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People v. Scott & People v. Keta: "Democracy Begins in Conversation"

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*PEOPLE v. SCOTT** & *PEOPLE v. KETA*:** "DEMOCRACY BEGINS IN CONVERSATION"***

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INTRODUCTION

In April, 1992 an acrimoniously divided New York Court of Appeals decided two significant search and seizure cases, *People v. Scott*,[1] which involved the warrantless search of posted undeveloped land for marijuana, and *People v. Keta*,[2] which involved a warrantless administrative search of an automobile dismantling business. The cases are important, first because they establish broad protection for the citizens of New York against unlawful searches and seizures; and second, because in so doing, the court of appeals rejected outright United States Supreme Court precedent on the identical issues in *Oliver v. United States*[3] and *New York v. Burger*[4] under the federal Constitution

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* 79 N.Y.2d 474, 593 N.E.2d 1328, 583 N.Y.S.2d 920 (1992).

** 79 N.Y.2d 474, 593 N.E.2d 1328, 583 N.Y.S.2d 920 (1992).

*** Asked what his long life had taught him, John Dewey is said to have replied, "I have learned that democracy begins in conversation." James Boyd White, *Judicial Criticism*, 20 GA. L. REV. 835 (1986).

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[1] 79 N.Y.2d 474, 593 N.E.2d 1328, 583 N.Y.S.2d 920 (1992). The New York Court of Appeals held 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 and that they will be free from unwarranted intrusions is reasonable" within the meaning of article I, section 12, of the New York State Constitution. *Id.* at 491, 593 N.E.2d at 1338, 583 N.Y.S.2d at 930.

[2] 79 N.Y.2d 474, 593 N.E.2d 1328, 583 N.Y.S.2d 920 (1992). The New York Court of Appeals held that article I, section 12 forbids "random warrantless searches of vehicle dismantling businesses to determine whether such businesses are trafficking in stolen automobile parts." *Id.*

[3] 466 U.S. 170 (1984). In *Oliver* the Supreme Court held warrantless searches of posted land like that in *Scott* to be constitutional.

[4] 482 U.S. 691 (1987). In *Burger* the Court upheld an "administrative" search similar to the one in *Keta*.

and instead relied solely on the New York State constitution.[5]

Both New York decisions triggered strong dissents.[6] While the dissenters were critical of the outcome in both cases, it was not the search and seizure issues that generated the controversy among the members of New York's highest court. Rather, the question that seriously divided them—not for the first time—was the question of methodology: when may a state court *legitimately* reject a decision of the United States Supreme Court interpreting the federal Constitution and use its own state constitution to raise the floor of protection afforded individual rights?[7]

The opinions in *Scott* and *Keta* are both edifying and cautionary, at one and the same time examples of how courts should and should not behave. The court's search and seizure discussions are characterized by logic, reason, adherence to precedent, and appropriate judicial tone. In dramatic contrast, the majority's discussion of the methodology of state constitutional adjudication is non-existent, the concurrence's analysis is elusive and the dissent's answer consists of little more than invective.

Part I of this Article summarizes the majority opinion in *People v. Scott* after providing federal constitutional background; part II does the same for *People v. Keta*. Part III summarizes the omnibus dissent and concurrence in both cases. The double aspect of the cases dictated a two-part analysis. Part IV analyzes *Scott* and *Keta* as search and seizure law, concluding that they are not only good decisions—that is, principled extensions of what came before—but also good opinions, texts that

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[5] Section 12 of article I provides, in pertinent part, that "[t]he right of the people to be secure in their persons, houses, papers and effects, against unreasonable searches and seizures, shall not be violated, and no warrants shall issue, but upon probable cause, supported by oath or affirmation, and particularly describing the place to be searched, and the persons or things to be seized."

[6] 79 N.Y.2d 474, 506, 593 N.E.2d 1328, 1348, 583 N.Y.S.2d 920, 940 (1992) (Bellacosa, J., dissenting).

[7] All of the many courts or commentators that have written on the subject agree that a state supreme court has an unassailable right to interpret its own state constitution. Although state court decisions interpreting the federal Constitution are subject to review by the Supreme Court, state court decisions interpreting state constitutions are subject to Supreme Court review only for violations of federal law. *See, e.g.*, Judith S. Kaye, *Dual Constitutionalism in Practice and Principle*, 61 ST. JOHN'S L. REV. 399, 400 n.2 (1987); Ellen A. Peters, *State Constitutional Law: Federalism in the Common Law Tradition*, 84 MICH. L. REV. 583, 588 (1986) (reviewing DEVELOPMENTS IN STATE CONSTITUTIONAL LAW: THE WILLIAMSBURG CONFERENCE (1985)).

invite the reader to a "conversation in which democracy flourishes."[8] Part V analyzes the state constitutional methodology of *Scott* and *Keta*, concluding that while they are good decisions—that is, the court of appeals acted wisely in granting broader protection under the state constitution than the Supreme Court did under the federal Constitution—they are nevertheless inadequate opinions because they fail to adopt any intelligible theory of state constitutional adjudication on which litigators and judges can rely.

This Article concludes that although any clearly articulated approach to state constitutional adjudication in cases like *Scott* and *Keta*[9] would be preferable to the ambiguity and rancor prevailing in the recent decisions of the court of appeals, there is one "better" method for determining whether departure from Supreme Court precedent is warranted.[10] In brief, such a methodology would require a state court to conduct a careful evaluation of the Supreme Court's decision, exploring the full range of available arguments. This evaluation would result either in adoption or in principled and reasoned rejection. Having discussed the Supreme Court's rationale in a way accessible to readers, a court that disagreed would then be free to use its own state constitution to grant broader protection. Although reasoned disagreement as a basis for departure from Supreme Court precedent has traditionally been disparaged by courts and commentators,[11] this Article argues that it is the only methodology consistent with the state courts' unquestioned historical role as "primary guardian[s]" of individual liberties.[12]

In its painstaking analyses and ultimate rejection of *Oliver* and *Burger*, the New York Court of Appeals has succeeded admirably in doing precisely what this Article advocates. Its failure, however, is in refusing to adopt explicitly the methodology it has in fact employed, making it impossible for participants in

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[8] James Boyd White, *Judicial Criticism*, 20 GA. L. REV. 835, 847, 867 (1986).

[9] That is, cases in which individual rights provided by parallel provisions of a state constitution and the federal Constitution are at stake and the precise issue has been decided by the United States Supreme Court.

[10] *See infra* notes 361-72 and accompanying text.

[11] *See, e.g., Scott*, 79 N.Y.2d 474, 506, 593 N.E.2d 1328, 1348, 583 N.Y.S.2d 920, 940 (1992) (Bellacosa, J., dissenting); James Gardner, *The Failed Discourse of State Constitutionalism*, 90 MICH. L. REV. 761, 772 (1992).

[12] Massachusetts v. Upton, 466 U.S. 727, 739 (1984) (Stevens, J., concurring).

the state judicial system to engage in meaningful discourse about the state constitution.

I. PEOPLE v. SCOTT

A. *Background: "Open Fields" and the Fourth Amendment*[13]

In 1924 the Supreme Court upheld a warrantless search of a field 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."[14] This decision was based in its entirety on a literal reading of the language of the Fourth Amendment: land is not a person, house, paper, or effect. Three years later, holding that the Fourth Amendment did not apply to electronic eavesdropping, the Court endorsed *Hester*'s literalism in *Olmstead v. United States*,[15] further ruling there that in the absence of trespass into a constitutionally protected area, no search within the meaning of the Fourth Amendment occurs. Thus, under *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," a narrow constitutionally protected zone of real property surrounding the home.[16]

In *United States v. Katz*,[17] decided in 1967, the Court abandoned this property-oriented, physical-trespass approach, declaring that the Fourth Amendment protects people, not places, against unreasonable searches and seizures. The conduct at issue in *Katz* was the warrantless surveillance of calls made from a public telephone booth. According to the Court, the issue was not whether a telephone booth is a constitutionally protected area, but whether the defendant's privacy had been violated. The Court concluded that the surveillance "violated the privacy upon which [defendant] justifiably relied and thus constituted a 'search and seizure' within the meaning of the Fourth

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[13] This discussion and that in Part II.A, *infra*, occupy neutral ground in the debate of the New York Court of Appeals; the dissenters had no quarrel with the majority's summary of Fourth Amendment law here or in *Keta*.

[14] Hester v. United States, 265 U.S. 57, 59 (1924).

[15] 277 U.S. 438 (1927).

[16] *Id.* at 465-66.

[17] 389 U.S. 347 (1967).

Amendment."[18] *Katz* mandates a two-step "expectation-of-privacy" test that asks first, whether the individual has manifested a subjective expectation of privacy from the challenged search, and second, if so, whether society would find that expectation objectively reasonable.[19]

Seventeen years later, in *United States v. Oliver*,[20] amid speculation that *Katz* had overruled *Hester*, the Court revisited the question of Fourth Amendment protection against warrantless searches of land outside the curtilage. The search in *Oliver* differed from that in *Hester* in one respect: the landowner had surrounded the perimeter of his secluded, undeveloped land with "no trespassing" signs. However, these precautions did not dissuade the Court from putting a categorical end to speculation about the "open fields" doctrine. Reaffirming *Hester*, the Court concluded that for land outside the curtilage of the home, an owner is entitled to no Fourth Amendment protection, not even for secluded property surrounded by fences or "no trespassing" signs.[21]

The *Oliver* majority announced two bases for its holding. First, the Court returned to *Hester*'s literal reading of the Fourth Amendment, which explicitly guarantees the security of the people "in their persons, houses, papers, and effects," but does not mention open land.[22] In an attempt to resolve the seeming inconsistency between *Hester* and *Katz*, the Court held that the *Katz* expectation-of-privacy analysis would continue to be applied to the residence and its curtilage. But this raised the further question of whether logic compelled the extension of privacy analysis to fenced or posted land. This question the Court dismissed in its second rationale: under *Katz* an owner of such land could have no legally cognizable expectation of privacy because an expectation of privacy based on fencing or posting, even in the most secluded areas, as a matter of law, is not one that our society recognizes as reasonable. That is, the owner's expectations could never pass the second, "objective" part of the *Katz* test. The Court held:

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[18] *Id.* at 353.
[19] *Id.* at 360-62.
[20] 466 U.S. 170 (1984).
[21] *Id.* at 179.
[22] *Id.* at 176-77.

> 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 are usually 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. . .[Thus,] the asserted expectation of privacy in "open fields"[23] is not an expectation that "society recognizes as reasonable."[24]

Finally, the Court seemingly added a new twist to *Katz* in *Oliver*: a landowner's expectation need not only be genuinely held and objectively reasonable—it must be "legitimate" as well. Emphasizing the illicit nature of the activity sought to be kept private by appellant Oliver (marijuana growing), rather than the nature of the efforts to ensure privacy, the Court concluded that expectations like his were not "legitimate."[25]

In 1988 the New York Court of Appeals applied the *Katz* expectation-of-privacy test to a *Hester*-like case, a warrantless search of unfenced, unposted land outside the curtilage and found no search within the meaning of the Fourth Amendment or article I, section 12 of the New York Constitution.[26] The court of appeals reasoned that no subjective expectation of privacy (the first step in the *Katz* analysis) is demonstrated by a landowner who fails to indicate that the public is not welcome. The court left for another day whether article I, section 12 forbids warrantless search of lands fenced or otherwise marked in a way that demonstrates a subjective expectation of privacy.[27]

In *People v. Scott* that day came and saw a rancorously divided court decline to adopt *Oliver* as the law of New York under article I, section 12 on the ground that *Oliver* "does not adequately protect fundamental constitutional rights."[28] Writing for the majority, Judge Hancock was joined by Judges Kaye, Alexander, and Titone. Judge Bellacosa wrote an infuriated, scolding omnibus dissent to *Scott* and *Keta* in which Judge Simons and Chief Judge Wachtler joined. The four judges of the majori-

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[23] The Court uses "open fields" to refer to any undeveloped land. *Id.* at 180 n.11.

[24] *Id.* at 179.

[25] *Id.* at 178.

[26] People v. Reynolds, 71 N.Y.2d 552, 523 N.E.2d 291, 528 N.Y.S.2d 15 (1988).

[27] *Id.* at 556, 523 N.E.2d at 293, 528 N.Y.S.2d at 16.

[28] *Scott*, 79 N.Y.2d at 486, 593 N.E.2d at 1335, 583 N.Y.S.2d at 927.

ties were reunited in an omnibus concurrence written by Judge Kaye.[29] The majority opinion is concerned almost entirely with the substantive issue: whether the *Oliver* rule is a good rule. The dissent does not explicitly quarrel with the majority's conclusion that *Oliver* insufficiently protects against unreasonable searches and seizures. Rather, the dissent rebukes the majority for the way in which it reaches its decision, specifically the criteria it did and did not apply, and how it applied them. The concurrence is the majority's indignant reply to the dissent's charge that the majority's decision is politically motivated and without support in reason or precedent.

B. *The Facts of* Scott

Guy Scott pled guilty to criminal possession of marijuana in the first degree following the denial of his motion to suppress evidence of marijuana cultivation seized by state police on the execution of a search warrant. Scott had argued that the warrant was defective because it was based on evidence obtained in violation of his rights under the Fourth Amendment of the federal Constitution and article I, section 12 of the New York Constitution. The search warrant was based on evidence obtained by a private citizen and by a police officer, both of whom entered Scott's property after observing conspicuously posted "no trespassing" signs.[30]

The appellate division affirmed Scott's conviction, agreeing with the hearing court that his act of posting "no trespassing" signs about every twenty to thirty feet around the perimeter of his property, which consisted of 165 acres of rural, hilly, undeveloped fields and woodlands that were uncultivated except for some 200 marijuana plants, did not establish a constitutionally cognizable expectation of privacy.[31] Scott was granted leave to appeal to the court of appeals, which reversed his conviction.

C. *The Majority Opinion*

The majority begins its analysis with a lengthy exposition of

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[29] Since the omnibus concurrence answers the omnibus dissent rather than advancing reservations or alternative arguments, it is summarized here after both majority opinions and the omnibus dissent. *See infra* notes 116-26 and accompanying text.

[30] *Scott*, 79 N.Y.2d at 479, 593 N.E.2d at 1330-31, 583 N.Y.S.2d at 922-23.

[31] *Id.* at 478-79, 593 N.E.2d at 1330, 583 N.Y.S.2d at 922.

the *Hester-Katz* evolution and a summary of the Court's reasoning in *Oliver*.[32] The majority then proceeds to reject both bases of *Oliver*, the first briefly and the second at length. Preliminarily, however, the majority notes its conviction that the two holdings are inconsistent with each other; that is, the literal reading of the Fourth Amendment in *Oliver* cannot coexist with *Katz*. The *Scott* majority agrees with Justice Marshall's dissent in *Oliver* that there is an irreconcilable conflict between the majority's restricted reading of the Fourth Amendment's language and the *Katz* holding that a telephone conversation is constitutionally protected although "neither a public telephone booth nor a conversation conducted therein can fairly be described as a person, house, paper, or effect."[33]

Agreeing that both the Fourth Amendment and article I, section 12 speak of "persons, houses, papers, and effects," the court of appeals nonetheless rejects outright the Supreme Court's literal reading of that text as excluding "land."[34] This rejection is based on the history of section 12, which though "sparse," is in any event *different* from the history of the Fourth Amendment, and can thus justify a different reading.[35] Further, although the language in question is identical to that of the Fourth Amendment, section 12 is *not* identical to the Fourth Amendment. Section 12 contains a clause not found in the Fourth Amendment, a clause providing protection against the warrantless interception of electronic communications.[36] Thus, the majority concludes, the Supreme Court's literal textual analysis is simply irrelevant to its interpretation of section 12.[37] The majority also rejects *Oliver*'s "categorical" holding that an expectation of privacy in fenced or posted land outside the curtilage is not one that society recognizes as reasonable.[38] To the

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[32] This review is substantially similar in effect and extent to part I.A, *supra*. *Scott*, at 481-85, 593 N.E.2d at 1332-34, 583 N.Y.S.2d at 924-26.

[33] *Id.* at 485, 593 N.E.2d at 1334-35, 583 N.Y.S.2d at 926-27 (citing United States v. Oliver, 466 U.S. at 185 (1984) (Marshall, J., dissenting)).

[34] 79 N.Y.2d at 485-86, 593 N.E.2d at 1334-35, 583 N.Y.S.2d at 926-27.

[35] Article I, section 12 was originally Civil Rights Law section 8. It was added to the New York Constitution in 1938.

[36] This clause constituted a rejection of the (now obsolete) *Olmstead* rule exempting electronic communications from Fourth Amendment protection. Olmstead v. United States, 277 U.S. 438 (1924); *see supra* notes 15-16 and accompanying text.

[37] *Scott*, 79 N.Y.2d at 486, 593 N.E.2d at 1335, 583 N.Y.S.2d at 927.

[38] *Id.*

contrary, "[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."[39] The *Scott* majority gives the following four reasons for this rejection of *Oliver*.

First, the *Oliver* rule is contrary to New York law, particularly search-and-seizure decisions following the *Katz* rationale. New York courts have consistently adhered to the *Katz* rule that it is persons and their privacy rights, not places, that are protected from an unreasonable search and seizure.[40] *Oliver*'s categorical no-expectation-of-privacy-in-open-land rule would thus unsettle New York law, subverting protection of justifiable expectations of privacy.[41]

Second, the *Oliver* rule is inconsistent with what Justice Brandeis called "the right to be let alone."[42] The right to privacy, this "core principle," is reflected not only in New York's search-and-seizure jurisprudence, but in other case law and in statutes such as those proscribing criminal trespass and permitting the "posting" of land.[43] The majority further notes that property rights generally reflect society's recognition that we may act as we wish in certain areas. In particular, the right to exclude the public is "one of the most treasured strands in an owner's bundle of property rights" in New York.[44]

Third, the *Oliver* Court's use of the same illegal conduct discovered by the disputed search as a factor justifying that search is "troublesome."[45] This boot-strapping justification for illegal police conduct is incompatible with "New York's recognition of fairness as an essential concern in criminal jurisprudence," as is the "unbridled license" given law-enforcement agents.[46]

Finally, the *Oliver* rule offends New York's tradition of tol-

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[39] *Id.*

[40] *Id.* at 488, 593 N.E.2d at 1336, 583 N.Y.S.2d at 928.

[41] *Id.*

[42] *Id.* at 487-88, 593 N.E.2d at 1335, 583 N.Y.S.2d at 927.

[43] *Id.*

[44] *Id.* at 487, 593 N.E.2d at 1336, 583 N.Y.S.2d at 928.

[45] *Id.* at 488, 593 N.E.2d at 1336, 583 N.Y.S.2d at 928.

[46] *Id.* at 488-90, 593 N.E.2d at 1336-37, 583 N.Y.S.2d at 928-29.

erance. According to the *Scott* majority, *Oliver* presupposes a "conforming society" in which law-abiding persons have or do nothing on their property that they would not want the world to see. This is "foreign" to New York's tradition, memorialized in our case law, of tolerating the unconventional, the bizarre, even the offensive.[47]

According to the majority, these several reasons more than justify rejection of *Oliver* and "resort" to the state constitution for the "adequate protection of fundamental rights."[48]

Turning briefly to the criteria used in determining whether to interpret New York's constitution more broadly than the Supreme Court has interpreted the analogous federal constitutional provision, the Fourth Amendment, the *Scott* majority concludes that the test is simply whether "under established New York Law and traditions some greater degree of protection must be given."[49] Recognizing that the dissent would impose more and stricter criteria, the majority nevertheless "decline[s] 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."[50]

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[47] *Id.* at 488-89, 593 N.E.2d at 1337, 583 N.Y.S.2d at 929.

[48] *Id.* at 486, 593 N.E.2d at 1335, 583 N.Y.S.2d at 927. The majority cites the following cases as precedent for this "resort" to New York's constitution: People v. Dunn, 77 N.Y.2d 19, 564 N.E.2d 1054, 563 N.Y.S.2d 388 (1990); People v. Torres, 74 N.Y.2d 224, 543 N.E.2d 61, 544 N.Y.S.2d 796 (1989); Matter of Patchogue-Medford Congress of Teachers v. Board of Educ., 70 N.Y.2d 57, 510 N.E.2d 325, 517 N.Y.S.2d 456 (1987); People v. P.J. Video, 68 N.Y.2d 296, 501 N.E.2d 556, 508 N.Y.S.2d 907 (1987); People v. Class, 67 N.Y.2d 431, 494 N.E.2d 444, 503 N.Y.S.2d 313 (1986); People v. Gokey, 60 N.Y.2d 309, 457 N.E.2d 723, 469 N.Y.S.2d 618 (1983); People v. Gleeson, 36 N.Y.2d 462, 330 N.E.2d 72, 369 N.Y.S.2d 113 (1975); *see also* People v. Millan, 69 N.Y.2d 514, 508 N.E.2d 903, 516 N.Y.S.2d 168 (1987); People v. Stith, 69 N.Y.2d 313, 506 N.E.2d 911, 514 N.Y.S.2d 201 (1987); People v. Johnson, 66 N.Y.2d 398, 488 N.E.2d 439, 497 N.Y.S.2d 618 (1985); People v. Bigelow, 66 N.Y.2d 417, 488 N.E.2d 451, 497 N.Y.S.2d 630 (1985); People v. Belton, 55 N.Y.2d 49, 432 N.E.2d 745, 447 N.Y.S.2d 873 (1982); People v. Elwell, 50 N.Y.2d 231, 406 N.E.2d 471, 428 N.Y.S.2d 655 (1980). *Scott*, 79 N.Y.2d at 480-81, 593 N.E.2d at 1331-32, 583 N.Y.S.2d at 923-24.

[49] *Scott*, at 491, 593 N.E.2d at 1338, 583 N.Y.S.2d at 930.

[50] *Id.* at 490, 593 N.E.2d at 1338, 583 N.Y.S.2d at 930.

II. PEOPLE V. KETA

A. *Background: "Administrative" Searches and the Fourth Amendment*[51]

In *Franks v. Maryland*[52] 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.[53] For example, because of the state's interest in preventing fire safety code violations, neither a warrant nor probable cause were requirements for inspecting premises to insure compliance. The Court abandoned that position in *Camara v. Municipal Court*[54] and *See v. City of Seattle*,[55] however, holding that the Fourth Amendment does indeed apply to administrative searches, but that warrants for such searches need not be supported by probable cause in the traditional sense since such searches "are neither personal in nature *nor aimed at the discovery of evidence of crime.*"[56]

Soon, however, the Court created an ostensibly narrow exception to this warrant requirement: where the particular industry is subject to close governmental supervision and the authorizing statute prescribes specific procedural rules governing the conduct of the search, warrantless searches do not offend the Constitution.[57] Just three years after explaining that this exception was limited to those "relatively unique circumstances" where a long history of governmental oversight precludes any reasonable expectation of privacy,[58] the Court substantially broadened the exception, holding that it is the "pervasiveness and regularity," not the longevity, of regulation that determines

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[51] *See supra* notes 13-25 and accompanying text.

[52] 359 U.S. 360 (1959).

[53] *Id.* at 366.

[54] 387 U.S. 523 (1967) (warrant requirement of Fourth Amendment applies to business as well as residential premises).

[55] 387 U.S. 541 (1967) (to the same effect as *Camara*).

[56] *Camara*, 387 U.S. at 537 (emphasis added).

[57] Colonnade Catering Corp. v. United States, 397 U.S. 72 (1970) (warrantless inspection of alcoholic beverage industry constitutional because industry long subject to close supervision and inspection); United States v. Biswell, 406 U.S. 311 (1972) (*Colonnade* extended to firearms industry).

[58] Marshall v. Barlows, Inc., 436 U.S. 307 (1978) (warrantless inspection of commercial premises may offend Fourth Amendment if random, infrequent, or unpredictable).

whether a warrant is necessary.[59]

It was in this context of shifting constitutional meaning that a unanimous New York Court of Appeals held in *People v. Burger*[60] that Vehicle and Traffic Law section 415-a(5)(a),[61] the statute later challenged in *Keta*, violated the Fourth Amendment. Section 415-a(5)(a) required vehicle-dismantling businesses to maintain records of vehicles that came into their possession, authorized Department of Motor Vehicles agents and police officers to examine those records, and permitted warrantless searches to locate and inspect items subject to the record-keeping requirement. Striking down section 415-a(5)(a) in *Burger*, the court of appeals reasoned that the exception for administrative searches was not applicable because the purported "administrative" scheme allowed searches "of vehicles and vehicle parts notwithstanding the absence of any records against which the results of such a search could be compared"; it thus "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."[62]

On appeal the Supreme Court reversed[63] and the law of ad-

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[59] Donovan v. Dewey, 452 U.S. 594, 605-06 (1981) (warrant not required for search of commercial premises where Congress has reasonably determined search necessary to further regulatory scheme and regulatory presence is sufficiently comprehensive and defined).

[60] 67 N.Y.2d 338, 493 N.E.2d 926, 502 N.Y.S.2d 702 (1986).

[61] New York's law 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.

N.Y. VEHICLE & TRAFFIC LAW § 415-a(5)a (Mckinney 1986).

[62] *Burger*, 67 N.Y.2d at 344-45, 493 N.E.2d at 929-30, 502 N.Y.S.2d at 705-06.

[63] New York v. Burger, 482 U.S. 691 (1987). On remand, the court of appeals dismissed the appeal at the prosecutor's request when respondent Burger could not be found. People v. Burger, 70 N.Y.2d 828, 518 N.E.2d 1, 523 N.Y.S.2d 489 (1987).

ministrative searches took yet another hairpin bend. The Court discounted the court of appeals's primary premise: that the administrative search exception cannot be used to validate warrantless searches conducted for the purpose of exposing violations of penal law. The fact that section 415-a(5)(a)'s objectives happened to coincide with those of the penal law was of no importance, according to the Supreme Court, because a state may "address a major social problem . . . [*e.g.*, car theft] *both* by way of an administrative scheme *and* through penal sanctions."[64] The Court concluded that New York had a substantial interest in regulating the vehicle dismantling industry as a means of containing the stolen vehicle industry and that warrantless inspections were reasonably necessary to serve that interest.[65]

Addressing the requirements that the industry be a closely regulated one, the Court held that this test was satisfied because the regulations were "extensive" and, although the vehicle dismantling business was a fairly recent phenomenon, it was "related to" the junkyard and pawnshop businesses. According to the Court, these businesses had been the subject of close supervision in the past.[66] 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.[67]

Five years later, in *People v. Keta*,[68] the New York Court of Appeals finally had an occasion to revisit the administrative-search issue. Issuing a consolidated opinion for *Scott* and *Keta*, the court's revisitation was fraught with anger and indignation. Judge Titone wrote the majority opinion addressing *Keta*, in which Judges Hancock, Kaye, and Alexander joined. Judges Simons and Bellacosa and Chief Judge Wachtler issued an omnibus dissent to the *Scott* and *Keta* opinions.

B. *The Facts of* Keta

George Keta, the owner and operator of an automobile dismantling business in Maspeth, Queens was charged with multi-

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[64] 482 U.S. at 712 (emphasis added).

[65] *Id.* at 708.

[66] *Id.* at 706-07.

[67] *Id.* at 711.

[68] 79 N.Y.2d 474, 593 N.E.2d 1328, 583 N.Y.S.2d 920 (1992).

ple counts of criminal possession of stolen vehicle parts. He moved to suppress the physical evidence seized from his business premises, arguing that section 415-a(5)(a) violated article I, section 12 of New York's constitution.[69]

A hearing was held, establishing that in February, 1988 five police officers arrived at Keta's business premises, announced that they were present to perform an administrative inspection, and proceeded to search for parts of stolen vehicles. When their search was rewarded, they checked Keta's "police book" and found that it did not contain the mandated information about the contraband vehicle parts.[70]

The hearing court agreed with Keta, holding that warrantless searches under section 415-a(5)(a) violate article I, section 12 of the state constitution. A divided appellate division reversed, declining to read article 1, section 12 differently from the Supreme Court's most recent reading of the Fourth Amendment.[71]

C. *The Majority Opinion*

As in *Scott*, the majority begins its analysis with a detailed history of Fourth Amendment precedent in the Supreme Court;[72] it characterizes that precedent as "perplexing."[73] Before addressing the substantive issue—whether section 415-a(5)(a) offends article I, section 12—the majority briefly reaffirms not only its *authority* to reject the Court's *Burger* decision, but its *duty* to do so if that decision does not meet state constitutional standards.[74] The Court notes that "[t]he Supreme Court itself has on more than one occasion reminded us that we—as 'the primary guardian[s] of the liberty of the people'—have the power to interpret the provisions of our State Constitution as providing greater protections than their federal counterparts."[75] Even where identical language "generally tends to support a policy of uniformity," the "worthwhile goal" of uniformity must yield

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[69] *Id.* at 492, 593 N.E.2d at 1339, 583 N.Y.S.2d at 930.

[70] *Id.*

[71] People v. Keta, 165 A.D.2d 172, 567 N.Y.S.2d 738 (2d Dep't 1991).

[72] *See supra* part I.A.

[73] *Scott*, 79 N.Y.2d at 494, 593 N.E.2d at 1340, 583 N.Y.S.2d at 932.

[74] *Id.* at 495, 593 N.E.2d at 1340-41, 583 N.Y.S.2d at 933.

[75] *Id.* at 496, 593 N.E.2d at 1341-42, 583 N.Y.S.2d at 934 (quoting California v. Greenwood, 486 U.S. 35, 43 (1988) and Oregon v. Hass, 420 U.S. 714, 719 (1975)).

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 a part of their birthright."[76] With respect to the precise "analytical methodology" of state constitutionalism, the majority "simply adopt[s] the views expressed in the concurrence."[77]

Turning to the question presented, the majority holds that "[o]ur 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(5)(a)'s provisions for warrantless, suspicionless searches of business premises cannot withstand challenge under our State Constitution."[78] Underlying most of the majority's quarrel with *Burger* is its conviction that, potentially at least, administrative searches are the "twentieth century equivalent" of the infamous colonial Writs of Assistance.[79] The Writs, which authorized officials to search any premises without particularized suspicion, were "an important component of colonial resentment against the Crown and, in fact, 'ignited the flame that led to American independence'."[80] In light of this ominous similarity, the court of appeals concludes that rules governing administrative searches "must be narrowly and precisely tailored to prevent the subversion of the basic privacy values embodied in our Constitution."[81] Specifically, the majority identifies four weaknesses in the "principles and standards" of *Burger* that put these values at risk.[82]

First, *Burger* permits administrative searches where they are "undertaken solely to uncover evidence of criminality" and where the underlying regulatory scheme is "in reality, designed simply to give the police an expedient means of enforcing penal sanctions."[83] According to the *Keta* majority, it was a "funda-

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[76] *Scott*, at 496-97, 593 N.E.2d at 1342, 583 N.Y.S.2d at 934.

[77] *Id.* at 496, 593 N.E.2d at 1341, 583 N.Y.S.2d at 933 ("including [the concurrence's] well founded point concerning the tone of the dissent").

[78] *Id.* at 497, 593 N.E.2d at 1342, 583 N.Y.S.2d at 934.

[79] *Id.* at 497, 593 N.E.2d at 1343, 583 N.Y.S.2d at 935 (quoting Illinois v. Krull, 480 U.S. 340, 364 (1987) (O'Connor, J., dissenting)).

[80] *Scott*, at 498, 593 N.E.2d at 1343, 583 N.Y.S.2d at 935 (quoting Comment, *The Junking of the Fourth Amendment*: Illinois v. Krull *and* New York v. Burger, 63 TUL. L. REV. 335, 335-36 (1988)).

[81] *Id.* at 498, 593 N.E.2d at 1343, 583 N.Y.S.2d at 935.

[82] *Id.*

[83] *Id.*

mental assumption" in Fourth Amendment jurisprudence before *Burger* that the administrative search exception could not be invoked in such circumstances.[84] This assumption was "analytically sound" because permitting "administrative" searches for evidence of criminality would permit the originally narrow exception to the warrant and probable cause requirements to "swallow up the rule."[85]

Second, *Burger*'s analysis of the "essential element of pervasive governmental supervision" is insufficiently rigorous and inconsistent with the court of appeals's conception of a "narrow and carefully circumscribed" administrative search exception.[86] The Supreme Court found the "pervasive supervision" requirement to be satisfied by analogy: automobile dismantling businesses are "related to" junkyards and, according to the Court, junkyards are highly regulated.[87] Rejecting the Court's reasoning, the court of appeals examines the actual vehicle-dismantling regulatory scheme and concludes that "such minimal regulatory requirements as the obligations to register with the government, to pay a fee and to maintain certain prescribed books and records" do not constitute "close regulation" or a "pervasive" regulatory scheme.[88] Indeed, the *Keta* majority warns, "[i]f the existence of such relatively nonintrusive obligations were sufficient, few businesses would escape being labelled 'closely regulated,' and warrantless, suspicionless general inspections would become the rule rather than the exception."[89]

Third, the Supreme Court mistakenly concludes in *Burger* that section 415-a(5)(a) contains rules that guarantee the "certainty and regularity of . . . application" necessary to provide a "constitutionally adequate substitute for a warrant."[90] The only

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[84] *Id.* (citing Donovan v. Dewey, 452 U.S. 594, 598 n.6 (1981); Camara v. Municipal Court, 387 U.S. 523, 539 (1967)); People v. Burger, 67 N.Y.2d 338, 493 N.E.2d 926, 502 N.Y.S.2d 702 (1986); *In re* Glenwood TV, Inc. v. Ratner, 103 A.D.2d 322, 330 n.6, 480 N.Y.S.2d 98, 103-04 (1984), *aff'd*, 65 N.Y.2d 642, 491 N.Y.S.2d 620 (1985), *appeal dismissed*, 474 U.S. 916 (1985) (administrative search upheld where inspectors do not seek evidence of a crime and their function is limited to insuring compliance with a civil regulatory scheme); *see supra* notes 54-56 and accompanying text.

[85] *Keta*, 79 N.Y.2d at 498-99, 593 N.E.2d at 1343, 583 N.Y.S.2d at 935.

[86] *Id.* at 499, 593 N.E.2d at 1343, 583 N.Y.S.2d at 936.

[87] *Id.*

[88] *Id.* at 499, 593 N.E.2d at 1344, 583 N.Y.S.2d at 936.

[89] *Id.*

[90] *Id.* (quoting Donovan v. Dewey, 452 U.S. 594, 603 (1981)).

unequivocal restriction in the statute is the requirement that searches take place during business hours. It neither furnishes guidelines for determining which establishments may be targeted nor sets a maximum number of times that a particular establishment may be searched within a given time period. Moreover, "because the regulatory scheme prescribes no standards or required practices 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."[91] Thus, entailing a virtually unmitigated risk of arbitrary and abusive enforcement, section 415-a(5)(a) "shares one of the most objectionable characteristics of colonial writs of assistance."[92]

Finally, the *Keta* majority finds that *Burger* inappropriately emphasizes the "substantial" governmental interest in regulating the vehicle dismantling industry—deterring and prosecuting car-theft—and the "necessity" of warrantless searches to the furtherance of this interest.[93] By its very nature, the protection against unreasonable searches and seizures contained in the Fourth Amendment and article I, section 12 is a "counterbalancing check on what may be done to individual citizens in the name of governmental goals."[94] Warrantless searches are always useful in detecting and deterring crime, an activity in which the government always has at least a "substantial" interest. "If these were the only criteria for determining when citizens' privacy rights may be curtailed, there would . . . be few, if any situations in which the protections of article I, section 12, would operate."[95]

The majority thus takes indignant issue with Judge Bellacosa's dissent that the prevalence of automobile theft in New York and the concomitant "intolerable" economic loss justify *Burger* and the search provisions of section 415-a(5)(a):[96]

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[91] *Id.* at 499-500, 593 N.E.2d at 1344, 583 N.Y.S.2d at 936 (emphasis added).

[92] *Id.* at 500, 593 N.E.2d at 1344, 583 N.Y.S.2d at 936.

[93] *Id.*

[94] *Id.*

[95] *Id.*

[96] *Id.* at 517, 593 N.E.2d at 1355, 583 N.Y.S.2d at 947 (Bellacosa, J., dissenting). The majority characterizes this argument as "the dissent's appeal to our citizens' legitimate fears about rising crime." *Id.* at 501, 593 N.E.2d at 1345, 583 N.Y.S.2d at 937.

> 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 concern, but few would seriously argue that those unfortunate facets of modern life justify routine searches of pedestrians on the street. . . . The fact is that, regrettably, there will always be crime in our society, and there will always be upsurges in the rate of particular crimes. . . . 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.
>
> 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. . . . [A]s Benjamin Franklin [observed] some two hundred years ago . . . "those who give up essential liberty to purchase a little temporary safety deserve neither liberty nor safety."[97]

Finding section 415-a(5)(a) unconstitutional, the majority nonetheless concludes that a statute providing for administrative inspections of vehicle dismantling businesses could be constitutionally drawn. The inspection provisions of such a statute would have to be part of a comprehensive administrative program unrelated to the enforcement of the criminal law, however. Further, 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 . . . or, alternatively, the law must provide for such certainty and regularity of application as to be a constitutionally adequate substitute for a warrant."[98]

III. *Scott* And *Keta*: Omnibus Dissent and Concurrence

A. *The Dissent*

As the *Scott* majority observes, Judge Bellacosa's lengthy omnibus dissent does not overtly "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 evi-

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[97] *Id.* at 500-01, 593 N.E.2d at 1344-45, 583 N.Y.S.2d at 936-37.

[98] *Id.* at 502, 593 N.E.2d at 1345, 583 N.Y.S.2d at 937.

dence."[99] Rather, the dissent's considerable rage is focused on the criteria the majority uses (or fails to use) in determining to reject Supreme Court precedent.[100] According to the dissent, the court totally disregards its own precedent, which the dissent maintains would have required the application of a rigid, multi-phase test before departing from a Supreme Court decision.[101] Judge Bellacosa accuses the majority of basing its decisions on "mere ideological disagreement . . . with the definitive decisions of the highest court in the land."[102]

The dissent's central criticism is that the majority ignored precedent by failing to apply "non-interpretive" analysis in determining whether "sufficient reasons" existed for disagreeing with the Supreme Court.[103] According to the dissent, non-interpretive analysis finds sufficient reasons only in

> 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 attitudes of the State citizenry toward the definition, scope, or protection of the individual right.[104]

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[99] *Id.* at 489, 593 N.E.2d at 1337, 583 N.Y.S.2d at 929.

[100] The tone of the dissent is set as the first paragraph cuts a path that propels it furiously across several metaphors:

> In these cases, the Court cuts its own constitutional path through a commercial marijuana 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 and from this Court's own recent noninterpretive constitutional analysis and definitive guidance propels the Court across a jurisprudential Rubicon into a kind of Articles of Confederation time warp. The "movement" has been dubbed the "New Federalism."

Id. at 506, 593 N.E.2d at 1348, 583 N.Y.S.2d at 940 (Bellacosa, J., dissenting) (citations omitted).

[101] *Id.* at 510, 593 N.E.2d at 1351, 583 N.Y.S.2d at 943 (Bellacosa, J., dissenting).

[102] *Id.* at 510, 593 N.E.2d at 1350-51, 583 N.Y.S.2d at 942-43 (Bellacosa, J., dissenting).

[103] Curiously, the term "non-interpretive" is not explained in *Scott* or *Keta*. However, it is explained in People v. P.J. Video, 68 N.Y.2d 296, 501 N.E.2d 556, 508 N.Y.S.2d 907 (1987). According to that decision, when confronted with a provision of the state Constitution that is worded differently from its federal counterpart, the court of appeals will interpret the language of the provisions. When state and federal provisions are identically worded, however, the state court will not interpret the language, but rather, will "proceed from a judicial perception of sound policy, justice, and fundamental fairness." *P.J. Video*, 68 N.Y.2d at 303, 501 N.E.2d at 560, 508 N.Y.S.2d at 911.

[104] *Scott*, 79 N.Y.2d at 510, 593 N.E.2d at 1350, 583 N.Y.S.2d at 946 (Bellacosa, J.,

Two further rationales cited by the dissent are the need for federal-state uniformity and the need for a "bright-line" test.[105] As measured by the dissent against these criteria, the majority's decisions fail to supply a sufficient number of reasons, and, in so far as they supply reasons, they fail to be satisfactory.

The dissent criticizes the *Scott* majority for basing its conclusion that *Oliver* disturbs settled New York law on its own perception that *Oliver* simply changes *federal* law. According to the dissent, state law can only be "unsettled" by a federal ruling that directly conflicts with it.[106] Judge Bellacosa also accuses the majority of conflating the *Katz* search-and-seizure privacy interest with generalized privacy concerns in which, he agrees, New York takes special interest.[107] Moreover, the dissent taxes the majority for "disdain[ing] uniformity in constitutional adjudication," according to Judge Bellacosa a vital concern in drug prosecutions, where state and federal agencies sometimes collaborate; had the informant in *Scott* "called the F.B.I. instead of the local sheriff . . . the major criminal drug harvester would not be set free to resume the illicit drug enterprise."[108]

All of the criticisms detailed above in respect to *Scott* were equally directed at *Keta*. Thus, like the *Scott* majority, the *Keta* majority is accused by the dissenters of "sever[ing] the expectation of privacy attribute from its essential unreasonable searches and seizures mooring, and invest[ing] [the case] in the alluring cloak of a generalized privacy interest, as a matter of unique New York concern."[109] Further, the dissent rejects the majority's conclusion that *Burger* conflicts with preexisting state law. Finally, in the dissent's view *Scott* compromised the state-federal ideal of uniformity, so *Keta* fails the "bright line" test: like *Scott*, it will "sow confusion in understanding the law and divi-

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dissenting).

[105] *Id.*

[106] *Id.*

[107] *Id.* at 510, 593 N.E.2d at 1350-51, 583 N.Y.S.2d at 942-43 (Bellacosa, J., dissenting).

[108] *Id.* at 515, 593 N.E.2d at 1354, 583 N.Y.S.2d at 946 (Bellacosa, J., dissenting).

[109] *Id.* at 507, 593 N.E.2d at 1349, 583 N.Y.S.2d at 941 (Bellacosa, J., dissenting). The *Keta* majority complains "nowhere does the dissent explain how the state constitutional privacy right we recognize here differs from 'the traditional expectation of privacy feature of the unreasonable searches and seizures protection [previously recognized] in criminal jurisprudence.' " *Id.* at 496 n.3, 593 N.E.2d at 1341 n.3, 583 N.Y.S.2d at 933 n.3 (quoting *id.* at 513, 593 N.E.2d at 1353, 583 N.Y.S.2d at 945 (Bellacosa, J., dissenting)).

sion in the execution of responsible administrative, investigative and prosecutorial responsibilities."[110] According to the dissent, "if state fiscal and personnel resources had allowed Department of Motor Vehicle 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 [*Keta*]."[111] As it stands, the dissent fears that *Keta*, like *Scott*, will visit "calamitous consequences in economics and crimes" on New York.[112]

The penultimate section of the dissent is addressed to *Keta* alone. There the dissent describes at length the "horrendous proportions" of New York's auto theft rate and its "intolerable economic burden on the citizens of New York."[113] It was despite these statistics and the legislature's determination that regulation and inspection are necessary that the majority granted privacy protection to auto dismantlers—for the dissenters, an entirely gratuitous act.

> 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 to the rest of the nation. In fact, the opposite is true. . . . The pervasiveness 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 business hours.[114]

Finally, Judge Bellacosa warns that "inasmuch as this

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[110] *Id.* at 515, 593 N.E.2d at 1354, 583 N.Y.S.2d at 946 (Bellacosa, J. dissenting).

[111] *Id.* The majority characterizes this as a "non-existent strawman" distinction. "Regardless of whether the inspection is undertaken by a police officer or an administrative officer, the State Constitution is offended if the standards . . . described [in the majority opinion] are unsatisfied." *Id.* at 502 n.6, 593 N.E.2d at 1345 n.6, 583 N.Y.S.2d at 937 n.6 (Bellacosa, J., dissenting).

[112] *Id.* at 515, 593 N.E.2d at 1354, 583 N.Y.S.2d at 946 (Bellacosa, J., dissenting).

[113] *Id.* at 517, 593 N.E.2d at 1355, 583 N.Y.S.2d at 947 (Bellacosa, J., dissenting).

[114] *Id.* at 517, 593 N.E.2d at 1355, 583 N.Y.S.2d at 947 (Bellacosa, J., dissenting) (emphasis added). Dissenters Chief Judge Wachtler and Judge Simons have apparently changed their views in the six years between People v. Burger, 67 N.Y.2d 338, 493 N.E.2d 926, 502 N.Y.S.2d 702 (1986), and *Keta*.

court's self-imposed non-interpretive analysis has now been effectively scuttled by [*Scott* and *Keta*], New York's adjudicative process is left bereft of any external or internal doctrinal disciplines."[115]

B. *The Concurrence*

Judge Kaye concurs "only to respond to the broader statements and implications of the dissent about state constitutional law, *and especially about us.*"[116] Although state constitutional law cases tend to "fracture" the court more consistently than any other category of case, there is, according to the concurrence, a common thread running through those cases: "at least four judges (not always the same four) . . . have perceived something distinctive about New York, or about the particular case, that called upon the Court to differ from the United States Supreme Court."[117] The dissenters always argued that there was in fact no "unique New York interest."[118] *Scott* is thus no different from earlier state constitutional law cases, Judge Kaye argues, except for the "tone" of Judge Bellacosa's dissent and his "baseless . . . accusation that the Court's legal conclusions and analysis are the product of ideology."[119]

The concurrence argues that the majority opinion does indeed follow precedent, and that "in an evolving field of constitutional rights," the court is not required to rigidly apply an "ironclad checklist" on pain of being accused of "lack of principle or lack of adherence to *stare decisis*."[120] When it concludes that "the Supreme Court has changed course and diluted constitu-

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[115] *Scott*, at 518, 593 N.E.2d at 1356, 583 N.Y.S.2d at 948 (Bellacosa, J., dissenting). According to the dissenters, this "long-term guidance vacuum," *id.* at 512, 593 N.E.2d at 1352, 583 N.Y.S.2d at 944, is created in part by the majority/concurrence's misuse of precedent: "[*People v.*] *Johnson* [66 N.Y.2d 398, 488 N.E.2d 439, 497 N.Y.S.2d 618 (1985)] 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 [*Scott* and *Keta*]. Nor is the new approach supported by the litany of New York cases relied upon by the court, especially in *Scott*." *Id.* at 512, 593 N.E.2d at 1352, 583 N.Y.S.2d at 944 (Bellacosa, J., dissenting).

[116] *Id.* at 503, 593 N.E.2d at 1346, 583 N.Y.S.2d at 938 (Kaye, J., concurring) (emphasis added).

[117] *Id.*

[118] *Id.* at 512, 593 N.E.2d at 1352, 583 N.Y.S.2d at 944 (Bellacosa, J., dissenting).

[119] *Id.* at 503, 593 N.E.2d at 1346, 583 N.Y.S.2d at 938 (Kaye, J., concurring).

[120] *Id.* at 504, 593 N.E.2d at 1347, 583 N.Y.S.2d at 939 (Kaye, J., concurring).

tional principles," the court of appeals must decide whether to "follow along."[121]

Further, according to the concurrence, the dissent wrongly sees "impropriety" in the court's rejection of a Supreme Court decision.[122] On the contrary, the concurrence argues, rejecting Supreme Court precedent and opting for greater safeguards is a respectable, even respectful action. "Time and again . . . the Supreme Court as well as its individual Justices have reminded state courts not merely of this right but also of their responsibility to interpret their own Constitutions, and [to reject the views of the Supreme Court] where in the state courts' view those provisions afford greater safeguards . . . ."[123] Thus, as Justice White recently wrote, "[i]ndividual states may surely construe their own constitutions as imposing more stringent constraints on police conduct than does the Federal Constitution."[124] Ultimately, the states "remain the primary guardian of the liberty of the people."[125]

Finally, a state court does not "disdain" the Supreme Court by choosing to grant more protection. By imposing different, stricter rules, the states serve as "laboratories for national law."[126]

IV. *SCOTT* AND *KETA* (AND *OLIVER* AND *BURGER*) AS SEARCH-AND-SEIZURE LAW

Analyzing *Scott* and *Keta* as search-and-seizure law necessarily presupposes close analysis of *Oliver* and *Burger* as well because, for good or for ill, the court of appeals framed the debate negatively (Is the Supreme Court wrong?).

Since one important measure of a judicial opinion is how well it reads when we read it well, the four cases are analyzed from what is essentially a law-and-literature perspective. Close textual scrutiny, fundamentally literary, can reveal vastly more than felicity or infelicity of organization and expression. Close

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[121] *Id.*

[122] *Id.*

[123] *Id.* at 505, 593 N.E.2d at 1347, 583 N.Y.S.2d at 939 (Kaye, J., concurring).

[124] *Id.* (citing California v. Greenwood, 486 U.S. 35, 43 (1988)).

[125] *Id.* (citing Massachusetts v. Upton, 466 U.S. 727, 739 (1984) (Stevens, J., concurring)).

[126] *Id.* at 505-06, 593 N.E.2d at 1348, 583 N.Y.S.2d at 940 (Kaye, J., concurring).

and critical reading of a judicial opinion can disclose candor, meticulous reasoning, a generous and democratic imagination; it can also expose incoherence, intellectual *force majeure*, and covert manipulation of the reader's emotions. It can thus tell us a great deal about the "rightness" or "wrongness" of a decision.[127] To put *Scott*, *Keta*, *Oliver*, and *Burger* to the question, this Article borrows a mode of analysis devised by law-and-literature dean James Boyd White and applied by him to *Olmstead v. United States*,[128] an essential early decision in the development of search-and-seizure law. Measured by White's "standards of excellence,"[129] *Scott* and *Keta* are very good decisions indeed, as cogent in their reasoning as they are passionate about individual rights and democratic values. The same scrutiny reveals *Oliver* and *Burger* to be as incoherent in their reasoning as they are overbearing in their tone, superficially seductive invitations to an authoritarian monologue.[130] Thus, whatever the nature of *Scott* and *Keta*'s contribution to the discourse of state constitutionalism, they are abundantly correct in their rejection of *Oliver* and *Burger* in terms of search and seizure law.

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[127] Although, like so much of contemporary scholarship, such textual criticism is an inheritor of legal realism, it uses its own revealing filters, including the analysis of genre, voice, diction, and rhetoric. It sees the judicial opinion and indeed, the law itself, as "interpretive and compositional, and in this sense, a radically literary activity." White, *supra* note 8, at 836. This literary exegesis of judicial opinions is one aspect of the "law-as-literature" movement, itself a part of the larger "law-and-literature" enterprise. *See generally* Richard Weisberg, *The Law-Literature Enterprise*, 1 YALE J.L. & HUMAN. 1 (1988). Some of the most notable practitioners of the genre are White himself, Richard Weisberg, and Robert A. Ferguson. *See, e.g.*, Robert A. Ferguson, *The Judicial Opinion as Literary Genre*, 2 YALE J.L. & HUMAN. 201 (1990); Richard Weisberg, *How Judges Speak: Some Lessons on Adjudication in Billy Budd, Sailor With an Application to Justice Rehnquist*, 57 N.Y.U. L. REV. 1 (1982); White, *supra* note 8. Although Patricia Williams's focus is not so overtly literary, she is also an unsparingly intelligent reader of judicial opinions. *See, e.g.*, Patricia Williams, *The Obliging Shell: An Informal Essay on Formal Equal Opportunity*, 87 MICH. L. REV. 2128 (1989).

[128] 277 U.S. 438 (1927).

[129] White, *supra* note 8, at 869; *see supra* notes 15-16 and accompanying text.

[130] Of course, as White says of his *Olmstead* analysis, we always "make" some of the meaning we "claim" for a text. This is inevitable, yet ultimately salutary, because

> [t]he reader of this paper will in turn give it much of whatever meaning he claims for it. The text at once creates and constrains a liberty (or a power) in its reader, and in doing so defines for the reader a particular kind of responsibility. It is in that combination—liberty, constraint, and responsibility, for the reader and maker of texts—that the ethical and intellectual heart of the law can be found.

White, *supra* note 8, at 870.

A. *White's Reading of* Olmstead

Asked what a long life had taught him, John Dewey replied, "I have learned that democracy begins in conversation."[131] This answer informs Professor White's analysis of the majority and dissenting opinions in *Olmstead v. United States*.[132] "Locating" Dewey's insight in the context of the law, White sees the law in general and the *Olmstead* opinions of Justices Taft and Brandeis in particular, as "way[s] of reading, composing, and criticizing authoritative texts, and in so doing, as a way of constituting, through conversation, a community and a culture of a certain kind."[133] More specifically, he suggests that

> [i]n every opinion a court not only resolves a particular dispute one way or another, but validates or authorizes one kind of response to argument, one way of looking at the world and its own authority. . . [E]ach case is an invitation to lawyers and judges to talk one way rather than another, to give one kind of meaning rather than another to what they do, and this invitation can itself be analyzed and judged. Is this an invitation to a conversation in which democracy begins (or

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[131] White, *supra* note 8, at 835.

[132] 277 U.S. 438 (1927). *Olmstead* concerned the government's warrantless tapping of telephones belonging to suspected bootleggers. Convicted on the evidence thus obtained, the defendants appealed, arguing that the Fourth Amendment forbade warrantless wiretapping. Chief Justice Taft crisply dismissed their argument:

> 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.
>
> . . . The Amendment does not forbid what was done here. There was no searching. There was no seizure. The evidence was secured by the sense of hearing and that only. There was no entry of the houses or offices of the defendants.

277 U.S. at 464.

Justice Brandeis's dissent contains the following famous and influential passage:

> 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, a right to be let alone—the most comprehensive of rights and the right most valued by civilized men.

277 U.S. at 478 (Brandeis, J., dissenting). Perhaps the least significant fact about *Olmstead* is that it was overruled by *Katz*, 389 U.S. 347 (1967); *see supra* note 18 and accompanying text.

[133] White, *supra* note 8, at 836.

flourishes)? Or to one in which it ends?[134]

Reading *Olmstead*'s two primary opinions,[135] White asks of each:

> How does it define the Constitution it is interpreting; the process of constitutional interpretation in which it is engaged; the meaning of the Fourth Amendment; the place and character of the individual citizen in our country, and that of the judge, the law, and the lawyer? What conversation does it establish, with what relation to "democracy"? What community does it call into being, constituted by what practices and enacting what values?[136]

Read in this light, Justice Taft's majority opinion reveals itself to White as purely conclusory upon a complex issue,[137] conclusory in its treatment of precedent,[138] and reliant for authority on the very voice of authority that it creates for itself.[139] Moreover, in Justice Taft's characterization, the Constitution is no more than a document that tells the rest of us what to do, the "ultimate boss," a document that has "no higher purposes, no discernible values, no aims or context."[140] The judge is the "intermediate boss" in the community that Justice Taft's opinion evokes.[141] The judge's role is to tell the rest of us what it is the

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[134] *Id.* at 846.

[135] 277 U.S. 438 (1927); 277 U.S. at 471 (Brandeis, J., dissenting).

[136] White, *supra* note 8, at 847.

[137] White argues that Justice Taft's laconic conclusion—"There was no searching. There was no seizure."—is debatable even in Taft's view of the law. *Id.* at 850. The government clearly trespassed against the telephone company, and the defendant might well have had standing to protest. Or the defendant might have been said to have a leasehold or easement in the telephone wires. Moreover, if words can be property under copyright law, why can they not be said to be seized? *Id.* at 851-52.

[138] For instance, Justice Taft says of Gouled v. United States, 255 U.S. 298 (1921), only that it "carried the inhibition against unreasonable searches and seizures to the extreme limit." *Olmstead*, 277 U.S. at 463.

[139] [Taft] repeatedly characterizes both the facts and the other judicial opinions with a kind of blunt and unquestioning finality, as if everything were obviously and unarguably as he sees them, and in doing this he prepares us for the conclusory and unreasoned characterizations upon which the case ultimately turns. He makes a character for himself in his writing and then relies upon that created self as the ground upon which his opinion rests. . . . There is a kind of self-evident circularity about this, of course, but here as elsewhere arguments from self-evidence have a remarkable power, at least for those disposed to share the basic premises.

White, *supra* note 8, at 852-53.

[140] *Id.* at 853.

[141] Indeed, the voice Justice Taft fashions for himself reminds White of "a crusty old boss from a 1930s movie." *Id.* at 855. It is the created voices, the literary personae, of

Constitution requires us to do—not to reason or explain, not to "creat[e] in the reader the power that reason and explanation do," but rather, to perpetrate "an act of power resting on power."[142] In contrast to this terse and simplistic concept of the Constitution, Justice Taft describes at great length and in great detail Olmstead's flourishing criminal enterprise and the attempts of law enforcement agencies to bring that awesome bootlegging behemoth to its knees.[143]

> [T]his narrative implicitly supports the constitutional ideology [Justice Taft] has been obeying, for it invites us to see power and force as real, language as simple, and government as about the struggle between the forces of good and the forces of evil. . . . And law is simply the will of good authority.[144]

Justice Taft's majority opinion works as well as it does, according to White, because it appeals to our (ultimately suicidal) desire to be passive, to be told in no uncertain terms what is what. Although it is our individual responsibility to "engage as an autonomous and present person"[145] with our culture's sacred constitutive texts, we tend to yield to claimed authority. "When we do so, we participate in a conversation that is not the beginning, but the end of democracy."[146]

In contrast, White finds that Justice Brandeis's voice and his notions of authority, constitution, interpretation, and community are consistent with democracy. His voice is that of "a teacher, a teacher who must first learn, and who by having learned may teach."[147] This self-definition in turn defines the law, legal education, and the Constitution "as challenging [our]

Justices Taft and Brandeis in their *Olmstead* opinions that concern White here—not, to be sure, the historical personages.

[142] *Id.* at 853. According to White, Justice Taft assures us, "The Constitution is a document written in plain English making plain commands: If you think they are not plain, wait till I have spoken and I will make them plain." *Id.*

[143] *Id.* at 854. "At the end of this long statement of the facts, Taft abruptly interposes the language of the fourth amendment, flopped before us like a pancake." *Id.* White concludes, "what [Taft] admires [is] organization, scale, enterprise, and success. It would be possible to imagine someone saying: 'The Constitution of the United States is an achievement of amazing magnitude.' But Taft's enthusiasms, as expressed in this text at least, lie elsewhere." *Id.*

[144] *Id.*

[145] *Id.* at 857.

[146] *Id.*

[147] *Id.* at 865.

every intellectual and moral capacity."[148] In contrast to Justice Taft's conclusory pronouncement of no-search-no-seizure, Justice Brandeis asks how the text should be "expounded."[149] He goes on to demonstrate how in the past the Court had repeatedly read the Constitution in "non-literalist" fashion, sustaining Congress's exercise of power over "objects of which the Fathers could not have dreamed."[150]

Justice Brandeis's view of the Constitution and its "expounding" implies a view of human life and society at odds with that of Justice Taft. The dissenter sees humanity living in time and through change, shaped by immediate experience yet seeking through our collective life to "maintain a central identity while undergoing this process of change and to learn from that process."[151] In such a view, interpretation of the Constitution is "translation," bringing a text from the past into the present. Indeed, in his dissent, Justice Brandeis not only translates the Constitution into contemporary legal language, he translates it into contemporary ordinary language, into the vulgate, when he invokes the "right to be let alone."[152] He thus invites a conversation "not only among lawyers, but among citizens, a conversation in that sense democratic."[153] But the conversation is democratic in a larger sense also: "in its ultimate subjection to popular determination, in its openness to all who learn its terms. . .but most of all in its recognition that the essential conditions of human life that it takes as its premises are shared by all of us."[154]

White concludes that a judge's definition of the judicial role and "of us and the conversation that constitutes us"[155] is more than a formal or technical matter: there is ultimately no distinction between form and content, opinion and result. "You cannot write a great novel in support of anti-semitism, wrote Sartre,

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[148] *Id.*

[149] *Id.* at 858.

[150] *Id.* at 850 (quoting *Olmstead*, 277 U.S. 438, 472 (1927) (Brandeis, J., dissenting)).

[151] *Id.* at 860. Thus, White describes Justice Brandeis's view: "The point of the Constitution is to enable us to bring into our minds at once both our own experience and that of our predecessors, and to think about that experience as a whole in a disciplined way: it is in principle a mode of education and self-creation over time." *Id.*

[152] *Id.* at 864.

[153] *Id.*

[154] *Id.* at 867-68.

[155] *Id.* at 869.

and I think you cannot write a great opinion that denies that sense of the ultimate value of the individual person that is necessarily enacted in any sincerely other-recognizing expression."[156]

B. Oliver

Over half a century after *Olmstead*, the voice of Justice Taft's "crusty old boss"[157] can still be heard in Justice Powell's opinion for the Court in *Oliver*.[158] Like Justice Taft in *Olmstead*, Justice Powell makes short work of the defendants' claim. Despite the significance of the Fourth Amendment issue posed, he takes surprisingly few pages to dispose of it on two separate grounds.[159] Indeed, Justice Powell's discussion of the first ground occupies only two paragraphs:

> The rule announced in *Hester v. United States* was founded upon the explicit language of the Fourth Amendment. That Amendment indicates with some precision the places and things encompassed by its protections. As Justice Holmes explained for the Court in his characteristically laconic style: "[T]he special protection afforded by the Fourth Amendment to the people in their 'persons, houses, papers, and effects,' is not extended to the open fields. The distinction between the latter and the house is as old as the common law."
>
> . . . .
>
> We conclude, as did the Court in deciding *Hester v. United States*, that the government's intrusion upon the open fields is not one of those "unreasonable searches" proscribed by the text of the Fourth Amendment.[160]

This brief passage tells us more about Justice Powell's notions of Court, Constitution, and community than it does about the substantive issue. Like Justice Taft in *Olmstead*, what Justice Powell values is authority; Justice Holmes's voice itself validates *Hester*. What Justice Powell commends to the reader is

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[156] *Id.*

[157] *Id.* at 855.

[158] 466 U.S. 170 (1984). Just as White is concerned with the created voices that speak in *Olmstead*, this Article analyzes the various voices, the *personae*, that announce *Oliver*, *Scott*, *Burger*, and *Keta*—not the judicial philosophies or real-life personalities of Justices Powell and Blackmun and Judges Hancock and Titone.

[159] The Court's analysis occupies ten pages in United States Reports and four and one-half pages in the Supreme Court Reporter.

[160] *Oliver*, 466 U.S. at 176, 177.

not Justice Holmes's reasoning, but his "characteristically laconic style."[161] In fact, one might argue that the last thing a good judicial opinion should be is so laconic as to be full of holes, but no matter, Justice Holmes's persona transforms this vice into a virtue, or at worst, a mere stylistic quirk.[162] Indeed, Justice Holmes's (and Justice Powell's) "explanation" is not reasoning, but a leap from assertion to assertion: the Fourth Amendment does not protect open fields. "The distinction between [open fields] and the house is as old as the common law."[163] Thus echoing Justice Holmes, Justice Powell also echoes Justice Taft's "no-searching-no-seizure" conclusory pronouncement. Moreover, in its return to purported literalism,[164] the majority opinion in *Oliver* embodies an *Olmstead* conception of the Fourth Amendment not as embodied values, but as a simple "textual" proscription of some kinds of searches. In the *Oliver-Olmstead* world, the Constitution and Olympian judges tell us the law with "precision." And the law is identical to what the law was and will always be. No attempts are made to persuade or educate the reader, who is not encouraged to ask questions.[165]

The *Oliver* majority's other ground of decision—that under *Katz* there is no reasonable expectation of privacy in fenced or posted land is elaborated at much greater length, and is in this sense superficially more plausible. Justice Powell's analysis begins, however, with the bare assertion that the Court's first ground of decision (open fields are not a house) is "consistent" with the *Katz* understanding of the right to privacy inherent in the Fourth Amendment that the Constitution protects people, not places.[166] That no attempt is made to explain this assertion

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[161] *Id.* at 176.

[162] When judges talk about "style," form and substance are inextricably intertwined.

[163] 466 U.S. at 176.

[164] White explains thus the fallacy of literalism:

> Since there is no such thing as "literal" reading of words, [Justice Taft's] repudiation of ambiguity and complexity itself works as an unexposed, unexplained, and unjustified claim to authority, including the authority to reduce difficulty to simplicity - a claim to an authority that is in fact implicit in every claim to read language "literally."

White, *supra* note 8, at 855.

[165] One might ask just *how* old the common law is and why that matters, or why no authority other than the "laconic" *Hester* is cited. If indeed the framers intended a clear distinction between a house and the land it stands on, surely this should be explained to the readers and authority adduced.

[166] *Oliver*, 466 U.S. at 177.

is all the more disturbing because *Katz* is apparently *inconsistent* with a "literal" reading of the Fourth Amendment. If the Fourth Amendment protects only what it enumerates, how can the telephonic communication from a telephone booth in *Katz* be protected? How can the whole line of post-*Katz* holdings invalidating searches of commercial establishments[167] be justified?[168] And, how can *Hester* be said to be good law when *Olmstead*, which built on *Hester's* "literalism," was overruled by *Katz*? Finally, the unsupported assertion that *Katz* and *Hester* are consistent is itself plainly inconsistent with the notion that the law exists in time and through time.[169]

Oliver's *Katz* analysis is more developed than its first ground of decision, but ultimately no more coherent or candid. The Court's conclusion that there is no reasonable expectation of privacy in fenced and posted land rests on four contentions: that there is no societal interest in protecting activities "such as the cultivation of crops" that take place in open fields;[170] that posting and fencing are not generally effective against trespassers;[171] that government agents can lawfully "search" land by flying over it;[172] and that in any event it is not "legitimate" to expect that unlawful activities like growing marijuana will remain private.[173] Although these arguments have an initial commonsense appeal, they turn out to rest, variously, on semantic sleight of hand and rhetorical "bait and switch."

The term "open fields," used to refer to all privately-owned undeveloped land, is itself highly equivocal. With its agrarian, Jeffersonian ring, its evocation of an idyllic American past, "open fields" is an effective image. Yet neither *Oliver*[174] nor its

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[167] *See, e.g.*, Marshall v. Barlow's Inc., 436 U.S. 307 (1978); G.M. Leasing Corp. v. United States, 429 U.S. 338 (1977).

[168] Justice Marshall objects to the Court's assertion of consistency. *Oliver*, 466 U.S. at 185-86 (Marshall, J., dissenting). Yet it is conceivable that the majority *could* have given an explanation. It might, for instance, have explained that *Katz* and progeny all address situations which the framers could not have foreseen and that the "reasonable expectation of privacy" analysis is limited to that context. The Court could then have ended its opinion without such tortured reading of *Katz*.

[169] 466 U.S. at 194 n.18 (Marshall, J., dissenting).

[170] *Id.* at 179.

[171] *Id.*

[172] *Id.*

[173] *Id.* at 182.

[174] In *Oliver* marijuana was found growing in a "highly secluded" field a mile from the entry to Oliver's property and "bounded on all sides by woods, fences, and embank-

companion case, *Maine v. Thornton*,[175] concerns anything that could properly be called either a field or open. If indeed all "open fields" were open to view, no "open fields" exception would be necessary: the long-established "plain view" doctrine would apply.[176] The term "open fields" thus distracts from the real issue: whether there is a reasonable expectation of privacy in undeveloped real property that is both secluded and fenced. It is only in a footnote at the end of his *Katz* analysis that Justice Powell belatedly defines "open fields" to "include any unoccupied or undeveloped area outside of the curtilage."[177]

Further, the inaccurate and archaic term "open fields" is also the basis of the Court's argument that only such non-intimate activities as "the cultivation of crops" takes place there. Yet, as Justice Marshall points out, secluded undeveloped land is susceptible of a vast number of other ordinary, less impersonal uses.[178]

The argument that the occasional ineffectiveness of fencing and posting renders the expectation of privacy unreasonable is also conclusory and dubious. Justice Powell tells us that "[i]t is not generally true that fences or 'No Trespassing' signs effectively bar the public from viewing open fields in rural areas."[179] This assertion of fact is simply thrust at the reader without any hint as to how the writer knows this. It also misleadingly suggests again that what is at issue here is mere viewing of open areas—not, as is in fact the case, sustained trespass into a se-

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ments," not visible "from any point of public access." *Id.* at 173-74. In *Thornton* the respondent was growing marijuana in the woods. *Id.* at 174.

[175] 466 U.S. 170 (1984).

[176] *See, e.g.*, Coolidge v. New Hampshire, 403 U.S. 443, 465 (1971) ("It is well established that under certain circumstances the police may seize evidence in plain view without a warrant.").

[177] *Oliver*, 466 U.S. at 180 n.11.

[178] 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)(footnotes omitted).

[179] *Id.* at 179.

cluded area. Further, Justice Powell's reasoning is more sinister than it might appear; it equally supports the conclusion that people who live in a neighborhood plagued by robberies and burglaries therefore lose the reasonable expectation that their persons and homes will be exempt from government search and seizure.

The ancillary argument that posted woods may be searched on foot because they can be legitimately subjected to aerial searches is also unsatisfactory. The fact that one limited form of search is constitutionally permissible hardly authorizes all other forms. For instance, a search incident to arrest does not authorize a general search of the defendant's home.[180] Justice Powell writes in a footnote that if warrantless searches of posted land are prohibited, this "merely would require law enforcement officers, in most situations, to use aerial surveillance."[181] First, this argument assumes, erroneously, that what can be found on foot can be seen from the air. Moreover, it is also ominously reminiscent of Justice Taft's *Olmstead* opinion in its suggestion that the government's convenience is a dispositive Fourth Amendment concern.[182]

The argument that the legitimacy of an expectation of privacy can be measured by the nature of the landowner's activities is the most disturbing of all Justice Powell's arguments. In the last section of his analysis, he writes: "[W]e reject the suggestion that steps taken to protect privacy establish that expectations of privacy in an open field are legitimate."[183] Thus, the fact that Thornton and Oliver so effectively fenced and posted their land that no one but determined government agents came upon their marijuana plants does not render an expectation of privacy in such circumstances "legitimate". In Justice Powell's opinion, "[t]he test of legitimacy is not whether the individual chooses to conceal assertedly 'private' activity. Rather, the correct inquiry

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[180] *See, e.g.*, Chimel v. California, 395 U.S. 752 (1969) (search incident to arrest does not authorize search of premises beyond immediate area from which arrestee might gain possession of a weapon or destructible evidence).

[181] *Oliver*, 466 U.S. at 179 n.9.

[182] *Olmstead*, 277 U.S. at 468 (Justice Taft suggests "[a] standard which would forbid the reception of evidence, if obtained by other than nice ethical conduct by government officials, would make society suffer and give criminals greater immunity than has been known heretofore.")

[183] *Oliver*, 466 U.S. at 182.

is whether the government's intrusion infringes upon the personal and societal values protected by the Fourth Amendment."[184] In a footnote Justice Powell goes further: "Certainly the Framers did not intend that the Fourth Amendment should shelter criminal activity wherever persons with criminal intent choose to erect barriers and post 'No trespassing' signs."[185]

Not a single citation impedes the flow of this novel argument: the Justice's own voice of authority and "certainty" alone commend its reasoning to us. And indeed, as search-and-seizure law, this argument has nothing else to commend it;[186] it turns on a kind of verbal sleight of hand that has no place in principled adjudication. Searches and seizures conducted by the government are legitimate, that is, lawful, when they are "reasonable" within the meaning of the Fourth Amendment. Under *Katz*, however, no Fourth Amendment search occurs unless there is a "reasonable" expectation of privacy. Reasonableness in this latter context of course has nothing to do with lawful conduct, but adding "legitimate" to "reasonable"—as the court did in *Oliver*[187]—creates a through-the-looking-glass Fourth Amendment proposition: no one who possesses contraband can legitimately expect not to be found out.

Here, as in Justice Taft's *Olmstead* opinion, the Constitution is not about rights and values and about the relationship of the government and the individual. Rather, like Justice Taft, Justice Powell sees the law, and indeed, the Fourth Amendment itself, as enacting a battle between the forces of good (the government) and the forces of evil (persons with criminal intent). So powerful is this conception of the legal universe, and ultimately, of the body politic, that it bends language to its own uses.

Finally, Justice Powell dismisses as unfounded and impractical the petitioners' arguments that expectations of privacy in

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[184] *Id.* at 182-83 (footnote omitted).

[185] *Id.* at 182 n.13.

[186] The Court's own precedent holds unambiguously that expectation-of-privacy analysis turns on "the sorts of uses to which a given space is susceptible, not the manner in which [the defendant] was in fact employing it." *Id.* at 191 n.13 (Marshall, J., dissenting) (citing United States v. Chadwick, 433 U.S. 1 (1977), *overruled on other grounds by* California v. Acevedo, 111 S. Ct. 1982 (1991)).

[187] *Oliver*, 466 U.S. 170.

posted land should be evaluated on a case-by-case basis.[188] The answer is again very short indeed: "The language of the Fourth Amendment itself answers their contention."[189] However, Justice Powell continues, a case-by-case approach would in any event be unworkable, because "police officers would have to guess before every search whether landowners had erected fences sufficiently high, posted a sufficient number of warning signs, or located contraband in an area sufficiently secluded."[190] Here again, we are in a world where simple rules are the best rules, and the government's convenience can trump individual rights.

C. Scott

Judge Hancock's opinion for the *Scott* majority of the New York Court of Appeals presupposes (and in Justice Marshall's sense, "promotes")[191] a legal, ethical, and political universe antithetical to that of *Oliver*. First, Judge Hancock's voice is not that of a boss laying down the law. Rather, like Justice Brandeis in *Olmstead*,[192] he is an individual speaking to individuals, the teacher who must learn in order to teach. Instead of asserting a conclusion, Judge Hancock begins his analysis of the search and seizure issues by setting *Oliver* in historical perspective, narrating the *Hester-Olmstead-Katz-Oliver* sequence.[193] Having thus educated court and reader, he notes that *Oliver*'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."[194] Inherent in this "seeming" is a kind of judicial humility, an invitation to the reader to look at the cited cases and come to an independent conclusion. For the court, Judge Hancock "agrees" with Justice Marshall's dissent identifying the inconsistency between *Oliver* and *Katz*.[195]

Since the Supreme Court's reading of the language of the

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[188] *Id.* at 181.

[189] *Id.*

[190] *Id.*

[191] *Id.* at 198 (Marshall, J., dissenting).

[192] 277 U.S. 438 (1928).

[193] *Scott*, 79 N.Y.2d at 478-85, 593 N.E.2d at 1328-34, 583 N.Y.S.2d at 920-26.

[194] *Id.* at 485, 593 N.E.2d at 1334, 583 N.Y.S.2d at 926.

[195] *Id.* at 485-86, 593 N.E.2d at 1334-35, 583 N.Y.S.2d at 926-27; *see also Oliver*, 466 U.S. at 185-88 (Marshall, J., dissenting).

Fourth Amendment has no bearing on adjudication under article I, section 12, most of *Scott* is devoted to the court's rejection of *Oliver*'s holding that there is, *per se*, no reasonable expectation of privacy in fenced or posted land.[196] The court announces its holding in forthright, everyday language that "translates" the law: "A constitutional rule which permits State agents to invade private lands for no reason at all—without permission and in out-right disregard of the owner's efforts . . . is one that we cannot accept . . . ."[197] Rather than play the neutral, Oracle-at-Delphi-like vehicle through which transcendent law is spoken, Judge Hancock admits that the court is made up of subjects who choose how to rule after considering conflicting constitutional interpretations. As explained by Judge Hancock, this rejection is profoundly a matter of "core principle[s],"[198] of fundamental democratic values: the rule in *Oliver* offends against the citizen's rights to privacy and autonomy and the government's obligation to deal honestly and fairly with its citizens. *Scott* is about values in the way *Oliver* is about law enforcement.

First, the court rejects *Oliver*'s analysis because, in its categorical emphasis on places, not people, *Oliver* contradicts *Katz* even while purporting to apply it, thus unsettling post-*Katz* search and seizure law. Further, in Judge Hancock's view, *Oliver* is incompatible with "the right to be let alone—the most comprehensive of rights and the right most valued by civilized men."[199] This use of Justice Brandeis's vernacular "translation" of the Fourth Amendment exemplifies the court's idea of the Bill of Rights as a source of values, not a set of do's and don'ts.[200]

The court finds further reasons to reject *Oliver* in the various protections traditionally afforded to property rights, protections that imply fundamental respect for privacy and individual autonomy. Judge Hancock cites the Supreme Court's own pronouncement that "property rights reflect 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

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[196] *Scott*, 79 N.Y.2d at 485-90, 593 N.E.2d at 1334-38, 583 N.Y.S.2d at 926-30.

[197] *Id.* at 486, 593 N.E.2d at 1335, 583 N.Y.S.2d at 927.

[198] *Id.* at 487, 593 N.E.2d at 1335, 583 N.Y.S.2d at 927.

[199] *Id.* at 486-87, 593 N.E.2d at 1335, 583 N.Y.S.2d at 927 (quoting *Olmstead*, 277 U.S. at 478 (Brandeis, J., dissenting)).

[200] *Keta*, 79 N.Y.2d at 504, 593 N.E.2d at 1349, 583 N.Y.S.2d at 939.

individual's expectations of privacy are reasonable."[201] The existence of laws prohibiting unauthorized entry onto private property discredits *Oliver* still further: like the government agents in *Olmstead*, the officers in *Oliver*, *Thornton*, and *Scott* were breaking the law. Again, Judge Hancock quotes Justice Brandeis: "Our Government is the potent, the omnipresent teacher. For good or for ill, it teaches the whole people by its example. . . . If the Government becomes a lawbreaker, it breeds contempt for law."[202] Once more, Judge Hancock's opinion presupposes a community in which teaching/learning, not giving/taking orders, is the dominant discourse.

With thoughtful understatement, Judge Hancock finds "troublesome" *Oliver*'s "suggestion that the very conduct discovered . . . could be considered . . . in determining whether the police had violated defendant's rights."[203] This "after-the-fact justification for illegal police conduct" is incompatible with "fairness as an essential concern in criminal jurisprudence."[204] Moreover, because law-abiding citizens may have good reasons for keeping to themselves what they do on their secluded property, blanket permission for police access ignores still another basic democratic premise: "the only legitimate purpose for governmental infringement on the rights of an individual is to prevent harm to others."[205]

In brief, *Oliver* presents the reader with an assertion (no expectation of privacy in fenced land beyond the curtilage) that rests on further assertions ("open fields" are chiefly used for farming, fencing and posting do not keep out the public, only lawful activity creates a legitimate expectation of privacy) while *Scott* invites the reader to a reasoned consideration of rights and values.

D. Burger

In *New York v. Burger*[206] Justice Blackmun speaks in the

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[201] *Scott*, 79 N.Y.2d at 487, 593 N.E.2d at 1335, 583 N.Y.S.2d at 927 (quoting Rakas v. Illinois, 439 U.S. 128, 153 (1978)(Powell, J., concurring)).

[202] *Id.* at 487, 593 N.E.2d at 1336, 583 N.Y.S.2d at 928 (quoting *Olmstead*, 277 U.S. at 485 (Brandeis, J., dissenting)).

[203] *Id.* at 488, 593 N.E.2d at 1330, 583 N.Y.S.2d at 928.

[204] *Id.*

[205] *Id.* at 489, 593 N.E.2d at 1337, 583 N.Y.S.2d at 929.

[206] 482 U.S. 691 (1987).

same authoritarian voice as Justice Powell in *Oliver* and Justice Taft in *Olmstead*. It is a voice that constitutes community as an epic struggle between crime and the state. Although more detailed in its analysis than *Oliver*, the *Burger* majority opinion is no more candid and no better reasoned. Like *Oliver*, it undermines settled search and seizure law while leaving the facade intact, trivializing and shouldering aside the court of appeals's principled concern that "administrative" searches under section 415 could be no more than pretexts for searches for evidence of criminality.

Significantly, Justice Blackmun frames the issues presented in *Burger* without a single mention of the Fourth Amendment. Indeed, his statement of the Court's reasons for granting *certiorari* in *Burger*—"[b]ecause of the important state interest in administrative schemes designed to regulate the vehicle-dismantling or automobile junkyard industry"[207]—places the emphasis where it will remain throughout the opinion, not on the legitimacy of expectations of privacy, but on the government's power.

Burger's failings as reasoned discourse lie less in articulation than in application of the law. It was settled by the time of *Burger* that a warrantless search of business premises is constitutional when the business in question is "pervasively regulated."[208] In addition, the particular regulatory scheme must provide a sufficient guarantee of certain and regular application to provide a constitutionally adequate substitute for a warrant.[209] Finally, the regulation must be informed by a substantial state interest and its search provisions must be necessary to further that interest.[210]

Applying the first prong of this test, Justice Blackmun unaccountably pronounces section 415-a(5)(a) of New York's Vehicle and Traffic Law[211] to be "clearly" pervasive regulation, an "extensive" regulation of the vehicle-dismantling business.[212] But his own (accurate) description of the provisions of section 415-a(5) immediately and starkly contradicts this assertion. The regulations require only registering, displaying a registration cer-

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[207] *Id.* at 698.
[208] *Id.* at 702.
[209] *Id.* at 703 (citing Donovan v. Dewey, 452 U.S. 594, 603 (1981)).
[210] *Id.* at 702.
[211] *See supra* note 61.
[212] New York v. Burger, 482 U.S. 691, 703-04 (1987).

tificate, and keeping an inventory log.[213] Justice Blackmun's use of emperor's-new-clothes rhetoric here is no more appropriate to reasoned discourse than the conclusory assertions of Justices Taft, Holmes, or Powell.

But *Burger* deals in conclusory assertions as well as naked overstatement. Although the age of a regulatory scheme is a factor in determining whether it is pervasive, and auto-dismantling is a relatively new industry, Justice Blackmun cures this defect by declaring section 415-a(5)(a) the descendant of venerable junk shop and second-hand shop regulations.[214] How this historical analogy might operate to reduce a vehicle-dismantler's expectation of privacy is, however, not explained. And indeed, it does not appear that these older industries were themselves more than minimally regulated.[215]

The Court's conclusion that section 415-a(5)(a) "place[s] appropriate restraints upon the discretion of the inspecting officers,"[216] and thus satisfies the policies behind the warrant requirement, is yet another example of adjudication by sheer rhetorical *force majeure*. Section 415-a(5)(a) guarantees certain and regular application, according to Justice Blackmun, because it requires that (1) only vehicle-dismantling and related industries may be inspected (a seemingly tautological restriction), (2) only during business hours may inspections take place, and (3) only records and vehicles or vehicle parts may be inspected.[217] Other than proscribing midnight raids and washroom searches, it is hard to see how section 415-a(5)(a) guides or limits official discretion.

Moreover, under its provisions, government agents are authorized to conduct searches of inventory that cannot possibly reveal administrative violations. Although this means that section 415-a(5)(a) can be used to circumvent the warrant requirement, and that its "administrative" aspects may well be purely pretextual, the Court does not so much as mention this problem in determining whether section 415-a(5)(a) fits within the administrative search exception of the warrant requirement. This

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[213] *Id.* at 704.
[214] *Id.* at 705-07.
[215] *See id.* at 720 n.4 (Brennan, J., dissenting).
[216] *Id.* at 711.
[217] *Id.* at 711-12.

omission is all the more unsettling because the court of appeals's opinion below turned on that very issue.[218]

While the state undoubtedly has a substantial interest in stemming the rising tide of vehicle theft, and warrantless inspections of vehicle dismantlers would doubtless serve that end, the Court's bland analysis of that issue once again ignores whether a purportedly administrative search that can discover only evidence of criminality is constitutional.

Having concluded that section 415-a(5)(a) meets all of the requirements of the administrative search exception, Justice Blackmun belatedly addresses the issue that so troubled the court of appeals, but he addresses it as a separate, and clearly subsidiary, issue. According to Justice Blackmun, the court of appeals's concern for the constitutionality of section 415-a(5)(a) was the result of simple ignorance: the regulation only appeared to the New York court to be a "pretext" because "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."[219] This explanation is as discourteous as it is unsatisfactory. First, it accuses the seven judges of New York's highest court of failing to recognize a proposition of the most blinding obviousness. More importantly, it entirely begs the question. What troubled the court of appeals was neither the mere existence of section 415-a(5)(a) nor the possibility that an administrative search *might* reveal evidence of criminality, but rather, the fact that the provision broadly authorized searches that could uncover *only* criminal violations. This was in fact the situation in *Burger*. Although the defendant had neither the required license nor the required inventory book, the officers searched his premises for stolen property—despite the fact that there were no administrative violations that such a search could uncover.[220]

Yet the Supreme Court deals only glancingly and dismissively with the tunnel that section 415-a(5)(a) excavates beneath the Fourth Amendment: "Forbidding inspecting officers to examine the inventory [when the owner keeps no record of his inventory] would permit an illegitimate vehicle dismantler to

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[218] *See* People v. Burger, 67 N.Y.2d 338, 493 N.E.2d 926, 502 N.Y.S.2d 702 (1986).
[219] *Burger*, 482 U.S. at 712-13.
[220] *Id.* at 695.

thwart the purposes of the administrative scheme and would have the absurd result of subjecting his counterpart who maintained records to a more extensive search."[221] As in *Oliver*, efficient law enforcement takes precedence over concern for individual rights, and even over the Court's own precedent, which forbids the use of administrative searches to uncover evidence of crimes.[222]

Finally, Justice Blackmun sees no significance in the fact that searches under section 415-a(5)(a) are conducted by police officers, rather than by administrative agents:

> As a practical matter, many States do not have the resources to assign to enforcement of a particular administrative scheme to a specialized agency. . . . .
> [W]e decline to impose upon the States the *burden* of requiring the enforcement of their regulatory statutes to be carried out by specialized agents.[223]

One final time, concern for practical law enforcement is interposed against the court of appeals's principled concerns about the statutory provision.

E. Keta

Unlike *Burger* and like *Scott* and Justice Brandeis's *Olmstead* dissent, *People v. Keta*[224] portrays the Constitution as a source of fundamental democratic values. Indeed, Judge Titone explicitly bases the majority's rejection of *Burger* on its failure to serve constitutional "values" and distinguishes his own concern for "ordered liberty" from the concern for "well-kept order" manifested by the Supreme Court in *Burger* and by the *Scott-Keta* dissenters.[225]

As *Scott* educates us about the *Hester-Katz* progression, *Keta* educates the citizen/reader about the "perplexing" law of administrative searches before beginning its appraisal of *Burger*: we are equipped and invited to participate in the court's analy-

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[221] *Id.* at 716.

[222] *See, e.g.*, Donovan v. Dewey, 452 U.S. 594 (1981); Camara v. Municipal Court, 387 U.S. 523 (1967).

[223] *Burger*, 402 U.S. at 717-18 (emphasis added). Yet it might equally be argued that "high crime" states can ill afford to use police officers for administrative enforcement.

[224] People v. Keta, 79 N.Y.2d 474, 593 N.E.2d 1328, 583 N.Y.S.2d 920 (1992).

[225] *Id.* at 501, 593 N.E.2d at 1345, 583 N.Y.S.2d at 937.

sis. But the court takes the reader's education a step farther in *Keta*, pausing for a history lesson on the notorious Writs of Assistance.[226] Where *Burger* is shrilly concerned with the crisis of the moment, *Keta*, like the *Olmstead* dissent,[227] sees a complex reality that takes past and future into account, seeking to understand the lessons of history and our responsibility to the future. Judge Titone concludes that as the repressive Writs of Assistance fueled the American Revolution, sweeping and warrantless "administrative searches" put at risk the future of democracy.[228]

Since the stakes were thus so high, the *Burger* Court had a special duty to employ "close analysis," according to Judge Titone, but failed to meet the occasion.[229] The *Keta* majority refutes *Burger* point by point, meticulously. First, Judge Titone quotes the Supreme Court's own precedent to demonstrate that before *Burger*, the Court itself assumed that the Fourth Amendment would not tolerate purported "administrative" searches that are actually searches for evidence of criminality.[230] Moreover, he adds, this assumed limitation is "analytically sound," for without it, the exception could "swallow" the warrant and probable cause requirements.[231] Next, Judge Titone examines and rejects the Supreme Court's analysis: section 415-a(5)(a) is neither "pervasive" regulation nor does it provide for such certainty and regularity of application as to obviate the need for a warrant. More importantly, Judge Titone explains, the state's interest in eradicating car theft is beside the point. The government *always* has an interest in law enforcement and searches are always useful, but the very purpose of the Fourth Amendment and article I, section 12 is "to provide a counterbalancing check

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[226] *See supra* notes 79-80 and accompanying text.

[227] *Olmstead*, 277 U.S. at 471-75.

[228] *Keta*, 79 N.Y.2d at 497-98, 593 N.E.2d at 1343, 583 N.Y.S.2d at 935.

[229] *Id.* at 499, 593 N.E.2d at 1343, 583 N.Y.S.2d at 935.

[230] *Id.* at 498, 593 N.E.2d at 1343, 593 N.Y.S.2d at 935 (citing Donovan v. Dewey, 452 U.S. at 598 n.6 (1981) (warrant and probable cause requirements "pertain when commercial property is searched for contraband or evidence of crime"); Camara v. Municipal Court, 387 U.S. 523, 539 (1967) (authorization of administrative searches on less than probable cause will not "endange[r] time-honored doctrines applicable to criminal investigations")). It is characteristic of the tone of the *Scott-Keta* majorities that Judge Titone does not accuse the Supreme Court of "failing to recognize" its own precedent, while the *Burger* court accuses the New York court of just that. *See supra* notes 78-98 and accompanying text.

[231] *Id.* at 498-99, 593 N.E.2d at 1343, 583 N.Y.S.2d at 935.

on what may be done to individual citizens in the name of governmental goals."[232]

In *Keta* the court of appeals declines to address "our citizens' legitimate fears about rising crime,"[233] yet neither does it belittle or lose sight of these concerns. Rather, Judge Titone answers them with Benjamin Franklin's high-minded admonition that "those who give up essential liberty to purchase a little temporary safety deserve neither liberty nor safety,"[234] and notes his own belief that constitutionally acceptable regulation (including warrantless searches) of the vehicle dismantling industry can be drafted. In the end, there is a founded hope that liberty and order can be reconciled.

Like *Scott*, then, *Keta* invites us to a conversation about values, a conversation in which democracy and reason can indeed flourish. In sharp contrast, *Oliver* and *Burger* simply lay down the law, relying on the voice of authority, our fear of crime, and our masochistic romance with power to silence our questions. In short, the court of appeals correctly, even *necessarily*, rejected decisions of the United States Supreme Court that violated one of the most fundamental of democratic guarantees: the right to a reasoned explanation for the exercise of power.

V. State Constitutional Interpretation

While *Scott* and *Keta* are wise decisions, well-supported by reason and precedent, their federal counterparts, *Oliver* and *Burger*, are not. Therefore, the court of appeals's principled disagreement with the Supreme Court would appear to be sufficient to justify its departure from federal precedent. To the *Scott* and *Keta* dissenters, however, the notion that a state court may, in interpreting its own constitution, simply *disagree* with the Supreme Court's interpretation of an identical provision is anathema. Rather, the dissenters argue, in the absence of a textual difference between the federal Constitution and a state constitution that would permit different interpretations of the words used, only the existence of a "non-interpretive" factor, *i.e.*, some unique characteristic of the particular state that distinguishes it from the rest of the nation, can justify the state court's depar-

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[232] *Id.* at 500, 593 N.E.2d at 1344, 583 N.Y.S.2d at 936.

[233] *Keta*, 79 N.Y.2d at 501, 593 N.E.2d at 1345, 583 N.Y.S.2d at 937.

[234] *Id.* at 501, 593 N.E.2d at 1345, 583 N.Y.S.2d at 937.

ture from the law of the land.[235] In *Scott* and *Keta*, the dissent's ire is piqued in particular by its perception that the court of appeals had previously adopted and recently reaffirmed non-interpretive analysis.[236] Therefore, in failing to employ non-interpretive analysis in *Scott* and *Keta*, the majority undermined *stare decisis*.

The majority opinions in *Scott* and *Keta* in fact contain no explicit discussion of methodology. Response to the dissent's shower of vitriol is left to the concurring Judge Kaye, who simply denies that the court has ever adopted any particular methodology for deciding state constitutional cases or that its decisions in *Scott* and *Keta* signal a break from the past.[237]

These opinions together raise several issues for both the tone and content of the discussion of state constitutional adjudication contrasts sharply with the reasonable discussion of search and seizure. Indeed, all of the qualities that make the search and seizure opinion such excellent constitutional discourse are entirely lacking in the discussion of the state constitution. First, the precedents cited by the dissent do not support its contention that the court of appeals has, in the past, adopted non-interpretive analysis in state constitutional cases, then "scuttled" it in *Scott* and *Keta*. Second, the court has, in fact, failed to adopt any consistent theory of state constitutional adjudication. Rather, it relies on "non-interpretive factors" when they appear to exist, invents them when they do not or, alternatively, ignores the entire issue. The result of this approach is that where the federal Constitution and the state constitution contain analogous provisions, no litigator in New York can be sure of how to raise or defend against a state constitutional claim.

Finally, while any reasoned, clearly explained methodology would be better than the current disarray, the court of appeals should explicitly reject the notion, fundamental to non-interpretive analysis, that a state court may not reject Supreme Court precedent unless it can advance some state-specific circumstance to justify the departure. Such a requirement appears to be a recent invention born of state court sensitivity to criticism that their constitutional decisions reflect mere ideological disagree-

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[235] *Id.* at 510-11, 593 N.E.2d at 1351, 583 N.Y.S.2d at 945.
[236] *Id.* at 512-13, 593 N.E.2d at 1351-53, 583 N.Y.S.2d at 944-45.
[237] *Id.* at 504, 593 N.E.2d at 1347, 583 N.Y.S.2d at 939.

ment with the Supreme Court. In fact, this requirement conflicts with the state courts' historic obligation to serve as the primary defenders of citizens' individual liberties. Moreover, the notion of "unique state characteristics" does not reflect the reality of a nation in which fundamental values do not align with state boundaries.[238] There are not fifty-one separate discourses about individual rights but rather a continuing national conversation in which state courts may and should dissent in the interest of their citizens' rights.

A. *A History of the "New Federalism" Movement*

A reader who receives the impression from the dissenting and concurring opinions in *Scott* and *Keta* of having walked in on a family feud with ancient origins may not be far wrong. As Judge Kaye points out, the judges of the New York Court of Appeals have been "uncommonly divided" for at least the past five years over state constitutional law cases, particularly those in which they have been called upon to interpret a provision of the New York State Constitution more broadly than the United States Supreme Court has already interpreted an analogous federal provision.[239]

By this time, so much has been written on "New Federalism" by both judges and commentators, the sides in the debate are so clearly drawn and the points of view so tenaciously held, that participants in the argument, like members of a quarrelsome family, possess an exclusive frame of reference and speak in a shorthand comprehensible only to themselves.[240]

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[238] *See* Gardner, *supra* note 11, at 830-32.

[239] *Scott*, 79 N.Y.2d at 503, 593 N.E.2d at 1346, 583 N.Y.S.2d at 938.

[240] The term "New Federalism," or, more precisely, "New Judicial Federalism" describes the recent emphasis on independent state constitutional analysis, particularly in the area of individual rights. The Burger and Rehnquist Courts' de-emphasis of those rights is probably the single greatest impetus behind the New Federalism, a movement that counts among its most committed adherents: Chief Judge Judith Kaye of the New York Court of Appeals (Kaye, *supra* note 7, at 399); Wisconsin Supreme Court Justice Shirley Abrahamson (Shirley Abrahamson, *Criminal Law and State Constitutions: The Emergence of State Constitutional Law*, 63 TEX. L. REV. 1141 (1985)); New Jersey Supreme Court Justice Stuart Pollock (Stuart G. Pollock, *State Constitutions as Separate Sources of Fundamental Rights*, 35 RUTGERS L. REV. 707, 716 (1983)); Washington Supreme Court Justice Robert Utter (Robert F. Utter, *State Constitutional Law, the United States Supreme Court, and Democratic Accountability: Is There a Crocodile in the Bathtub?*, 64 WASH. L. REV. 19 (1989)); and former Oregon Supreme Court Judge Hans Linde (Hans A. Linde, *E Pluribus—Constitutional Theory and State Courts*, 18

Readers who missed the beginning of the argument may therefore need some background. The New Federalism movement is in essence an attempt to regain for state constitutions the meaningful role they once held as the "primary guardian[s]" of individual liberties.[241] At the time the federal Bill of Rights was first drafted, it applied exclusively to actions by the federal government. State bills of rights were thus the only restrictions upon actions by state, as opposed to the federal, government.[242]

Over the next two centuries, however, the central place of state constitutions shifted. The Civil War created a spirit of national rather than state identification. Moreover, the Thirteenth, Fourteenth and Fifteenth Amendments placed the power to protect the civil rights of former slaves in the federal government. The view of the states as the guarantors of liberty against federal overreaching began to be replaced by the view of the federal government as the bulwark against abuse of power by the states.[243]

This process was intensified in the twentieth century by the application to the states of rights guaranteed in the first ten amendments to the federal constitution through the Fourteenth Amendment. Under this model, the federal Constitution set a

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GA. L. REV. 165 (1984)). *See generally* Robert N.C. Nix, Jr., *Federalism in the Twenty-First Century, in* INDIVIDUAL LIBERTIES IN SEARCH OF A GUARDIAN: FEDERALISM - THE SHIFTING BALANCE (Janice C. Griffith ed., 1989); William J. Brennan, Jr., *Symposium on the Revolution in State Constitutional Law*, 13 VT. L. REV. 11 (1988).

[241] Massachusetts v. Upton, 466 U.S. 727, 739 (1984) (Stevens, J., concurring).

[242] For example, in Barron v. Mayor of Baltimore, 32 U.S. (7 Pet.) 243 (1833) the owner of a wharf in a Baltimore harbor brought a lawsuit claiming that the City of Baltimore had caused several streams to run into the harbor carrying with them soil and debris which made the harbor so shallow that the plaintiff's wharf became useless. On appeal to the Supreme Court, Barron argued that the City had taken his property in violation of the Fifth Amendment. In an opinion written by Justice Marshall, the unanimous Court held that the Fifth Amendment was intended solely as a limitation on the exercise of power by the federal government and is not applicable to the legislation of states. Justice Marshall explained:

> Each State established a constitution for itself, and in that constitution provided such limitations and restrictions on the powers of its particular government as its judgment dictated.
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> . . . .
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> In their several constitutions [the states] have imposed such restrictions on their respective governments as their own wisdom suggested; such as they deemed most proper for themselves. It is a subject on which they judge exclusively.

Id. at 247-48.

[243] *See* Kaye, *supra* note 7, at 402.

minimum level of protection for individual liberties that the states could not violate. Thus, the federal Constitution became the "primary guardian" of individual rights and state bills of rights simply a second line of defense.[244]

The attempt to develop a modern role for state constitutions must be seen in this historical context. When state bills of rights were the only protection against state government power, state courts performed a meaningful task if they simply interpreted state constitutional provisions identically to analogous provisions of the federal Constitution. Once the Due Process Clause of the Fourteenth Amendment became available to limit the power of state governments, however, it became clear that state constitutions that did no more than mimic the federal Constitution would be superfluous. And, in fact, this is precisely what happened.[245]

During the years that Earl Warren was Chief Justice of the Supreme Court, individual rights became increasingly federalized.[246] Although a dual constitutional system remained theoretically intact, the federal Constitution became the dominant partner.[247] Litigants who could do so invariably chose a federal forum in which to challenge state violations of civil liberties. Those who could not, namely criminal defendants, frequently argued defenses based on federal rather than state law. State constitutional claims, if raised at all, were simply tacked onto federal arguments.[248]

State courts responded accordingly. They decided cases under the federal Constitution, occasionally adding that the same outcome was required under the state constitution.[249] In a

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[244] *See id.* at 404-05.

[245] *See Project Report: Toward an Activist Role for State Bills of Rights*, 8 HARV. C.R.-C.L. L. REV. 271 (1973) [hereinafter *Project Report*].

[246] *Id.* at 274.

[247] Kaye, *supra* note 7, at 404.

[248] *Project Report*, *supra* note 245, at 274.

[249] This procedure had the potential for causing problems when the losing parties in state court sought Supreme Court review. Before 1983 ambiguity as to the legal basis for a state court's decision was generally resolved by a finding by the Supreme Court that the case had been decided as a matter of state law and that therefore the Supreme Court lacked jurisdiction to review it. In Michigan v. Long, 463 U.S. 1032 (1983), however, the Supreme Court reversed this presumption and announced that henceforth where a state court fails to make clear that its decision rests on state or federal grounds, the court will accept "as the most reasonable explanation that the state decided the case the way it did because it believed that federal law required it to do so." *Id.* at 1041. Only if the state

time of expanding federal constitutional rights, few if any, state courts seriously considered the possibility of granting broader protection under their state constitutions. Conversely, since the states were bound by minimum federal standards, no practical purpose would be served by determining that the state constitution granted less protection than the federal Constitution. Therefore, state constitutional adjudication languished.[250]

Unsurprisingly, the "New Federalism" movement grew as the Supreme Court under Chief Justices Burger and Rehnquist set about contracting federal rights.[251] Initially, a new cumbersome system of constitutional litigation developed. Courts accustomed to deciding cases under the Fourteenth Amendment continued to do so. Their decisions would then be reversed and remanded by the Supreme Court. Back in the state court, state constitutional claims would then for the first time be seriously considered. In the New York Court of Appeals, as in many other state courts, this second round frequently resulted in a holding that state constitutional requirements exceeded those of the federal Constitution in the particular case.[252]

An increasing number of judges and commentators criticized this state court practice of deciding federal before state claims.[253] They urged that it made more sense for a state court to decide a case first on state law grounds. If a state statute or action were found to meet state constitutional standards, only then would a court determine if it also provided the minimum federal level of protection. If it were struck down on state grounds, on the other hand, there would be no reason to consider the federal claim at all. This "primacy approach" to state constitutional litigation would, its proponents argued, not only help to relieve the overloaded federal dockets, but it would also allow state court judges, whose expertise was presumably in the area of state rather than federal law, to devote more time to

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court decision "indicates clearly and expressly that it is alternatively based on *bona fide* separate, adequate, and independent grounds" will the Supreme Court decline to review the decision. *Id.*

[250] *Project Report, supra* note 245, at 273 n.16.

[251] *Oliver* and *Burger* are, of course, prime examples of the Court's deemphasis of individual rights.

[252] *See, e.g.*, Arcara v. Cloud Books, Inc., 68 N.Y.2d 553, 503 N.E.2d 492, 510 N.Y.S.2d 844 (1986).

[253] *See, e.g.*, Hans A. Linde, *First Things First: Rediscovering the States' Bills of Rights*, 9 U. BALT. L. REV. 379, 390 (1980).

these issues, thereby resulting in the development of state constitutional jurisprudence.[254]

If state courts have the unquestioned right—some would say duty—to adopt a primacy approach to constitutional claims not yet considered by the Supreme Court, (the situation in *Upton*), they should have similarly unfettered freedom to interpret provisions of a state constitution differently from interpretations already given by the Supreme Court to analogous provisions of the federal constitution (the situation in *Scott* and *Keta*). Indeed, there is no dispute whatsoever that " . . . the states . . . have sovereign powers. When their courts interpret State statutes or the State Constitution, the decisions of these courts are conclusive if not violative of Federal law. Although state courts may not circumscribe rights guaranteed by the Federal Constitution, they may interpret their own law to supplement or expand them."[255] Despite the lack of any qualifications by the Supreme Court on a state court's power to interpret its own constitution, as the dissent and concurrence in *Scott* and *Keta* illustrate, a baffling dispute has materialized in state courts concerning the methodology a state court should employ in deciding when it will surpass the Supreme Court in protecting individual rights under a state constitution. On one side of the debate are those who argue that our dual constitutional system

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[254] The failure of the Massachusetts Supreme Court to employ a primacy approach to the state constitution was criticized by Justice Stevens in an exasperated concurrence in Massachusetts v. Upton, 466 U.S. 727, 735-39 (1984). In *Upton* the Massachusetts Supreme Court rested its decision on the Fourth Amendment without deciding first whether the warrant in question was valid under state law. The Massachusetts court, said Justice Stevens,

> thereby increased its own burdens as well as ours. For when the case returns to that court, it must then review the probable-cause issue once again and decide whether or not a violation of the state constitutional protection against unreasonable searches and seizures has occurred. If such a violation did take place, much of that court's first opinion and all of this court's opinion are for naught. If no such violation occurred, the second proceeding in that court could have been avoided by a ruling to that effect when the case was there a year ago.

Id. at 735-36 (Stevens, J., concurring) (footnote omitted).

Moreover, Justice Stevens asserted that the Massachusetts Court's methodology not only made for needless work, but also disparaged the rights retained by the people of Massachusetts under their own constitution when it "refused[d] to adjudicate their very existence because of the enumeration of certain rights in the Constitution of the United States. *Id.* at 738 (Stevens, J., concurring).

[255] People v. P.J. Video, 68 N.Y.2d 296, 302, 501 N.E.2d 556, 560, 508 N.Y.S.2d 907, 911 (1986), *cert. denied*, 479 U.S. 1091 (1987).

permits a state court faced with the task of deciding an issue already decided by the Supreme Court simply to construe its own constitution as it deems appropriate, taking into consideration the "various factors that constitute sound constitutional analysis."[256] Accordingly, it may turn to the United States Supreme Court's opinions, both majority and dissenting, as sources of wisdom, but as with any persuasive authority, sources deserving critical scrutiny, not blind obedience.[257]

Others would reverse this presumption of independence and argue that state courts should adhere to the federal constitutional interpretation unless some peculiarity of the state dictates a different interpretation is preferable. The factors frequently listed as justifying divergence from the Supreme Court include "interpretive" factors—such as difference in the texts and history of the two constitutions—and "non-interpretive factors"—such as pre-existing state law, matters of particular state or local concern, state traditions and distinctive public attitudes. In sum, the question for non-interpretivists is whether "distinctive and identifiable attributes of a state government, its laws, and its people justify recourse to the state constitution as an independent source for recognizing and protecting individual rights."[258]

B. State v. Hunt:[259] *A Model of State Constitutional Discourse*

The debate concerning non-interpretive analysis in state constitutional adjudication moved from the pages of law reviews into the courts with mixed results. One example of excellent state constitutional discourse takes place in the New Jersey Supreme Court in *State v. Hunt* where competing theories of state constitutional methodology were advanced in separate concurrences by Justices Handler and Pashman. In *Hunt* the New Jersey Supreme Court rejected the United States Supreme Court's conclusion that telephone billing records are not entitled to Fourth Amendment protection[260] and concluded that the equities "so strongly favor protection of a person's privacy interest

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[256] State v. Hunt, 450 A.2d 952, 960 (N.J. 1982) (Pashman, J., concurring).
[257] *Id.* at 960.
[258] *Id.* at 967 (Handler, J., concurring).
[259] *Id.* at 952.
[260] *Id.*

in his toll billing records that the Court should apply higher standards than the federal constitution."[261] As in *Scott* and *Ketą*, the majority opinion in *Hunt* deals simply with the search and seizure issue and leaves the issue of state constitutional adjudication to separate opinions.

Justice Handler takes the non-interpretivist position, arguing in favor of the presumption that a state court should follow the lead of the Supreme Court when interpreting provisions of the state constitution analogous to provisions in the federal Constitution. He begins his opinion, however, by acknowledging that the federal Supreme Court itself has recognized the sovereign right of each state to adopt in its own constitution individual liberties more expansive than those conferred by the federal Constitution.[262] He points to the growing frequency with which state courts have done just that and praises the New Jersey Supreme Court for being "fully responsive to its judicial role in ultimately resolving questions that concern its citizens."[263]

Justice Handler next points out what he perceives nevertheless to be "a danger . . . in state courts' turning uncritically to their state constitutions for convenient solutions to problems not readily or obviously found elsewhere." He warns that the eventual outcome of such an "expedient approach" may be the "erosion or dilution of constitutional doctrine" and cites commentators who have made this point.[264] He fears that "it would be unfortunate if the decision [in *Hunt*] were cast in that light."

Justice Handler concedes that there is no mandate that a state court explain itself when it invokes its state charter to achieve a result unavailable under federal law and recognizes that using the state constitution to avoid restrictive federal rules can be regarded as a sign of healthy federalism for which no justification is required. Having said all this, however, he points out that our national judicial history and traditions closely wed federal and state constitutional doctrine. Furthermore, "a considerable measure of cooperation must exist in a truly federalist system and *some* consistency and uniformity in certain areas of

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[261] Id. at 955.

[262] *Id.* at 962 (Handler, J., concurring) (citing Prunyard Shopping Ctr. v. Robins, 447 U.S. 74, 81 (1980)).

[263] *Id.* at 963 (Handler, J., concurring).

[264] *Id.* at 963-64 (Handler, J., concurring).

judicial administration is desirable."[265] For this reason, state courts should be "sensitive to developments in the federal law" and recognize that opinions of the United States Supreme Court, while not controlling "are nevertheless important guides on the subjects which they squarely address."[266]

Justice Handler concludes from these facts that it is "appropriate to identify and explain standards and criteria for determining when to invoke our State Constitution as an independent source for protecting individual rights."[267] He then proceeds to discuss at length and with extensive citation to a broad range of authority, the non-interpretive factors that should be considered. He concludes that "the explanation of standards such as these demonstrates that the discovery of unique rights in a state constitution does not spring from pure intuition but, rather, from a process that is reasonable and reasoned."[268]

Justice Pashman's opinion, in which he addresses the points raised by Justice Handler, is equally thoughtful and judicial in tone.[269] He concedes that the New Jersey Supreme Court "has not to date set forth any rules, principles or theories explaining when it will go beyond the federal courts in protecting constitutional rights and liberties but rather has simply stated the court's undoubted power to construe the New Jersey Constitution in accord with our own analysis of the right at issue."[270] He consequently "applaud[s] Justice Handler's thoughtful effort to rationalize our cases in this area and to analyze when divergent state and federal constitutional interpretations are appropriate."[271] He then goes on to explain precisely why he believes the court should reverse Justice Handler's presumption in favor of state/federal uniformity unless particular state reasons exist to diverge and instead should perform an independent state constitutional analysis unless particular reasons indicate that conformity to federal law would be preferable.

In support of his position Justice Pashman first points to the fact that independent analysis "strengthens the safeguards

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[265] *Id.* at 964 (Handler, J., concurring).
[266] *Id.*
[267] *Id.* at 965 (Handler, J., concurring).
[268] *Id.* at 967 (Handler, J., concurring).
[269] *Id.* at 958-62 (Pashman, J., concurring).
[270] *Id.* at 959-60 (Pashman, J., concurring).
[271] *Id.* at 960 (Pashman, J., concurring).

of fundamental liberties,"[272] which is what state courts were designed to do. Second, he notes the advantages of diversity of constitutional analysis over uniformity, explaining that if state supreme courts are not discouraged from independent constitutional analysis, they may serve as laboratories for testing competing interpretations of constitutional concepts. Third, he explains that the structure of our federal system does not impose on states the strong limitations imposed on the Supreme Court which must interpret laws for a "vastly diverse nation"[273] and which lack familiarity with local conditions. After discussing these federalism concerns further, Justice Pashman concludes that "where the state court perceives that the federal constitution has been construed to protect the fundamental rights and liberties of our citizens inadequately, it cannot shrink from its duty to act."[274]

Together these opinions surely invite the reader to a conversation in which democracy can flourish. Both participants appear to proceed on the premise that they are engaged in a difficult joint enterprise rather than a battle. They share the goal of finding the desirable delicate balance between state and federal power and disagree only as to the means of achieving it. They seek to explain and persuade rather than to "win." Both opinions present opposing views in their best light. The authors' own views are expressed with a candid admission of subjectivity: "In my estimation" and "I offer my own analysis."[275] While the debate may continue, the writers' positions at least were clearly stated and reasons given to support them thus allowing the reader to participate in the discussion.

C. Scott *and* Keta *as State Constitutional Discourse*

Measured by James Boyd White's "standards of excellence" the dissent and, to a lesser extent, the concurrence in *Scott* and *Keta* suffer by comparison to *Hunt*. Immediately striking is the nastiness of the dissent. Instead of explaining his views, Judge Bellacosa resorts to name-calling. Rather than pointing out what appear to him to be the disadvantages of the majority's ap-

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[272] *Id.* (Pashman, J., concurring).
[273] *Id.* at 961 (Pashman, J., concurring).
[274] *Id.* at 962 (Pashman, J., concurring).
[275] *Id.* at 958 (Handler, J., concurring); *id.* at 965 (Pashman, J., concurring).

proach, he sarcastically characterizes the thoughtful majority opinion, as a "jurisprudential Rubicon"[276] and an "Articles of Confederation time warp,"[277] simply to denigrate it. Instead of engaging in a conversation with the rest of the court, he ridicules it. The dissent's unjustified *ad hominem* accusations that the majority is unprincipled and ideological contrast unfavorably with Justice Handler's tactful suggestion that the explanation of non-interpretive standards will spare the court the inaccurate charge that it is acting on the basis of intuition rather than reason.[278]

Even more troublesome than the tone of the dissent is the fact that although Judge Bellacosa is apparently a strong proponent of non-interpretive analysis, he fails to point to a single reason besides uniformity why the court should look to such standards instead of simply engaging in independent analysis of the state constitution. Instead of weighing the value of uniformity against other, conflicting values, he merely repeats that the Supreme Court has "definitively ruled" on the search and seizure question and that such "definitive decisions of the highest Court in the land" should not be ignored on the basis of "mere ideological disagreement."[279] "Ideological disagreement," as far as one can tell from the dissent, is simply disagreement with the reasoning of a Supreme Court decision on the merits rather than on the basis of non-interpretive factors. Judge Bellacosa gives no reason for adhering to decisions of the Supreme Court other than that the Supreme Court is Supreme.

The dissent dismisses the majority's well-founded concern that the Supreme Court in *Oliver* and *Burger* has undermined the theoretical foundations on which much of New York's search and seizure law has been based and its conclusion that the new rules now conflict with pre-existing state law (a circumstance that should even qualify as a non-interpretive factor). Rather, Judge Bellacosa asserts, without citation to authority, that "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 his-

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[276] *Scott*, 79 N.Y. at 506, 593 N.E.2d at 1348, 583 N.Y.S.2d at 940.

[277] *Id.*

[278] *Hunt*, 450 A.2d 952, 964 (N.J. 1982) (Handler, J., concurring).

[279] *Scott*, 79 N.Y.2d at 509-10, 593 N.E.2d at 1350-51, 583 N.Y.S.2d at 942-43 (Bellacosa, J., dissenting).

torical reprises of the United States Supreme Court's own articulations on a particular subject."[280] This characterization belittles the majority's reasonable point and, more importantly, gives no reasons to support the conclusion that a Supreme Court decision can "unsettle prior state law" only when it directly conflicts with it.

In contrast to the justices of the New Jersey Supreme Court, who take such pains to set out opposing views fairly, the dissent seems purposely to misinterpret the majority's reasoning. For example, the majority refers to various sections of New York's criminal, environmental and general obligation laws to support the proposition central to the case: the expectation of privacy on one's own property is one that society regards as reasonable, otherwise it would not have permitted property owners to post their land or provided for the punishment of trespassers.[281] Judge Bellacosa, however, characterizes this point as a claim that New York's laws with respect to private property are unique—a non-interpretive basis for departure from the Supreme Court.[282] He then scathingly demolishes this argument—one the majority does not make—by pointing out that these laws are not in any way peculiar to New York.

Similarly, the dissent transforms the majority's reasonable assertion that an independent construction of the state constitution is appropriate when the Supreme Court "dramatically narrows fundamental constitutional rights that our citizens have long assumed to be part of their birthright"[283] into the ridiculous recognition of "some constitutional 'birthright' of auto dismantling businesses."[284] Having thus characterized the issue, he is able easily to conclude that no such right exists and that *Keta* "simply involves legitimate and statutorily authorized administrative regulation with reasonable allowance for investigative and prosecutorial follow-up."[285] Finally, the careful historical comparison between administrative searches and certain features of writs of assistance[286] becomes in Judge Bellacosa's

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[280] *Id.* at 511, 593 N.E.2d at 1352, 583 N.Y.S.2d at 944 (Bellacosa, J., dissenting).
[281] *Id.* at 487, 593 N.E.2d at 1335-36, 583 N.Y.S.2d at 927-28.
[282] *Id.* at 510-11, 593 N.E.2d at 1351, 583 N.Y.S.2d at 943 (Bellacosa, J., dissenting).
[283] *Keta*, 79 N.Y.2d at 497, 593 N.E.2d at 1342, 583 N.Y.S.2d at 934.
[284] *Id.* at 512, 593 N.E.2d at 1352, 583 N.Y.S.2d at 944 (Bellacosa, J., dissenting).
[285] *Id.*
[286] *See supra* note 227 and accompanying text.

hands the obviously foolish "concern that the colonial 'writs of assistance' will be reinstituted."[287]

Judge Kaye's gentle concurrence is simply devoted to defending the majority against the dissent's charge that it engaged in ideological decision-making rather than explaining what the court's methodology is or should be when it diverges from Supreme Court precedent.[288] While Judge Kaye's defensiveness is understandable, the opinion nevertheless is unsatisfactory. Although the tone of the decision is reasonable, the reasons are not forthcoming. She does little better than Judge Bellacosa in explaining to the reader why the court should not employ strict non-interpretive analysis but should instead interpret the state constitution independently.[289]

The trouble with these decisions is not that it is unseemly for members of the state's highest court to squabble in public, but that they fail to discuss the important questions that deserve to be addressed. This failure to address the issues squarely has resulted in a situation in which not only are litigators unsure whether the court of appeals employs non-interpretive analysis, but the members of the court themselves appear unsure of what methodology they employ. The rage of the dissent is not about the failure of the court of appeals to adopt its view of non-interpretive analysis in *Scott* and *Keta*. Rather, it arises from Judge Bellacosa's perception that the court already *had* adopted non-interpretive analysis in prior cases and was now cavalierly abandoning it. This failure to follow precedent, according to the dissent, constitutes a "*sub silentio* overruling"[290] of prior cases that have required noninterpretive analysis and thus undermines "*stare decisis* by pulling the analytical props out from under several of [the] Court's guiding precedents."[291]

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[287] *Scott*, 79 N.Y.2d at 512, 593 N.E.2d at 1352, 583 N.Y.S.2d at 944 (Bellacosa, J., dissenting).

[288] *Id.* at 502-06, 593 N.E.2d at 1346-48, 583 N.Y.S.2d at 938-40 (Kaye, J., concurring).

[289] The fuzziness of Judge Kaye's opinion is noteworthy in that it stands in sheer contrast to the clarity of her writing on state constitutional adjudication in various law review articles. The disparity leads to the conclusion that in her concurrence in *Scott* and *Keta* she was exercising her well-known talent as a peacemaker and consensus-builder rather than her capacity for critical legal thinking.

[290] *Scott*, 79 N.Y.2d at 513, 593 N.E.2d at 1353, 583 N.Y.S.2d at 945 (Bellacosa, J., dissenting).

[291] *Id.* at 507, 593 N.E.2d at 1348, 583 N.Y.S.2d at 940 (Bellacosa, J., concurring).

Judge Kaye, on the other hand, simply denies that the court of appeals ever adopted non-interpretive analysis and declares that she is satisfied that the grounds recited in the majority decisions are fully in accord with the New York Court of Appeals' precedents."[292] Thus, the debate in *Scott* and *Keta* is not about what the court's methodology should be in the future, but rather about what it has been in the past. The reader who turns back to the majority opinion to determine first, what methodology the court in fact employed and second, whether in employing that methodology the court broke new ground, will not find any answers.

In *Scott* the majority says that it "declines to accept any rigid method of analysis" and denies that it ever has adopted any "fixed analytical formula for determining when the proper protection of fundamental rights requires resort to the state constitution."[293] In *Keta* the majority says even less about methodology. It simply asserts its power to decide cases under the state constitution independently of Supreme Court interpretation of parallel federal constitutional provisions.[294] It points to the fact that article I, section 12 and the Fourth Amendment are worded similarly and therefore indicate a policy of uniformity. At the same time, it cites numerous cases in which the court has found this policy to be less important than other considerations, for example, when 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."[295] The court concludes that where, as here, "the rules governing official intrusions on individuals' privacy become muddied and the constitutional guarantees represented by article I, Section 12 concomitantly diluted," uniformity must give way.[296]

The court's reasons for rejecting *Oliver* and *Burger* make good sense.[297] Yet whether the court's reasoning is "non-interpretive analysis," as defined by courts and commentators, is unclear. The court's opinion seems almost purposely ambiguous on

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[292] *Id.* at 503, 593 N.E.2d at 1346, 583 N.Y.S.2d at 938 (Kaye, J., concurring).
[293] *Scott*, 79 N.Y.2d at 490-91, 593 N.E.2d at 1338, 583 N.Y.S.2d at 930.
[294] *Keta*, 79 N.Y.2d at 495-96, 593 N.E.2d at 1341, 583 N.Y.S.2d at 933.
[295] *Id.* at 497, 593 N.E.2d at 1342, 583 N.Y.S.2d at 934.
[296] *Id.*
[297] *Id.* at 478-502, 593 N.E.2d at 1330-46, 583 N.Y.S.2d at 922-38.

this point. For example, when the majority concludes that following federal precedent would unsettle state law by rejecting the rationale underlying many prior cases,[298] it seems to employ a frequently mentioned non-interpretive factor. As the dissent points out, however, no New York cases would be directly overruled should the court follow *Oliver* or *Burger*.[299] Thus, the law would not in fact be unsettled, as it would have been had the court of appeals decided the issues on state law grounds *before* the Supreme Court issued contrary federal opinions.

Moreover, while the majority in *Scott* cites various New York statutes that protect private property, it does not (contrary to the dissent's assertion) claim that they are "unique" New York considerations.[300] The majority does claim for New York a unique tradition of tolerance "of what may appear bizarre or even offensive,"[301] but it lifts those words out of their context in an obscenity case, *People v. P.J. Video*.[302] The court's point in that case was that New Yorkers are uniquely tolerant when it comes to free expression and therefore works of art that would be considered obscene elsewhere might not be in New York. The majority in *Scott* and *Keta* neither asserts that New Yorkers' unique tolerance extends to drug possession or car theft, nor suggests that citizens with conventional cultural tastes value their privacy on their own property any less than do their *avant garde* neighbors.

In sum, the court's methodology in *Scott* and *Keta* is unclear. It neither explicitly applies nor explicitly disclaims non-interpretive analysis. The next question is whether this arguable failure to apply non-interpretive analysis in *Scott* and *Keta* is, as the dissent contends, a scuttling of *stare decisis* or, in the words of the concurrence, "fully in accord" with precedent. An examination of the court's prior cases provides no clear answer.

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[298] *Id.* at 486, 593 N.E.2d at 1335, 583 N.Y.S.2d at 927 (Bellacosa, J., dissenting).

[299] *Id.* at 511, 593 N.E.2d at 1351, 583 N.Y.S.2d at 943 (Bellacosa, J., dissenting).

[300] Indeed the majority cites Justice Powell's concurring opinion in Rakas v. Illinois, 439 U.S. 128, 153 (1978) (Powell, J., concurring), to support the proposition that "property rights reflect 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." *Id.* at 488, 593 N.E.2d at 1337, 583 N.Y.S.2d at 929.

[301] *Id.* at 488, 593 N.E.2d at 1337, 583 N.Y.S.2d at 929.

[302] 68 N.Y.2d 296, 501 N.E.2d 556, 508 N.Y.S.2d 907, *cert. denied*, 479 U.S. 1091 (1987).

1. Non-Interpretive Precedent

a. People v. P.J. Video

The *Scott-Keta* dissent cites an impressive number of cases to support its contention that the New York Court of Appeals has in past cases adopted a strict method of non-interpretive analysis. The most important of these is *People v. P.J. Video*,[303] the first case in New York to use the words "non-interpretive analysis." In that case defendants were charged with violating the New York obscenity statute. They moved to suppress films that had been seized under a search warrant issued on the basis of an application containing only an itemized list of the sexual acts depicted on the video cassettes, accompanied by a police officer's conclusory affidavit that the acts listed were typical of the contents of the films. The court of appeals affirmed the granting of the motion, holding that under the *Aguilar-Spinelli* rule,[304] the affidavit was insufficient to allow the magistrate to determine that the films as a whole appealed to predominantly prurient sexual interest and lacked social value.

On *certiorari* review, the Supreme Court held that probable cause should have been determined by applying the totality-of-the-circumstances test under *Illinois v. Gates*,[305] which would permit the magistrate to focus simply on the explicit nature of the pornographic material without considering the other statutory elements of the crime.[306] On remand, the court of appeals held that under the state constitution, probable cause should continue to be measured by the stricter *Aguilar-Spinelli* standard.[307]

The court begins its analysis by noting that courts and commentators have identified "many considerations and concerns upon which a state may rely" when deciding to interpret its own constitution more broadly than the Supreme Court has interpreted the federal Constitution.[308] The court cites Justice Han-

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[303] *Id.*

[304] This rule, based on Aguilar v. Texas, 378 U.S. 108 (1964) and Spinelli v. United States, 393 U.S. 410 (1969), required courts to review both the basis of the informant's knowledge and the reliability of the informant's information.

[305] 462 U.S. 213 (1983).

[306] New York v. P.J. Video, 475 U.S. 868 (1986).

[307] *See supra* note 303.

[308] *P.J. Video*, 68 N.Y.2d at 302, 501 N.E.2d at 560, 508 N.Y.S.2d at 911.

dler's concurring opinion in *State v. Hunt*,[309] which discusses non-interpretive analysis, and also cites a number of law reviews. The court continues by explaining the difference between interpretive and non-interpretive factors and stating that its decision in *P. J. Video* rests on non-interpretive factors.

The court next recognizes a presumption of uniformity in search and seizure cases based on the identity of language in the state and federal constitutional provisions. It concludes, however, that "[w]hen weighed against the ability to protect fundamental constitutional rights, the practical need for uniformity can seldom be a decisive factor."[310] Thus, the court explains that it has "adopted independent standards under the State constitution 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'."[311] In support of this proposition the court cites a number of search and seizure cases in which the court has rejected Supreme Court precedent. The court asserts that "these decisions reflect a concern that the Fourth Amendment rules governing police conduct have been muddied and judicial supervision of the warrant process diluted, thus heightening the danger that our citizens' rights against unreasonable police intrusions might be violated."[312]

The court goes on to state that the standard for evaluation of search warrants previously employed established a "clear and definable standard of review"[313] and therefore this is the standard that should continue to be applied to protect the rights of New York citizens. The decision to rely on article I, section 12 rather than the Supreme Court's Fourth Amendment pronouncement" is, the court explains, "motivated . . . by concerns of federalism and separation of powers."[314]

The court notes that the New York warrant statute requires that a magistrate issuing a warrant must carefully consider all elements of the crime involved:

> Given that our legislature has determined that an offensive, explicit

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[309] 450 A.2d 952 (N.J. 1982); *see supra* notes 258-74 and accompanying text.
[310] *P.J. Video*, 68 N.Y.2d 296, 304, 501 N.E.2d 556, 561, 508 N.Y.S.2d 907, 912.
[311] *Id.* at 304, 501 N.E.2d at 561, 508 N.Y.S.2d at 912.
[312] *Id.* at 305, 501 N.E.2d at 562, 508 N.Y.S.2d at 913.
[313] *Id.* at 307, 501 N.E.2d at 563, 508 N.Y.S.2d at 914.
[314] *Id.*

> depiction of sexual conduct standing alone is not obscene, a magistrate cannot find probable cause that the crime of obscenity has been committed solely on a showing that sexually oriented material is explicit and offensive. The Supreme Court's decision in this case has, in effect, stated that certain elements of our statutory definition of a crime are not significant. We are not free to similarly ignore or recast the legislative mandate.[315]

Finally, the court explains that obscenity cases differ from other crimes because, by definition, they are predicated on contemporary community standards. Thus, in determining whether a particular work is obscene a magistrate must determine the average New Yorker's evaluation of and reaction to the challenged material. This evaluation must include the "recognition that New York is a State where freedom of expression and experimentation has not only been tolerated but encouraged."[316]

When carefully analyzed, the decision in *P.J. Video* does not support the dissent's claim that the court has adopted mandatory non-interpretive analysis. While the court lists the familiar non-interpretive factors, it describes them simply as considerations on which a court "may" rely if it chooses to do so.[317] Likewise it recognizes the value of uniformity, but in the same passage concludes that it is "seldom . . . a decisive factor."[318] Rather, the court indicates that "predictability and precision in judicial review" and "the protection of the individual rights of our citizens" are the most important factors in deciding Fourth Amendment cases.[319]

Moreover, while the court points to a "unique" New York tolerance for pornography, none of the precedents it cites involve the First Amendment. They are cited, the court explains, because they reflect the court's concern that the Supreme Court has abandoned the clear, workable rules governing search and seizure that had been in effect.[320] By diluting Fourth Amendment protections, the Supreme Court heightened the danger that citizens' rights against unreasonable searches and seizures

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[315] *Id.* at 308, 501 N.E.2d at 564, 508 N.Y.S.2d at 915.

[316] *Id.* at 309, 501 N.E.2d at 564, 508 N.Y.S.2d at 915.

[317] *Id.* at 302, 501 N.E.2d at 559, 508 N.Y.S.2d at 911 ("State courts may interpret their own law to supplement or expand [rights guaranteed by the Federal Constitution].").

[318] *Id.*

[319] *Id.* at 304, 501 N.E.2d at 561, 508 N.Y.S.2d at 913.

[320] *Id.*

will be violated. Thus, while New York's traditional tolerance may make careful probable cause determinations particularly urgent in obscenity cases, the court's reasoning on the dilution of the warrant requirement would be persuasive in a community with far stricter community standards regarding sexually explicit material.

b. People v. Harris

The case to which the dissent refers as having recently reaffirmed the court of appeals's commitment to mandatory non-interpretive analysis is *People v. Harris*.[321] Once again, however, the dissent's characterization of that case is not entirely accurate. The defendant, Harris, was arrested in his home without a warrant and made a statement. Subsequently, he made a second statement in the police station. The first statement was suppressed as the product of an unlawful arrest. At issue in the case was whether the second statement was sufficiently attenuated to be admissible.

The court of appeals found that the stationhouse confession was tainted and suppressed it on Fourth Amendment grounds. The Supreme Court reversed, holding that the police illegality was in the entry, not in the arrest, and that the exit from the apartment broke any causal connection between the illegality and the later statement.[322] The Court held that no attenuation was required because the "deterrent value of suppressing this type of statement was minimal."[323]

On remand from the Supreme Court, the court of appeals determined that although the defendant's stationhouse confession was admissible at his murder trial under federal standards, it should have been suppressed under article 1, section 12. The court concluded that "the Supreme Court's rule does not adequately protect the search and seizure rights of citizens of New York."[324]

In reaching its conclusion, the court of appeals once again notes that the identical language of the search and seizure provisions of the two constitutional provisions supports uniform in-

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[321] 72 N.Y.2d 614, 532 N.E.2d 1229, 536 N.Y.S.2d 1 (1989).
[322] New York v. Harris, 495 U.S. 14 (1990).
[323] *Id.* at 21.
[324] *Harris*, 77 N.Y.2d at 437, 570 N.E.2d at 1052-53, 568 N.Y.S.2d at 703-04.

terpretation but concludes that, "sufficient reasons appearing," divergence is permissible.[325] The court relies on its own precedents, including *P.J. Video*, to support this proposition. The court next explains the difference between interpretive and non-interpretive analysis, lists the non-interpretive factors and asserts that in "employing this analysis in the past," it had "delineated an independent body of search and seizure law under the State Constitution to govern citizen-police encounters when doing so best promotes 'the protection of the individual rights of our citizens.' "[326] Finally, the court turns to "the circumstances peculiar to New York" and concludes "that although attenuation may not be necessary to deter *Payton* violations under Federal law or in the Nation generally, the Supreme Court's rule is not adequate to protect New York citizens from *Payton* violations" because of New York's stringent right to counsel rule.[327] A lengthy discussion of the rule and its history follows.

Thus, *Harris* and *P.J. Video* arguably employ non-interpretive analysis. Although neither case explicitly privileges it over other approaches, in each the court does give as one of its reasons for departing from Supreme Court precedent a unique feature of New York's criminal law. That by so doing the court adopted and then reaffirmed mandatory application of non-interpretive analysis is, however, not at all certain. Between the 1986 decision in *P.J. Video* and the 1991 decision in *Harris*, the court of appeals decided a number of cases under the state constitution in which the issue had already been decided by the Supreme Court as a matter of federal law. The Court's discussion of methodology in these cases is contradictory and ambiguous and by no means supports the contention that it was wedded to non-interpretive analysis. In some cases, the court refers explicitly to non-interpretive analysis and in some it does not. In some cases it appears to rely on non-interpretive factors, in others the basis for the decision is unclear.[328] Thus, anyone who read only

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[325] *Id.* at 437, 570 N.E.2d at 1053, 568 N.Y.S.2d at 704.

[326] *Id.* at 438, 570 N.E.2d at 1053, 568 N.Y.S.2d at 704.

[327] *Id.* at 439, 570 N.E.2d at 1054, 568 N.Y.S.2d at 705.

[328] For example, in People v. Reynolds, 71 N.Y.2d 552, 523 N.E.2d 291, 528 N.Y.S.2d 15 (1988), the court of appeals followed the Supreme Court's decision in holding that there is no expectation of privacy on non-posted land. In so doing, the court simply asserted that the identical wording of the federal and state search and seizure provisions supports a policy of uniform interpretation.

the opinions in *P.J. Video* and *Harris* might or might not agree

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Yet in People v. Dunn, 77 N.Y.2d 19, 564 N.E.2d 1054, 563 N.Y.S.2d 388 (1990), the court departed from the Supreme Court's decision in United States v. Place, a canine sniff case, finding simply that "the analysis adopted by the Supreme Court . . . has threatened to undercut the right of our citizens to be free from unreasonable government intrusions." *Id.* at 24, 564 N.E.2d at 1057, 563 N.Y.S.2d at 391.

In People v. Vilardi, 76 N.Y.2d 67, 555 N.E.2d 915, 556 N.Y.S.2d 518 (1990), the court held that as a matter of state constitutional law, in cases involving failure of the prosecution to disclose exculpatory evidence material to the defense, the applicable harmless error standard should be a "reasonable possibility" of prejudice rather than the "reasonable probability" standard adopted by the Supreme Court in United States v. Bagley. 473 U.S. 667 (1985). The majority opinion by Judge Kaye does not discuss non-interpretive analysis, but simply cites a variety of cases in which the court of appeals has "differed significantly from the Supreme Court's newest interpretation of the dictates of the Federal due process standard." 76 N.Y.2d at 76, 555 N.E.2d at 919, 556 N.Y.S.2d at 522. The court declines to "abandon these accepted principles" for a less clear rule. *Id.* Of interest is Judge Simons' concurrence in *Vilardi*, for in it he sets forth his perception of the court's methodology:

> In the past when we have departed from the Supreme Court's decisions, we generally have done so because (1) we chose to adhere to our own established law or because the Supreme Court has retreated from previously announced rules (*e.g.*, People v. P.J. Video, 68 N.Y.2d 296, *supra*; People v. Johnson, 66 N.Y.2d 398; People v. Bigelow, 66 N.Y.2d 417), (2) to establish a more protective State right by constitutionalizing a prior fully developed common-law right (*e.g.*, Rivers v. Katz, 67 N.Y.2d 485, or (3) because we have found a separate State rule justified by concerns peculiar to New York State residents (*see* Matter of Patchogue-Medford Congress of Teachers v. Board of Educ., 70 N.Y.2d 57, 510 N.E.2d 325, 517 N.Y.S.2d 456 (1987).

According to Judge Simons, in *Vilardi*, the analytical tests of *P.J. Video* were not satisfied.

Again, in People v. Torres, 74 N.Y.2d 226, 543 N.E.2d 61, 544 N.Y.S.2d 796 (1989), the court rejected the Supreme Court's Fourth Amendment ruling in Michigan v. Long, 463 U.S. 1032 (1983), and held that under the state constitution a police officer during a stop and frisk cannot search the passenger compartment of the suspect's car. The decision does not mention "non-interpretive analysis," but simply notes that the court has "demonstrated its willingness to adopt more protective standards under the State Constitution '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." 74 N.Y.2d at 228, 543 N.E.2d at 63, 544 N.Y.S.2d at 798.

People v. Alvarez, 70 N.Y.2d 375, 515 N.E.2d 898, 521 N.Y.S.2d 212 (1987), lists the non-interpretive factors, cites *P.J. Video*, and concludes that "under non-interpretive analysis there can be no doubt that the fairness of a criminal proceeding is of particular state concern and New York has historically provided various protections in this area above the federal constitutional minimum." *Id.* at 377. The court declines, however, to depart from the Supreme Court's ruling in California v. Trombetta, 467 U.S. 479 (1984), that the failure of the police to take and preserve a breath sample in a drunk driving case deprived defendant of the meaningful opportunity to present a complete defense.

In Arcara v. Cloud Books, 68 N.Y.2d 553, 503 N.E.2d 492, 510 N.Y.S.2d 844 (1986), the court of appeals held that the state's closing down a store that sold pornographic books as a public nuisance affected the store's First Amendment rights. The burden was therefore on the state to show that closing the store was the only available means to

with the dissent that the court of appeals disregarded *stare decisis* in *Scott* and *Keta*. A far more interesting question, however, is whether the court of appeals undermined *stare decisis* in *P.J. Video* itself. For, contrary to the impression conveyed by the opinion in *P.J. Video* that non-interpretive analysis had an established place in New York constitutional jurisprudence, an examination of the cases on which that decision relied reveals that, in fact, it had never been employed or even mentioned before *P.J. Video*.

After the inclusion of article I, section 12 in the New York Constitution in 1938, the court of appeals followed a policy of uniformity between that provision and the Fourth Amendment based on the identical wording of the two provisions.[329] During the 1970s, however, when an increasing number of the court's Fourth Amendment decisions were reversed by the Supreme Court, the court of appeals, like so many other state courts, first began to interpret the state constitution more broadly than the Supreme Court had interpreted the federal constitution. Although a number of these pre-*P.J. Video* cases are cited in the *Scott* and *Keta* dissent as examples of non-interpretive analysis, they are no such thing.

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abate the nuisance. The Supreme Court found no First Amendment violation and remanded. The court of appeals then held that the defendant's rights had been violated under the state constitution. In its opinion the court notes that it is "bound to exercise its independent judgment and is not bound by a decision of the Supreme Court of the United States limiting the scope of similar guarantees in the constitution of the United States." *Id.* at 557. The court goes on to explain that the federal Bill of Rights establishes minimal standards for individual rights and that if comparable provisions of the state constitution "are not to be considered purely redundant" they must "supplement those rights to meet the needs and expectations of the particular state." *Id.* The court does not mention non-interpretive analysis but cites *P.J. Video* for the proposition that freedom of expression is an area in which there is great diversity among the states and that New York "has a long history and tradition of fostering freedom of expression, often tolerating and supporting works which in other states would be found offensive to the community." *Id.* The court concludes that "the minimal national standards established by the United States Supreme Court for first amendment rights cannot be considered dispositive in determining the scope of this state's constitutional guarantee of freedom of expression." *Id.* at 557-58.

[329] *See, e.g.*, People v. Ponder, 54 N.Y.2d 160, 165, 429 N.E.2d 735, 737-38, 445 N.Y.S.2d 57, 59 (1982); Kaye, *supra* note 7, at 417.

c. People v. Johnson

The dissent's reliance on *People v. Johnson*,[330] is a particularly clear example of its misuse of precedent. In that case, the court held that the warrantless arrest of the defendant was unlawful because the police acted solely upon hearsay information provided by an informant that did not satisfy the reliability requirement of the *Aguilar-Spinelli* rule.[331] The court declined to apply the less stringent *Illinois v. Gates*[332] totality-of-the-circumstances test recently adopted by the Supreme Court and instead opted to retain the *Aguilar-Spinelli* rule as a matter of state constitutional law.

In reaching this decision, however, Judge Simons, writing for the majority, noted that *Gates* involved a search warrant, not a warrantless arrest, and that the Supreme Court, in adopting the less stringent test, had relied heavily on the fact that the determination of probable cause had been made by a neutral magistrate. For this reason and others, the court of appeals predicted that the Supreme Court might not apply the *Gates* test to warrantless arrests. Judge Simons does not mention non-interpretive analysis but simply quotes the court's frequently-made statement that the identity of language between the state and federal constitutions supports a policy of uniformity. He notes, however, that this policy must yield "to a predictable, structured analysis of the quality of evidence necessary to support intrusive searches and seizures" particularly in cases in which the Supreme Court has not addressed a specific issue or provided guidance in its Fourth Amendment rulings . . . ."[333]

The dissent's claim that this opinion adopted strict non-interpretive analysis finds no support in the opinion itself. Indeed, the case is not one in which such analysis could have been employed; since the court was distinguishing *Johnson* from *Gates*, uniformity was not an issue. In refusing to apply the *Gates* rule to the new situation of a warrantless arrest, the court was not diverging from federal precedent, but simply choosing to employ primacy analysis, deciding a new issue in the first instance on state rather than federal law grounds. In fact, the court sug-

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[330] 66 N.Y.2d 398, 488 N.E.2d 439, 497 N.Y.S.2d 618 (1985).

[331] *See supra* note 303.

[332] 462 U.S. 213 (1983); *see supra* note 304 and accompanying text.

[333] *Id.* at 407, 488 N.E.2d at 445, 497 N.Y.S.2d at 625.

gested its belief that the Supreme Court would decide such a case similarly. Indeed, the court's own language is self-contradictory. There obviously can never be a "policy of uniformity" between article I, section 12 and the federal Constitution "in cases in which the Supreme Court has not addressed a specific issue or provided guidance in its Fourth Amendment rulings."[334]

Finally, although the court makes an obeisance to the notion of uniformity, it quickly makes clear that uniformity is but a minor concern and must yield when "a predictable, structured analysis" of the evidence indicates that it should.[335] What constitutes a "predictable, structured analysis" is nowhere explained. The opinion, however, contains no mention of any unique state factors to justify its resort to the state constitution. Instead, the court analyzes federal precedents which might support a Fourth Amendment claim and then decides the case as a matter of state constitutional law.

d. *Other Non-Interpretative Precedents?*

Other cases decided around the same time as *Johnson*, all of which are cited by the dissent in *Scott* and *Keta* as examples of non-interpretive analysis, contain even less discussion of the court's reasons for departing from federal precedent or are simply not on point.[336] For example, *People v. Bigelow*[337] contains no mention of non-interpretive analysis. The court simply "decline[s] to apply" without explanation the good faith exception to the warrant requirement established by the Supreme Court in *United States v. Leon*.[338] Similarly, in *People v. Gokey*,[339] the

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[334] *Id.* at 407, 488 N.E.2d at 445, 497 N.Y.S.2d at 625.

[335] *Id.*

[336] Not on point is People v. Class, 63 N.Y.2d 491, 472 N.E.2d 1009, 483 N.Y.S.2d 181 (1984), which held that a police officer's non-consensual entry into the defendant's automobile to determine its VIN number on a stop solely for a traffic infraction violated both the state and federal constitutions. The Supreme Court reversed the decision on federal constitutional grounds. New York v. Class, 475 U.S. 106 (1986). On remand the court of appeals stated simply, "Where, as here, we have already held that the state constitution has been violated we should not reach a different result following reversal on federal constitutional grounds unless respondent demonstrates that there are extraordinary or compelling circumstances." 67 N.Y.2d 431, 433, 494 N.E.2d 444, 445, 503 N.Y.S.2d 313, 314 (1986).

[337] 66 N.Y.2d 417, 488 N.E.2d 451, 497 N.Y.S.2d 630 (1985).

[338] 468 U.S. 897 (1984).

[339] 60 N.Y.2d 309, 457 N.E.2d 723, 469 N.Y.S.2d 618 (1983).

court of appeals departed from the Supreme Court's decision in *New York v. Belton*,[340] which involved the permissible scope of a search incident to an arrest, saying simply that it "declines to interpret the State Constitutional protection against unreasonable searches and seizures so narrowly."[341]

Likewise, in *People v. Elwell*,[342] a case involving standards for informant reliability in warrant applications, the court says no more than that "[t]o the extent that [federal cases] may be read as imposing a less stringent test under the Federal Constitution, we decline to construe the parallel provision of our State Constitution similarly and adopt the rule set forth above as a matter of State constitutional law."[343]

These cases reveal that, for reasons nowhere explained, the concept of "non-interpretive analysis" simply crept onto the New York judicial scene in 1987 in *P.J. Video* and became embedded there. With *P.J. Video*, a court that had regularly and confidently departed from Supreme Court precedent when it believed such a course was in the best interest of New Yorkers suddenly became defensive about exercising its undoubted right to decide cases under the state constitution. Nowhere, however, did the court ever explicitly announce that it was adopting a new methodology and give reasons for doing so, though in *P.J. Video* and *Harris* it looked as though it were going through the motions. As a result, in *Scott* and *Keta* the dissenting judges are able to claim that the court has adopted and reaffirmed a rigid methodology while the concurrence can deny that the court follows any methodology at all. Moreover, neither the dissent nor the concurrence gives reasons why one methodology is preferable to another in language that the reader might understand and the

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[340] 453 U.S. 454 (1981). In *Belton*, 50 N.Y.2d 447, 407 N.E.2d 420, 429 N.Y.S.2d 574, *rev'd* 453 U.S. 454, *remand* 55 N.Y.2d 49, 432 N.E.2d 745, 447 N.Y.S.2d 873 (1982), the court of appeals first held on Fourth Amendment grounds that after arresting the occupant of a car the police may not contemporaneously search the passenger compartment or closed containers within it. The Supreme Court reversed. On remand, the majority of the court flip-flopped, concluding on a new rationale that the search that followed the defendant's lawful arrest was permissible under the state constitution. The court noted "[t]he identical wording of the two provisions does not proscribe our more strictly construing the State Constitution than the Supreme Court has construed the Federal Constitution." *Id.* at 51. The court nowhere mentions non-interpretive analysis.

[341] *Gokey*, at 312, 457 N.E.2d 724, 469 N.Y.S.2d 619.

[342] 50 N.Y.2d 231, 406 N.E.2d 471, 428 N.Y.S.2d 655 (1980).

[343] *Id.* at 235, 406 N.E.2d at 473, 428 N.Y.S.2d at 657.

litigator rely on.

2. The Need for Honest Legal Reasoning

In his article *Honest Judicial Opinions*, Robert A. Leflar,[344] former Associate Justice of the Supreme Court of Arkansas, asks the question whether judicial opinions should set forth courts' real reasons for their decisions. He remarks that a court's failure to state the real reasons for a decision can occur in opinions that break new ground as well as in those simply decided by analogy to old cases.[345] He notes that "[a]n opinion that breaks new ground is more honest if it sets out that fact clearly and does not pretend that it is merely applying settled law. Lawyers and other judges can be misled by that pretense."[346] It is precisely such a pretense that has resulted in the acrimonious opinions in *Scott* and *Keta*.

In *P.J. Video*,[347] which is now cited to support the contention that the court has adopted non-interpretive review, the court indeed used the words "non-interpretive analysis," but did so for the first time. Instead of making clear that it was employing a new methodology and giving reasons for its new direction, however, the court simply listed the non-interpretive factors "identified by courts and commentators"[348] and announced that its determination "rests on non-interpretive grounds."[349] The court then cited a number of cases in which it had in the past applied the state constitution more broadly than the federal Constitution, thus misleading the reader into believing that the court was doing nothing new.

The court's failure to state clearly that it would (or would not) henceforth employ non-interpretive review allowed it in subsequent cases to adopt such analysis if the unique state factors existed, as in *Harris*,[350] and reject it when they did not, as in *People v. Dunn*.[351] In some cases non-interpretive analysis is

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[344] 74 Nw. U. L. Rev. 721 (1979).

[345] *Id.*

[346] *Id.* at 723.

[347] 68 N.Y.2d 296, 501 N.E.2d 556, 508 N.Y.S.2d 907 (1987): *see supra* notes 302-19 and accompanying text.

[348] *Id.* at 302, 501 N.E.2d at 559, 508 N.Y.S.2d at 911.

[349] *Id.* at 303, 501 N.E.2d at 560, 508 N.Y.S.2d at 911.

[350] 72 N.Y.2d 614, 532 N.E.2d 1229, 536 N.Y.S.2d 1 (1989).

[351] 77 N.Y.2d 19, 564 N.E.2d 1054, 563 N.Y.S.2d 388 (1990); *see supra* note 327.

mentioned but not employed; in others it is not mentioned at all.[352] And as Judge Kaye herself pointed out, in a few cases some judges found unique state factors while others did not, yet still concurred in the result.[353]

The absence of a fixed method of analysis accompanied by the threat that in any given case rigid non-interpretive analysis may be applied turns litigation into a crap shoot. "Whether judicial opinions are or are not themselves law, we look to them for our 'prophecies of what the courts will do in fact'. . . . The law-making and law-retaining opinions are the ones whose quality most concerns us. If they are honest and clear they furnish better guidance to one who seeks to discover from them what the next case will hold."[354]

A litigator attempting to frame a state constitutional argument might do as well reading tea leaves as the decisions of the court of appeals. Does an appellant's attorney risk losing a case if he or she fails to produce sociological studies documenting the peculiarities of New Yorkers? Must over-worked prosecutors research state constitutional history to prove that uniformity is required? At this point, most lawyers would surely be well-advised to discover some unique state interest at stake in his or her case. For as long as the court continues to mention non-interpretive analysis, whether or not it regularly applies it, no litigator is safe ignoring it.

While any clear statement by the court of appeals would be an improvement over the current ambiguity, the question still remains as to what that statement should be. In the end, however, the entire notion of mandatory non-interpretive analysis should be explicitly rejected.

Non-interpretive analysis is a judicially created restraint on the power of state courts to fulfill their historic function of acting as genuine protectors of individual liberty. Whether a state court views itself as a first line of defense and regularly adopts a primacy approach to the state constitution,[355] or whether it simply acts as a back-up to be called upon when the Supreme Court

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[352] *See supra* note 327.

[353] 79 N.Y.2d 474, 502, 593 N.E.2d 1328, 1346, 583 N.Y.S.2d 920, 938 (1992) (Kaye, J., concurring).

[354] Leflar, *supra* note 341, at 737.

[355] *See supra* notes 252-53 and accompanying text.

fails to be sufficiently protective, there is neither a constitutional command nor a historical precedent which requires that it justify its actions on the basis of non-interpretive factors.

Indeed, such analysis is directly contrary to the very notion of state constitutionalism. Nowhere is it suggested that a state court that decides to rely on its state constitution rather than the federal Constitution on an issue as yet undecided by the Supreme Court must engage in non-interpretive review. Should the Supreme Court subsequently cut back on federal constitutional protection in the same area, the state court is not required to overturn pre-existing state constitutional law to be in conformity with federal law, despite the absence of any unique state factors. It therefore makes no sense to require the existence of such factors when, fortuitously, an issue happens to have reached the Supreme Court before it is raised in state court.

Moreover, one of the advantages of state courts most discussed by courts and commentators is their ability to serve as "laboratories" for federal courts.[356] If state courts are entitled to rely on state constitutions only when the citizens of the particular state differ from the rest of the body politic, then a state can hardly serve as a useful laboratory. Finally, state constitutions cannot act as the "primary guardians" of individual rights if they can be relied upon only in unique situations.[357]

The contradiction between a state court's unquestioned power to interpret its own constitution and the self-imposed requirement that it employ non-interpretive analysis is so apparent that it is mystifying why state courts should be so troubled by it. Proponents of the notion appear to believe that without it, state courts are bound to abandon all notions of judicial restraint and will engage in purely ideological decisionmaking.[358] Implicit in this notion is the belief that the Supreme Court does not decide cases on the basis of ideology. Thus, state courts are required to articulate unique state characteristics before departing from Supreme Court precedent simply so that they will be prevented from deciding cases on the basis of mere ideological

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[356] 77 N.Y.2d 474, 505-06, 593 N.E.2d 1328, 1348, 583 N.Y.S.2d 920, 938 (1992) (Kaye, J., concurring).

[357] *Id.* at 505, 593 N.E.2d at 1347, 583 N.Y.S.2d at 939 (Kaye, J., concurring).

[358] *See id.* at 474, 506, 593 N.E.2d at 1348, 583 N.Y.S.2d at 940 (Bellacosa, J., dissenting).

disagreements with the current Supreme Court.

Neither of these two propositions are correct. First, non-interpretive analysis does not protect against political decision-making. "Non-interpretive" factors are, in fact, as capable of being manipulated for political reasons as any others. The court of appeals's out-of-context invocation in *Scott* of New York's "traditional" acceptance of the bizarre and offensive a dubious proposition that might well surprise the residents of, say, Elmira is an example of the judicial creation of a non-interpretive factor.[359]

Even more important, however, is the palpable fact that the Supreme Court is as political a body as any other court. Indeed, the entire "New Federalism" movement is a response to a Supreme Court whose most recent members have been selected specifically to implement a political agenda, *e.g.*, the reversal of *Roe v. Wade*.[360] While commentators routinely point out this obvious fact, courts, sensitive to the charge that they are "ideological," decline to mention it. This, perhaps, accounts for the acrimony of the New York Court of Appeals and the uneasy sensation created in the reader of these opinions that the "real reasons" underlying the decisions lie elsewhere than in unique state factors. The court's anxiety is perplexing because it is *only* when the Supreme Court dilutes constitutional rights that a state court can refuse to follow. And when it acts to give broad protection to individual rights, it is doing precisely what it was created to do.

D. *State Constitutionalism as Discourse*

Professor James Gardner[361] describes state constitutional law today as "a vast wasteland of confusing, conflicting and essentially unintelligible pronouncements."[362] He argues that the fundamental defect responsible for this state of affairs is the failure of state courts to develop a coherent discourse of state constitutional law that is "a language in which it is possible for participants in the legal system to make intelligible claims about

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[359] *See* 77 N.Y.2d at 488-89, 593 N.E.2d at 1337, 583 N.Y.S.2d at 929.

[360] 410 U.S. 113 (1973).

[361] Gardner, *supra* note 11, at 761.

[362] *Id.* at 763.

the meaning of state constitutions."[363] Gardner concludes that "the failure of state constitutional discourse reflects . . . a failure of state constitutionalism itself."[364] State constitutionalism has failed, argues Gardner, because "[its] central premise . . . is that a state constitution reflects the fundamental values, and ultimately the character, of the people of the state that adopted it. This premise, however, cannot serve as the foundation for a workable state constitutional discourse because it is not a good description of actual state constitutions."[365]

Gardner explains that "one of the foundational and indispensable beliefs of American political and social life is that we are a nation, which is to say that we constitute collectively a certain community."[366] Gardner agrees with James Boyd White[367] that

> a community is, on the most basic level "a group of people who tell a shared story in a shared language." On this view, discourse is a critical element of the communal relationship: The "community talks itself into an historical identity." One way discourse accomplishes this task is by revealing and maintaining the common values of the members of the community.[368]

According to Gardner "[f]or Americans, discourse, values and activities all intersect in the U.S. Constitution: it is a text, and thus a form of discourse, its subject matter is the values of society. . . . [I]t serves as a focal point for the creation and perpetuation of a plausible narrative identity for the national community and its individual members."[369] In sum, constitutional law is only made in a discourse that defines us as a community.

State constitutionalism is therefore a failure. State constitutionalism fails first because state constitutions do not, in fact, express anyone's most deeply held values;[370] the fundamental differences in the history and character and fundamental values

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[363] *Id.* at 763-64.

[364] *Id.*

[365] *Id.*

[366] *Id.* at 823.

[367] HERACLES' BOW 33, at 172 (1985).

[368] *Id.* at 823 (citing KENNETH L. KARST, BELONGING IN AMERICA 28-31 (1989)).

[369] *Id.*

[370] Frequently mentioned in articles on the New Federalism is the fact that most state constitutions are lengthy, frequently amended documents, dealing with a wide variety of trivial matters, *e.g.*, the width of ski trails in Adirondak State Park.

of the citizens of different states thought to justify differences in state constitutional interpretation simply do not exist today, if they ever did. Moreover, as Gardner points out, there is a basic inconsistency in one group of people having two different, and possibly incompatible, sets of "fundamental values" expressed in two different constitutions.[371]

Gardner, on one level, is right: defined as discourse about peculiar state rights and values, state constitutionalism is a failure. Gardner's framework is not the only way of judging state constitutional discourse, however. According to Gardner, an indication of the "impoverishment" of state constitutional discourse is that rather than developing an independent robust language of its own, its "terms and conventions are often borrowed wholesale from federal constitutional law."[372] Rather than as evidence of impoverishment, however, on another level, this "borrowing" can equally be seen as a sign that in fact there is only one national discourse concerning our fundamental values. State courts are simply using the parallel provisions of their own constitutions as a means of registering reasoned dissent from the Supreme Court's views and continuing a single debate that would otherwise be entirely cut off.

CONCLUSION

Courts and commentators routinely disparage state courts' continuation of debate after the Supreme Court has spoken on a particular issue as "reactive" and "mere disagreement" on ideological or political grounds. State courts therefore often disguise what is, in fact, reasoned dissent with invented claims of local difference. It is this refusal to reveal the true basis for its decision that results in the type of angry and unintelligible pronouncements on state constitutions in *Scott* and *Keta* which are rightly characterized as failed discourse. When, on the other hand, the *Scott* and *Keta* majorities meticulously detail the shortcomings of *Oliver* and *Burger*, they invite us, like Justice Brandeis in *Olmstead*, to a conversation that is democratic "in its openness to all who learn its terms, in its continuity with ordinary speech, but most of all in its recognition that the essen-

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[371] Gardner, *supra* note 11, at 763.

[372] *Id.* at 766.

tial condition of human life that it takes as its premises are shared by all of us."[373]

[373] White, *supra* note 8, at 867-68.