 661*, the level of punitive damages is not really a "fact" "tried" by the jury. In none of our cases holding that the Reexamination Clause prevents federal appellate review of claims of excessive damages does it appear that the damages had a truly "punitive" component.

In any event, it is not *this* Court's statements that the Court puts forward as the basis for dispensing with our prior cases. Rather, it is the Courts of Appeals' unanimous "agree[ment]" that they may review trial-court refusals to set aside jury awards claimed to be against the weight of the evidence. *Ante*, at 435. This current unanimity is deemed controlling, notwithstanding **[****80]** the "relatively late" origin of the practice, *ante*, at 434, and without *any* inquiry into the

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T. 200, 84 Eng. Rep. 1216 (K. B. 1685); *Redshaw* v. *Brook*, 2 Wils. K. B. 405, 95 Eng. Rep. 887 (C. P. 1769); *Sharpe* v. *Brice*, 2 Black. W. 942, 96 Eng. Rep. 557 (C. P. 1774). The cases cited by JUSTICE STEVENS, *ante*, at 444-445, n. 5, are not at all to the contrary: In one, the case was tried at the bar of the court, so that there was no *nisi prius* judge, see *Wood* v. *Gunston*, Sty. 466, 82 Eng. Rep. 867 (K. B. 1655); in the other, the judge who had presided at trial was on the panel that ruled on the new trial motion, and recommended a new trial, see *Bright* v. *Eynon, supra*, at 390-391, 396-397, 97 Eng. Rep., at 365, 368.

[*460] reasoning set forth **[***694]** in those Court of Appeals decisions. [6] **[****81]** The Court contents itself with citations of two federal appellate cases and the assurances of two leading treatises that the view (however meager its intellectual provenance might be) is universally held. See *ante*, at 435-436. To its credit, one of those treatises describes the "dramatic change in doctrine" represented by appellate abuse-of-discretion review of denials of new trial orders generally as having been "accomplished by a blizzard of dicta" that, through repetition alone, has "given legitimacy to a doctrine of doubtful constitutionality." 11 C. Wright, A. Miller, & M. Kane, Federal Practice and Procedure § 2819, pp. 200, 204 (2d ed. 1995). [7]

[2236]** The Court's only suggestion as to what rationale might underlie approval of abuse-of-discretion review is to be found in a quotation from *Dagnello v. Long Island R. Co., 289 F.2d 797 (CA2 1961)*, to the effect that review of denial of a new trial motion, if conducted under a sufficiently deferential standard, poses only "'a question of law.'" *Ante*, at 435 (quoting *Dagnello, supra, at 806*). But that is not the test that the *Seventh Amendment* sets forth. Whether **[****82]** or not it **[*461]** is possible to characterize an appeal of a denial of new trial as raising a "legal question," it is not possible to review such a claim without engaging in a "reexamin[ation]" of the "facts tried by the jury" in a manner "otherwise" than allowed at common law. Determining whether a particular award is excessive requires that one first determine the nature and extent of the harm -- which undeniably requires reviewing the facts of the case. That the court's review also entails application of a legal standard (whether "shocks the conscience," "deviates materially," or some other) makes no difference, for what is necessarily *also* required is *reexam-ination of facts* found by the jury.

In the last analysis, the Court frankly abandons any pretense at faithfulness to the common law, suggesting that "the meaning" of the Reexamination Clause was not "fixed at 1791," *ante*, at 436, n. 20, contrary to the view that all our prior discussions of the Reexamination Clause have adopted, see *supra, at 451-454*. The Court believes we can ignore the very explicit command that "no fact tried by a jury shall be otherwise reexamined in any Court of the United States, **[****83]** than according to the rules of the common law" because, after all, we have not insisted that juries be all male, or **[***695]** consist of 12 jurors, as they were at common law. *Ante*, at 436, n. 20. This is a desperate analogy, since there is of course no comparison between the specificity of the command of the Reexamination Clause and the specificity of the command that there be a "jury." The footnote abandonment of our traditional view of the Reexamination Clause is a major step indeed. [8]

[**84]** **[*462]** II

The Court's holding that federal courts of appeals may review district court denials of motions for new trials for error of fact is not the only novel aspect of today's decision. The Court also directs that the case be

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[6] The Second Circuit, notwithstanding its practice with respect to excessiveness claims, will not review a district court's determination that the jury's liability ruling was supported by the weight of the evidence, see *Stonewall Ins. Co. v. Asbestos Claims Management, 73 F.3d 1178, 1199 (1995)* (such a decision is "one of those few rulings that is simply unavailable for appellate review"), and the Eighth Circuit has questioned whether the *Seventh Amendment* permits appellate review of such determinations, see *Thongvanh v. Thalacker, 17 F.3d 256, 259-260 (1994)*; see also *White v. Pence, 961 F.2d 776, 782 (1992)*.

[7] I am at a loss to understand the Court's charge that keeping faith with our precedents -- and requiring that the courts of appeals do likewise -- would "'destroy the uniformity of federal practice,'" *ante*, at 436, n. 19. I had thought our decisions established uniformity. And as for commentators' observations that it would be "'astonishing'" for us actually to heed our precedents, see *ibid.*, quoting 11 C. Wright, A. Miller, & M. Kane, Federal Practice and Procedure § 2820, p. 212 (2d ed. 1995), they are no more than a prediction of inconstancy -- which the Court today fulfills.

[8] *Gasoline Products Co. v. Champlin Refining Co., 283 U.S. 494, 75 L. Ed. 1188, 51 S. Ct. 513 (1931)*, is the only case cited in the Court's footnote that arguably involved the slightest departure from common-law practices regarding review of jury findings. It held, to be sure, that new trial could be ordered on damages alone, even though at common law there was no practice of setting a verdict aside in part. But it did so only after satisfying itself that the change was one of "form" rather than "substance," quoting Lord Mansfield to the effect that "'for form's sake, we must set aside the whole verdict.'" *Id., at 498* (quoting *Edie* v. *East India Co.*, 1 Black W. 295, 298, 96 Eng. Rep. 166, 167 (K. B. 1761)). It can hardly be maintained that whether or not a jury's damages award may be set aside on appeal is a matter of form. The footnote also cites 9A C. Wright & A. Miller, Federal Practice and Procedure § 2522 (2d ed. 1995) for its discussion of *Federal Rule of Civil Procedure 50(b)*, which permits post-trial motion for judgment as a matter of law. The Court neglects to mention that that discussion states: "The Supreme Court held that reservation of the decision in this fashion had been recognized at common law . . . ." *Id.*, § 2522, at 245.

remanded to the District Court, so that it may "test the jury's verdict against CPLR § 5501(c)'s 'deviates materially' standard," *ante*, at 439. This disposition contradicts the principle that "the proper role of the trial and appellate courts in the federal system in reviewing the size of jury verdicts is . . . a matter of federal law." Donovan v. Penn Shipping Co., 429 U.S. 648, 649, 51 L. Ed. 2d 112, 97 S. Ct. 835 (1977) *(per curiam)*.

The Court acknowledges that state procedural rules cannot, as a general matter, be permitted to interfere with the allocation of functions in the federal court system, see *ante*, at 436-437. Indeed, it is at least partly for this reason that the Court rejects direct application **[**2237]** of § 5501(c) at the appellate level as inconsistent with an "'essential characteristic'" of the federal court system -- by which the Court presumably means abuse-of-discretion review of denials of **[****85]** motions for new trials. See *ante*, at 431, 437-438. But the scope of the Court's concern is oddly circumscribed. The "essential characteristic" of the federal jury, and, more specifically, the role of the federal trial court in reviewing jury judgments, apparently counts for little. The Court approves the "accommodation" **[*463]** achieved by having district courts review jury verdicts under the "deviates materially" standard, because it regards that as a means of giving effect to the State's purposes "without disrupting the federal system," *ante*, at 437. But changing the standard by which trial judges review jury verdicts *does* disrupt the federal system, and is plainly inconsistent with the "strong federal policy against allowing state rules to disrupt the judge-jury relationship in the federal court." Byrd v. Blue Ridge Rural Elec. Cooperative, Inc., 356 U.S. 525, 538, 2 L. Ed. 2d 953, ***[***696]*** 78 S. Ct. 893 (1958). [9] The Court's opinion does not even acknowledge, let alone address, this dislocation.

[**86]** We discussed precisely the point at issue here in Browning-Ferris Industries of Vt., Inc. v. Kelco Disposal, Inc., 492 U.S. 257, 106 L. Ed. 2d 219, 109 S. Ct. 2909 (1989), and gave an answer altogether contrary to the one provided today. *Browning-Ferris* rejected a request to fashion a federal common-law rule limiting the size of punitive damages awards in federal courts, reaf-firming the principle of Erie R. Co. v. Tompkins, 304 U.S. 64, 82 L. Ed. 1188, 58 S. Ct. 817 (1938), that "in a diversity action, or in any other lawsuit where state law provides the basis of decision, the propriety of an award of punitive damages . . . and the factors the jury may consider in determining their amount, are questions of state law." 492 U.S. at 278. But the opinion expressly stated that "federal law . . . will control on those issues involving the proper review of the jury award by a federal district court and court of appeals." Id., at 278-279. "In reviewing an award of punitive damages," it said, "the role of the district court is to determine whether the jury's verdict is within the confines set by state law, and to **[****87]** determine, by reference to federal standards developed under Rule 59, whether a new trial or remittitur should be ordered." Id., at 279. The same distinction necessarily applies where the **[*464]** judgment under review is for compensatory damages: State substantive law controls what injuries are compensable and in what amount; but federal standards determine whether the award exceeds what is lawful to such degree that it may be set aside by order for new trial or remittitur. [10]

[**88]** The Court does not disavow those statements in *Browning-Ferris* (indeed, it does not even discuss them), but it presumably overrules them, at least where the state rule that governs "whether a new trial or remittitur should be ordered" is characterized as "substantive" in nature. That, at any rate, is the reason the Court asserts for giving § 5501(c) dispositive effect. The objective of that provision, the Court states, "is manifestly substantive," *ante*, at 429, since it operates to "control how much a plaintiff can be awarded" by "tightening the range of tolerable awards," *ante*, at 425, 426. Although "less readily classified" as substantive than "a statutory cap on damages," it nonetheless "was designed to provide an analogous control," *ante*, at 428, 429, by making a new trial mandatory when the award "deviat[es] materially" from what is reasonable, see *ante*, at 428-429.

[2238]** I do not see how this can be so. It seems to me quite wrong to regard this provision as a "substantive" rule **[***697]** for *Erie* purposes. The "analogy" to "a statutory cap on damages," *ante*, at 428,

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[9] Since I reject application of the New York standard on other grounds, I need not consider whether it constitutes "reexamination" of a jury's verdict in a manner "otherwise . . . than according to the rules of the common law."

[10] JUSTICE STEVENS thinks that if an award "'exceeds what is lawful,'" the result is "legal error" that "may be corrected" by the appellate court. *Ante*, at 443, n. 2. But the sort of "legal error" involved here is the imposition of legal consequences (in this case, damages) in light of *facts* that, under the law, may not warrant them. To suggest that every fact may be reviewed, because what may ensue from an erroneous factual determination is a "legal error," is to destroy the notion that there is a factfinding function reserved to the jury.

429, fails utterly. There is an absolutely fundamental distinction between **[****89]** a *rule of law* such as that, which would ordinarily be imposed upon the jury in the trial court's instructions, and a *rule of review*, which simply determines how closely the jury verdict will be scrutinized for **[*465]** compliance with the instructions. A tighter standard for reviewing jury determinations can no more plausibly be called a "substantive" disposition than can a tighter appellate standard for reviewing trial-court determinations. The one, like the other, provides additional assurance *that the law has been complied with*; but the other, like the one, *leaves the law unchanged*.

The Court commits the classic *Erie* mistake of regarding whatever changes the outcome as substantive, see *ante*, at 428-431. That is not the only factor to be considered. See *Byrd, supra, at 537* ("Were 'outcome' the only consideration, a strong case might appear for saying that the federal court should follow the state practice. But there are affirmative countervailing considerations at work here"). Outcome-determination "was never intended to serve as a talisman," *Hanna v. Plumer, 380 U.S. 460, 466-467, 14 L. Ed. 2d 8, 85 S. Ct. 1136 (1965)*, **[****90]** and does not have the power to convert the most classic elements of the *process* of assuring that the law is observed into the substantive law itself. The right to have a jury make the findings of fact, for example, is generally thought to favor plaintiffs, and that advantage is often thought significant enough to be the basis for forum selection. But no one would argue that *Erie* confers a right to a jury in federal court wherever state courts would provide it; or that, were it not for the *Seventh Amendment*, *Erie* would require federal courts to dispense with the jury whenever state courts do so.

In any event, the Court exaggerates the difference that the state standard will make. It concludes that different outcomes are likely to ensue depending on whether the law being applied is the state "deviates materially" standard of *§ 5501(c)* or the "shocks the conscience" standard. See *ante*, at 429-430. Of course it is not the federal *appellate* standard but the federal *district-court* standard for granting new trials that must be compared with the New York standard to determine whether substantially different results will obtain -- and it is far from clear that the **[****91]** district-court standard **[*466]** *ought* to be "shocks the conscience." [11] Indeed, it is not even clear (as the Court asserts) that "shocks the conscience" *is* the standard (erroneous or not) actually applied by the district courts of the Second Circuit. The Second Circuit's test for reversing a grant of a new trial for an excessive verdict is whether the award was "*clearly* within the maximum limit of a reasonable range," *Ismail v. Cohen, 899 F.2d 183, 186 (CA2 1990)* (internal quotation marks omitted), so any district court that uses that standard **[***698]** will be affirmed. And while many district-court decisions express the "shocks the conscience" criterion, see, *e. g., Koerner v. Club Mediterranee, S. A., 833 F. Supp. 327, 333 (SDNY 1993)*, some have used a standard of "indisputably egregious," *Banff v. Express, Inc., 921 F. Supp. 1065, 1069 (SDNY 1995)*, or have adopted the inverse of the Second Circuit's test for reversing a grant of new trial, namely, "*clearly* outside the maximum limit of a reasonable range," *Paper Corp. v. Schoeller Technical Papers, Inc., 807 F. Supp. 337, 350-351 (SDNY 1992)*. **[****92]** Moreover, some decisions that *say* "shocks the conscience" in fact apply a rule much less stringent. One case, for example, says that *any* award that would not be sustained under the New York "deviates materially" rule "shocks the conscience." See *In re Joint Eastern & S. Dist. Asbestos Litigation, 798 F. Supp. 925, 937* (E&SDNY 1992), rev'd on other grounds, *995 F.2d 343, 346 (CA2 1993)*. In sum, it is at **[**2239]** least highly questionable whether the consistent outcome differential claimed by the Court even exists. What seems to me far more likely to produce forum shopping is the consistent difference between the state and federal *appellate* standards, which the Court leaves untouched. Under the Court's **[*467]** disposition, the Second Circuit reviews only for abuse of discretion, whereas New York's appellate courts engage in a *de novo* review for material deviation, giving the defendant a double shot at getting the damages award set aside. The only result that would produce the conformity the Court erroneously believes *Erie* requires is the one adopted by the Second Circuit and rejected by the Court: *de novo* federal appellate **[****93]** review under the *§ 5501(c)* standard.

To say that application of *§ 5501(c)* in place of the federal standard will not consistently produce disparate results is not to suggest that the decision the Court has made today is not a momentous one. The *principle* that

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[11] That the "shocks the conscience" standard was not the traditional one would seem clear from the opinion of Justice Story, quoted approvingly by the Court, *ante*, at 433, to the effect that remittitur should be granted "if it should clearly appear that the jury . . . have given damages excessive in relation to the person or the injury." *Blunt v. Little, 3 F. Cas. 760, 761-762* (No. 1,578) (CC Mass. 1822).

the state standard governs is of great importance, since it bears the potential to destroy the uniformity of federal practice and the integrity of the federal court system. Under the Court's view, a state rule that directed courts "to determine that an award is excessive or inadequate if it deviates *in any degree* from **[****94]** *the proper measure of compensation*" would have to be applied in federal courts, effectively requiring federal judges to determine the amount of damages *de novo*, and effectively taking the matter away from the jury entirely. Cf. *Byrd, 356 U.S. at 537-538*. Or consider a state rule that allowed the defendant a second trial on damages, with judgment ultimately in the amount of the lesser of two jury awards. Cf. *United States v. Wonson, 28 F. Cas., at 747-748* (describing Massachusetts practice by which a second jury trial could be had on appeal). Under the reasoning of the Court's opinion, even such a rule as that would have to be applied in the federal courts.

The foregoing describes why I think the Court's *Erie* analysis is flawed. But in my view, one does not even reach the *Erie* question in this case. The standard to be applied by a district court in ruling on a motion for a new trial is set forth in *Rule 59 of the Federal Rules of Civil Procedure*, which provides that "[a] new trial may be granted . . . for any of the reasons for which new trials have heretofore been granted in **[*468]** actions at law *in the courts of the* **[****95]** *United States*" (emphasis added). That is **[***699]** undeniably a federal standard. [12] Federal district courts in the Second Circuit have interpreted that standard to permit the granting of new trials where "'it is quite clear that the jury has reached a seriously erroneous result'" and letting the verdict stand would result in a "'miscarriage of justice.'" *Koerner v. Club Mediterranee, S. A., supra, at 331* (quoting *Bevevino v. Saydjari, 574 F.2d 676, 684 (CA2 1978)*). Assuming (as we have no reason to question) that this is a correct interpretation of what *Rule 59* requires, it is undeniable that the Federal Rule is "'sufficiently broad' to cause a 'direct collision' with the state law or, implicitly, to 'control the issue' before the court, thereby leaving no room for the operation of that law." *Burlington Northern R. Co. v. Woods, 480 U.S. 1, 4-5, 94 L. Ed. 2d 1, 107 S. Ct. 967 (1987)*. It is simply not possible to give controlling effect both to the federal standard and the state standard in reviewing the jury's award. That being so, the court has no choice but to apply the Federal Rule, which is an exercise of what **[****96]** we have called Congress's "power to regulate matters which, though falling within the uncertain area between substance and procedure, are rationally capable of classification as either," *Hanna, 380 U.S. at 472*.

* * *

[2240]** There is no small irony in the Court's declaration today that appellate review of refusals to grant new trials for error of fact is "a control necessary **[****97]** and proper to the fair administration **[*469]** of justice," *ante*, at 435. It is objection to *precisely* that sort of "control" by federal appellate judges that gave birth to the Reexamination Clause of the *Seventh Amendment*. Alas, those who drew the Amendment, and the citizens who approved it, did not envision an age in which the Constitution means whatever this Court thinks it ought to mean -- or indeed, whatever the courts of appeals have recently thought it ought to mean.

When there is added to the revision of the *Seventh Amendment* the Court's precedent-setting disregard of Congress's instructions in *Rule 59*, one must conclude that this is a bad day for the Constitution's distinctive Article III courts in general, and for the role of the jury in those courts in particular. I respectfully dissent.

References

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[12] I agree with the Court's entire progression of reasoning in its footnote 22, *ante*, at 437, leading to the conclusion that *state* law must determine "whether damages are excessive." But the question whether damages are excessive is quite separate from the question of when a jury award may be set aside for excessiveness. See *supra, at 465*. It is the latter that is governed by *Rule 59*; as *Browning-Ferris* said, district courts are "to determine, by reference to *federal standards developed under Rule 59*, whether a new trial or remittitur should be ordered," *492 U.S. at 279* (emphasis added).

People v. Weaver

Court of Appeals of New York

March 24, 2009, Argued; May 12, 2009, Decided

No. 53

Reporter

12 N.Y.3d 433 *; 909 N.E.2d 1195 **; 882 N.Y.S.2d 357 ***; 2009 N.Y. LEXIS 944 ****; 2009 NY Slip Op 3762

[1] The People of the State of New York, Respondent, v Scott C. Weaver, Appellant.

Prior History: Appeal, by permission of a Justice of the Appellate Division of the Supreme Court in the Third Judicial Department, from an order of that Court, entered June 5, 2008. The Appellate Division affirmed a judgment of the Supreme Court, Albany County (Dan Lamont, J.), which had convicted defendant, upon a jury verdict, of burglary in the third degree and attempted grand larceny in the second degree.

People v. Weaver, 52 AD3d 138, 860 NYS2d 223, 2008 N.Y. App. Div. LEXIS 4811 (N.Y. App. Div. 3d Dep't, 2008), reversed.

Disposition: [**1]** Order reversed, defendant's motion to suppress the evidence obtained from the GPS tracking device granted and a new trial ordered.

Case Summary

Procedural Posture

Defendant appealed an order by the Appellate Division of the Supreme Court in the Third Judicial Department (New York) that upheld the denial of his motion to suppress the evidence obtained from a global positioning system (GPS) tracking device; defendant claimed that his constitutional rights were violated by the warrantless placement and use of the device.

Overview

In the early morning hours, a state police investigator crept underneath defendant's street-parked van and placed a GPS tracking device inside the bumper. The device remained in place for 65 days, constantly monitoring the position of the van. The device's battery required replacement during the monitoring period, which resulted in yet another nocturnal visit by the investigator to the van's undercarriage. The nonstop surveillance was conducted without a warrant. Thereafter, the GPS readings were admitted at defendant's burglary trial. The Court of Appeals found, inter alia, that the GPS surveillance was not a mere enhancement of human sensory capacity. The residual privacy expectation that defendant retained in his vehicle, while perhaps small, was at least adequate to support his claim of a violation of his *N.Y. Const. art. I, § 12* right to be free of unreasonable searches and seizures. The search was illegal because it was executed without a warrant and without justification under any exception to the warrant requirement. Accordingly, defendant's motion to suppress should not have been denied.

Outcome

The order was reversed, defendant's motion to suppress was granted, and a new trial was ordered.

Counsel: *Smith Hernandez LLC,* Troy (Trey Smith and Matthew C. Hug of counsel), for appellant. I. County Court erred reversibly in failing to suppress GPS evidence obtained by the police without a warrant. (*United States v Knotts, 460 US 276, 103 S Ct 1081, 75 L Ed 2d 55*; *Katz v United States, 389 US 347, 88 S Ct 507, 19 L Ed 2d 576*; *Lopez v United States, 373 US 427, 83 S Ct 1381, 10 L Ed 2d 462*; *Olmstead v United States, 277 US 438, 48 S Ct 564, 72 L. Ed. 944*; *Smith v Maryland, 442 US 735, 99 S Ct 2577, 61 L Ed 2d 220*; *People v Guerra, 65 NY2d 60, 478 NE2d 1319, 489 NYS2d 718*; *United States v Karo, 468 US 705, 104 S Ct 3296, 82 L Ed 2d 530*; *United States v Garcia, 474 F3d 994*; *New York v Class, 475 US 106, 106 S Ct 960, 89 L Ed 2d 81*; *People v Hall, 10 NY3d 303, 886 NE2d 162, 856 NYS2d 540*.) II. Supreme Court erred in failing to instruct the jury that Amber Roche was an accomplice as a matter of law to the K-Mart burglary. (*People v Berger, 52 NY2d 214, 418 NE2d 1291, 437 NYS2d 272*; *People v Cohen, 73 AD2d 603, 422 NYS2d 117*; *People v Cona, 49 NY2d 26, 399 NE2d 1167, 424 NYS2d 146*; *People v Rugg, 91 AD2d 692, 457 NYS2d 613*; *People*

v Bell, 32 AD2d 781, 302 NYS2d 946.) III. Alternatively, Supreme Court erred in failing to submit to the jury the issue of whether Amber Roche was an accomplice to the K-Mart burglary. (*People v Caban, 5 NY3d 143, 833 NE2d 213, 800 NYS2d 70*; *People v Dorta, 46 NY2d 818, 386 NE2d 1081, 414 NYS2d 114*; *People v Prude, 2 AD3d 1318, 769 NYS2d 680*, *3 NY3d 646, 816 NE2d 207*, *782 NYS2d 417*; *People v Durham, 248 AD2d 820, 670 NYS2d 235*, *91 NY2d 972, 695 NE2d 720, 672 NYS2d 851*; *People v O'Malley, 236 AD2d 736, 654 NYS2d 840*; *People v Gjonaj, 179 AD2d 773, 579 NYS2d 140*, *79 NY2d 947, 592 NE2d 809, 583 NYS2d 201*; *People v DeMatteis, 186 AD2d 460, 589 NYS2d 153*, *81 NY2d 787, 610 NE2d 406, 594 NYS2d 733*; *People v Tutora, 42 AD2d 952, 348 NYS2d 750*.) IV. Supreme Court erred in permitting evidence of alleged witness tampering by defendant. (*People v Bennett, 79 NY2d 464, 593 NE2d 279, 583 NYS2d 825*; *People v Reddy, 261 NY 479, 185 NE 705*; *People v Moses, 63 NY2d 299, 472 NE2d 4, 482 NYS2d 228*; *People v Alexander, 37 NY2d 202, 333 NE2d 157, 371 NYS2d 876*; *People v Shilitano, 218 NY 161, 112 NE 733, 34 N.Y. Cr. 358*; *People v Yazum, 13 NY2d 302, 196 NE2d 263, 246 NYS2d 626*; *People v Leyra, 1 NY2d 199, 134 NE2d 475, 151 NYS2d 658*; *People v Lewis, 69 NY2d 321, 506 NE2d 915, 514 NYS2d 205*; *People v Jackson, 218 AD2d 556, 630 NYS2d 715*; *People v Harper, 75 NY2d 313, 552 NE2d 148, 552 NYS2d 900*.) V. The evidence was insufficient as a matter of law to sustain the convictions. (*People v Moses, 63 NY2d 299, 472 NE2d 4, 482 NYS2d 228*.)

P. David Soares, District Attorney, Albany (Christopher D. Horn of counsel), for respondent. I. Placing a GPS device on the undercarriage of a vehicle without a warrant does not violate the *Fourth Amendment* or *article I, § 12 of the New York Constitution.* (*Katz v United States, 389 US 347, 88 S Ct 507, 19 L Ed 2d 576*; *Lewis v United States, 385 US 206, 87 S Ct 424, 17 L Ed 2d 312*; *United States v Miller, 425 US 435, 96 S Ct 1619, 48 L Ed 2d 71*; *Cardwell v Lewis, 417 US 583, 94 S Ct 2464, 41 L Ed 2d 325*; *United States v Knotts, 460 US 276, 103 S Ct 1081, 75 L Ed 2d 55*; *Kyllo v United States, 533 US 27, 121 S Ct 2038, 150 L Ed 2d 94*; *Vernonia School Dist. 47J v Acton, 515 US 646, 115 S Ct 2386, 132 L Ed 2d 564*; *United States v Moran, 349 F Supp 2d 425*; *New York v Class, 475 US 106, 106 S Ct 960, 89 L Ed 2d 81*; *United States v Rascon-Ortiz, 994 F2d 749*.) II. Supreme Court properly rejected defendant's request for an accomplice instruction. (*People v Caban, 5 NY3d 143, 833 NE2d 213, 800 NYS2d 70*; *People v Besser, 96 NY2d 136, 749 NE2d 727, 726 NYS2d 48*; *People v Cobos, 57 NY2d 798, 441 NE2d 1106, 455 NYS2d 588*; *People v Basch, 36 NY2d 154, 325 NE2d 156, 365 NYS2d 836*; *People v Torello, 94 AD2d 857, 463 NYS2d 607*; *People v Faulkner, 36 AD3d 951, 826 NYS2d 831*.) III. Supreme Court properly rejected defendant's request to submit to the jury the issue of whether Amber Roche was an accomplice. (*People v Basch, 36 NY2d 154, 325 NE2d 156, 365 NYS2d 836*; *People v Sweet, 78 NY2d 263, 577 NE2d 1030, 573 NYS2d 438*.) IV. Supreme Court properly admitted testimony regarding witness tampering. (*People v De Perno, 101 AD2d 1003, 476 NYS2d 667*; *People v Shilitano, 218 NY 161, 112 NE 733, 34 N.Y. Cr. 358*; *People v Bennett, 79 NY2d 464, 593 NE2d 279, 583 NYS2d 825*; *People v Yazum, 13 NY2d 302, 196 NE2d 263, 246 NYS2d 626*; *People v Leyra, 1 NY2d 199, 134 NE2d 475, 151 NYS2d 658*; *People v Crimmins, 36 NY2d 230, 326 NE2d 787, 367 NYS2d 213*.) V. The verdict was based upon legally sufficient evidence. (*People v Craft, 36 AD3d 1145, 827 NYS2d 376*; *People v Parker, 29 AD3d 1161, 814 NYS2d 818*, *7 NY3d 907, 860 NE2d 980, 827 NYS2d 679*; *People v Contes, 60 NY2d 620, 454 NE2d 932, 467 NYS2d 349*; *Jackson v Virginia, 443 US 307, 99 S Ct 2781, 61 L Ed 2d 560*; *People v Ficarrota, 91 NY2d 244, 691 NE2d 1017, 668 NYS2d 993*; *People v Cabey, 85 NY2d 417, 649 NE2d 1164, 626 NYS2d 20*; *People v Bleakley, 69 NY2d 490, 508 NE2d 672, 515 NYS2d 761*.)

Moskowitz, Book & Walsh, LLP, New York City (Susan J. Walsh of counsel), Norman L. Reimer, Washington, D.C., Ivan J. Dominguez, *Green & Willstatter,* White Plains (Richard D. Willstatter of counsel), *Lee Tien,* San Francisco, California, *Rajdeep Singh Jolly,* Washington, D.C., *Alfred O'Connor,* Albany, *Arnold & Porter LLP,* Washington, D.C. (Stephen M. Sacks of counsel), *Abed A. Ayoub,* and Nadhira F. Al-Khalili for National Association of Criminal Defense Lawyers and others, amici curiae. This Court should hold that surreptitious implantation of a GPS monitoring device in an individual's vehicle by law enforcement and around-the-clock electronic tracking and recording of movements without spatial or temporal limitation is impermissible, absent a warrant based upon probable cause. (*United States v Knotts, 460 US 276, 103 S Ct 1081, 75 L Ed 2d 55*; *United States v Jacobsen, 466 US 109, 104 S Ct 1652, 80 L Ed 2d 85*; *Olmstead v United States, 277 US 438, 48 S Ct 564, 72 L Ed 944*; *Katz v United States, 389 US 347, 88 S Ct 507, 19 L Ed 2d 576*; *United States v Karo, 468 US 705, 104 S Ct 3296, 82 L Ed 2d 530*; *Bond v United States, 529 US 334, 120 S Ct 1462,*

146 L Ed 2d 365; United States v Berry, 300 F Supp 2d 366; United States v Garcia, 474 F3d 994; United States v Moran, 349 F Supp 2d 425; People v Gant, 9 Misc 3d 611, 802 NYS2d 839.)

Christopher Dunn, New York City, Arthur Eisenberg and Palyn Hung for New York Civil Liberties Union, amicus curiae. I. The highest courts of two other states have held that their state constitutions require police to obtain a warrant before engaging in electronic tracking. II. Defendant's state constitutional claim is not controlled by Fourth Amendment "reasonable expectation of privacy" doctrine. (People v Class, 63 NY2d 4911, 472 NE2d 1009, 483 NYS2d 181, 475 US 106, 106 S Ct 960, 89 L Ed 2d 81, 54 U.S.L.W. 4178, 67 NY2d 431, 494 NE2d 444, 503 NYS2d 313.) III. The Court should hold that electronic police tracking of private vehicles requires a warrant. (People v Class, 63 NY2d 491, 472 NE2d 1009, 483 NYS2d 181; Katz v United States, 389 US 347, 88 S Ct 507, 19 L Ed 2d 576; Olmstead v United States, 277 US 438, 48 S Ct 564, 72 L. Ed. 944.)

Judges: Opinion by Chief Judge Lippman. Judges Ciparick, Pigott and Jones concur. Judge Smith dissents in an opinion in which Judges Graffeo and Read concur. Judge Read dissents in an opinion in which Judge Graffeo concurs.

Opinion by: LIPPMAN

Opinion

[*357] [*436] [**1195]** Chief Judge Lippman.

In the early morning hours of December 21, 2005, a State Police Investigator crept **[2]** underneath defendant's street-parked van and placed a global positioning system (GPS) tracking device inside the bumper. The device remained in place for 65 days, **[***358]** constantly monitoring the position of the **[**1196]** van. This nonstop surveillance was conducted without a warrant.

The GPS device, known as a "Q-ball," once attached to the van, operated in conjunction with numerous satellites, from which it received tracking data, to fix the van's location. The Q-ball readings indicated the speed of the van and pinpointed its location within 30 feet. Readings were taken **[****2]** approximately every minute while the vehicle was in motion, but less often when it was stationary. The device's battery required replacement during the monitoring period, which resulted in yet another nocturnal visit by the investigator to the van's undercarriage. To download the location information retrieved by the Q-ball, the investigator would simply drive past the van and press a button on a corresponding receiver unit, causing the tracking history to be transmitted to and saved by a computer in the investigator's vehicle.

It is not clear from the record why defendant was placed under electronic surveillance. What is clear is that he was eventually charged with and tried in a single proceeding for crimes relating to two separate burglaries--one committed in July 2005 at the Latham Meat Market and the other on Christmas Eve of the same year at the Latham K-Mart.

The prosecution sought to have admitted at trial GPS readings showing that, on the evening of the Latham K-Mart **[*437]** burglary at 7:26, defendant's van traversed the store's parking lot at a speed of six miles per hour. Without a hearing, County Court denied defendant's motion to suppress the GPS data, and the electronic surveillance **[****3]** evidence was received. The additional evidence against defendant came primarily from Amber Roche, who was charged in connection with the Latham Meat Market burglary and was deemed an accomplice in the commission of that burglary.

Roche testified that prior to the date of the burglary, she drove through the parking lot of the Latham K-Mart with defendant and John Scott Chiera, while the men looked for the best place to break into the store. She stated that on the night of the burglary, defendant and Chiera left her apartment wearing dark clothing. When they returned, Chiera's hand was bleeding. Other evidence showed that, during the burglary, a jewelry case inside the K-Mart had been smashed and stained with blood containing DNA matching that of Chiera. Notably, Roche's initial statement to the police did not implicate defendant in the K-Mart burglary, but rather indicated that Chiera had committed the crime with a different individual. A few weeks later, Roche gave the police a second statement implicating defendant instead of that individual.

The jury convicted defendant of two counts relating to the K-Mart burglary, but acquitted him of the counts pertaining to the Meat Market burglary. **[****4]** The ensuing judgment of conviction was affirmed by a divided Appellate Division. The majority rejected defendant's argument that his Fourth Amendment rights had been violated by the warrantless placement and use of the GPS device, and found that he had no

greater right to relief under the State Constitution. It premised its decision largely upon what it deemed to be defendant's reduced expectation of privacy in the exterior of his vehicle *(52 AD3d 138, 860 NYS2d 223 [3d Dept 2008])*.

One Justice dissented and would have suppressed the evidence obtained from the GPS tracking device. The dissenting opinion agreed that there was no *Fourth Amendment* violation, but found a violation of defendant's corresponding rights under the State Constitution--stating that citizens **[***359]** "have a reasonable expectation that their every move will not be continuously **[**1197]** and **[3]** indefinitely monitored by a technical device without their knowledge, except where a warrant has been issued based on probable cause" (*id. at 145*). The dissenting Justice granted defendant leave to appeal *(10 NY3d 966, 893 NE2d 456, 863 NYS2d 150 [2008])* and we now reverse.

[*438] The *Fourth Amendment*, read literally, protects property and for a long time was read to do no more. In *Olmstead v United States (277 US 438, 48 S Ct 564, 72 L Ed. 944 [1928])*, **[****5]** the Supreme Court, adhering to the notion that a *Fourth Amendment* infringement was essentially one affecting property, * refused to find that a telephone wiretap was a search within the amendment's meaning because the wiretap involved no trespass into the houses or offices of the defendants. Justice Brandeis differed and offered as an alternative to the majority's understanding of the amendment this much more encompassing view:

> "The protection guaranteed by the Amendments [the Fourth and Fifth] is much broader in scope [than the protection of property]. The makers of our Constitution undertook to secure conditions favorable to the pursuit of happiness. They recognized the significance of man's spiritual nature, of his feelings and of his intellect. They knew that only a part of the pain, pleasure and satisfactions of life are to be found in material things. They sought to protect Americans in their beliefs, their thoughts, their emotions and their sensations. They conferred, as against the Government, the right to be let alone--the most comprehensive of rights and the right most valued by civilized men. To protect that right, every unjustifiable intrusion by the Government upon the **[****6]** privacy of the individual, whatever the means employed, must be deemed a violation of the *Fourth Amendment*. And the use, as evidence in a criminal proceeding, of facts ascertained by such intrusion must be deemed a violation of the Fifth" (*id. at 478-479* [dissenting op]).

Brandeis's dissent was resonant, even in the years immediately after the case's decision. And, some 12 years later, at the New York State Constitutional Convention of 1938, the view that there should be constitutional protection against governmental infringements of privacy not involving any offense against property found vindication in this state's analogue to the *Fourth Amendment*, only then adopted. Our constitutional **[*439]** provision (art I, § 12), in addition to tracking the language of the *Fourth Amendment*, provides:

> "The right of the people to be secure against unreasonable interception of telephone and telegraph communications **[****7]** shall not be violated, and ex parte orders or warrants shall issue only upon oath or affirmation that there is reasonable ground to believe that evidence of crime may be thus obtained, and identifying the particular means of communication, and particularly describing the person or persons whose communications are to be intercepted and the purpose thereof."

On the federal level, however, Brandeis's seminal and eloquent recognition that privacy and not property per se was the **[***360]** essential value protected by the *Fourth Amendment* was slower **[4]** to find definitive doctrinal acceptance. Finally, however, in **[**1198]** *Katz v United States (389 US 347, 357, 88 S Ct 507, 19 L Ed 2d 576 [1967])* the Supreme Court overruled *Olmstead*, holding:

> "[T]he underpinnings of *Olmstead* and *Goldman* have been so eroded by our subsequent decisions that the 'trespass' doctrine there enunciated can no longer be regarded as controlling. The Government's activities in electronically listening to and recording the petitioner's words violated the privacy upon which he justifiably relied while using the telephone booth and thus constituted a 'search and seizure' within the meaning of the *Fourth*

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* The Court noted: "The Amendment itself shows that the search is to be of material things--the person, the house, his papers or his effects. The description of the warrant necessary to make the proceeding lawful, is that it must specify the place to be searched and the person or *things* to be seized" (*277 US at 464*).

> *Amendment*. The fact that the electronic device employed to achieve **[****8]** that end did not happen to penetrate the wall of the booth can have no constitutional significance" (*id. at 353*).

Since *Katz*, the existence of a privacy interest within the *Fourth Amendment's* protective ambit has been understood to depend upon whether the individual asserting the interest has demonstrated a subjective expectation of privacy and whether that expectation would be accepted as reasonable by society (*see Katz, 389 US at 361* [Harlan, J., concurring]). However, while *Katz* purported to deemphasize location as a determinant in judging the reach of the *Fourth Amendment*, the analysis it seemed to require naturally reintroduced considerations of place back into the calculus since the social reasonableness of an individual's expectation of privacy will quite often turn upon the quality of the space inhabited or traversed, i.e., whether it is **[*440]** public or private space. An individual has been held to have a significantly reduced expectation of privacy when passing along a public way, particularly in a motor vehicle.

The amalgam of issues with which we here deal, arising from the use of a new and potentially doctrine-forcing surveillance technology by government law enforcers to track **[****9]** movements over largely public terrain, was most significantly dealt with by the Supreme Court in the post-*Katz* era in *United States v Knotts (460 US 276, 103 S Ct 1081, 75 L Ed 2d 55 [1983])*. There, government agents placed a beeper in a five-gallon drum of chloroform to track the container's movements. They then followed the vehicle that transported the container using both visual surveillance and a monitor that received signals from the beeper. Although the officers lost sight of the vehicle, it was eventually located at Knotts's cabin. The Court noted that, although Knotts had an expectation of privacy in his cabin, there was no such expectation attending the movements of the vehicle transporting the container (*id. at 282*). "A person traveling in an automobile on public thoroughfares," the Court observed, "has no reasonable expectation of privacy in his [or her] movements from one place to another" (*id. at 281*). This was so, said the Court, because the particular route taken, stops made and ultimate destination are apparent to any member of the public who happens to observe the vehicle's movements (*see id. at 281-282*). The use of the beeper in addition to the visual surveillance did not change the Court's **[****10]** analysis: "Nothing in the *Fourth Amendment* prohibited the police from augmenting the sensory faculties bestowed upon them at birth with such enhancement as science and technology afforded them in this case" (*id. at 282*).

[*361]** At first blush, it would appear that *Knotts* does not bode well for Mr. Weaver, for in his case, as in *Knotts*, the surveillance technology was utilized for the purpose of tracking the progress of a vehicle **[**1199]** over what may be safely supposed to have been predominantly public roads and, as in *Knotts*, these movements were at least in theory exposed to "anyone who wanted to **[5]** look" (*id. at 281*). This, however, is where the similarity ends.

Knotts involved the use of what we must now, more than a quarter of a century later, recognize to have been a very primitive tracking device. The device was, moreover, used in a focused binary police investigation for the discreet purpose of ascertaining the destination of a particular container of chloroform. And, in this application, during the single trip from the place where the chloroform was purchased to the Knotts cabin, the beeper **[*441]** was fairly described by the Court as having functioned merely as an enhancing adjunct to the surveilling **[****11]** officers' senses; the officers actively followed the vehicle and used the beeper as a means of maintaining and regaining actual visual contact with it. The technology was, in this context, not unconvincingly analogized by the Court to a searchlight, a marine glass, or a field glass (*id. at 283*, citing *United States v Lee, 274 US 559, 563, 47 S Ct 746, 71 L Ed 1202, Treas. Dec. 42252 [1927])*.

Here, we are not presented with the use of a mere beeper to facilitate visual surveillance during a single trip. GPS is a vastly different and exponentially more sophisticated and powerful technology that is easily and cheaply deployed and has virtually unlimited and remarkably precise tracking capability. With the addition of new GPS satellites, the technology is rapidly improving so that any person or object, such as a car, may be tracked with uncanny accuracy to virtually any interior or exterior location, at any time and regardless of atmospheric conditions. Constant, relentless tracking of anything is now not merely possible but entirely practicable, indeed much more practicable than the surveillance conducted in *Knotts*. GPS is not a mere enhancement of human sensory capacity, it facilitates a new technological perception of the world **[****12]** in which the situation of any object may be followed and exhaustively recorded over, in most cases, a practically unlimited period. The potential for a similar capture of information or "seeing" by law enforcement would require, at a minimum, millions of additional police

officers and cameras on every street lamp.

That such a surrogate technological deployment is not--particularly when placed at the unsupervised discretion of agents of the state "engaged in the often competitive enterprise of ferreting out crime" (*Johnson v United States, 333 US 10, 14, 68 S Ct 367, 92 L Ed 436 [1948]*) --compatible with any reasonable notion of personal privacy or ordered liberty would appear to us obvious. One need only consider what the police may learn, practically effortlessly, from planting a single device. The whole of a person's progress through the world, into both public and private spatial spheres, can be charted and recorded over lengthy periods possibly limited only by the need to change the transmitting unit's batteries. Disclosed in the data retrieved from the transmitting unit, nearly instantaneously with the press of a button on the highly portable receiving unit, will be trips the indisputably private nature **[****13]** of which takes little imagination to conjure: trips to the psychiatrist, the plastic surgeon, the abortion clinic, the **[*442]** AIDS treatment center, the strip club, the criminal defense attorney, the by-the-hour motel, the union meeting, the mosque, synagogue or church, the gay bar and on and on. What **[***362]** the technology yields and records with breathtaking quality and quantity is a highly detailed profile, not simply of where we go, but by easy inference, of our associations--political, religious, amicable and amorous, to name only a few--and of the pattern of our professional and avocational **[**1200]** pursuits. When multiple GPS devices are utilized, even more precisely resolved inferences about our activities are possible. And, with GPS becoming an increasingly routine feature in cars and cell phones, it will be possible to tell from the technology with ever increasing precision who we are and are not with, when we are and are not with them, **[6]** and what we do and do not carry on our persons--to mention just a few of the highly feasible empirical configurations.

Knotts, of course, opens by adverting to *Olmstead* and the eventual vindication of the *Olmstead* dissent in *Katz*, and there is every evidence **[****14]** from the decision that the Court was acutely aware of its obligation in the post-*Katz* era to assure, as one court has succinctly (and perhaps disapprovingly) put it, that *Fourth Amendment* jurisprudence "keep[s] pace with the march of science" (*United States v Garcia, 474 F3d 994, 997 [7th Cir 2007,* Posner, J.]). The science at issue in *Knotts* was, as noted, quite modest, amounting to no more than an incremental improvement over following a car by the unassisted eye (*see id. at 998*). This being so, the Court quite reasonably concluded that the technology "*in this case*" (*Knotts, 460 US at 282* [emphasis added]) raised no *Fourth Amendment* issue, but pointedly acknowledged and reserved for another day the question of whether a *Fourth Amendment* issue would be posed if "twenty-four hour surveillance of any citizen of this country [were] possible, without judicial knowledge or supervision" (*id. at 283*). To say that that day has arrived involves no melodrama; 26 years after *Knotts*, GPS technology, even in its present state of evolution, quite simply and matter-of-factly forces the issue.

It would appear clear to us that the great popularity of GPS technology for its many useful applications **[****15]** may not be taken simply as a massive, undifferentiated concession of personal privacy to agents of the state. Indeed, contemporary technology projects our private activities into public space as never before. Cell technology has moved presumptively private phone conversation from the enclosure of *Katz*'s phone booth to the **[*443]** open sidewalk and the car, and the advent of portable computing devices has resituated transactions of all kinds to relatively public spaces. It is fair to say, and we think consistent with prevalent social views, that this change in venue has not been accompanied by any dramatic diminution in the socially reasonable expectation that our communications and transactions will remain to a large extent private. Here, particularly, where there was no voluntary utilization of the tracking technology, and the technology was surreptitiously installed, there exists no basis to find an expectation of privacy so diminished as to render constitutional concerns de minimis.

It is, of course, true that the expectation of privacy has been deemed diminished in a car upon a public thoroughfare. But, it is one thing to suppose that the diminished expectation affords a police officer **[****16]** certain well-circumscribed options for which a warrant is not required and quite another to suppose that when we drive or ride in a vehicle our expectations of privacy are so utterly diminished that we effectively consent to the unsupervised disclosure to law enforcement authorities of all that GPS technology can and will reveal. Even before the advent of GPS, it was recognized that a ride in a motor vehicle does not so **[***363]** completely deprive its occupants of any reasonable expectation of privacy:

> "An individual operating or traveling in an automobile does not lose all reasonable expectation of privacy simply because the automobile and its use are subject to government

> regulation. Automobile travel is a basic, pervasive, and often necessary mode of transportation **[**1201]** to and from one's home, workplace, and leisure activities. Many people spend more hours each day traveling in cars than walking on the streets. Undoubtedly, many find a greater sense of security and privacy in traveling in an automobile than they do in exposing themselves by pedestrian or other modes of travel. Were the individual subject to unfettered governmental intrusion every time he **[7]** entered an automobile, the security guaranteed **[****17]** by the *Fourth Amendment* would be seriously circumscribed. As *Terry v Ohio* … recognized, people are not shorn of all *Fourth Amendment* protection when they step from their homes onto the public sidewalks. Nor are they shorn of those interests when they step from the sidewalks **[*444]** into their automobiles. See *Adams v. Williams, 407 US 143, 146, 92 S Ct 1921, 32 L Ed 2d 612 (1972)*" (*Delaware v Prouse, 440 US 648, 662-663, 99 S Ct 1391, 59 L Ed 2d 660 [1979]*).

This view has recently been reaffirmed by the Supreme Court in *Arizona v Gant (556 US , 129 S Ct 1710, 173 L Ed 2d 485, 2009 WL 1045962 [2009])*, where the Court, in addressing the scope of the search incident to arrest exception to the warrant requirement in the context of a vehicle stop, had occasion to observe, "the State seriously undervalues the privacy interests at stake. Although we have recognized that a motorist's privacy interest in his vehicle is less substantial than in his home … the former interest is nevertheless important and deserving of constitutional protection" (556 US at ___, 129 S Ct at 1720). And, we, of course, have held in reliance upon our own Constitution that the use of a vehicle upon a public way does not effect a complete surrender of any objectively reasonable, socially acceptable privacy expectation **[****18]** (*People v Class, 63 NY2d 491, 495, n 3 472 NE2d 1009, 483 NYS2d 181[1984]*, *revd 475 US 106, 106 S Ct 960, 89 L Ed 2d 81 [1986]* [adhering to determination of state constitutional law]).

The residual privacy expectation defendant retained in his vehicle, while perhaps small, was at least adequate to support his claim of a violation of his constitutional right to be free of unreasonable searches and seizures. The massive invasion of privacy entailed by the prolonged use of the GPS device was inconsistent with even the slightest reasonable expectation of privacy.

While there may and, likely will, be exigent situations in which the requirement of a warrant issued upon probable cause authorizing the use of GPS devices for the purpose of official criminal investigation will be excused, this is not one of them. Plainly, no emergency prompted the attachment of the Q-ball to defendant's van. Indeed, upon this record, it is impossible to discern any reason, apart from hunch or curiosity, for the Q-ball's placement. But even if there were some retrospectively evident reason for the use of the device, it could not validate the search. "Over and again [the Supreme] Court has emphasized that the mandate of **[****19]** the (Fourth) Amendment requires adherence to judicial processes, and that searches conducted outside the judicial process, without prior approval by judge or magistrate, are per se unreasonable under the *Fourth Amendment* --subject only to a few specifically established and well-delineated exceptions" **[***364]** (*Katz, 389 US at 357* [citations and internal quotation marks omitted]). The placement of the Q-ball and the **[*445]** ensuing disclosure of defendant's movements over a 65-day period comes within no exception to the warrant requirement, and the People do not contend otherwise. They contend only that no search occurred, a contention that we find untenable.

[1202]** In reaching this conclusion, we acknowledge that the determinative issue remains open as a matter of federal constitutional law, since the United States Supreme Court has not yet ruled upon whether the use of GPS by the state for the purpose of criminal investigation constitutes a search under the *Fourth Amendment*, and, indeed, the issue has not yet been addressed by the vast majority of the Federal Circuit Courts. Thus, we do not presume to decide the question as a matter of federal law. The very same principles are, however, dispositive of **[****20]** this matter under our State Constitution. If, as we have found, defendant had a reasonable expectation of privacy that was infringed by the State's placement and monitoring of the Q-ball on his van to track his **[8]** movements over a period of more than two months, there was a search under article I, § 12 of the State Constitution. And that search was illegal because it was executed without a warrant and without justification under any exception to the warrant requirement. In light of the unsettled state of federal law on the issue, we premise our ruling on our State Constitution alone.

We note that we have on many occasions interpreted our own Constitution to provide greater protections when circumstances warrant and have developed an independent body of state law in the area of search and seizure (*see e.g. People v Scott, 79 NY2d 474, 593*

NE2d 1328, 583 NYS2d 920 [1992]; People v Harris, 77 NY2d 434, 570 NE2d 1051, 568 NYS2d 702 [1991]; People v Dunn, 77 NY2d 19, 564 NE2d 1054, 563 NYS2d 388 [1990]; People v Torres, 74 NY2d 224, 228, 543 NE2d 61, 544 NYS2d 796 [1989]). We have adopted separate standards "when doing so best promotes 'predictability and precision in judicial review of search and seizure cases and the protection of the individual rights of our citizens'" (People v P.J. Video, 68 NY2d 296, 304, 501 NE2d 556, 508 NYS2d 907 [1986] **[****21]** [citations omitted]). What we articulate today may or may not ultimately be a separate standard. If it is, we believe the disparity would be justified. The alternative would be to countenance an enormous unsupervised intrusion by the police agencies of government upon personal privacy and, in this modern age where criminal investigation will increasingly be conducted by sophisticated technological means, the consequent marginalization of the State Constitution and judiciary in matters crucial to safeguarding the privacy of our citizens.

At a similar crossroads, Justice Brandeis in *Olmstead* queried, "[c]an it be that the Constitution affords no protection against **[*446]** such invasions of individual security?" (277 US at 474) We today, having understood the lesson of *Olmstead*, reply "no," at least not under our State Constitution. Leaving the matter to the Legislature would be defensible only upon the ground that there had been no intrusion upon defendant's privacy qualifying as an article I, § 12 "search." Nothing prevents the Legislature from acting to regulate the use of GPS devices within constitutional limits, but, we think it manifest that the continuous GPS surveillance and recording **[****22]** by law enforcement authorities of the defendant's every automotive movement cannot be described except as a **[***365]** search of constitutional dimension and consequence.

Contrary to the dissenting views, the gross intrusion at issue is not less cognizable as a search by reason of what the Legislature has or has not done to regulate technological surveillance. Nor does the bare preference for legislatively devised rules and remedies in this area constitute a ground for treating the facts at bar as of subconstitutional import. Before us is a defendant whose movements have, **[**1203]** for no apparent reason, been tracked and recorded relentlessly for 65 days. It is quite clear that this would not and, indeed, realistically could not have been done without GPS and that this dragnet use of the technology at the sole discretion of law enforcement authorities to pry into the details of people's daily lives is not consistent with the values at the core of our State Constitution's prohibition against unreasonable searches.

We find persuasive the conclusions of other state courts that have addressed this issue and have held that the warrantless use of a tracking device is inconsistent with the protections guaranteed **[****23]** by their state constitutions (State v Jackson, 150 Wash 2d 251, 76 P3d 217 [2003]; State v Campbell, 306 Or 157, 759 P2d 1040 [1988]). The corresponding provision of the Washington State Constitution differs from and has been held to be more protective than the Fourth Amendment. However, the court noted that the use of a GPS device was not merely an augmentation of an officer's senses (*see* Jackson, 150 Wash 2d at 261-262, 76 P3d at 223) and that the means of surveillance allowed the government to access an enormous amount of additional information, **[9]** including a person's associations and activities (*see* 150 Wash 2d at 260, 76 P3d at 222). The court concluded that "citizens of this State have a right to be free from the type of governmental intrusion that occurs when a GPS device is attached to a citizen's vehicle, regardless of **[*447]** reduced privacy expectations due to advances in technology" and that a warrant was needed before such a device could be installed (150 Wash 2d at 264, 76 P3d at 224).

Similarly, the Supreme Court of Oregon held that the government's use of a radio transmitter to monitor the location of defendant's car was a search under the State Constitution as it was a significant limitation on the defendant's freedom from scrutiny (Campbell, 306 Or at 171, 759 P2d at 1048), and that the warrantless use of the transmitter in the absence of exigent circumstances was "nothing short of a staggering limitation upon personal freedom" (306 Or at 172, 759 P2d at 1049). **[****24]**

Technological advances have produced many valuable tools for law enforcement and, as the years go by, the technology available to aid in the detection of criminal conduct will only become more and more sophisticated. Without judicial oversight, the use of these powerful devices presents a significant and, to our minds, unacceptable risk of abuse. Under our State Constitution, in the absence of exigent circumstances, the installation and use of a GPS device to monitor an individual's whereabouts requires a warrant supported by probable cause.

In light of this disposition, it is not necessary to address

defendant's remaining contentions.

Accordingly, the order of the Appellate Division should be reversed, defendant's motion to suppress the evidence obtained from the GPS device should be granted and a new trial ordered.

Dissent by: SMITH; READ

Dissent

Smith, J.(dissenting). Using a GPS device, the police discovered that defendant's car was in a K-Mart **[***366]** parking lot on Christmas Eve. This was obviously not a private place, and no one claims that **[****25]** defendant's constitutional rights would be infringed if his car had been observed there by a human eye or a hidden camera. But the majority finds that evidence of the car's location must be suppressed because the police used a more technologically sophisticated way of obtaining it. I think this holding is unsound. The attempt to find in the Constitution a line between ordinary, acceptable means of observation and more efficient, high-tech ones that cannot be used without a warrant **[**1204]** seems to me illogical, and doomed to fail.

I am more troubled by another aspect of the case: the surreptitious attachment of the device to the car, without the car owner's consent. (This event is highlighted in the first sentence of the majority's opinion, but goes virtually unmentioned after that.) I conclude, with some hesitation, that this trespass, **[*448]** though a violation of defendant's property rights, did not violate his right to be free from unreasonable searches.

I

It is beyond any question that the police could, without a warrant and without any basis other than a hunch that defendant was up to no good, have assigned an officer, or a team of officers, to follow him everywhere he went, so long as he remained **[****26]** in public places. He could have been followed in a car or a helicopter; he could have been photographed, filmed or recorded on videotape; his movements could have been reported by a cellular telephone or two-way radio. These means could have been used to observe, record and report any trips he made to all the places the majority calls "indisputably private", from the psychiatrist's office to the gay bar **[10]** (majority op at 441-442). One who travels on the public streets to such destinations takes the chance that he or she will be observed. The Supreme Court was saying no more than the obvious when it said that a person's movements on public thoroughfares are not subject to any reasonable expectation of privacy (*United States v Knotts, 460 US 276, 281, 103 S Ct 1081, 75 L Ed 2d 55 [1983]*, quoted in majority op at 440). What, then, is the basis for saying that using a GPS device to obtain the same information requires a warrant?

The majority's answer is that the GPS is new, and vastly more efficient than the investigative tools that preceded it. This is certainly true -- but the same was true of the portable camera and the telephone in 1880, the automobile in 1910 and the video camera in 1950. Indeed, the majority distinguishes **[****27]** *Knotts* on the ground that it involved a beeper -- "what we must now … recognize to have been a very primitive tracking device" (majority op at 440). I suspect that the GPS used in this case will seem primitive a quarter of a century from now. Will that mean that police will then be allowed to use it without a warrant?

The proposition that some devices are too modern and sophisticated to be used freely in police investigation is not a defensible rule of constitutional law. As technology improves, investigation becomes more efficient--and, as long as the investigation does not invade anyone's privacy, that may be a good thing. It bears remembering that criminals can, and will, use the most modern and efficient tools available to them, and will not get warrants before doing so. To limit police use of the same tools is to guarantee that the efficiency of law enforcement will increase more slowly than the efficiency of law breakers. If the people of **[*449]** our State **[***367]** think it worthwhile to impose such limits, that should be done through legislation, not through ad hoc constitutional adjudication, for reasons well explained in Judge Read's dissent (Read, J., dissenting at 457-459).

The Federal and State Constitutions' **[****28]** prohibition of unreasonable searches should be enforced not by limiting the technology that investigators may use, but by limiting the places and things they may observe with it. If defendant had been in his home or some other private place, the **[**1205]** police would, absent exigent circumstances, need a warrant to follow him there, whether by physical intrusion or by the use of sophisticated technology (*see Kyllo v United States, 533 US 27, 121 S Ct 2038, 150 L Ed 2d 94 [2001]* [use of thermal-imaging device to detect relative amounts of heat in the home an unlawful search]; *United States v*

Karo, 468 US 705, 714, 104 S Ct 3296, 82 L Ed 2d 530 [1984] [monitoring a beeper in a private home violates the rights of those justifiably expecting privacy there]). But the police were free, without a warrant, to use any means they chose to observe his car in the K-Mart parking lot.

The theory that some investigative tools are simply too good to be used without a warrant finds no support in any authority interpreting the Federal or New York Constitution. *Knotts*, despite the majority's attempt to distinguish it, seems to me to establish conclusively that the *Fourth Amendment* did not prohibit the police "from augmenting the sensory faculties bestowed upon them at **[****29]** birth with such enhancement as science and technology afforded them" (*460 US at 282*). And no New York authority suggests that we would reject *Knotts* as a matter of State constitutional law. *Knotts* was a unanimous decision as to its result (though three Justices declined to endorse the language I have quoted, *[460 US at 288* (Stevens, J., concurring)]); and, in my view, it was an easy one. If the majority is holding--as it apparently is--that police may never, in the absence of exigent circumstances or probable cause, track a suspect with a GPS device, it has imposed a totally unjustified limitation on law enforcement. It has also presented future courts with the essentially impossible task of deciding which investigative tools are so **[11]** efficient and modern that they are subject to the same prohibition.

II

For the reasons explained above, I would have no problem at all with this case if the device had been attached to the car with the consent of the car's owner or co-owner, or if the police had **[*450]** found some other way to track defendant's movements electronically without trespassing on his property. But, like the majority, I do not care for the idea of a police officer--or anyone else **[****30]** -- sneaking under someone's car in the middle of the night to attach a tracking device. I find this the hard aspect of the case (*cf. Knotts, 460 US at 286* [Brennan, J., concurring] ["this would have been a much more difficult case if respondent had challenged, not merely … the monitoring of the beeper … but … its original installation"]), but I conclude, as did a federal Court of Appeals in a substantially identical case (*United States v Garcia, 474 F3d 994 [7th Cir 2007]*), that what the police did was not an unconstitutional search. (Defendant does not argue that the attachment of the device was a seizure of the car, and I do not consider that possibility.)

As the majority points out, the privacy protected by the constitutional prohibition of unreasonable searches and the property **[***368]** rights protected by the laws against trespass have been divorced for decades. The Supreme Court held in *Katz v United States (389 US 347, 353, 88 S Ct 507, 19 L Ed 2d 576 [1967])* that *Fourth Amendment* protections turn not on whether there was an intrusion upon private property but on whether government conduct "violated the privacy upon which [a person] justifiably relied". The accepted test for whether there has been a "search" **[****31]** for *Fourth Amendment* purposes has become that stated in Justice Harlan's concurrence in *Katz*: Did government action invade a "reasonable expectation of privacy" (*id. at 360*; *see e.g. Samson v California, 547 US 843, 847, 126 S Ct 2193, **[**1206]** 165 L Ed 2d 250 [2006])*? The test under the New York Constitution is the same (*e.g. People v Quackenbush, 88 NY2d 534, 541, 670 NE2d 434, 647 NYS2d 150 [1996])*. The attachment of the GPS device in this case violated defendant's property rights, but it did not invade his privacy.

The device was attached to the outside of the car while it was parked on a public street. No one who chooses to park in such a location can reasonably think that the outside--even the underside--of the car is in a place of privacy. He may reasonably expect that strangers will leave his car alone, but that is not an expectation of privacy; it is an expectation of respect for one's property rights. This distinction is critical: "the existence of a *property* interest does not mean that defendant also had a *privacy* interest protectable by the State and Federal guarantees against unreasonable searches and seizures" (*People v Natal, 75 NY2d 379, 383, 553 NE2d 239, 553 NYS2d 650 [1990]*; *see also People v Reynolds, 71 NY2d 552, 523 NE2d 291, 528 NYS2d 15 [1988])*. No authority, so far as I know, **[****32]** holds that a trespass on **[*451]** private property, without more, is an unlawful search when the property is in a public place. Such a search occurs only when, as a result of the trespass, some information is acquired that the property owner reasonably expected to keep private (*e.g. Bond v United States, 529 U.S. 334, 120 S Ct 1462, 146 L Ed 2d 365 [2000]* [suppression of drugs found in bus passenger's luggage]; *People v Hollman, 79 NY2d 181, 590 NE2d 204, 581 NYS2d 619 [1992]* [same]).

I am admittedly relying on a fine distinction, but I think I am justified in doing so. When the government violates privacy, and not just property, rights, the exclusionary

rule applies; that rule is a blunt instrument, whose effect is often to guarantee an unjust result in a criminal case--in Judge Cardozo's famous phrase, to set the criminal free because the constable has blundered (*People v Defore, 242 NY 13, 21, 150 NE 585 [1926]*, *cert denied 270 US 657, 46 S Ct 353, 70 L Ed 784 [1926]*). The rule's application should not be expanded to punish every action by a police officer that a court may find distasteful; it **[12]** should be strictly limited to the protection of constitutional rights--in this case, the privacy rights that are the concern of the Search and Seizure Clauses of the State and *federal Constitutions*. **[****33]** Because no one invaded defendant's privacy here, his motion to suppress the evidence obtained from the GPS device should be denied.

Read, J. (dissenting): The majority opinion--while destined to elicit editorial approval--is wrong on the law and unnecessarily burdens law enforcement and the courts, and, more importantly, all New Yorkers. Although aspects of this case are indeed troubling--notably, the unexplained length of time (65 days) the GPS tracking device was affixed to defendant's van--I agree with Judge Smith that there was simply no search **[***369]** within the meaning of the Federal or State Constitution. I write separately to emphasize two untoward consequences of today's decision: first, our State constitutional jurisprudence has been brushed aside; second, we are handcuffing the Legislature by improperly constitutionalizing a subject more effectively dealt with legislatively than judicially in our system of government.

The Federal Background

To date, the United States Supreme Court has never defined a search within the meaning of the *Fourth Amendment* to encompass the government's use of tracking devices in lieu of or supplemental to visual surveillance, so long as the tracking **[****34]** **[**1207]** occurs outside the home (*see United States v Knotts, 460 US 276, 282-285, 103 S Ct 1081, 75 L Ed 2d 55 **[*452]** [1983]* [monitoring of a tracking device that was inserted into a container but did not reveal information about the inside of a home merely substituted for or supplemented visual surveillance that would have revealed the same facts]; [1] *United States v **[13]** Karo, 468 US 705, 714-715, 719, 104 S Ct 3296, 82 L Ed 2d 530 [1984]* [transfer of a container with a tracking device inside is not a search nor was monitoring it outside the home; monitoring inside a home, however, is a search]; *Kyllo v United States, 533 U.S. 27, 34, 121 S Ct 2038, 150 L Ed 2d 94 [2001]* [using a thermal-imaging device to "obtain( ) by sense-enhancing technology any information regarding the interior of the home that could not otherwise have been obtained without physical intrusion into a constitutionally protected area, constitutes a search--at least where . . . the technology in question is not in general public use" (internal quotation marks and citation omitted)]). As the majority points out, the Supreme Court has not decided the exact question on this appeal: whether the government's use of this particular technology--a GPS tracking device attached to a car--constitutes a search within the meaning of **[****35]** the *Fourth Amendment* [2]. Still, every lower court judge analyzing the likely outcome of this case as a matter of Federal constitutional law has concluded, based on *Knotts* and *Karo* and *Kyllo*, that there was no *Fourth Amendment* violation. The majority therefore places this decision **[***370]** squarely on independent State constitutional grounds, holding that "there was a search **[*453]** under article I, § 12 of the

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[1] The Court did *not*, in *Knotts*, "pointedly acknowledge[ ] and reserve[ ] for another day the question of whether a *Fourth Amendment* issue would be posed if 'twenty-four hour surveillance of any citizen of this country [were] possible, without judicial knowledge or supervision'" (majority op at 442, quoting *Knotts, 460 US at 283* [which, in turn, was quoting the respondent's brief in that case]). The Court merely noted that the *respondent* "expresse[d] the generalized view" that this would be the result of the holding sought by the government (*460 US at 283*). The Court responded that "if such *dragnet-type* law enforcement practices as [the] **[****36]** respondent envisions should eventually occur, there will be time enough then to determine whether different constitutional principles may be applicable" (*id. at 284* [emphasis added]; *see also United States v Garcia, 474 F3d 994, 998 [7th Cir 2007]* [After refusing to suppress evidence obtained from GPS tracking device placed on the defendant's car without a warrant, court observed that "[i]t would be premature to rule that . . . a program of mass surveillance could not possibly raise a question under the *Fourth Amendment*"]). This case--like *Knotts* and *Garcia*--involves the use of GPS monitoring technology in the criminal investigation of an individual suspect, not dragnet-type or mass surveillance.

[2] Despite an implication to the contrary, the Supreme Court's recent decision in *Arizona v Gant (556 US ___, 129 S Ct 1710, 173 L Ed 2d 485, 2009 US LEXIS 3120 [2009])* does not support the majority's position. *Gant* addressed a search of the interior of a car, an unquestionably protected area. The decision suggests nothing about whether tracking the movements of a vehicle on public roadways constitutes a search under the *Fourth Amendment*.

State Constitution. And that search was illegal because it was executed without a warrant and without justification under any exception to the warrant requirement" (majority op at 445).

Interpreting Our State Constitution

We set out our methodology for State constitutional interpretation **[****37]** in *People v P.J. Video (68 NY2d 296, 302, 501 NE2d 556, 508 NYS2d 907 [1986])*, which described two bases for relying on independent State constitutional grounds: interpretive and noninterpretive review. Interpretive review essentially flows from textual differences between a provision of the State Constitution and its federal counterpart, **[**1208]** and is not available here since the operative language of the *Fourth Amendment* and article 1, section 12 is the same (*see People v Harris, 77 NY2d 434, 437, 570 NE2d 1051, 568 NYS2d 702 [1991]* ["Because the language of the *Fourth Amendment* . . . and section 12 of article I . . . is identical, it may be assumed, as a general proposition, that the two provisions confer similar rights"]). "To contrast" with interpretive analysis, we stated that

> "noninterpetive review proceeds from a judicial perception of sound policy, justice and fundamental fairness. A noninterpretive analysis attempts to discover, for example, any preexisting State statutory or common law defining the scope of the individual right in question; the history and traditions of the State in its protection of the individual right; any identification of the right in the State Constitution as being one of peculiar State or local concern; and any distinctive **[****38]** attitudes of the State citizenry toward the definition, scope or protection of the individual right" (*P.J. Video, 68 NY2d at 303* [citation **[14]** omitted]).

Here, the majority has not come close to justifying its holding as a matter of State constitutional law in the way called for by *P.J. Video*. First, the majority states that "we have on many occasions interpreted our own Constitution to provide greater protections when circumstances warrant and have developed an independent body of State law in the area of search and seizure" (majority op at 445). This is the assertion of a truism--i.e., that we can and have interpreted article I, section 12 more broadly than the Supreme Court has interpreted the *Fourth Amendment*. The majority does not identify, much less discuss, the "circumstances" requiring a departure from the federal approach here.

[*454] Next, the majority cites a number of cases where we have, in fact, parted ways with the Supreme Court (majority op at 445). But there is no discussion of how the *reasoning* of those cases--*Harris* (involving the defendant's arrest inside his apartment); *People v Dunn (77 NY2d 19, 564 NE2d 1054, 563 NYS2d 388 [1990]* [a "canine sniff" revealing the presence of drugs inside the defendant's **[****39]** apartment]); *People v Scott (79 NY2d 474, 593 NE2d 1328, 583 NYS2d 920 [1992]* [search of private land owned by the defendant]); and *People v Torres (74 NY2d 224, 543 NE2d 61, 544 NYS2d 796 [1989]* [search of the interior passenger compartment of the defendant's car])--supports deviation from federal precedent in this case. A person's home has always enjoyed a special status as a haven from government intrusion under the federal and State constitutions, but in *Dunn* we concluded that the "canine sniff," although a search of the defendant's apartment within the meaning of article I, section 12, **[***371]** could "be used *without a warrant or probable cause*, provided that the police ha[d] a reasonable suspicion that a residence contain[ed] illicit contraband" (*Dunn, 77 NY2d at 26* [emphasis added]). The majority does not explain why a much higher standard must now be met by law enforcement authorities to justify use of a GPS tracking device attached to a vehicle by a magnet. The majority does not explain how its holding fits in with those decisions where we have recognized the diminished expectation of privacy in a vehicle on a public highway (*see e.g. People v Yancy, 86 NY2d 239, 654 NE2d 1233, 630 NYS2d 985 [1995]*; *People v Scott, 63 NY2d 518, 473 NE2d 1, 483 NYS2d 649 [1984]*; *People v Belton, 55 NY2d 49, 432 NE2d 745, 447 NYS2d 873 [1982])*; **[****40]** or with the proposition that, generally, "conduct **[**1209]** and activity which is readily open to public view is not protected" by the *Fourth Amendment* (*People v Reynolds, 71 NY2d 552, 557, 523 NE2d 291, 528 NYS2d 15 [1988])*.

Finally, the majority adverts to the decisions of the highest courts in Washington and Oregon. But the majority does not explain how other state courts' decisions interpreting their own (and different) constitutions are possibly relevant to a noninterpretive analysis, which is explicitly keyed to factors *peculiar* to the State of New York. [3] **[15]**

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[3] *State v Jackson (150 Wash 2d 251, 76 P3d 217 [2003])* relied in large part on the broader language of the Washington State Constitution's search-and-seizure clause. And *State v Campbell (306 Or 157, 759 P2d 1040 [1988])* rejected the reasonable-expectation-of-privacy test in *Katz v United States*

[*455] The majority also ignores *People v Di Raffaele (55 NY2d 234, 242, 433 NE2d 513, 448 NYS2d 448 [1982])*, where we declined "to establish a more restrictive standard under the provisions of *section 12 of article I of the New York State Constitution*" for telephone toll-billing records, "concluding that there [was] no sufficient reason for . . . differentiation" from the *Fourth Amendment*. Similarly, we concluded that the police could place a pen register on a telephone line without a warrant (*People v Guerra, 65 NY2d 60, 478 NE2d 1319, 489 NYS2d 718 [1985]*). In *Guerra*, there concededly was no violation of the *Fourth Amendment*, and we rejected the defendant's plea that article I, section 12 afforded greater protection.

As our case law now stands, then, the State Constitution does not require the police to obtain a warrant in order to follow or "tail" my car to an abortion clinic or a strip club (*see* majority op at 441-442). The police may gather such details as, for example, whether I was actually in the car for this trip, and, if so, whether I was the driver or a passenger, whether I was traveling alone or with others, whether I met anyone outside an abortion clinic or a strip club, **[****42]** and whether I walked inside these establishments, either by myself or accompanied. In addition, the police may photograph me while I am doing these things. A warrant is also not required by the State Constitution in order for the police to review telephone toll billing records or use a pen register and thereby find out how often someone (not necessarily me) calls an abortion clinic or a **[***372]** strip club from my residence. But, as a result of today's decision, a warrant is mandated before the police may attach a GPS tracking device to my car and thereby discover if or how often someone (again, not necessarily me) drives my car by or parks it near an abortion clinic or a strip club. These results are difficult to reconcile; the Court seems to interpret article I, section 12 as affording the *greatest* State constitutional protection to the surveillance technique that garners the *least* specific information about "[t]he whole of [my] progress through the world" (majority op at 441).

The facts in this case illustrate how GPS monitoring technology is less revealing than old-fashioned physical surveillance. Defendant apparently owned two vehicles--a van and a Mercedes Benz automobile. The investigator **[****43]** from the New York State Police attached the battery-powered **[**1210]** GPS tracking device to the van on December 21, 2005. The data subsequently **[*456]** retrieved from the device showed that at 7:17 p.m. on December 24, 2005, the van moved from the street where defendant resided to the K-Mart's parking lot, returning at 7:55 p.m.. The van then remained parked overnight, not moving again until 7:41 a.m. on December 26, 2005. In other words, defendant's van was nowhere near the K-Mart at the time the store was broken into at roughly 11:00 p.m. on Christmas Eve. The testimony of a witness was necessary for the jury to draw the inference that defendant had driven the van to scout out the K-Mart early on the evening of the break-in because the police did not actually see him behind the wheel. If the police had been watching defendant rather than just monitoring the movements of his van, they might have gathered direct proof of their theory of the crime: that late on Christmas Eve he drove his Mercedes to the K-Mart, and waited in the car while his accomplice burglarized the store.

According to the investigator, the State Police maintain a "small fleet of undercover cars," which may be made available to assist local **[****44]** police agencies with surveillance. The GPS monitoring technology used in this case was less intrusive or informative than physical **[16]** surveillance of defendant would have been; it was a less optimal way for the police to figure out defendant's movements. But the State Police have limited resources. They may not always have personnel handy to engage in surveillance at the request of a local police agency, or a vehicle's location (for example, in a sparsely populated area) may make it difficult to trail or watch undetected. As Judge Smith observes, to limit police use of GPS monitoring technology, which is readily available to criminals, "guarantee[s] that the efficiency of law enforcement will increase more slowly than the efficiency of law breakers" (Smith, J. dissenting op at 448).

Finally, the majority does not examine relevant State statutory law, as called for by noninterpretive analysis. In fact, the Legislature has enacted elaborate statutory provisions to regulate police surveillance; in particular, *CPL articles 700* (eavesdropping and video surveillance warrants) and 705 (pen registers and trap and trace devices), adopted after our decision in *Guerra*. But *Penal Law § 250.00 (5) (c)* **[****45]** specifically states that an "[e]lectronic communication" does *not* include

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(389 US 347, 360, 88 S Ct 507, 19 L Ed 2d 576 [1967, Harlan, J., concurring]) in holding that the warrantless use of a GPS tracking device violated the Oregon State Constitution. The operative language of *article I, section 12 of the New York State Constitution* and the *Fourth Amendment* is--as previously noted--identical. Moreover, we have consistently adhered to the *Katz* test in determining whether a search has taken place, even when recognizing **[****41]** more expansive rights under our Constitution (*see Scott, 79 NY2d at 486*).

"any communication made through a tracking device consisting of an electronic or mechanical device which permits the tracking of the movement of a person or object." CPL article 700 only requires warrants for those electronic communications covered **[*457]** by Penal Law § 250.00 (5). In short, the warrant requirement pronounced by the majority today is contrary to, not consistent with, "preexisting State statutory . . . **[***373]** law" (P.J. Video, 68 NY2d at 303).

The analytical methodology embodied in our decision in *P.J. Video* has its critics (*see generally* James A. Gardner, Interpreting State Constitutions: A Jurisprudence of Function in a Federal System, at 41-45 [University of Chicago Press 2005]). And there are certainly alternative theories of state constitutional interpretation available for us to adopt (*id*.). Unless the Court frankly embraces another approach, however, we should decide our State constitutional cases in accordance with the principles enunciated in *P.J. Video*: precedent is not "a custom [m]ore honored in the breach than the observance" (Hamlet, Act I, scene iv). By disregarding our precedent in this area, **[****46]** a methodology already seen by some as excessively malleable is rendered patently standardless. The public may be left with the impression that we **[**1211]** do indeed treat the State Constitution as "a handy grab bag filled with a bevy of clauses [to] be exploited in order to circumvent disfavored United States Supreme Court decisions" (*see* Ronald K.L. Collins, *Reliance on State Constitutions--Away from a Reactionary Approach*," 9 Hastings Const LQ 1, 2 [1981]).

The Role of the Legislature

We are all familiar with GPS monitoring technology, which is widely used in modern society and serves many worthwhile purposes. For example, GPS tracking devices help us drive our automobiles without getting lost; they may be used to find a stolen vehicle; they assist employers in routing their fleet vehicles and knowing the location of their employees; they can identify the location of miners who are trapped underground as a result of an accident; they may pinpoint the whereabouts of an errant pet; and parents may install GPS devices on their children's cell phones so as to keep track of them.

Certainly, GPS monitoring technology may be abused by law enforcement authorities. As a result, many states have **[****47]** enacted comprehensive legislation governing its use by police for investigative purposes. Generally speaking, these provisions require the police or a prosecutor to make an application to a judge before installing or using a mobile tracking device. The **[17]** provisions differ considerably in terms of the quantum and nature of the proof required for judicial authorization; but they **[*458]** do not compel the high threshold insisted upon by the majority here.

For example, at one end of the spectrum are those states that permit the installation and use of a mobile tracking device upon a showing by the applicant "that the information likely to be obtained is relevant to an ongoing criminal investigation" (Utah Code Ann § 77-23a-15.5 [3] [b]; *see also* Minn Stat § 626A.37 [1]; Fla Stat § 934.42 [2] [b]). At the other end of the spectrum are those states requiring a showing of probable cause. But the probable cause in these statutes is not the same as that mandated by the majority here--probable cause to believe that installation of the GPS tracking device on a vehicle will disclose evidence of a crime. Rather, these states merely call for the applicant to certify that "probable cause **[****48]** exists to believe that the information likely to be obtained [from installation and use of a mobile tracking device] is relevant to an ongoing criminal investigation" (SC Code Ann § 17-30-140 [B] [2]; *see also* Okla Stat, tit 13, § 177.6 [A] [no warrant for tracking device "shall issue unless probable cause is shown for believing that such installation or use will lead to the discovery of evidence, fruits, or instrumentalities of the commission or attempted commission of an offense"]; Haw Rev Stat § 803-44.7 [b] [judge should be satisfied "that there are sufficient facts and circumstances **[***374]** contained within the application to establish probable cause to believe that the use of a mobile tracking device will discover the fruits, instrumentalities, or evidence of a crime or is relevant to an ongoing criminal investigation"]). In the middle of the spectrum are those states that apply a "reasonable suspicion" requirement. In Pennsylvania, for example, an applicant must "provide a statement setting forth all facts and circumstances which provide the applicant with a reasonable suspicion that criminal activity has been, is or will be in progress and that the use of a mobile tracking device will yield **[****49]** information relevant to the investigation of criminal activity" (18 Pa Cons Stat § 5761 [c] [4]; *see also* Tex. Code Crim Proc Ann, art 18.21, § 14 [c] [5]).

Police surveillance techniques implicate competing values of great importance to all New Yorkers--privacy and security. Absent this decision, our Legislature would have been in a position to look at **[**1212]** the variety of GPS-related investigative tools currently available to

law enforcement authorities, balance these competing values and fashion a comprehensive regulatory **[*459]** program (*see e.g.* CPL arts 700 and 705) readily capable of amendment as the science evolves. As the variety of approaches enacted by our sister states' legislatures shows, there are numerous ways to deal with these issues.

Of course, the Legislature is still free to act in this area. But by constitutionalizing this particular GPS monitoring technology, my colleagues in the majority have defined what the Legislature cannot do in a fashion that may make little sense. For example, perhaps the most controversial aspect of this case was the length of time--65 days--the GPS tracking device remained attached to defendant's van. The Legislature might have considered whether to **[****50]** allow law enforcement (with or without a warrant) to place such a device on a vehicle for a limited period of time, based on a reasonable suspicion that this would produce information relevant to an investigation of criminal activity. Because of today's decision, however, this and any number of other potential options that the Legislature (and most New Yorkers) might view as respectful of both privacy and security are off the table: instead, law enforcement authorities will have to obtain a warrant based on probable cause to believe that installation of a GPS tracking device **[18]** will disclose evidence of a crime. Further, different judges may impose different temporal or other restrictions in the warrant, creating a lack of uniformity even where GPS tracking is permitted. As a result, the utility of this particular GPS monitoring technology as a police investigative tool has been significantly diminished. In effect, by torturing precedent to "find" a new subject of State constitutional protection, the majority has limited the Legislature's liberty to act in the best interests of the State's citizens as a whole.

Conclusion

Surely, it is up to the judiciary to protect New Yorkers' individual **[****51]** constitutional rights--there is no doubt whatsoever about that; surely, we may establish a greater level of protection under our State Constitution for those rights than the Supreme Court recognizes under a parallel provision of the national Constitution--equally, there is no doubt whatsoever about that; and surely, technological advances may threaten individual privacy by enabling otherwise prohibitively costly surveillance. As a result, safeguards against potential government (and perhaps **[*460]** private) [4] abuse of these technologies **[***375]** should be explored in New York: protections have, after all, been put into place by many other states' legislatures. But as the majority opinion's thin legal analysis and Judge Smith's dissent show, federal and New York precedents do not transmute GPS-assisted monitoring for information that could have been easily gotten by traditional physical surveillance into a constitutionally prohibited search. By ruling otherwise, the majority calls the Court's institutional integrity into question, and denies New Yorkers the full benefit of the carefully wrought balance between privacy and security interests that other states have struck for their citizens through **[****52]** legislation. **[**1213]** For these reasons and those expressed by Judge Smith, I respectfully dissent.

Judges Ciparick, Pigott and Jones concur with Chief Judge Lippman; Judge Smith dissents in a separate opinion in which Judges Graffeo and Read concur; Judge Read dissents in another opinion in which Judge Graffeo concurs.

Order reversed, etc.

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[4] The "Q-ball" involved in this case is apparently relatively cheap and widely available to the public (*see* Kyllo, 533 U.S. at 34 [suggesting that law enforcement does not engage in a constitutionally prohibited search when it uses technology readily accessible to the public]). There is no reason to doubt that private citizens (say, for example, a suspicious spouse) have used these GPS tracking devices to surreptitiously monitor the movements of fellow citizens' vehicles. Today's decision does nothing to prevent this from happening or to curb its incidence.

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*489 STATE CONSTITUTIONS AND THE PROTECTION OF INDIVIDUAL RIGHTS

William J. Brennan, Jr. [FNa1]

During the 1960's, as the Supreme Court expanded the measure of federal protection for individual rights, there was little need for litigants to rest their claims, or judges their decisions, on state constitutonal grounds. In this Article, Mr. Justice Brennan argues that the trend of recent Supreme Court civil liberties decisions should prompt a reappraisal of that strategy. He particularly notes the numerous state courts which have already extended to their citizens, via state constitutions, greater protections than the Supreme Court has held are applicable under the federal Bill of Rights. Finally, he discusses, and applauds, the implications of this new state court activism for the structure of American federalism.

REACHING the biblical summit of three score and ten seems to be the occasion--or the excuse--for looking back. Forty-eight years ago I entered law school and forty-four years ago was admitted to the New Jersey Bar. In those days of innocence, the preoccupation of the profession, bench and bar, was with questions usually answered by application of state common law principles or state statutes. Any necessity to consult federal law was at best episodic. But those were also the grim days of the Depression, and its cure was dramatically to change the face of American law. The year 1933 witnessed the birth of a plethora of new federal laws and new federal agencies developing and enforcing those laws; ones that were to affect profoundly the daily lives of every person in the nation.

In my days at law school, Felix Frankfurter had taught administrative law in terms of the operations of the Interstate Commerce Commission--because that was the only major federal regulatory agency then existing. But then came in rapid succession the National Labor Relations Board, the Securities and Exchange Commission, the Civil Aeronautics Board, the Federal Communications Commission, the Federal Power Commission and a host of others. In addition, laws such as the Fair Labor Standards Act, administered by the Labor Department, also began to require practitioners to master new, and federal, fields of law in ***490** order to serve their clients. And, of course, those laws and agencies did not disappear with the end of the Depression--rather a procession of still more federal agencies and federal laws has followed. Only recently, for example, Congress created the Environmental Protection Agency and the Equal Employment Opportunity Commission--new major sources of concern for today's clients keeping lawyers everywhere very federal law-minded.

In the beginning of this legal revolution, however, federal law was not a major concern of state judges. Judicial involvement with decisions of the new federal agencies was the business

of federal courts. I have tried to recall how often in my years on the New Jersey courts from 1949 to 1956 issues of federal law were relevant to cases tried before me as a trial judge in Paterson and Jersey City, or were addressed by me on the appellate division or in the supreme court. I can remember only three cases out of the hundreds with which I was involved over those years that turned on the resolution of a federal question, and in all three that question was statutory. Two were cases tried before me in Jersey City, one a railroad worker's suit under the Federal Employers Liability Act and the other a case that implicated the Immigration and Naturalization Act. Undoubtedly the reason they are still fresh in my memory is that I had frantically to dig up the federal statutes and federal cases that bore on their disposition because both presented federal questions of first impression in my experience. The third instance was a labor injunction case in which I first circulated an opinion to my brethren on the supreme court sustaining a chancery injunction against peaceful picketing, only to have to withdraw the opinion and set aside the injunction when the United States Supreme Court held that federal law preempted state regulation of such picketing.

In recent years, however, another variety of federal law--that fundamental law protecting all of us from the use of governmental powers in ways inconsistent with American conceptions of human liberty--has dramatically altered the grist of the state courts. Over the past two decades, decisions of the Supreme Court of the United States have returned to the fundamental promises wrought by the blood of those who fought our War between the States, promises which were thereafter embodied in our fourteenth amendment--that the citizens of all our states are also and no less citizens of our United States, that this birthright guarantees our federal constitutional liberties against encroachment by governmental action at any level of our federal system, and that each of us is entitled to due process of law and the equal protection of the laws from our state governments no less than from our national one. Although courts do not today substitute their personal***491** economic beliefs for the judgments of our democratically elected legislatures, [FN1] Supreme Court decisions under the fourteenth amendment have significantly affected virtually every other area, civil and criminal, of state action. And while these decisions have been accompanied by the enforcement of federal rights by federal courts, they have significantly altered the work of state court judges as well. This is both necessary and desirable under our federal system--state courts no less than federal are and ought to be the guardians of our liberties.

But the point I want to stress here is that state courts cannot rest when they have afforded their citizens the full protections of the federal Constitution. State constitutions, too, are a font of individual liberties, their protections often extending beyond those required by the Supreme Court's interpretation of federal law. The legal revolution which has brought federal law to the fore must not be allowed to inhibit the independent protective force of state law--for without it, the full realization of our liberties cannot be guaranteed.

* * *

The decisions of the Supreme Court enforcing the protections of the fourteenth amendment generally fall into one of three categories. The first concerns enforcement of the federal guarantee of equal protection of the laws. While the best known, of course, are *Brown v.*

Board of Education [FN2] and *Baker v. Carr,* [FN3] perhaps even more the concern of state bench and bar in terms of state court litigation are decisions invalidating state legislative classifications that impermissibly impinge on the exercise of fundamental rights, such as the rights to vote, [FN4] to travel interstate, [FN5] or to bear or beget a child. [FN6] Equally important are decisions that require exacting judicial scrutiny of classifications that operate to the peculiar disadvantage of politically powerless groups whose members have historically been subjected to purposeful discrimination--racial minorities [FN7] and aliens [FN8] are two examples.

The second category of decisions concerns the fourteenth ***492** amendment's guarantee against the deprivation of life, liberty or property where that deprivation is without due process of law. The root requirement of due process is that, except for some extraordinary situations, an individual be given an opportunity for a hearing before he is deprived of any significant "liberty" or "property" interest. Our decisions enforcing the guarantee of the due process clause have elaborated the essence of that "liberty" and "property" in light of conditions existing in contemporary society. For example, "property" has come to embrace such crucial expectations as a driver's license [FN9] and the statutory entitlement to minimal economic support, in the form of welfare, of those who by accident, birth or circumstance find themselves without the means of subsistence. [FN10] The due process safeguard against arbitrary deprivation of these entitlements, as well as of more traditional forms of property, such as a workingman's wages [FN11] and his continued possession and use of goods purchased under conditional sales contracts, [FN12] has been recognized as mandating prior notice and the opportunity to be heard. At the same time, conceptions of "liberty" have come to recognize the undeniable proposition that prisoners and parolees retain some vestiges of human dignity, so that prison regulations and parole procedures must provide some form of notice and hearing prior to confinement in solitary [FN13] or the revocation of parole. [FN14] Moreover, the concepts of liberty and property have combined in recognizing that under modern conditions tenured public employees may not have their reasonable expectation of continued employment, [FN15] and school children their right to a public education, [FN16] revoked without notice and opportunity to be heard.

I suppose, however, that it is mostly the third category of decisions by the United States Supreme Court during the last twenty years--those enforcing the specific guarantees of the Bill of Rights against encroachment by state action--that has required the special consideration of state judges, particularly as those decisions affect the administration of the criminal justice system. After his retirement, Chief Justice Earl Warren was asked what he regarded to be the decision during his tenure that would have the greatest consequence for all Americans. His choice was *Baker v. Carr,* because he believed that if each of us has an ***493** equal vote, we are equally armed with the indispensable means to make our views felt. I feel at least as good a case can be made that the series of decisions binding the states to almost all of the restraints of the Bill of Rights will be even more significant in preserving and furthering the ideals we have fashioned for our society.

Before the fourteenth amendment was added to the Constitution, the Supreme Court held that the Bill of Rights did not restrict state, but only federal, action. [FN17] In the decades between 1868, when the fourteenth amendment was adopted, and 1897, the Court decided in

case after case that the amendment did not apply various specific restraints in the Bill of Rights to state action. [FN18] The break-through came in 1897 when the prohibition against taking private property for public use without payment of just compensation was held embodied in the fourteenth amendment's proscription, "nor shall any state deprive any person of … property, without due process of law." [FN19] But extension of the rest of the specific restraints was slow in coming. It was 1925 before it was suggested that perhaps the restraints of the first amendment applied to state action. [FN20] Then in 1949 the fourth amendment's prohibition of unreasonable searches and seizures was extended, [FN21] but the extension was made virtually meaningless because the states were left free to decide for themselves whether any effective means of enforcing the guarantee was to be made available. It was not until 1961 that the Court applied the exclusionary rule to state proceedings. [FN22]

It was in the years from 1962 to 1969 that the face of the law changed. Those years witnessed the extension to the states of nine of the specifics of the Bill of Rights; decisions which have had a profound impact on American life, requiring the deep involvement of state courts in the application of federal law. The eighth amendment's prohibition of cruel and unusual punishment was applied to state action in 1962, [FN23] and is the guarantee under which the death penalty as then administered was struck ***494** down in 1972. [FN24] The provision of the sixth amendment that in all prosecutions the accused shall have the assistance of counsel was applied in 1963, and in consequence counsel must be provided in every courtroom of every state of this land to secure the rights of those accused of crime. [FN25] In 1964, the fifth amendment privilege against compulsory self-incrimination was extended. [FN26] And after decades of police coercion, by means ranging from torture to trickery, the privilege against self-incrimination became the basis of *Miranda v. Arizona,* requiring police to give warnings to a suspect before custodial interrogation. [FN27]

The year 1965 saw the extension of the sixth amendment right of an accused to be confronted by the witnesses against him; [FN28] in 1967 three more guarantees of the sixth amendment--the right to a speedy and public trial, the right to a trial by an impartial jury, and the right to have compulsory process for obtaining witnesses-- were extended. [FN29] In 1969 the double jeopardy clause of the fifth amendment was applied. [FN30] Moreover, the decisions barring state-required prayers in public schools, [FN31] limiting the availability of state libel laws to public officials and public figures, [FN32] and confirming that a right of association is implicitly protected, [FN33] are significant restraints upon state action that resulted from the extension of the specifics of the first amendment.

These decisions over the past two decades gave full effect to the principle of *Boyd v. United States,* [FN34] the case Mr. Justice Brandeis hailed as "a case that will be remembered so long as civil liberty lives in the United States." [FN35] That principle, stated by Mr. Justice Bradley, was "… constitutional provisions for the security of person and property should be liberally construed …. It is the duty of courts to be watchful for the constitutional rights of the citizen, and against any stealthy encroachments thereon." [FN36]

***495** The thread of this series of Bill of Rights holdings reflects a conclusion--arrived at only after a long series of decisions grappling with the pros and cons of the question--that there exists in modern America the necessity for protecting all of us from arbitrary action by

governments more powerful and more pervasive than any in our ancestors' time. Only if the amendments are construed to preserve their fundamental policies will they ensure the maintenance of our constitutional structure of government for a free society. For the genius of our Constitution resides not in any static meaning that it had in a world that is dead and gone, but in the adaptability of its great principles to cope with the problems of a developing America. A principle to be vital must be of wider application than the mischief that gave it birth. Constitutions are not ephemeral documents, designed to meet passing occasions. The future is their care, and therefore, in their application, our contemplation cannot be only of what has been but of what may be.

* * *

Of late, however, more and more state courts are construing state constitutional counterparts of provisions of the Bill of Rights as guaranteeing citizens of their states even more protection than the federal provisions, even those identically phrased. This is surely an important and highly significant development for our constitutional jurisprudence and for our concept of federalism. I suppose it was only natural that when during the 1960's our rights and liberties were in the process of becoming increasingly federalized, state courts saw no reason to consider what protections, if any, were secured by state constitutions. It is not easy to pinpoint why state courts are now beginning to emphasize the protections of their states' own bills of rights. It may not be wide of the mark, however, to suppose that these state courts discern, and disagree with, a trend in recent opinions of the United States Supreme Court to pull back from, or at least suspend for the time being, the enforcement of the *Boyd* principle with respect to application of the federal Bill of Rights and the restraints of the due process and equal protection clauses of the fourteenth amendment.

Under the equal protection clause, for example, the Court has found permissible laws that accord lesser protection to over half of the members of our society due to their susceptibility to the medical condition of pregnancy, [FN37] as well as laws that impose special burdens on those of our citizens who are of illegitimate birth. [FN38] The Court has also found uncompelling the claims of ***496** those barred from judicial forums due to their inability to pay access fees, [FN39] and has further handicapped the indigent by limiting their right to free trial transcripts when challenging the legality of their imprisonment. [FN40]

Under the due process clause, the Supreme Court has found no liberty interest in the reputation of an individual--never tried and never convicted--who is publicly branded as a criminal by the police without benefit of notice, let alone a hearing. [FN41] The Court has recently indicated that tenured public employees might not be entitled to any more process before deprivation of their employment than the government sees fit to give them. [FN42] It has approved the termination of payments to disabled individuals who are completely dependent upon those payments, prior to an oral hearing, a form of hearing statistically shown to result in a huge rate of reversals of preliminary administrative determinations. [FN43] And it has veered from its promise to recognize that prisoners, too, have liberty interests that cannot be ignored. [FN44]

The same trend is repeated in the category of the specific guarantees of the Bill of Rights. The Court has found the first amendment insufficiently flexible to guarantee access to essential public forums when in our evolving society those traditional forums are under private ownership in the form of suburban shopping centers; [FN45] and at the same time has found the amendment's prohibitions insufficient to invalidate a system of restrictions on motion picture theaters based upon the content of their presentations. [FN46] It has found that the warrant requirement plainly appearing***497** on the face of the fourth amendment does not require the police to obtain a warrant before arrest, however easy it might have been to get an arrest warrant. [FN47] It has declined to read the fourth amendment to prohibit searches of an individual by police officers following a stop for a traffic violation, although there exists no probable cause to believe the individual has committed any other legal infraction. [FN48] The Court has held permissible police searches grounded upon consent regardless of whether the consent was a knowing and intelligent one, [FN49] and has found that none of us has a legitimate expectation of privacy in the contents of our bank records, thus permitting governmental seizure of those records without our knowledge or consent. [FN50] Even when the Court has found searches to violate fourth amendment rights, it has--on occasion-- declared exceptions to the exclusionary rule and allowed the use of such evidence. [FN51]

Moreover, the Court has held, contrary to *Boyd v. United States*, that we may not interpose the privilege against self-incrimination to bar government attempts to obtain our personal papers, no matter how private the nature of their contents. [FN52] And the privilege, said the Court, is not violated when statements unconstitutionally obtained from an individual are used for purposes of impeaching his testimony, [FN53] or securing his indictment by a grand jury. [FN54]

The sixth amendment guarantee has fared no better. The guarantee of assistance of counsel has been held unavailable to an accused in custody when shuffled through pre-indictment identification procedures, no matter how essential counsel might be to the avoidance of prejudice to his rights at later stages of the criminal process. [FN55] In addition, the Court has countenanced a state's placing significant burdens--in the form of a “two-tier” ***498** trial system--on the constitutional right to trial by jury in criminal cases. [FN56] And in the face of our requirement of proof of guilt beyond a reasonable doubt, the Court has upheld the permissibility of less than unanimous jury verdicts of guilty. [FN57]

Also, a series of decisions has shaped the doctrines of jurisdiction, justiciability, and remedy, so as increasingly to bar the federal courthouse door in the absence of showings probably impossible to make. [FN58] At the same time, the *Younger* doctrine has been extended to allow state officials to block federal court protection of constitutional rights simply by answering a plaintiff's federal complaint with a state indictment. [FN59] And the centuries-old remedy of habeas corpus was so circumscribed last Term as to weaken drastically its ability to safeguard individuals from invalid imprisonment. [FN60]

It is true, of course, that there has been an increasing amount of litigation of all types filling the calendars of virtually every state and federal court. But a solution that shuts the courthouse door in the face of the litigant with a legitimate claim for relief, particularly a claim of deprivation of a constitutional right, seems to be not only the wrong tool but also a

dangerous tool for solving the problem. The victims of the use of that tool are most often the litigants most in need of judicial protection of their rights--the poor, the underprivileged, the deprived minorities. The very lifeblood of courts is popular confidence that they mete out evenhanded justice and any discrimination that denies these groups access to the courts for resolution of their meritorious claims unnecessarily risks loss of that confidence.

* * *

Some state decisions have indeed suggested a connection between these recent decisions of the United States Supreme Court and the state court's reliance on the state's bill of rights. For example, the California Supreme Court, in holding that statements taken from suspects before first giving them *Miranda* warnings are inadmissible in California courts to impeach an accused who testifies in his own defense, stated: "We … declare that [the decision to the contrary of the United States Supreme Court [FN61]] ***499** is not persuasive authority in any state prosecution in California. … We pause … to reaffirm the independent nature of the California Constitution and our responsibility to separately define and protect the rights of California citizens despite conflicting decisions of the United States Supreme Court interpreting the federal Constitution." [FN62]

Enlightenment comes also from the New Jersey Supreme Court. In 1973 the United States Supreme Court held that where the subject of a search was not in custody and the prosecution attempts to justify the search by showing the subject's consent, the prosecution need not prove that the subject knew he had a right to refuse to consent to the search. [FN63] The Court expressly rejected the contention that the validity of consent to a non-custodial search should be tested by a waiver standard requiring the state to demonstrate that the individual consented to the search knowing he did not have to, and that he intentionally relinquished or abandoned that right. In *State v. Johnson,* [FN64] Mr. Justice Sullivan, writing for New Jersey's high court, first acknowledged that the United States Supreme Court decision was controlling on state courts in construing the fourth amendment and was therefore dispositive of the defendant's federal constitutional argument. [FN65] But Mr. Justice Sullivan went on to consider whether the identically phrased provision of the New Jersey Constitution, Art. 1, para. 7, "should be interpreted to give the individual greater protection than is provided by" the federal provision. [FN66] Counsel had not made this argument either to the trial court or on appeal, but the supreme court, *sua sponte,* posed the issue and afforded counsel the opportunity for argument on the question. Mr. Justice Sullivan held for the court that, while Art. I, para. 7 was *in haec verba* with the fourth amendment and until then had not been held to impose higher or different standards than the fourth amendment, "we have the right to construe our state constitutional provision in accordance with what we conceive to be its plain meaning." [FN67] That meaning, he went on to hold, was "that under Art. I, par. 7 of our State Constitution the validity of a consent to search, even in a non-custodial situation, must be measured in terms of waiver, i.e., where the state ***500** seeks to justify a search on the basis of consent it has the burden of showing that the consent was voluntary, an essential element of which is knowledge of the right to refuse consent." [FN68]

Among other instances of state courts similarly rejecting United States Supreme Court de-

cisions as unpersuasive, the Hawaii [FN69] and California [FN70] Supreme Courts have held that searches incident to lawful arrest are to be tested by a standard of reasonableness rather than automatically validated as incident to arrest; [FN71] the Michigan Supreme Court has held that a suspect is entitled to the assistance of counsel at any pretrial lineup or photographic identification procedure; [FN72] and the South Dakota [FN73] and Maine [FN74] Supreme Courts have held that there is a right to trial by jury even for petty offenses. [FN75]

Other examples abound where state courts have independently considered the merits of constitutional arguments and declined to follow opinions of the United States Supreme Court they find unconvincing, even where the state and federal constitutions are similarly or identically phrased. [FN76] As the Supreme Court of Hawaii has observed, "while this results in a divergence of meaning between words which are the same in both federal and state constitutions, the system of federalism envisaged by the United States Constitution tolerates such divergence where the result is greater protection of individual rights under state law than under federal law…." [FN77] Some state courts seem apparently even to be anticipating contrary rulings by the United States Supreme Court and are therefore resting decisions solely on state law grounds. ***501** For example, the California Supreme Court held, as a matter of state constitutional law, that bank depositors have a sufficient expectation of privacy in their bank records to invalidate the voluntary disclosure of such records by a bank to the police without the knowledge or consent of the depositor; [FN78] thereafter the United States Supreme Court ruled that federal law was to the contrary. [FN79]

And of course state courts that rest their decisions wholly or even partly on state law need not apply federal principles of standing and justiciability that deny litigants access to the courts. Moreover, the state decisions not only cannot be overturned by, they indeed are not even reviewable by, the Supreme Court of the United States. We are utterly without jurisdiction to review such state decisions. [FN80] This was precisely the circumstance of Mr. Justice Hall's now famous *Mt. Laurel* decision, [FN81] which was grounded on the New Jersey Constitution and on state law. The review sought in that case in the United States Supreme Court was, therefore, completely precluded.

This pattern of state court decisions puts to rest the notion that state constitutional provisions were adopted to mirror the federal Bill of Rights. The lesson of history is otherwise; indeed, the drafters of the federal Bill of Rights drew upon corresponding provisions in the various state constitutions. Prior to the adoption of the federal Constitution, each of the rights eventually recognized in the federal Bill of Rights had previously been protected in one or more state constitutions. [FN82] And prior to the adoption of ***502** the fourteenth amendment, these state bills of rights, independently interpreted, were the primary restraints on state action since the federal Bill of Rights had been held inapplicable.

The essential point I am making, of course, is not that the United States Supreme Court is necessarily wrong in its interpretation of the federal Constitution, or that ultimate constitutional truths invariably come prepackaged in the dissents, including my own, from decisions of the Court. It is simply that the decisions of the Court are not, and should not be, dispositive of questions regarding rights guaranteed by counterpart provisions of state law. [FN83] Accordingly, such decisions are not mechanically applicable to state law issues, and state court

judges and the members of the bar seriously err if they so treat them. Rather, state court judges, and also practitioners, do well to scrutinize constitutional decisions by federal courts, for only if they are found to be logically persuasive and well-reasoned, paying due regard to precedent and the policies underlying specific constitutional guarantees, may they properly claim persuasive weight as guideposts when interpreting counterpart state guarantees. I suggest to the bar that, although in the past it might have been safe for counsel to raise only federal constitutional issues in state courts, plainly it would be most unwise these days not also to raise the state constitutional questions.

* * *

Every believer in our concept of federalism, and I am a devout believer, must salute this development in our state courts. Unfortunately, federalism has taken on a new meaning of late. In its name, many of the door-closing decisions described above have been rendered. [FN84] Under the banner of the vague, undefined notions of equity, comity and federalism the Court has condoned both isolated [FN85] and systematic [FN86] violations of civil liberties. Such decisions hardly bespeak a true concern for equity. Nor do they properly understand the nature of our federalism. Adopting the premise that state courts can be trusted to safeguard individual ***503** rights, [FN87] the Supreme Court has gone on to limit the protective role of the federal judiciary. But in so doing, it has forgotten that one of the strengths of our federal system is that it provides a double source of protection for the rights of our citizens. Federalism is not served when the federal half of that protection is crippled.

Yet, the very premise of the cases that foreclose federal remedies constitutes a clear call to state courts to step into the breach. With the federal locus of our double protections weakened, our liberties cannot survive if the states betray the trust the Court has put in them. And if that trust is, for the Court, strong enough to override the risk that some states may not live up to it, how much more strongly should we trust state courts whose manifest purpose is to expand constitutional protections. With federal scrutiny diminished, state courts must respond by increasing their own.

Moreover, it is not only state-granted rights that state courts can safeguard. If the Supreme Court insists on limiting the content of due process to the rights created by state law, [FN88] state courts can breathe new life into the federal due process clause by interpreting their common law, statutes and constitutions to guarantee a “property” and “liberty” that even the federal courts must protect. Federalism need not be a mean-spirited doctrine that serves only to limit the scope of human liberty. Rather, it must necessarily be furthered significantly when state courts thrust themselves into a position of prominence in the struggle to protect the people of our nation from governmental intrusions on their freedoms.

We can confidently conjecture that James Madison, Father of the Bill of Rights, would have approved. We tend to forget that Madison proposed not ten, but, in the form the House sent them to the Senate, seventeen amendments. The House approved all seventeen including Number XIV--a number prophetic of things to come with the adoption of Amendment XIV seventy-nine years later--for Number XIV would have imposed specific restraints on the

states. Number XIV provided: "No State shall infringe the right of trial by Jury in criminal cases, nor the right of conscience, nor the freedom of speech or of the press." [FN89] Madison, in a speech to the House in 1789, argued that these restrictions on the state power were "of equal, if not greater, importance than those already made" [FN90] in the body of the Constitution. There ***504** was, he said, more danger of those powers being abused by state governments than by the government of the United States. Indeed, he said, he "conceived this to be the most valuable amendment in the whole list. If there were any reason to restrain the Government of the United States from infringing these essential rights, it was equally necessary that they should be secured against the State governments." [FN91]

But Number XIV was rejected by the Senate, and Madison's aim was not accomplished until adoption of Amendment XIV seventy-nine years later. The reason that Madison placed such store in the effectiveness of the Bill of Rights was his belief that "independent tribunals of justice will consider themselves in a peculiar manner the guardians of those rights." [FN92] His reference was, of course, to his proposed Bill including Number XIV, but we may be confident that he would welcome the broadening by state courts of the reach of state constitutional counterparts beyond the federal model as proof of his conviction that independent tribunals of justice "will be naturally led to resist every encroachment upon rights expressly stipulated for…." [FN93]

[FNa1]. Associate Justice, United States Supreme Court.

[FN1]. Ferguson v. Skrupa, 372 U.S. 726, 730 (1963).

[FN2]. 347 U.S. 483 (1954) (invalidating state laws requiring public schools to be racially segregated).

[FN3]. 369 U.S. 186 (1962) (invalidating state laws diluting individual voting rights by legislative malapportionments). *See also* Reynolds v. Sims, 377 U.S. 533 (1964).

[FN4]. Harper v. Virginia State Bd., 383 U.S. 663 (1966).

[FN5]. Shapiro v. Thompson, 394 U.S. 618 (1969).

[FN6]. Eisenstadt v. Baird, 405 U.S. 438 (1972); Griswold v. Connecticut, 381 U.S. 479 (1965).

[FN7]. Brown v. Board of Educ., 347 U.S. 483 (1954).

[FN8]. Sugarman v. Dougall, 413 U.S. 634 (1973); Graham v. Richardson, 403 U.S. 365 (1971).

[FN9]. Bell v. Burson, 402 U.S. 535 (1971).

[FN10]. Goldberg v. Kelly, 397 U.S. 254 (1970).

[FN11]. Sniadach v. Family Fin. Corp., 395 U.S. 337 (1969).

[FN12]. Fuentes v. Shevin, 407 U.S. 67 (1972).

[FN13]. Wolff v. McDonnell, 418 U.S. 539 (1974).

[FN14]. Morrissey v. Brewer, 408 U.S. 471 (1972).

[FN15]. Perry v. Sindermann, 408 U.S. 593 (1972).

[FN16]. Goss v. Lopez, 419 U.S. 556 (1975).

[FN17]. Barron v. Baltimore, 32 U.S. (7 Pet.) 243 (1833).

[FN18]. *See* O'Neil v. Vermont, 144 U.S. 323, 332 (1892); McElvaine v. Brush, 142 U.S. 155, 158-59 (1891); *In re* Kemmler, 136 U.S. 436, 446 (1890); Presser v. Illinois, 116 U.S. 252, 263-68 (1886); Hurtado v. California, 110 U.S. 516 (1884); United States v. Cruikshank, 92 U.S. 542, 552-56 (1875); Walker v. Sauvinet, 92 U.S. 90 (1875).

[FN19]. Chicago B. & Q.R.R. v. Chicago, 166 U.S. 226, 241 (1897).

[FN20]. *Compare* Gitlow v. New York, 268 U.S. 652, 666 (1925), *with* Prudential Ins. Co. v. Cheek, 259 U.S. 530, 543 (1922).

[FN21]. Wolf v. Colorado, 338 U.S. 25, 27-28 (1949).

[FN22]. Mapp v. Ohio, 367 U.S. 643 (1961).

[FN23]. Robinson v. California, 370 U.S. 660 (1962).

[FN24]. Furman v. Georgia, 408 U.S. 238 (1972). *But see* Gregg v. Georgia, 96 S. Ct. 2909 (1976); Proffitt v. Florida, 96 S. Ct. 2960 (1976); Jurek v. Texas, 96 S. Ct. 2950 (1976).

[FN25]. Gideon v. Wainwright, 372 U.S. 335 (1963); Argersinger v. Hamlin, 407 U.S. 25 (1972).

[FN26]. Malloy v. Hogan, 378 U.S. 1 (1964).

[FN27]. Miranda v. Arizona, 384 U.S. 436 (1966).

[FN28]. Pointer v. Texas, 380 U.S. 400 (1965).

[FN29]. Klopfer v. North Carolina, 386 U.S. 213 (1967); Parker v. Gladden, 385 U.S. 363 (1966); Washington v. Texas, 388 U.S. 14 (1967).

[FN30]. Benton v. Maryland, 395 U.S. 784 (1969).

[FN31]. School Dist. v. Schempp, 374 U.S. 203 (1963).

[FN32]. New York Times Co. v. Sullivan, 376 U.S. 254 (1964).

[FN33]. NAACP v. Alabama, 377 U.S. 288 (1964).

[FN34]. 116 U.S. 616 (1886).

[FN35]. Olmstead v. United States, 277 U.S. 438, 474 (1928) (dissenting opinion).

[FN36]. 116 U.S. at 635.

[FN37]. Geduldig v. Aiello, 417 U.S. 484 (1974); *cf.* General Electric Co. v. Gilbert, 45 U.S.L.W. 4031 (U.S. Dec. 7, 1976) (decided under Title VII).

[FN38]. *Compare* Mathews v. Lucas, 96 S. Ct. 2755 (1976), *with* Weber v. Aetna Cas. & Sur. Co., 406 U.S. 164, 175 (1972) ("… imposing disabilities on the illegitimate child is contrary to the basic concept of our system that legal burdens should bear some relationship to individual responsibility or wrongdoing."). Recent decisions have also given rise to some doubt as to the Court's continuing commitment to the eradication of racial discrimination in employment and education. *See* Washington v. Davis, 96 S. Ct. 2040 (1976); Pasadena City Bd. of Educ. v. Spangler, 96 S. Ct. 2697 (1976); Milliken v. Bradley, 418 U.S. 717 (1974).

[FN39]. *Compare* Ortwein v. Schwab, 410 U.S. 656 (1973), *and* United States v. Kras, 409 U.S. 434 (1973), *with* Boddie v. Connecticut, 401 U.S. 371 (1971).

[FN40]. United States v. MacCollom, 96 S. Ct. 2086 (1976).

[FN41]. Paul v. Davis, 424 U.S. 693 (1976).

[FN42]. Arnett v. Kennedy, 416 U.S. 134 (1974); Bishop v. Wood, 96 S. Ct. 2074 (1976).

[FN43]. Mathews v. Eldridge, 424 U.S. 319 (1976).

[FN44]. *Compare* Meachum v. Fano, 96 S. Ct. 2532 (1976) (finding no liberty interest implicated in the transfer of a prisoner to a maximum security facility), *with* Wolff v. McDonnell, 418 U.S. 539 (1974).

[FN45]. Hudgens v. NLRB, 424 U.S. 507 (1976), *overruling* Food Employees Union Local 590 v. Logan Valley Plaza, Inc., 391 U.S. 308 (1968); Lloyd Corp. v. Tanner, 407 U.S. 551 (1972).

[FN46]. *Compare* Young v. American Mini-Theatres, Inc., 96 S. Ct. 2440 (1976), *with* Erznoznick v. City of Jacksonville, 422 U.S. 205 (1975).

[FN47]. United States v. Watson, 423 U.S. 411 (1976). *See also* United States v. Santana, 96 S. Ct. 2406 (1976) (holding that in a *Watson*-like situation, police may pursue a suspect into his or her home).

[FN48]. United States v. Robinson, 414 U.S. 218 (1973); Gustafson v. Florida, 414 U.S. 260 (1973). The Court has also declined to read the amendment to prohibit warrantless searches of the glove compartments of automobiles impounded for mere parking violations. South Dakota v. Opperman, 96 S. Ct. 3092 (1976).

[FN49]. United States v. Watson, 423 U.S. 411 (1976); Schneckloth v. Bustamonte, 412 U.S.

218 (1973).

[FN50]. United States v. Miller, 96 S. Ct. 1619 (1976).

[FN51]. *E.g.*, United States v. Janis, 96 S. Ct. 3021 (1976).

[FN52]. Andresen v. Maryland, 96 S. Ct. 2737 (1976); Fisher v United States, 96 S. Ct. 1569 (1976).

[FN53]. Harris v. New York, 401 U.S. 222 (1971).

[FN54]. United States v. Calandra, 414 U.S. 338 (1974).

[FN55]. *Compare* Kirby v. Illinois, 406 U.S. 682 (1972), *with* United States v. Wade, 388 U.S. 218 (1967).

[FN56]. Ludwig v. Massachusetts, 96 S. Ct. 2781 (1976) (approving trial de novo system).

[FN57]. Apodaca v. Oregon, 406 U.S. 404 (1972).

[FN58]. Rizzo v. Goode, 423 U.S. 362 (1976); Simon v. Eastern Ky. Welfare Rights Org., 96 S. Ct. 1917 (1976); Warth v. Seldin, 422 U.S. 490 (1975); O'Shea v. Littleton, 414 U.S. 488 (1974).

[FN59]. Hicks v. Miranda, 422 U.S. 332 (1975).

[FN60]. Stone v. Powell, 96 S. Ct. 3037 (1976); Francis v. Henderson, 96 S. Ct. 1708 (1976).

[FN61]. Harris v. New York, 401 U.S. 222 (1971).

[FN62]. People v. Disbrow, 16 Cal. 3d 101, 113, 114-15, 545 P.2d 272, 280, 127 Cal. Rptr. 360, 368 (1976). The Hawaii and Pennsylvania Supreme Courts have taken similar positions. *See* State v. Santiago, 53 Hawaii 254, 492 P.2d 657 (1971); Commonwealth v. Triplett, 341 A.2d 62 (Pa. 1975).

[FN63]. Schneckloth v. Bustamonte, 412 U.S. 218 (1973).

[FN64]. 68 N.J. 349, 346 A.2d 66 (1975).

[FN65]. *See* Oregon v. Hass, 420 U.S. 714, 719 (1975).

[FN66]. 68 N.J. at 353, 346 A.2d at 67-68.

[FN67]. *Id.* at 353 n.2, 346 A.2d at 68 n.2.

[FN68]. *Id.* at 353-54, 346 A.2d at 68.

[FN69]. State v Kaluna, 55 Hawaii 361, 520 P.2d 51 (1974).

[FN70]. People v. Brisendine, 13 Cal. 3d 528, 531 P.2d 1099, 119 Cal. Rptr. 315 (1975).

[FN71]. *Compare* cases cited notes 69 & 70 *supra, with* United States v. Robinson, 414 U.S. 218 (1973).

[FN72]. *Compare* People v. Jackson, 391 Mich. 323, 217 N.W.2d 22 (1974), *with* United States v. Ash, 413 U.S. 300 (1973).

[FN73]. Parham v. Municipal Court, 199 N.W.2d 501 (S.D. 1972).

[FN74]. State v. Sklar, 317 A.2d 160 (Me. 1974). *See also* Baker v. City of Fairbanks, 471 P.2d 386 (Alaska 1970).

[FN75]. *Compare* cases cited notes 73 and 74 *supra, with* Baldwin v. New York, 399 U.S. 66 (1970), *and* Duncan v. Louisiana, 391 U.S. 145 (1968).

[FN76]. For a listing of such examples, see the cases collected in the following articles: Falk, *The Supreme Court of California 1971-1972, Foreword: The State Constitution: A More than "Adequate" Nonfederal Ground,* 61 CALIF. L. REV. 273 (1973); Howard, *State Courts and Constitutional Rights in the Day of the Burger Court,* 62 VA. L. REV. 873 (1976); Wilkes, *The New Federalism in Criminal Procedure: State Court Evasion of the Burger Court,* 62 KY. L.J. 421, 437-43 (1974); Wilkes, *More on the New Federalism in Criminal Procedure,* 63 KY. L.J. 873 (1975); *Project Report, Toward an Activist Role for State Bills of Rights,* 8 HARV. C.R.-C.L. L. REV. 271 (1973).

[FN77]. State v. Kaluna, 55 Hawaii 361, 369 n.6, 520 P.2d 51, 58 n.6 (1974).

[FN78]. Burrows v. Superior Court, 13 Cal. 3d 238, 529 P.2d 590, 118 Cal. Rptr. 166 (1974).

[FN79]. United States v. Miller, 96 S. Ct. 1619 (1976).

[FN80]. The Supreme Court's jurisdiction over state cases is limited to the correction of errors related solely to questions of federal law. It cannot review state court determinations of state law even when the case also involves federal issues. Murdock v. City of Memphis, 87 U.S. (20 Wall.) 590 (1875). Moreover, if a state ground is independent and adequate to support a judgment, the Court has no jurisdiction at all over the decision despite the presence of federal issues. Fox Film Corp. v. Muller, 296 U.S. 207 (1935); Murdock v. City of Memphis, 87 U.S. (20 Wall.) 590 (1875). One reason for the refusal to review such decisions, even where the state court also decides a federal question erroneously, was explained by Mr. Justice Jackson in Herb v. Pitcairn, 324 U.S. 117, 125-26 (1945):

> Our only power over state judgments is to correct them to the extent that they incorrectly adjudge federal rights. And our power is to correct wrong judgments, not to revise opinions. We are not permitted to render an advisory opinion, and if the same judgment would be rendered by the state court after we corrected its views of federal laws, our review could amount to nothing more than an advisory opinion.

[FN81]. Southern Burlington County NAACP v. Township of Mt. Laurel, 67 N.J. 151, 336 A.2d 713 (invalidating town's exclusive zoning ordinance), *appeal dismissed and cert. denied,* 423 U.S. 808 (1975).

[FN82]. *See generally* Brennan, *The Bill of Rights and the States,* in THE GREAT RIGHTS (E. Cahn ed. 1963).

[FN83]. The Court has made this point clear on a number of occasions. *See* Oregon v. Hass, 420 U.S. 714, 719 (1975) ("… a State is free *as a matter of its own law* to impose greater restrictions on police activity than those this Court holds to be necessary upon federal constitutional standards"); Cooper v. California, 386 U.S. 58, 62 (1967).

[FN84]. *See* Stone v. Powell, 96 S. Ct. 3037 (1976); Francis v. Henderson, 96 S. Ct. 1708 (1976); Hicks v. Miranda, 422 U.S. 332 (1975).

[FN85]. *See* Paul v. Davis, 424 U.S. 693 (1976); cases cited note 84 *supra.*

[FN86]. *See* Rizzo v. Goode, 423 U.S. 362 (1976); O'Shea v. Littleton, 414 U.S. 488 (1974).

[FN87]. *See* Stone v. Powell, 96 S. Ct. 3037, 3051 n.35 (1976); Doran v. Salem Inn, Inc., 422 U.S. 922, 930 (1975).

[FN88]. *See* p. 496 & notes 41-42 *supra.*

[FN89]. *See* E. DUMBAULD, THE BILL OF RIGHTS 215 (1957); Brennan, *supra* note 82, at 69-70.

[FN90]. 1 ANNALS OF CONG. 440 (Gales & Seaton eds. 1789).

[FN91]. *Id.* at 755. *See* Brennan, *supra* note 82, at 69-70.

[FN92]. 1 ANNALS OF CONG. 439 (Gales & Seaton eds. 1789). *See* United States v. Calandra, 414 U.S. 330, 356-57 (1974) (Brennan, J., dissenting).

[FN93]. 1 ANNALS OF CONG. 439 (Gales & Seaton eds. 1789).
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The Making of a Judge's Judge: Judith S. Kaye's 1987 Cardozo Lecture

Henry M. Greenberg

The Making of a Judge's Judge

JUDITH S. KAYE'S 1987 CARDOZO LECTURE

Henry M. Greenberg†

On the evening of February 26, 1987, Judge Judith S. Kaye delivered the Forty-First Benjamin N. Cardozo Lecture in the Great Hall of the Association of the Bar of the City of New York.[1] The audience was not large. The media did not cover the event. But Kaye's address was a turning point in her career and a milestone in New York legal history.

The Cardozo Lecture is one of America's most prestigious lecture series devoted to jurisprudence. It has drawn the brightest stars of the legal firmament to the City Bar. Past speakers include U.S. Supreme Court Justices,[2] Chief Judges of state courts of last resort,[3] distinguished academicians,[4] practitioners,[5] and other legal luminaries.[6]

It was a great honor for Kaye to be invited to give a Cardozo Lecture, especially so early in her judicial career. She was 48 years old and had served only three years as an

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† Henry M. Greenberg is a shareholder with Greenberg Traurig, LLP. He attended Judge Kaye's Benjamin N. Cardozo Lecture (Cardozo Lecture) in 1987, along with his future wife, Hope Engel, a brilliant attorney who has worked at the New York Court of Appeals for 30 years. The author served as a law clerk to Judge Kaye from 1988 to 1990.

[1] *See* Judith S. Kaye, *Dual Constitutionalism in Practice and Principal*, 61 ST. JOHN'S L. REV. 399 (1987) [hereinafter Kaye, *Dual Constitutionalism*], *reprinted from* 42 REC. ASS'N B. CITY N.Y. 285 (1987). The Association of the Bar of the City of New York is known today as the New York City Bar Association (the City Bar).

[2] *E.g.*, Ruth Bader Ginsburg (1999), William J. Brennan, Jr. (1987), Earl Warren (1970), John M. Harlan (1958), William O. Douglas (1949), Felix Frankfurter (1947), Robert H. Jackson (1944), and John M. Harlan (1958). *See The Benjamin N. Cardozo Lectures*, NEW YORK CITY BAR ASSOCIATION, http://www.nycbar.org/about-us/awards-aamp-special-lectures/the-benjamin-a-cardozo-lectures [http://perma.cc/X5NP-LJ9H] (last visited June 5, 2016).

[3] *E.g.*, Walter V. Schaefer (1967), Roger J. Traynor (1966), and Irving Lehman (1941). *Id.*

[4] *E.g.*, Lee C. Bollinger (2005), Geoffrey C. Hazzard, Jr. (1985), Derek C. Bok (1982), and Erwin N. Griswold (1972). *Id.*

[5] *E.g.*, Frederick A.O. Schwarz, Jr. (1991), Harrison Tweed (1955), and Whitney North Seymour (1968). *Id.*

[6] The City Bar collected and published Cardozo Lectures, delivered between 1941 and 1995, in THE BENJAMIN N. CARDOZO MEMORIAL LECTURES DELIVERED AT THE ASSOCIATION OF THE BAR OF THE CITY OF NEW YORK, 1941-1995 (1996).

Associate Judge on the New York Court of Appeals.[7] She had published a few law review articles and delivered a handful of speeches, but none were of particular moment.[8] Coming to the court directly from private practice, her first years on the bench were devoted to making the transition from the "fundamentally different roles" of lawyer to judge, advocate to arbiter.[9] She once joked that "[f]or a long time after my appointment to the Court of Appeals I marked every passing week as a triumph of survival—my own as well as the law of the State of New York."[10]

Her self-deprecating humor notwithstanding, Kaye quickly mastered the craft of judging. Even so, she had to adjust to the "thunderous quiet" of her new life as an appellate judge.[11] She missed the day-to-day interaction with lawyers in her former law firm and active participation in bar association activities.[12] Her love of the law and insatiable curiosity about it sought an outlet for expression beyond deciding cases. She wanted to be a "judge's judge" and knew that many of the nation's greatest jurists contributed to the growth of the law (and enhanced their reputations) through extrajudicial writings and addresses.[13]

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[7] Governor Mario M. Cuomo appointed Kaye an Associate Judge of the New York Court of Appeals in 1983 and Chief Judge in 1993. Steven C. Krane, *Dedication to Judith S. Kaye*, 70 ALB. L. REV. 807, 809-10 (2007).

[8] Judith S. Kaye, *Foreword to Report of the New York Task Force on Women in the Courts*, 15 FORDHAM URBAN L.J. 1 (1986); Judith S. Kaye, *My "Freshman Years" on the Court of Appeals*, 70 JUDICATURE 166 (1986) [hereinafter Kaye, *My "Freshman Years"*]; Judith S. Kaye, *Dedication, An Open Letter to My Colleague and Friend on the Occasion of His Seventieth Birthday*, 53 FORDHAM L. REV. 147 (1984).

[9] Kaye, *My "Freshman Years," supra* note 8, at 166.

[10] Judith S. Kaye, *A Five-Year Retrospective*, Address at New York State Family Court Judges Conference 10 (Sept. 24, 1988).

[11] Kaye, *My "Freshman Years," supra* note 8, at 166.

[12] *Id.*

[13] Perhaps the best example of such a jurist is the man after whom the Cardozo Lecture was named, Benjamin N. Cardozo, Kaye's illustrious predecessor as Chief Judge of the New York Court of Appeals. As it happens, Kaye idolized Cardozo—indeed, she personally identified with him—and was a scholar of his life and works. *See* Judith S. Kaye, *Cardozo: A Law Classic*, 112 HARV. L. REV. 1026, 1026-27 (1999) ("I occupy Cardozo's desk in Albany Chambers and his center chair at the Court's daily conferences and oral arguments, his spittoon at my feet (confident that neither of us would dream of using it for its intended purpose). My home is a mere five blocks from his, on the Upper West Side of Manhattan. My husband and I are long-time members of the Spanish and Portuguese Synagogue—his congregation—and friends of Cardozo family members."); *see also* Judith S. Kaye, *Benjamin N. Cardozo*, *in* THE JUDGES OF THE NEW YORK COURT OF APPEALS: A BIOGRAPHICAL HISTORY 376 (Albert M. Rosenblatt ed., 2007) [hereinafter THE JUDGES OF THE NEW YORK COURT OF APPEALS]. As such, Kaye was well aware that Cardozo delivered lectures published to great acclaim, especially *The Nature of the Judicial Process* (1921), which "erected a framework for understanding how judges go about their work. Thus, in his lifetime he not only changed the law, but also changed the way many thought about the law." Judith S. Kaye, *Cardozo: A Law Classic*, 112 HARV. L. REV. 1026, 1037-38 (1999). Additionally, Cardozo's extrajudicial writing "enhanced his standing in the legal profession and continues to do so." RICHARD A. POSNER, CARDOZO: A STUDY IN REPUTATION 129-30 (1990); *see also* Andrew L. Kaufman, *Cardozo, Benjamin N.*, in THE YALE BIOGRAPHICAL DICTIONARY OF AMERICAN LAW 95, 96 (Roger K. Newman ed.,

The Cardozo Lecture gave Kaye an opportunity to prove herself as a legal theorist and scholar. She seized the moment. Her chosen subject—state constitutional law—was largely unfamiliar to the Bench and Bar, as it had been for Kaye just a few years earlier. Before becoming a judge, she was aware of the existence of New York's Constitution and knew that every state has a constitution of its own. But that was all she knew. Like most lawyers trained in American law schools in the 1960s, her orientation was exclusively federal constitutional law.[14] In private practice, she never had occasion to think about New York's "double blessing" of having separate state and federal constitutions.[15]

But early in 1984, only months after she was appointed to the Court of Appeals, Kaye attended a conference on state constitutions sponsored by the National Center for State Courts, in Williamsburg, Virginia.[16] The conference was inspired by a 1977 *Harvard Law Review* article authored by William J. Brennan, Jr., an influential Justice of the U.S. Supreme Court, who reminded the profession that "one of the strengths of our federal system is that it provides a double source of protection for the rights of our citizens"—namely, a federal constitutional floor and a state constitutional ceiling.[17] Brennan argued that, for the full realization of fundamental liberties, state courts should look to their own constitutions instead of limiting their decisions to analysis under the U.S. Constitution.[18]

2009) ("[C]ardozo's reputation was derived from his opinions and extrajudicial writing and lectures.").

[14] Susan N. Herman, *Portrait of a Judge: Judith S. Kaye, Dichotomies, and State Constitutional Law*, 75 ALB. L. REV. 1977, 1991-92 (2012) [hereinafter Herman, *Portrait of a Judge*].

[15] *See* Judith S. Kaye, *A Double Blessing: Our State and Federal Constitution*, 20 PACE L. REV. 844, 847 (2010) [hereinafter Kaye, *A Double Blessing*].

[16] Judith S. Kaye, *The Brennan Lecture: A Bit of History*, 17 GREEN BAG 2d 133, 134 (Winter 2014).

[17] William J. Brennan, Jr., *State Constitutions and the Protection of Individual Rights*, 90 HARV. L. REV. 489, 503 (1977) [hereinafter Brennan, *State Constitutions*]; *see also* Stewart F. Hancock, Jr., *New York State Constitutional Law—Today Unquestionably Accepted and Applied as a Vital and Essential Part of New York Jurisprudence*, 77 ALB. L. REV. 1331, 1331 (2014) [hereinafter Hancock, *New York State Constitutional Law*] ("[S]tate constitutionalism or the so-called 'new judicial federalism' was given its most widespread recognition and acceptance as a result of a seminal article by Supreme Court Justice William Brennan."); Linda Greenhouse, *William Brennan, 91, Dies; Gave Court Liberal Vision*, N.Y. TIMES (July 25, 1997), http://www.nytimes.com/1997/07/25/us/william-brennan-91-dies-gave-court-liberal-vision.html [http://perma.cc/5YPK-YEBW] (noting that Brennan's 1977 article, "State Constitutions and the Protection of Individual Rights," "became one of the most frequently cited law review articles in history").

[18] Brennan, *State Constitutions*, *supra* note 17, at 491.

Kaye was swept up by the excitement generated by Brennan's exhortation for state courts to "step into the breach"[19] and revitalize state constitutions.[20] In preparation for the Cardozo Lecture, she steeped herself in the academic literature and case law developments stretching back to the founding of the state and nation.[21]

Kaye pulled out all the stops to make her lecture memorable. She provided the audience with paperback copies of the New York State Constitution. And, she had then–Chief Judge Sol Wachtler arrange for the presence at the lecture of New York's four original state constitutions—1777, 1821, 1846, and 1894—and several original documents involving the State's ratification of the federal Constitution.[22] This historic exhibit was guarded by two New York State Troopers and placed on display in a reception room, only for that evening.[23] Kaye felt that the exhibited documents reinforced "in a most tangible and exciting way that we—the citizens, lawyers and judges of today—are the true keepers and guardians of our Constitutions."[24]

Kaye opened her lecture on a humorous note. She thanked the Chief Judge for making possible the historic exhibit, quipping that her next speech would be on the origins of the law and that he should be prepared to deliver the Ten Commandments.[25] Although not yet the accomplished orator she became in later years, Kaye quickly warmed to her subject and displayed a palpable excitement for it.

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[19] *Id.* at 503. Brennan wrote that "our liberties cannot survive if the states betray the trust the Court has put in them . . . .With federal scrutiny diminished, state courts must respond by increasing their own." *Id.*

[20] *See* Judith S. Kaye, *State Courts at the Dawn of a New Century: Common Law Courts Reading Statutes and Constitutions*, 70 N.Y.U. L. REV. 1, 11 (1995) [hereinafter Kaye, *State Courts at the Dawn of a New Century*] ("I still remember the excitement [Brennan's] stirring words [calling on state courts to 'step into the breach'] generated"); Judith S. Kaye, *In Memoriam: William J. Brennan, Jr.*, 111 HARV. L. REV. 14, 16-17 (1997) (describing the impact of Brennan's call for state courts to take up their role as guardians of individual liberties); *see also* William J. Brennan, Jr., *The Bill of Rights and the States: The Revival of State Constitutions as Guardians of Individual Rights*, 61 N.Y.U. L. REV. 535, 549 (1986) ("[T]he state courts have responded with marvelous enthusiasm to many not-so-subtle invitations to fill the constitutional gaps left by the decisions of the Supreme Court majority.").

[21] *See* Kaye, *Dual Constitutionalism*, *supra* note 1, at 400-21.

[22] *Association Activities*, 42 REC. ASS'N B. CITY N.Y. 271, 271 (1987).

[23] A photo of this historic moment appears on the first page of this issue of the *Brooklyn Law Review*, alongside the introductory remarks by Dean Allard of Brooklyn Law School. *See* Nicholas Allard, *A Tribute to Judge Kaye*, 81 BROOK. L. REV. 1349 (2016).

[24] Kaye, *Dual Constitutionalism*, *supra* note 1, at 288.

[25] Twenty-nine years after the lecture, Judge Wachtler fondly recalled Judge Kaye's joke, as well as the steps he took to arrange for the historical exhibit, when he spoke with me on April 13, 2016.

First, she reviewed the historical role of state constitutions, which has advanced and receded over the years.[26] Nevertheless, throughout American history, state constitutions have existed and functioned "independently of the federal Constitution."[27] Kaye thus found that "independent state court adjudications based on state constitutions . . . are hardly revolutionary or illegitimate."[28] Against this background, she called attention to New York's long, laboriously detailed and oft-amended State Constitution,[29] containing some provisions that mirror the U.S. Constitution and others unique to the state charter. Examples of provisions with "a distinctive New York character"[30] are those that confer rights to a free education,[31] aid and support of the needy,[32] and environmental conservation.[33]

No one questions that provisions of the New York State Constitution that differ from the U.S. Constitution should be interpreted as a matter of state law.[34] What Kaye focused on, instead, was the hot-button issue of whether New York courts should independently construe provisions of their own State Constitution that have federal analogues and read them to provide greater protections than the federal Constitution, or whether they should read the state provisions to conform to federal precedent. Kaye cited New York's "long tradition of reading the parallel clauses independently and affording broader protection, where appropriate, under the State Constitution."[35] She then planted her flag as a leader of independent state constitutional adjudication, observing that

> there may in particular instances be a principled basis for broader protections within this State because of our history in adopting or applying a clause, or for other reasons. While language differences

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[26] Kaye, *Dual Constitutionalism*, *supra* note 1, at 400-08, 412-20.

[27] *Id.* at 403.

[28] *Id.* at 406; *see also* Judith S. Kaye, *Celebrating Our Other Constitution*, 60 N.Y. ST. B.J., 8, 73 (1988) ("The lesson to be drawn from history is that the process of state court adjudication under state constitutions cannot be viewed as radical or revolutionary. It is a consequence of the fact that we *have* two constitutions with many similar provisions, both living documents, neither superseding the other . . . .").

[29] Kaye, *Dual Constitutionalism*, *supra* note 1, at 408-12.

[30] *Id.* at 409.

[31] *Id.* (citing N.Y. CONST. art. IX, § 1).

[32] *Id.* (citing N.Y. CONST. art. XVII, § 1).

[33] *Id.* at 410 (citing N.Y. CONST. art. XIV, § 4).

[34] *See id.* at 409 ("I will not linger long on a recitation of the provisions of the State Constitution that have no specific analogue or counterpart in the federal document. No one would question that, though other considerations such as due process or equal protection may also be implicated, these singular provisions must at some point be analyzed as a matter of state law."); *id.* at 412 ("Where the text of a state constitution deals with matters not enumerated federally there is obviously basis—indeed necessity—for independent interpretation.").

[35] *Id.*

> between the two constitutions may determine that there is a need for independent analysis, where our Constitution is at issue, the fact that there is no language difference does not spell the end of state judicial review. It invites inquiry into matters of history, tradition, policy and other special state concerns.[36]

Kaye argued that "the development of an independent body of state constitutional doctrine not only has deep historical roots but also is theoretically sound."[37] In her view, state constitutional interpretation should be grounded in the unique character and values of an individual state.[38] "[I]t is the judiciary's duty," she stressed, "to look at what a 'constitution' represents in order to determine what it says, and if what a constitution represents is that community's most basic, overarching values, then it is only right to interpret a state constitution independently of others, even where concepts are expressed in the same words."[39]

Kaye identified practical considerations to support her theory. One was that state courts are closer to the people they serve, the legal environment within their states, and the political processes. This proximity informs state court decisionmaking and makes more readily accessible the constitutional amendment process to correct erroneous rulings.[40] "Moreover," she said, "building a coherent body of law—one that is not merely reacting to particular Supreme Court decisions, or waiting on the Supreme Court to flesh

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[36] *Id.* at 420.

[37] *Id.* at 425.

[38] *See id.* at 409 ("The combination of high detail and accessibility of the amendment process gives our Constitution a distinctive New York character. It is a product and expression of this State."); *id.* at 423 (noting that "[m]any states today espouse cultural values distinctively their own").

[39] *Id.* A quintessential example of a provision in the State Constitution "grounded in the character" of New York, "reflecting its unique character and values," is Article I, Section 8. It provides that "[e]very citizen may freely speak, write and publish . . . sentiments on all subjects." N.Y. CONST. art. I, § 8. Kaye distilled the history and purpose of Article I, Section 8 in *Immuno AG. v. Moor-Jankowski*—which held that that provision provides more protection for speech than the First Amendment to the U.S. Constitution—as follows:

> This State, a cultural center for the Nation, has long provided a hospitable climate for the free exchange of ideas. That tradition is embodied in the free speech guarantee of the New York State Constitution, beginning with the ringing declaration that "[e]very citizen may freely speak, write and publish . . . sentiments on all subjects." Those words, unchanged since the adoption of the constitutional provision in 1821, reflect the deliberate choice of the New York State Constitutional Convention not to follow the language of the First Amendment, ratified 30 years earlier, but instead to set forth our basic democratic ideal of liberty of the press in strong affirmative terms.

Immuno AG. v. Moor-Jankowski, 567 N.E.2d 1270, 1277 (N.Y. 1991) (citations omitted).

[40] Kaye, *Dual Constitutionalism*, *supra* note 1, at 424.

out the contours of a developing right—has the advantage of furthering predictability and stability in our state law."[41]

Having addressed the conditions under which state constitutional rights depend upon the delineation of federal constitutional rights, Kaye turned the tables. She asked: "are there conditions under which federal constitutional rights should depend upon the delineation of state constitutional rights?"[42] Answering this question in the affirmative, Kaye invoked the Ninth Amendment of the U.S. Constitution, which states, "The enumeration in the Constitution, of certain rights, shall not be construed to deny or disparage others retained by the people."[43] She gave this enigmatic provision a novel reading,[44] maintaining that the reference to "rights . . . retained by the people" means that states can establish or alter federal constitutional law.[45] If enough states recognize in their state constitutions a particular value, went the argument, then such value should become part of the federal Constitution.[46] Through this process, in addition to guaranteeing individual rights within their own jurisdictions, state courts can serve as "laboratories" for democracy[47] and "generators of individual rights" for the nation.[48]

Kaye closed her lecture without fanfare or flourish. She tersely summed up by declaring that "state constitutional law

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[41] *Id.*

[42] *Id.* at 425.

[43] U.S. CONST. amend. IX.

[44] Kaye described the Ninth Amendment as "perhaps the one sentence in the federal Constitution that has never been figured out." Kaye, *Dual Constitutionalism*, *supra* note 1, at 426; *see also* Herman, *Portrait of a Judge*, *supra* note 14, at 1999 (describing Kaye's reading of the Ninth Amendment as "a unique theory of federal constitutional interpretation" and federalism).

[45] *See* Kaye, *Dual Constitutionalism*, *supra* note 1, at 428 ("Whatever other rights may have been contemplated by the framers of the ninth amendment, one of these 'original' rights was clearly the right to establish, and to alter, the principles of government.").

[46] *See id.* at 426 ("In short, rights that come to be recognized as such by enough of the People acting through the states may become federal rights—values of national, constitutional importance.").

[47] *See* New State Ice Co. v. Liebmann, 285 U.S. 262, 311 (1932) (Brandeis, J., dissenting) ("It is one of the happy incidents of the federal system that a single courageous State may, if its citizens choose, *serve as a laboratory*; and try novel social and economic experiments without risk to the rest of the country." (emphasis added)). Kaye elsewhere used Brandeis's famous metaphor of states as laboratories when advocating for independent state constitutional adjudication. *See, e.g.*, People v. Scott and Keta, 593 N.E.2d 1328, 1348 (N.Y. 1990) (Kaye, J., concurring) ("Dual sovereignty has in fact proved itself not a weakness but a strength of our system of government. States, for example, by recognizing greater safeguards as a matter of State law can serve as 'laboratories' for national law . . . ." (citation omitted)); Kaye, *A Double Blessing*, *supra* note 15, at 848 ("Throughout American history decisions reached in the state court 'laboratories' under their own State Constitutions have sparked national debate, at times even persuading the United States Supreme Court to overturn its own decisions interpreting similar provisions of the United States Constitution and recognize greater rights.").

[48] Kaye, *Dual Constitutionalism*, *supra* note 1, at 429.

is significant historically; its independent development is sound today, both practically and theoretically; and it represents an avenue for the future delineation of constitutional rights nationally."[49] That was the pure and simple case she made.

Other prominent jurists, like Supreme Court Justice Brennan and Justice Hans A. Linde of Oregon,[50] had expressed similar views. But as Professor Susan N. Herman has aptly noted, Kaye's Cardozo Lecture "was one of the first to apply their points to the New York State Constitution and to urge New Yorkers to practice the art of state constitutional law."[51] At the time, there was little support for relying on the New York State Constitution to protect individual rights not adequately protected by the Supreme Court under the federal Constitution.[52] As Kaye explained, the legal profession "had grown so federalized, so accustomed to the Supreme Court of the United States as the fount of constitutional wisdom, that we barely remembered that our state even had a constitution."[53]

Kaye published her Cardozo Lecture as a law review article entitled *Dual Constitutionalism in Practice and Principle*.[54] The printed version runs 30 pages and is densely footnoted, establishing academic credibility and precedent for state constitutional adjudication. In the years that followed, she elaborated her views in a series of lectures[55] and publications.[56]

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[49] *Id.*

[50] *See, e.g.*, Hans A. Linde, *E Pluribus—Constitutional Theory and State Courts*, 18 GA. L. REV. 165 (1984); Hans A. Linde, *First Things First: Rediscovering the States' Bills of Rights*, 9 U. BALT. L. REV. 379 (1980).

[51] Herman, *Portrait of a Judge*, *supra* note 14, at 1993.

[52] *See* Hancock, *New York State Constitutional Law*, *supra* note 17, at 1331 ("In 1993, . . . reliance on New York State constitutional law to protect individual rights not adequately protected by the United States Supreme Court was still a recently emerging doctrine." (citation omitted)).

[53] Kaye, *State Courts at the Dawn of a New Century*, *supra* note 20, at 11-12.

[54] Kaye, *Dual Constitutionalism*, *supra* note 1.

[55] *See, e.g.*, Kaye, *State Courts at the Dawn of a New Century*, *supra* note 20 (reprinting Kaye's Brennan lecture delivered at New York University Law School on March 31, 1995).

[56] *See, e.g.*, Kaye, *A Double Blessing*, *supra* note 15; Judith S. Kaye, *State Constitutional Law and the State High Courts in the 21st Century*, 70 ALB. L. REV. 825 (2007); Hon. Judith S. Kaye, *Foreword to State Courts in Our Federal System: The Contributions of the New York Court of Appeals*, 46 SYRACUSE L. REV. 217 (1995); Kaye, *State Courts at the Dawn of a New Century*, *supra* note 20; Judith S. Kaye, *Foreword: The Common Law and State Constitutional Law as Full Partners in the Protection of Individual Rights*, 23 RUTGERS L.J. 727 (1992); Judith S. Kaye, *Federalism's Other Tier*, 3 CONSTITUTION 48 (Winter 1991); Judith S. Kaye, *The Supreme Court: State Constitutional Law*, 25 TRIAL MAGAZINE 67 (Dec. 1989) [hereinafter Kaye, *The Supreme Court: State Constitutional Law*]; Judith S. Kaye, *State Constitutional Adjudication Enjoys Clear Historical Foundation*, N.Y.L.J., Apr. 29, 1987; Judith S. Kaye, *Contributions of State Constitutional Law to the Third Century of American Federalism*, 13 VT. L. REV. 49 (1988); Judith S. Kaye, *A Midpoint Perspective on Directions in State Constitutional Law*, 1

These works reached not only academics, but also practicing lawyers. Kaye often recalled with joy the lawyer who heard her Cardozo Lecture and wrote her to express his delight, "I feel like I'm swimming in a whole new sea of culture."[57]

Soon after giving the Cardozo Lecture, Kaye put to use what she learned preparing it, fighting for acceptance of her views on the Court of Appeals.[58] She stood out from her colleagues in the 1980s as an advocate for resolving constitutional questions on the basis of the State Constitution in the face of federal precedents.[59] In dissents and concurrences, she repeatedly stated her belief that the Court of Appeals should independently interpret the State Constitution[60] and expressed dismay when the court retreated from prior rulings upholding state constitutional protections.[61]

The Cardozo Lecture was the intellectual foundation upon which Kaye built a reputation as one of the nation's leading thinkers about state constitutions.[62] By 1989, she was viewed "as

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EMERGING ISSUES ST. CONST. L. 17 (1988); Kaye, *Celebrating Our Other Constitutions*, *supra* note 28.

[57] Kaye, *The Supreme Court: State Constitutional Law*, *supra* note 55, at 67.

[58] *See* Vincent Martin Bonventre, *New York's Chief Judge Kaye: Her Separate Opinions Bode Well for Renewed State Constitutionalism at the Court of Appeals*, 67 TEMP. L. REV. 1163, 1169-1205 (1994) [hereinafter Bonventre, *New York's Chief Judge Kaye*] (detailing Judge Kaye's contributions to state constitutionalism through 1994).

[59] *See id.* at 1166 ("Unlike . . . the court generally, Kaye did not follow the Supreme Court's lead . . . . [H]er voting . . . [was] significantly more supportive of rights and liberties than that of the court as a whole.").

[60] For example, in Kaye's dissent in *People v. Hernandez*, she urged her colleagues not to assume that state law "would proceed in lockstep with Federal Law" and to develop "an authoritative body of State law instead of being held in suspense, case-by-case," by what the U.S. Supreme Court may decide in the future. People v. Hernandez, 552 N.E.2d 621, 626 (N.Y. 1990) (Kaye, J., dissenting), *aff'd*, 500 U.S. 352 (1991). Likewise, in Kaye's concurrence in *People v. Scott and Keta*—responding to arguments against giving defendants the protection of the state constitution for rights not covered under the federal Constitution—she directly instructed her colleagues that it is "perfectly respectable and legitimate" for a state court to establish higher constitutional standards locally. People v. Scott and Keta, 593 N.E.2d 1328, 1346-48 (N.Y. 1990) (Kaye, J., concurring). It does not show disdain for the Supreme Court, challenge its authority, or insult the Justices, she continued. *Id.* at 1347-48; *see also* O'Neil v. Oakgrove Construction, Inc., 523 N.E.2d 277, 282 (N.Y. 1988) (Kaye, J., concurring) (agreeing with the court's majority to provide greater protection for freedom of the press than the U.S. Supreme Court, but expressing the view that the "the case is correctly resolved under the State Constitution alone").

[61] *See, e.g.*, People v. Bing, 492, 558 N.E.2d 1011, 1023, 1029 (N.Y. 1990) (Kaye, J., concurring in part, dissenting in part) (objecting to the court's "break with its proud tradition" of protecting a defendant's constitutional right to counsel and that the cases before the Court provided inadequate justification for the "overruling of a significant recent precedent, by now fully a part of the law"); Town of Islip v. Caviglia, 540 N.E.2d 215, 235-36 (N.Y. 1989) (Kaye, J., dissenting) (objecting to the court's abandonment of the highly protective standard regarding the right to free expression under the state constitution, stating, "[F]reedoms such as these have been previously accorded transcendent value by this court"); Caruso v. Ward, 530 N.E.2d 850, 856 (N.Y. 1988) (Kaye, J., dissenting) (objecting to the court's "abrupt about-face" in ignoring recent past precedent and upholding program of suspicionless, random urine testing of special narcotics officers).

[62] *See* Ruth Bader Ginsburg, *In Praise of Judith S. Kaye*, 84 N.Y.U. L. REV. 653, 653-54 (2009) ("Taking a cue from Justice Brennan, [Kaye] . . . understood that

a prolific advocate of independent state-based adjudication, both as a matter of constitutional and common law."[63] In 1993, when appointed Chief Judge of the Court of Appeals, she was widely regarded as a brilliant jurist—indeed a judge's judge[64]—with commentators noting her advocacy of the State Constitution in their general evaluations.[65]

Indeed, Judith Kaye advanced New York's State Constitution more than anyone in modern New York history.[66] Due in no small part to her efforts, state constitutional law is no longer seen as an impractical field of study. New York courts now "accept and routinely apply state constitutionalism when necessary to effectively safeguard individual rights and liberties."[67] That would likely not be true but for Kaye's

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New York's constitution and common law had important roles to play in the protection of fundamental human rights. On her watch, the state's constitution and laws were read to advance due process, freedom of expression, freedom from unreasonable searches and seizures, and genuinely equal opportunity. The U.S. Supreme Court's sometimes constricted reading of parallel provisions of the Federal Constitution did not overwhelm her judgment."); Vincent Martin Bonventre, *Editor's Foreword*, 70 ALB. L. REV. 795, 795 (2007) (describing Kaye as the "leading authority on state constitutional law" and a "thoughtful proponent of independent state adjudication"); Herman, *Portrait of a Judge*, *supra* note 14, at 1991-2002 (providing an insightful analysis of Kaye's Cardozo Lecture, her vision of federalism and independent state-based adjudication, and her scholarship generally).

[63] Vincent Martin Bonventre, *State Constitutionalism in New York: A Non-Reactive Tradition*, 2 EMERGING ISSUES ST. CONST. L. 31, 58 n.198 (1989); *see also* Linda B. Matarese, *Other Voices: The Role of Justices Durham, Kaye and Abrahamson in Shaping the Methodology of the "New Judicial Federalism,"* 2 EMERGING ISSUES ST. CONST. L. 239 (I989).

[64] *See, e.g.*, Kevin Sack, *Cuomo's Choice to Head the Court of Appeals: A Judge's Judge*, N.Y. TIMES (Feb. 23, 1993), http://www.nytimes.com/1993/02/23/nyregion/woman-in-the-news-cuomo-s-choice-to-head-the-court-of-appeals-a-judge-s-judge.html [http://perma.cc/9G5Y-CNNB] ("The rigor of her intellect and the clarity of her writing have inspired any number of legal experts to rank her among the brightest members of any state court in the country."); Helen Hershkoff, *Positive Rights and State Constitutions: The Limits of Federal Rationality Review*, 112 HARV. L. REV. 1131, 1141 n.52 (1999) (noting that "[c]ommentators regard Chief Judge Kaye as a skilled and creative jurist").

[65] *See, e.g.*, *Cuomo Nominates Judith Kaye for Top New York Judicial Post*, N.Y. TIMES (Feb. 23, 1993), http://www.nytimes.com/1993/02/23/nyregion/cuomo-nominates-judith-kaye-for-top-new-york-judicial-post.html [http://perma.cc/Z4GW-S6GD] ("Legal scholars said Judge Kaye's appointment was a victory for the principle she has espoused in a number of recent rulings—that provisions of the State Constitution can be applied when they afford more protection of individual rights than those afforded by the United States Constitution."); Bonventre, *New York's Chief Judge Kaye*, *supra* note 58, at 1166 n.16 ("Judge Kaye's national reputation is in no small part due to her advocacy of independent state-based decision-making and her scholarship in the field.").

[66] *See* Albert M. Rosenblatt, *Honoring Chief Judge Judith S. Kaye*, 70 ALB. L. REV. 821, 821 (2007) (Chief Judge Judith S. Kaye . . . in her academic and judicial writings has surely done more to advance our state constitution than anyone else alive.").

[67] Hancock, *New York State Constitutional Law*, *supra* note 17, at 1332; *see, e.g.*, People v. Weaver, 909 N.E.2d 1195 (N.Y. 2009) (holding unconstitutional under Article I, § Section§ 12 of the New York State Constitution the warrantless installation by police of a global positioning system device that permitted the tracking of a suspect's vehicle for a great distance for lengthy periods at minimal cost); Immuno AG. v. Moor-Jankowski, 567 N.E.2d 1270, 1277-80 (N.Y. 1991).

leadership as the Court of Appeals' "foremost student and proponent of state constitutional adjudication."[68]

Apart from its impact on New York law, the Cardozo Lecture represented the first time that Kaye prepared, delivered, and published a scholarly lecture. The experience was so rewarding that she replicated it again and again. When she retired from the court 21 years later in 2008,[69] she had published over 200 articles[70]—on a "kaleidoscopic range of topics"[71]—"confront[ing] as educator, scholar and advocate many of the most important issues facing our country."[72] This astounding outpouring of scholarship and commentary is all the more remarkable given the arduous administrative responsibilities she assumed after becoming Chief Judge in 1993.[73]

Sometimes history is made right before our eyes, and we fail to appreciate it. Doubtless few, if anyone, who saw Kaye's Cardozo Lecture could have foretold its impact on her career and New York law. But history was made on February 26, 1987, at the City Bar. And we are all its beneficiaries.

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[68] Bonventre, *New York's Chief Judge Kaye*, *supra* note 58, at 1166.

[69] In 2008, Kaye turned 70 and was forced to retire at the end of the year by operation of the State Constitution. N.Y. CONST. art. VI, § 25(b).

[70] Herman, *Portrait of a Judge*, *supra* note 14, at 1983. For a partial list of Kaye's published articles, see Steven C. Krane, *Judith Smith Kaye*, *in* THE JUDGES OF THE NEW YORK COURT OF APPEALS, *supra* note 13, at 821-24.

[71] Herman, *Portrait of a Judge*, *supra* note 14, at 1983.

[72] Sandra Day O'Connor, *A Distinguished Path in Public Service*, 84 N.Y.U. L. REV. 662, 663 (2009).

[73] *See* Herman, *Portrait of a Judge*, *supra* note 14, at 1983 ("[W]hen you factor in the amount of time that it consumes to be chief judge of all the courts of New York State as Chief Administrative Judge and to have the full workload of a judge on the Court of Appeals, it is nothing less than astonishing that Judge Kaye managed during that same period of time to publish over two hundred articles."); Sam Roberts, *Judith S. Kaye, First Woman to Serve as New York's Chief Judge, Dies at 77*, N.Y. TIMES (Jan. 7, 2016), http://www.nytimes.com/2016/01/08/nyregion/judith-s-kaye-first-woman-to-serve-as-new-yorks-chief-judge-dies-at-77.html?_r=0 [http://perma.cc/7AQQ-P3GL] (quoting Kaye that her two jobs as the head of New York's court system and the Chief Judge of the Court of Appeals "each . . . took 80 percent of my time").