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Rhetorically Reasonable Police Practices: Viewing the Supreme Court's Multiple Discourse Paths

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ARTICLES

RHETORICALLY REASONABLE POLICE PRACTICES: VIEWING THE SUPREME COURT'S MULTIPLE DISCOURSE PATHS

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This Article analyzes the United States Supreme Court's numerous and shifting rhetorical discourse paths for declaring whether particular governmental practices constituted unreasonable searches or seizures under the Fourth Amendment to the United States Constitution. It examines how the Court has manipulated classic discourse paths arising from text, history, precedent and structure. It reveals that among and within each of these categories, the Court has created conflicting approaches. The Article argues that the Court's construction of Fourth Amendment reasonableness has depended upon which discourse paths it has selected as well as how it has characterized the values embedded within the discourse paths. The Article describes how the modern Court has selectively used these rhetorical frames to construct Fourth Amendment reasonableness as generally furthering police powers at the expense of an individual's interest in liberty, privacy, personal security, and property.

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INTRODUCTION

In declaring what constitutes a reasonable police practice under the Fourth Amendment, the United States Supreme Court has selectively used different rhetorical discourse paths to construct an evolving reasonableness standard.[1] Since its first major interpretive decision in 1886,[2] the Court has embraced different types of arguments to build its shifting doctrine of reasonableness. The Court has broadly invoked classic constitutional discourse paths arising from interpretations of text, history, structure, precedent, and policy. Modern day interpretative theory rejects the antiquated notion that these sources "restrain" decision-making.[3] Rather, the justices have used these tools to construct an evolving reasonableness

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1. U.S. CONST. amend. IV. The Fourth Amendment provides as follows:

> The right of the people to be secure in their persons, houses, papers, and effects, against unreasonable searches and seizures, shall not be violated, and no Warrants shall issue, but upon probable cause, supported by Oath and affirmation, and particularly describing the place to be searched, and the persons or things to be seized.

Id. The Court has declared that "every Fourth Amendment case . . . turns upon a 'reasonableness' determination." Whren v. United States, 517 U.S. 806, 817 (1996) ("It is of course true that in principle every Fourth Amendment case, since it turns upon a 'reasonableness' determination, involves a balancing of all relevant factors."). *See generally* RONALD KAHN, THE SUPREME COURT AND CONSTITUTIONAL THEORY: 1953-1993 265-66 (1994) ("In each age of the Supreme Court the conceptualization of cases and expectations of Court process changes. This influences the degree to which we see what justices do as principled. Through time, what it means to be 'conservative' changes and the bounds of the debate are different.").

2. *See* Boyd v. United States, 116 U.S. 616 (1886). Professor Thomas Y. Davies has described *Boyd* as the case in which "Justice Bradley invented the notion of a free-standing 'reasonableness' standard as a basis for making the extreme claim that any compelled production of business records was an 'unreasonable' seizure and thus unconstitutional under the Fourth Amendment." Thomas Y. Davies, *The Fictional Character of Law-and-Order Originalism: A Case Study of the Distortions and Evasions of the Framing-Era Arrest Doctrine in* Atwater v. Lago Vista, 37 WAKE FOREST L. REV. 239, 255 n.32 (2002).

3. *See, e.g.*, DANIEL A. FARBER & SUZANNA SHERRY, DESPERATELY SEEKING CERTAINTY: THE MISGUIDED QUEST FOR CONSTITUTIONAL FOUNDATIONS 152 (2002) (rejecting the need for foundational theory for deciding constitutional law cases and stating that a "grand theory" would not "lead to more coherent doctrinal rules"); PIERRE SCHLAG, THE ENCHANTMENT OF REASON 33-4 (1998) (describing the "noble scam" as those who believe that they can discern whether a decision was rightly or wrongly decided; and questioning "who gets to decide whether the game has been properly played or not"); Duncan Kennedy, *The Critique of Rights in Critical Legal Studies, in* LEFT LEGALISM/LEFT CRITIQUE 178, 191 (Wendy Brown & Janet Halley eds., 2002) ("To lose your faith in judicial reasoning means to experience legal argument as 'mere rhetoric' (but neither 'wrong' nor 'meaningless'). The experience of manipulability is pervasive. . . . [It] has gone on continuously with respect to elements within legal thought at least since Jeremy Bentham's critique of Blackstone."). Allan C. Hutchinson has similarly noted:

> [A]djudication is a language game in that its is played both through and with language: judges shape and are shaped by the discursive regimes that comprise law and the reality that it helps to make possible. . . . [And it] is played within a social and historical context that is never static but is always moving . . . .

standard, one that today strongly furthers police powers but, ironically, has also allowed the Court in the past to grant greater protection to an individual's interest in liberty, privacy, personal security and property.[4] In constructing reasonableness, the Court has not only created a variety of contrasting approaches within and among the discourse paths; it has also selected and characterized the values embedded within them to critically influence the outcome of a case. In choosing a particular discourse path or paths, the Court has rhetorically framed its decision, with each path or paths offering justifications for its determination that police practice complied with or violated the Fourth Amendment. As a result, these discourse paths constitute rhetorical tools for constructing the reasonableness or unreasonableness of police practices under the Fourth Amendment.

This Article argues that the Court's construction of Fourth Amendment reasonableness has depended upon which discourse paths its has selected as well as how it has characterized the values embedded within the discourse paths. In creating multiple discourse paths to determine what constitutes reasonableness under the Fourth Amendment, the Court gives effect to its own values and not to some constrained view of constitutional reasonableness. In short, the particular rhetorical frame generally allows the Court to reach a decision leading to its desired result.

Part I examines the Court's rhetorical characterizations of the word "unreasonable" as used in the Fourth Amendment.[5] In showing the Court's shift from construing reasonableness as typically requiring a warrant to an open-ended balancing standard, Part I reveals how the Court generally expanded police powers and limited individual rights. Part II considers the Court's use of "history" to rhetorically frame its reasonableness inquiry; it describes the Court's invocation of the spirit of the framers, its conflicting constructions of the relevant common law, and its use of modern state and federal practices in affirming or rejecting a

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ALLAN C. HUTCHINSON, IT'S ALL IN THE GAME: A NONFOUNDATIONALIST ACCOUNT OF LAW AND ADJUDICATION 52-53 (2002). *See also* DUNCAN KENNEDY, A CRITIQUE OF ADJUDICATION: FIN DE SIECLE 28 (1997) (stating that judges' "case-by-case claims that they are constrained by the legal materials to reach results to which their politics are irrelevant are not convincing").

4. *See, e.g.*, Stephen F. Smith, *The Rehnquist Court and Criminal Procedure*, 73 U. COLO. L. REV. 1335, 1344 (2002) ("The boldness and creativity of the Warren Court in criminal procedure inspired many, but ultimately produced a Rehnquist Court majority determined to swing the pendulum back in the direction of law enforcement.").

5. This Article primarily focuses on the Court's rhetorical constructions of whether a search or seizure was reasonable; it only briefly discusses the Court's early decisions addressing whether conduct constituted a "search" or "seizure." For a compelling and an insightful discussion of the Court's racial rhetoric in defining "seizures" and consent to investigative practices, see Devon W. Carbado, *(E)racing the Fourth Amendment*, 100 MICH. L. REV. 946 (2002). Professor Carbado notes that "[t]he 'free to leave' test–the test the Supreme Court applies to determine whether a particular police activity is a seizure of the person that implicates the Fourth Amendment–constitutes a specific doctrinal site within which the construction of race exploits and exacerbates existing racial inequalities." *Id.* at 974. In addition, he argues that the Court's consent doctrine "obscure[s] the fact that, because of race, people are differently situated with respect to their vulnerability to police encounters." *Id.* at 1013.

common-law practice. It also offers multiple perspectives on the role of historical arguments in interpreting reasonableness.

Part III examines the Court's use of precedent to create conflicting general reasonableness propositions. For example, sometimes the Court has stated that reasonableness requires case-by-case analysis, but at other times it has required bright-line rules. Part III also highlights the vital role that characterization plays when the Court explicitly balances interests to determine reasonableness. It describes how the Court has characterized a person's interest in liberty, privacy, personal security and property, and the government's need to investigate.

Part IV considers the Court's use of structural arguments to assess reasonableness. It shows the Court's selective deference to state and federal officials in determining sound policing practices. Part V concludes by focusing both on the values embedded within each rhetorical framing and the Court's ability to characterize them to further its ultimate reasonableness determination. For example, an historical argument characterized as "originalist" may express a different value than one drawn from precedent suggesting explicit balancing of interests. Because the Court has the power to choose its framing, it also has the power to characterize the values within the discourse paths. In short, the Court constructs reasonableness by selectively invoking and characterizing rhetorical framings. An examination of these different rhetorical framings reveals the tremendous breadth that the Court has in constructing Fourth Amendment reasonableness,[6] an evolving standard.

I. TEXTUAL REASONABLENESS

When considering whether a police practice violated the Fourth Amendment, the Court encounters the task of interpreting the relationship between two clauses. The first clause safeguards the "right of the people to be secure in their persons, houses, papers, and effects" from "unreasonable searches and seizures"; the second clause describes the warrant requirements – the need to have probable cause, to specify the scope of a search, and to provide an oath or "affirmation."[7] The Court has viewed the text of the Fourth Amendment as a discourse path with two distinct branches. The initial branch focused on the word "warrant" and its requirements. The second branch highlighted the word "unreasonable." When choosing the warrant branch, the Court has expressed its values as restraining police officers and safeguarding individual interests in liberty, privacy and property. This path has protected individuals by requiring officers to have probable cause and requiring

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6. *See generally* Jack M. Balkin, *The Proliferation of Legal Truth*, 26 HARV. J.L. & PUB. POL'Y 5, 6 (2003) ("My point . . . is not simply that propositions of law are true in virtue of legal conventions. It is rather that law *creates* truth–it makes things true as a matter of law. It makes things true in the eyes of the law.") (emphasis in original).

7. U.S. CONST. amend. IV.

magistrates to decide whether officers have sufficient information for a warrant. In contrast, the second path, focusing on "unreasonable," has given the Court wide latitude to balance interests, the result depending upon how it characterized the gravity of law enforcement interests as well as an individual's interests.

Frequently the Court constructed reasonableness to mean that officers must have a valid search warrant to conduct a search,[8] but not always an arrest warrant to apprehend a suspect.[9] In time, the Court created so many exceptions to the warrant requirement[10] that the "requirement" became only a "general rule."[11] Consequently, the Fourth Amendment reasonableness question became more contextual

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8. *See, e.g.*, Katz v. United States, 389 U.S. 347, 357 (1967) (stating the need for an arrest or a search warrant, "subject only to a few specifically established and well-delineated exceptions"). *See generally* Raymond Shih Ray Ku, *The Founder's Privacy: The Fourth Amendment and the Power of Technological Surveillance*, 86 MINN. L. REV. 1325, 1338 (2002) (stating that "[w]hile the Fourth Amendment speaks of the reasonableness of search and the issuing of warrants except upon probable cause in the disjunctive, the Supreme Court has collapsed the two requirements, creating a general rule that warrantless searches are per se unreasonable").

9. In 1976 the Court in *United States v. Watson*, 423 U.S. 411, 423 (1976), constructed a distinction between search warrants and arrest warrants, holding that officers who have probable cause to believe that a suspect has committed a felony may arrest him in public without a warrant, even if the officers lack "exigent circumstances." *Id.* The dissent criticized the majority for "sharply revers[ing] the course of our modern decisions construing the Warrant Clause of the Fourth Amendment." *Id.* at 433 (Marshall, J., dissenting). In constructing the difference between search warrants and arrest warrants, the *Watson* Court did not rely on the text of the Fourth Amendment, but instead invoked history and modern practices to support its conclusion, one labeled illogical by a concurrence. *Id.* at 429 (Powell, J., concurring) (stating that "logic sometimes must defer to history and experience"); *see also* Illinois v. McArthur, 531 U.S. 326, 331 (2001) (stating that "rather than employing a *per se* rule of unreasonableness to [warrantless seizures], we balance the privacy-related and law enforcement-related concerns to determine if the intrusion was reasonable").

10. *See, e.g.*, Florida v. White, 526 U.S. 559, 569 (1999) (Stevens, J., dissenting) (stating that the "Court does not expressly disavow the warrant presumption . . . but its decision suggests that the exceptions have all but swallowed the general rule"); New Jersey v. T.L.O., 469 U.S. 325, 341 n.7 (1985) (discussing exception for "special needs" searches, with results not given to police); South Dakota v. Opperman, 428 U.S. 364, 367 (1976) (inventory searches exception); Colonnade Catering Corp. v. United States, 397 U.S. 72, 78 (1970) ("closely regulated business" exception); Warden v. Hayden, 387 U.S. 294, 299 (1967) ("exigent circumstances" exception); *see also* California v. Acevedo, 500 U.S. 565, 582 (1991) (Scalia, J., concurring in judgment) (noting that the Court's "jurisprudence lurched back and forth between imposing a categorical warrant requirement and looking to reasonableness alone," and referring to twenty exceptions "riddl[ing]" the "warrant requirement," which made it "basically unrecognizable").

11. *See, e.g.*, Ferguson v. City of Charleston, 532 U.S. 67, 70 (2001) (questioning whether the facts of the case could "justify a departure from the general rule that an official nonconsensual search is unconstitutional if not authorized by a warrant"). That same term, Justice Breyer summarized the relationship between the warrant clause and the reasonableness clause:

> [The Fourth Amendment's] 'central requirement' is one of reasonableness. . . . In order to enforce that requirement, this Court has interpreted the Amendment as establishing rules and presumptions designed to control conduct of law enforcement officers that may significantly intrude upon privacy interests. Sometimes those rules require warrants. We have said, for example, that in 'the ordinary case,' seizures of personal property are 'unreasonable within the meaning of the Fourth Amendment,' without more, 'unless . . . accomplished pursuant to a judicial warrant. . . . We nonetheless have made it clear that there are exceptions to this warrant requirement.

Illinois v. McArthur, 531 U.S. 324, 330 (citations omitted); *see also* Kyllo v. United States, 533 U.S. 26, 40 (2001) (determining that officers' use of a thermal imager on a home to detect heat loss was a "search" and was "presumptively unreasonable without a warrant").

and less focused on warrants.[12] As the Court has repeatedly maintained, "[T]he touchstone of the Fourth Amendment is reasonableness."[13] With the question of reasonableness moving to the forefront of analysis, the Court freely constructed all kinds of doctrines. These doctrines, built upon the Court's balancing paradigm, address a variety of practices, including stops and frisks of criminals,[14] searches of public school students for school violations, roadblocks and drug-testing regimes.[15]

The stop and frisk doctrine emerged from the Court's landmark balancing paradigm in *Terry v. Ohio*.[16] Under this doctrine, officers can conduct investigatory stops and pat downs of individuals without a warrant and without probable cause. Even though the *Terry* Court stated that "in most instances failure to comply with the warrant requirement can only be excused by exigent circumstances,"[17] it used a

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12. *See, e.g., Kyllo*, 533 U.S at 31 ("With few exceptions, the question whether a warrantless search of a home is reasonable and hence constitutional must be answered no."); Flippo v. West Virginia, 528 U.S. 12, 13-14 (1999) (per curiam) (stating that a "warrantless search by the police is invalid unless it falls within one of the narrow and well-delineated exceptions to the warrant requirement" and adhering to a prior decision that refused to create a "homicide exception") (citing Mincey v. Arizona, 437 U.S. 385 (1978)); Maryland v. Dyson, 527 U.S. 466, 467 (1999) (stating that the "Fourth Amendment generally requires police to secure a warrant before conducting a search," but applying the "automobile exception" in the case). The Court has also noted:

> In most criminal cases, we strike this balance in favor of the procedure described by the Warrant Clause of the Fourth Amendment. . . . Except in certain well-defined circumstances, a search or seizure in such a case is not reasonable unless it is accomplished pursuant to a judicial warrant issued upon probable cause.

Skinner v. Ry Labor Executives' Assn., 489 U.S. 602, 619 (1989).

13. United States v. Knights, 123 S. Ct. 587, 591 (2002); *see also* Board of Educ. v. Earls, 533 U.S. 822, 828 (2002) (stating that "reasonableness . . . is the touchstone of the constitutionality of a governmental search").

The Court first referred to "reasonableness" as the "touchstone" in *Pennsylvania v. Mimms*, 434 U.S. 106, 110 (1977), which held that an officer acted "reasonably" in ordering a driver out of a lawfully stopped car, even though the officer lacked any suspicion that the driver may be armed and dangerous. The *Mimms* Court applied the general balancing test of *Terry v. Ohio*, 392 U.S. 1, 19 (1968), as a means of determining reasonableness.

In *Atwater v. City of Lago Vista*, 532 U.S. 315, 345-7 (2001) the Court recently scorned the contextual balancing of interests in favor of using history to construct a "reasonableness" balance. Dissenting, Justice O'Connor countered with a long string citation of the Court's invocation of reasonableness as the "touchstone." *Id.* at 360-61 (O'Connor, J. dissenting). Justice O'Connor listed the following cases, which refer to reasonableness as the "touchstone" of the Fourth Amendment: United States v. Ramirez, 523 U.S. 65, 71 (1998) (stating that the "general touchstone of reasonableness which governs Fourth Amendment analysis . . . governs the method of execution of the warrant"); Maryland v. Wilson, 519 U.S. 409, 411 (1997) (upholding the officer's ordering of a passenger out of a lawfully stopped car); Ohio v. Robinette, 519 U.S. 33, 39 (1996) (refusing to adopt a bright-line standard requiring officers to tell drivers that they are free to leave at the end of a traffic stop); Florida v. Jimeno, 500 U.S. 248, 250 (1991) (stating the scope of consent to search depends on an objective reasonableness inquiry). *Atwater*, 532 U.S. at 360-61 (O'Connor, J., dissenting). She also cited a case that stated "[o]ur fundamental inquiry in considering Fourth Amendment issues is whether or not a search or seizure is reasonable under all the circumstances." *Id.* (citing United States v. Chadwick, 433 U.S 1, 8 (1977) (holding that warrantless search of a footlocker seized from a car was unreasonable).

14. *See infra* text accompanying notes 16-24.

15. *See* cases cited *infra* note 48.

16. Terry v. Ohio, 392 U.S. 1, 16-20 (1968).

17. *Id.* at 20.

classic rhetorical framing to create a new doctrine. It declared that the case was simply different from prior cases. It characterized the case as "deal[ing] with an entire rubric of police conduct . . . which historically has not been, and as a practical matter could not be, subjected to the warrant requirement."[18] Instead it explicitly invoked a paradigm of reasonableness: "[T]he conduct involved in this case must be tested by the Fourth Amendment's general proscription against unreasonable searches and seizures."[19]

The Court created from the Fourth Amendment's proscription against "unreasonable searches and seizures" a new standard, "reasonable grounds to believe."[20] Officers could stop individuals if they reasonably believed that "criminal activity [was] afoot," and the officers could search individuals for weapons if they reasonably believed that the persons were "armed and presently dangerous."[21] The *Terry* Court explained that "reasonable grounds" was less than probable cause and more than an "inchoate and unparticularized suspicion or hunch."[22] Labeling this standard as "objective,"[23] the Court asked whether "the facts available to the officer at the moment of the seizure or the search [would] 'warrant a man of reasonable caution in the belief' that the action taken was appropriate. . . ."[24] The Court ironically quoted from cases dealing with probable cause, but it reframed these cases by posing a different question: whether there was a need to act, not whether there was a need to arrest a suspect for committing a crime.

The Court implicitly supported the creation of the *Terry* standard by citing the exigent circumstances exception to the warrant requirement. Both the new standard and the exigent circumstances doctrine embrace the notion of giving officers latitude to act quickly. For the *Terry* Court, the need to conduct stops and searches constituted a type of exigent circumstance. It then impliedly linked this with the exigencies it had perceived for administrative searches discussed in *Camara v. Municipal Court.*[25] *Camara* established the Fourth Amendment standard for administrative health and safety inspections of the home. The *Terry* Court applied *Camara*'s reasonableness inquiry to *criminal* investigations, even though adminis-

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18. *Id.*

19. *Id.*

20. *Id.* at 37 (Douglas, J., dissenting). In dissent, Justice Douglas characterized this new standard as a "reasonable suspicion" inquiry. *Id.* He argued that the "term 'probable cause' rings a bell of certainty that is not sounded by phrases such as 'reasonable suspicion.'" *Id.* He also noted that "the meaning of 'probable cause' is deeply embedded in our constitutional history." *Id.*

21. Terry v. Ohio, 392 U.S. 1, 30 (1968).

22. *Id.* at 27 (citations omitted).

23. *Id.* at 21.

24. *Id.* at 21-22 (quoting Beck v. Ohio, 379 U.S. 89, 96 (1964) (quoting Carroll v. United States, 267 U.S. 132, 162 (1925)). The *Beck* Court linked the quoted language to the question of whether "an offense had been committed." 379 U.S. at 96. The *Carroll* Court similarly linked it to the question of whether officers had reasonably believed that a particular crime had been committed. *See Carroll*, 267 U.S. at 162.

25. 387 U.S. 523 (1967).

trative searches involve potential *civil* violations. Quoting *Camara*, the Court stated:

> [T]o assess the reasonableness of Officer McFadden's conduct as a general proposition, it is necessary "first to focus upon the governmental interest which allegedly justifies official intrusion upon constitutionally protected interests of the private citizen," for there is "no ready test for determining reasonableness other than by balancing the need to search [or seize] against the invasion which the search [or seizure] entails."[26]

The *Terry* Court thus explicitly created reasonableness as the paradigm for evaluating the constitutionality of officers' stopping and frisking suspects.

This reasonableness paradigm represented a middle ground in the arguments considered by the Court. The Court rejected the argument that the stop was not a Fourth Amendment "seizure" and that the frisk was not a Fourth Amendment "search."[27] The Court also the rejected the dissent's argument that the officer needed full probable cause to stop and frisk.[28] Instead it characterized reasonableness as allowing the creation of an investigative stop and frisk doctrine, one requiring reasonable suspicion, not probable cause.

The *Terry* Court metaphorically structured its new reasonableness doctrine by invoking a balancing scale.[29] In the balancing scale constructed by the Court, one side weighed the government's need to conduct a search or seizure, and the other side weighed "the intrusion" of the individual's interest.[30] The metaphor suggested that all that the Court had to do was to identify the interests on each side of the scale and determine which side had the stronger interests.[31] The opinion, however, did not assign "weights" to the various interests.[32] Instead, it identified and characterized the interests on both sides of the scale and balanced the interests of both parties twice, once for the stop and once for the frisk.[33] It considered "whether the officer's action was justified at its inception, and whether it was reasonably related in scope to the circumstances which justified the interference in

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26. *Terry*, 392 U.S. at 20-21 (quoting *Camara*, 387 U.S. at 536-37). The Court bracketed "seizure" to signify its extension of the administrative "search" doctrine to the newly created stop-and-frisk doctrine. *See id.*

27. *See id.* at 22.

28. *Id.* at 25-26. In dissent, Justice Douglas commented on the following:

> [I]t is a mystery how that 'search' and that 'seizure' can be constitutional by Fourth Amendment standards, unless there was 'probable cause' to believe that (1) a crime had been committed or (2) a crime was in the process of being committed or (3) a crime was about to be committed.

Id. at 35 (Douglas, J., dissenting).

29. *See id.* at 27 (summarizing its "evaluation of the proper balance").

30. *See id.* at 24.

31. *See* Terry v. Ohio, 392 U.S. 1, 22-27 (1968).

32. *See id.*

33. *See id.* at 27-30.

the first place."[34] In describing the balancing process for the investigatory stop, the Court characterized the government as having a "general interest" in "crime prevention and detection."[35] The Court then examined the facts of the case in the light of that interest and asserted that a failure to investigate would have been "poor police work."[36] Although the Court did not proceed to discuss the individual's privacy interest, it did identify some of the interests protected by the Fourth Amendment. The Court characterized the Fourth Amendment as safeguarding an "inestimable right of personal security,"[37] a "sacred" right "of every individual to the possession and control of his own person, free from all restraint or interference . . . unless by clear and unquestionable authority of law."[38] The Court also recognized the concern over potential police harassment of minority groups,[39] yet reaffirmed its ability to craft remedies in order to "curtail abuses."[40] When balancing the interests, the government's side won out, allowing officers to conduct investigatory stops. In the end, the Court advanced its values by constructing the Fourth Amendment to further law enforcement goals at the expense of individual liberty. It could just as easily have characterized "sacred" personal security as a compelling interest, checked only by officers possessing probable cause for stops. Instead, the Court implied that the balancing of interests was easy when it came to the stops, as it characterized the "the crux of this case" [41] to be about the officer's frisking of the suspects.

The Court similarly furthered its values by its characterization of the interests implicated by frisks. On the government's side of the scale, the Court constructed police officer safety as a significant interest, referring to the "long tradition of armed violence" by American criminals.[42] The Court characterized the police officer's need to "neutralize the threat of physical harm"[43] as outweighing the individual's interest in personal security. The Court described the indignity created by a frisk as being of a lesser magnitude than that which is inflicted by an arrest. For the Court, a frisk serves different goals than an arrest: a frisk furthers officer safety while an arrest advances society's interest in law enforcement. Even though

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34. *Id.* at 20. The Court would repeatedly cite this language when continuing its expansion of reasonableness to other contexts. *See, e.g.*, New Jersey v. T.L.O., 469 U.S. 325, 341, 343 (1985) (quoting *Terry*'s two-part test and applying it to a school official's search of a student's purse, where official possessed reasonable suspicion that the student violated a school rule).

35. *Terry*, 392 U.S at 22.

36. Terry v. Ohio, 392 U.S. 1, 23 (1968).

37. *Id.* at 8-9.

38. *Id.* at 9 (quoting Union Pac. R. Co. v. Botsford, 141 U.S. 250, 251 (1891)).

39. *See id.* at 14-15.

40. *Id.* at 15 ("[O]ur approval of legitimate and restrained investigative conduct undertaken on the basis of ample factual justification should in no way discourage the employment of other remedies than the exclusionary rule to curtail abuses for which that sanction may prove inappropriate.").

41. Terry v. Ohio, 392 U.S. 1, 23 (1968).

42. *Id.* at 23.

43. *Id.* at 24.

the Court had characterized the right to personal security as "'sacred," "inestimable," and "cherished,"[44] it then shifted attention to when and how the officer performed the frisks: the officer reasonably believed that the suspects were armed and dangerous, and he patted down only the exterior of the suspect's clothing, as he checked for the presence of a weapon. Although the Court characterized the frisk as a "severe" or "serious intrusion,"[45] it simultaneously described the intrusion as "brief." It buried in a footnote the details of how, during frisks, officers feel "the groin and area about the testicles."[46]

The Court concluded by explicitly characterizing its decision as fact-specific.[47] Even a fact-specific holding, however, may offer fertile ground for future cases. Relying upon *Terry*'s construction of reasonableness, the Court has extended its reasonableness paradigm to a variety of contexts. The net result is the creation of Fourth Amendment doctrines that do not require officials to have any suspicion of wrongdoing.[48]

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44. *Id.* at 8-9, 25.

45. *Id.* at 17, 24.

46. *Id.* at 17 n.13.

47. It had also earlier stated that its decision addressed a "quite narrow question posed by the facts [of the case] . . . ." Terry v. Ohio, 392 U.S. 1, 15 (1968).

48. The Court created suspicionless "reasonableness" when it upheld roadblocks and drug-testing regimes. *See, e.g.*, Bd. of Educ. v. Earls, 536 U.S. 822, 828 (2002) (upholding suspicionless drug-testing of students engaged in competitive extracurricular activities); Vernonia Sch. Dist. 47J. v. Acton, 515 U.S. 646, 662-65 (1995) (upholding drug-testing of student athletes); Mich. Dep't of State Police v. Sitz, 496 U.S. 444, 455 (1990) (suspicionless sobriety checkpoints stops are valid, even though officials may later end up gathering evidence at the roadblock justifying a motorist's arrest for driving while intoxicated); Skinner v. Ry Labor Exec. Assn., 489 U.S. 602, 631-32 (1989) (upholding "postaccident testing" of railroad employees, even when employer lacks reasonable suspicion); Treasury Empls. v. Von Raab, 489 U.S. 656, 679 (1989) (upholding suspicionless drug-testing of custom agents).

In addition, the Court also created a "community caretaking" doctrine that allows officers to act without suspicion. *See, e.g.*, Cady v. Dombrowski, 413 U.S. 433, 441 (1973). In *Cady*, the Court upheld the suspicionless search of a vehicle that had been in an accident, even though it was stored at a private garage selected by the police. *Id.* at 446-48. For the Court, officers acted reasonably when searching the car's locked trunk because they believed that the trunk contained a gun and was vulnerable to intrusion by vandals. *Id.* at 448.

The Court also applied a suspicionless standard for border searches and for stopping vessels in the seas. *See, e.g.*, United States v. Villamonte-Marquez, 462 U.S. 579, 591-93 (1983) (upholding power granted under a federal statute for officials to stop and board vessels on the open seas); United States v. Martinez-Fuerte, 428 U.S. 543, 566-67 (1976) (upholding border patrol stops at permanent checkpoints and at intersections near the border); Almeida-Sanchez v. United States, 413 U.S. 266, 272-73 (1973) (affirming right of federal officers to conduct routine searches along the border and "its functional equivalents" in order to effectuate their power to exclude illegal aliens from the country).

After officials have probable cause for an arrest, they may also contemporaneously search suspects and the area within suspects' immediate control, all without reason to believe that suspects have incriminating evidence. *See, e.g.*, Chimel v. California, 395 U.S. 752, 762-63 (1969) (stating that searches incident to arrest recognize the need to protect the officer, to prevent escape, and to seize any concealed evidence). In addition, officials may also inventory suspects' belongings without reasonable suspicion, once they have properly arrested them. *See* Colorado v. Bertine, 479 U.S. 367, 374-76 (1987) (upholding suspicionless inventory of closed containers in an impounded car after driver was arrested).

II. HISTORICAL REASONABLENESS

In its first major Fourth Amendment case, *Boyd v. United States*,[49] the Supreme Court in 1886 looked to English history for interpretive guidance. Since then, *Boyd* has provided the Court with a precedent to justify its construction of the Fourth Amendment in the light of "history." The Court has not, however, methodically addressed what constitutes relevant "history," nor has it addressed the weight assigned to history in deciding constitutional questions.

In general, the Court's historical discourse path considers the common law and its associated values. The common law sometimes protected liberty, privacy, property, and personal security, and at other times furthered law enforcement interests. The Court has been able to advance its own preferences by manipulating the answers to several questions, such as: whether the common law's requirements in a particular area are clear, what common law practices are relevant, and what weight it should assign to common law practices. At times, the Court has used the common law as a dispositive basis for determining reasonableness; at other times, it has identified the common law as only one factor. The modern Court may thus draw upon a wide range of precedents to justify its occasional invocation of the common law as a basis for defining Fourth Amendment reasonableness.[50]

Early Fourth Amendment decisions focused on English history, using the colonists' rejection of English practices to construct a Framers' intent argument to justify various interpretations of the Fourth Amendment.[51] In time, the Court selectively moved the common law to the background of its Fourth Amendment analysis, relying on the common law to characterize individual interests and determine whether the states followed or rejected some common law principle. The modern Court, however, has often subordinated historical inquiry to other considerations, such as a general reasonableness balancing test[52] or reliance upon

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49. 116 U.S. 616, 625-29 (1886).

50. In light of this, Morgan Cloud has observed that:

> Lawyers writing briefs, judicial opinions, and scholarly commentaries tend to treat history as but one more source of evidence to be deployed in support of their arguments . . . [and] frequently have "manipulated history in the best tradition of American advocacy, carefully marshaling every possible scrap of evidence in favor of the desired interpretation and just as carefully doctoring all the evidence to the contrary."

Morgan Cloud, *Searching Through History; Searching for History*, 63 U. CHI. L. REV. 1707, 1709 (1996) (quoting Alfred H. Kelly, *Clio and the Court: An Illicit Love Affair*, 1965 S. CT. REV. 119, 144); *see also* G. Edward White, *The Arrival of History in Constitutional Scholarship*, 88 VA. L. REV. 485, 488 (2002) ("For many years legal scholars and judges were chastised by twentieth-century professional historians for engaging in 'lawyers' history,' the selective distortion of historical data to buttress policy outcomes.").

51. For an extensive analysis of the Court's use of English history in interpreting the Fourth Amendment, see Thomas Y. Davies, *Recovering the Original Fourth Amendment*, 98 MICH. L. REV. 547, 569 n.39, 570 n.43, 572 n.54, 726-34 (1999).

52. David A. Sklansky, *The Fourth Amendment and Common Law*, 100 COLUM. L. REV. 1739, 1739 (2000). Professor Sklansky noted that "[f]or most of the past century, the interpretation [of the Fourth Amendment guarantee] . . . has had little to do with its origins." He explained that the "reasonableness" paradigm created in

precedent.[53]

The Court shifted its approach again in the 1990s, occasionally relying on the common law to give content to reasonableness.[54] The Court used history to frame its reasonableness inquiry in these decisions.[55] Several recent cases that re-frame the Fourth Amendment inquiry with a strong historical view also invoke precedent,[56] with some also reflecting a need to account for modern times.[57] Yet, in many recent cases the Court has cited precedent, not explicit historical sources, when deciding reasonableness.[58] In these cases, history may nonetheless be an

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Terry v. Ohio, 392 U.S. 1, 89 (1968), was "an explicitly functional test, requiring no historical inquiry." Slansky, *supra*, at 1740 n.37.

53. *See, e.g.*, County of Riverside v. McLaughlin, 500 U.S. 44, 54-55 (1991). The majority in *McLaughlin*, in deciding how long the government could hold an arrested person without a probable cause determination by a magistrate, explicitly rejected Justice Scalia's invocation of the common law, which it characterized as a "vague admonition." *Id.* Instead, several times, the majority framed the question as that posed by *Gerstein v. Pugh*, 420 U.S. 103 (1975), when stating that the Fourth Amendment requires a "prompt" independent probable cause determination. 500 U.S. at 44-55 (quoting *Gerstein*, 420 U.S. at 125). It explicitly described *Gerstein* as a decision striking "a balance between competing interests." 500 U.S. at 55.

54. *See, e.g.*, Wilson v. Arkansas, 514 U.S. 927, 931 (1995). Justice Thomas wrote for a unanimous Court when stating that the common law "may" guide its determination of reasonableness: "'Although the underlying command of the Fourth Amendment is always that searches and seizures be reasonable,' . . . our effort to give content to this term may be guided by the meaning ascribed to it by the Framers of the Amendment." *Id.* (quoting New Jersey v. T.L.O. 469 U.S. 325, 337 (1985)). *See also* Sklansky, *supra* note 52, at 1743 (noting that the Court "recently has turned back to history for guidance in interpreting the Fourth Amendment").

55. *See, e.g.*, Sklansky, *supra* note 52, at 1757-74 (viewing several of the Court's decisions from the 1990s as embodying "the new Fourth Amendment originalism").

56. *See, e.g.*, Wilson v. Layne, 526 U.S. 603, 611-613 (1999) (invoking English cases decided in the 17th and 18th centuries as well as modern precedent to justify its determination that the presence of media during the execution of a search warrant violated the Fourth Amendment). *See also id.* at 619-20 (Stevens, J., concurring and dissenting in part) (stating that the "principle" that "the execution of a search warrant must be strictly limited to the objectives of the authorized intrusion" reflects "the confluence of two important sources: our English forefathers' traditional respect for the sanctity of the private home and the American colonists' hatred of the general warrant"); Florida v. White, 526 U.S. 559, 566 (1999) ("Based on the relevant history and our prior precedent, we therefore conclude that the Fourth Amendment did not require a warrant to seize [the suspect's] . . . automobile in these circumstances.").

57. *See, e.g.*, *Kyllo*, 533 U.S. at 40 (stating that the Court "must take the long view, from the original meaning of the Fourth Amendment forward"); Atwater v. City of Lago Vista, 592 U.S. 318, 354 (2001) (arguing that pre-founding English history, founding-era American practices, and current state and federal statutes all support its holding that "[i]f an officer has probable cause to believe that an individual has committed a very minor criminal offense in his presence, he may, without violating the Fourth Amendment, arrest the offender").

58. *See, e.g.*, *Earls*, 536 U.S. at 828-31 (applying precedent to uphold drug testing of students participating in extracurricular activities); United States v. Drayton, 536 U.S. 194, 199-203 (2002) (applying precedent to decide that officers did not seize bus passengers, who "consented" to searches of their persons); United States v. Knights, 534 U.S. 121, 118-19 (2001) ("[The] touchstone of the Fourth Amendment is reasonableness, and the reasonableness of a search is determined 'by assessing, on the one hand, the degree to which it intrudes upon an individual's privacy and, on the other, the degree to which it is needed for the promotion of legitimate governmental interests.'") (quoting only the second prong of the reasonableness inquiry as framed by *Wyoming v. Houghton*, 526 U.S. 295 (1999)); United States v. Arvizu, 534 U.S. 266, 272-76 (2001) (applying precedent to decide that officer had reasonable suspicion to stop driver); Saucier v. Katz, 533 U.S. 194, 207-08 (2001) (assuming, but not deciding, that officers' use of physical force violated the Fourth Amendment based on precedent); Illinois v. McArthur, 531 U.S. 326, 329-37 (2001) (applying precedent to uphold warrantless seizure of homeowner because of "exigent" need of officer to preserve evidence in the home); City of Indianapolis v.

implicit part of the Court's decision because the cited precedent may itself contain an historical discourse path.

A. Common Law as a Frame in Early Decisions

The early cases of *Boyd v. United States*[59] and *Olmstead v. United States*[60] reveal the Court's use of the common law to further its interest in protecting tangible property interests. Over time, the Court re-characterized the common law to strongly protect privacy as well. In *Boyd,* the Court considered several historical sources in declaring that the Fourth and Fifth Amendment prohibited compulsory process of an invoice to show that the buyer had not paid duties.[61] It cited English history,[62] colonial history,[63] and statutes passed by the First Congress[64] to construct "propositions [that] were in the minds of those who framed the fourth amendment."[65]

The Court explained that "during our revolutionary and formative period as a nation," "every American statesman" was familiar with Lord Camden's 1765 decision of *Entick v. Carrington,*[66] an action for trespass arising from the search and seizure of John Wilkes's papers. Even though the Court viewed Lord Camden's opinion as describing an "indefeasible right of personal security, personal liberty, and private property, where that right has never been forfeited by his conviction of some public offence,"[67] it emphasized the latter in its construction of the Fourth and Fifth Amendments. The Court quoted Lord Camden to highlight

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Edmond, 531 U.S. 32, 37 (2000) (stating that the "Fourth Amendment requires that searches and seizures be reasonable," and applying precedent to declare unconstitutional roadblocks having a "primary purpose" of detecting unlawful drug possession).

59. 116 U.S. 616 (1886).

60. 277 U.S. 438, 466 (1928), *overruled in part by* Katz v. United States, 389 U.S. 347 (1967) and Berger v. New York, 388 U.S. 41 (1967).

61. *Boyd,* 116 U.S. at 622.

62. The Court cited the early English practice of using writs of assistance and general warrants. *Id.* at 625. Writs of assistance arbitrarily gave officials great discretion to search for smuggled goods; general warrants allowed officials to search for private papers. *Id.* The Court stated that these oppressive English practices were of great concern to the framers of the Fourth Amendment. *Id.* at 626-67.

63. Boyd v. United States, 116 U. S. 616, 624-25 (1886) ("In order to ascertain the nature of the proceedings intended by the fourth amendment to the constitution under the terms 'unreasonable search and seizure,' it is only necessary to recall the contemporary or then recent history of the controversies on the subject, both in this country and in England."). The Court narrated the history of the colonies in light of the "oppressions of the mother county," and in light of an English "landmark" decision, *Entick v. Carrington,* which both the English and the American colonists viewed as safeguarding "liberty." *Id.* at 625-26.

64. *Id.* at 630-32 (referring to and describing statutes enacted in 1789, 1863, 1867, 1868, and 1874). The Court stated, "The views of the first congress on the question of compelling a man to produce evidence against himself may be inferred from a remarkable section of the judiciary act of 1789." *Id.* at 630-31. Another section of the Judiciary Act of 1789, Section 13, was presumably not regarded as "remarkable" when the Court held it unconstitutional in *Marbury v. Madison,* 5 U.S. 137, 176 (1803).

65. Boyd v. United States, 116 U. S. 616, 626-27 (1886).

66. *Id.* at 625.

67. *Id.* at 630.

the "sacred" nature of property: "The great end for which men entered into society was to secure their property. That right is preserved sacred and incommunicable in all instances where it has not been taken away or abridged by some public law for the good of the whole."[68] The Court then analogized the compulsory production of papers to the "[b]reaking into a house and opening [of] boxes and drawers."[69] The Court thus used the common law of trespass as a rhetorical frame for its decision.[70]

For decades, the Court used the common law of trespass to frame Fourth Amendment issues.[71] In the classic "intangible" information case, the 1928 decision of *Olmstead v. United States*, officials listened to a telephone conversation by installing wiretaps without actually trespassing on a suspect's property.[72] The *Olmstead* Court concluded that the language of the Fourth Amendment refers to only "material" objects, not anything intangible; it also noted that the officials were not guilty of trespass.[73] The Court declared that "[t]he reasonable view is that one who installs in his house a telephone instrument intends to project his voice to those outside his house. . . ."[74] The *Olmstead* Court also quoted from *Carroll v. United States*,[75] a 1925 case that the modern Court has often used to re-construct a historical framing of Fourth Amendment issues, to justify its reliance on the common law: "The Fourth Amendment is to be construed in light of what was deemed an unreasonable search and seizure when it was adopted, and in a manner which will conserve public interests, as well as interests and rights of individual citizens."[76] Given this historical framing, the Court determined that no search or seizure occurred when officials listened to the telephone conversations.

With common law trespass doctrine framing Fourth Amendment issues, the Court later restated the inquiry to involve three factors: whether a case involved a

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68. *Id.* at 627.

69. *Boyd*, 116 U.S. at 630 (quoting Lord Camden).

70. *See, e.g.*, AKHIL REED AMAR, THE CONSTITUTION AND CRIMINAL PROCEDURE: FIRST PRINCIPLES 23 (1997) (criticizing the *Boyd* Court for its embracing of "property worship"). In examining the same historical narration provided by the Court, Professor Morgan Cloud viewed a different frame, one that encompassed the intertwined interests of "[p]ersonal security, liberty, and private property." Morgan Cloud, *The Fourth Amendment During the* Lochner *Era: Privacy, Property, and Liberty in Constitutional Theory*, 48 STAN. L. REV. 555, 576 (1996). Under Cloud's construction, these interests "united to define significant attributes of individual freedom in a democracy." *Id.*

71. *But see, e.g.*, Hester v. United States, 265 U.S. 57, 59 (1924) (creating the "open fields" doctrine). The *Hester* Court characterized the common law as distinguishing between "open fields" and that which is covered by the Fourth Amendment ("persons, houses, papers and effects"); it did not, however, frame its decision by looking to the common law of trespass. *Id.* The Court construed the word "effects" in the Fourth Amendment to exclude an open field. *Id.*; *see also* Oliver v. United States, 466 U.S. 170, 183 (1984) (stating that the "government's intrusion upon an open field" was not a "search," even though the intrusion constituted a "trespass at common law").

72. 277 U.S. 438, 466 (1928), *overruled in part by* Katz v. United States, 389 U.S. 347 (1967) and Berger v. New York, 388 U.S. 41 (1967).

73. *Olmstead*, 277 U.S. at 464 (stating that the Fourth Amendment listed "material things–the person, the house, his papers, or his effects").

74. *Id.* at 466.

75. 267 U.S. 132 (1925).

76. 277 U.S. at 465 (quoting *Carroll*, 267 U.S. at 149).

tangible item; whether officials had invaded a constitutionally protected "area;" [77] and if so, whether officials had trespassed by "physical invasion."[78] These factors revealed the Court's evolving view of the common law of trespass.

Prior to explicitly discarding this property-based focus for determining whether a search or seizure had occurred, the Court initially refused to overrule prior cases. Later, it characterized cases as having "eroded" its doctrinal structure, justifying an explicit overruling and the creation of a new paradigm. Two cases laid the groundwork for this rhetorical re-framing: *Goldman v. United States*,[79] decided in 1942, and *Silverman v. United States*,[80] decided in 1961. In *Goldman*, the Court invoked *Olmstead* to justify its conclusion that officials did not conduct a search or seizure when they gathered information without a warrant by using a listening device attached to a wall.[81] In *Silverman*, the Court held that the Fourth Amendment did apply to officials' warrantless listening to a conversation by using a microphone to puncture a baseboard.[82] In both cases, the Court explicitly refused to overrule *Olmstead*.[83]

The *Silverman* Court used historical framings in two contrasting ways. First, it rejected a broad property framework for Fourth Amendment issues, stating that "[i]nherent Fourth Amendment rights are not inevitably measurable in terms of ancient niceties of tort or real property law."[84] Second, it selectively invoked the special protection historically accorded to the home, stating that "[a] man can still control a small part of his environment, his house."[85] Drawing attention to its implicit re-framing, the *Silverman* Court stated, "We find no occasion to re-examine *Goldman* here, but we decline to go beyond it, even by a fraction of an inch."[86] Later, the Court would characterize these cases and others as eroding a property foundation for the Fourth Amendment.[87]

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77. *See, e.g.*, Lanza v. New York, 370 U.S. 139, 143 (1962) (stating that a prison cell is not a constitutionally protected area because it "shares none of the attributes of privacy of a home, an automobile, an office, or a hotel room"); Silverman v. United States, 365 U.S. 505, 512 (1961) (stating that warrantless use of a spike microphone was unconstitutional, not because of trespass law, but rather because of "an actual intrusion into a constitutionally protected area").

78. *See, e.g.*, On Lee v. United States, 343 U.S. 747, 751 (1952) (stating that "no trespass was committed" by officers using a concealed microphone while in suspect's laundry).

79. Goldman v. United States, 316 U.S. 129 (1942).

80. Silverman v. United States, 365 U.S. 505 (1961).

81. *Goldman*, 316 U.S. at 135.

82. *Silverman*, 365 U.S. at 511.

83. *Id.* at 508 (declaring no need to re-examine *Olmstead* with regard to "recent and projected developments in the science of electronics"); *Goldman*, 316 U.S. at 136 (stating that overruling *Olmstead* "would serve no good purpose").

84. *Silverman*, 365 U.S. at 511.

85. *Id.* at 511 n.4 (quoting United States v. On Lee, 193 F.2d 306, 316 (2d Cir. 1951) (Frank, J., dissenting), *aff'd*, On Lee v. United States, 342 U.S. 941 (1952)).

86. *Silverman*, 365 U.S. at 512.

87. *See* Katz v. United States, 389 U.S. 347, 353 (1967) (stating that "the premise that property interests control the right of the Government to search and seize has been discredited") (quoting Warden, Md. Penitentiary v. Hayden, 387 U.S. 294, 304 (1967)); *see also* Berger v. New York, 388 U.S. 41, 51 (1967) (stating that later cases

The Court turned from a historical framing for the search and seizure question to a privacy focus in the 1967 decision of *Katz v. United States*,[88] in which Justice Harlan's concurring opinion questioned whether individuals subjectively and reasonably had an expectation of privacy,[89] a standard later adopted by a majority of the Court.[90] In re-framing the Fourth Amendment search question with a "privacy" focus, the Court at times would still overlay an historical perspective on its newly constructed privacy doctrine.[91] For example, the Court stated that the *Katz* standard had "not altogether abandoned use of property concepts in determining the presence or absence of the privacy interests protected by the Amendment."[92] As the Court explained, "Legitimation of expectations of privacy by law must have a source outside the Fourth Amendment, either by reference to concepts of real or personal property or to the understandings that are recognized and permitted by society."[93]

B. Common Law as a Factor in Deciding Reasonableness

With the *Katz* standard re-framing the question of when the Fourth Amendment applied to officials' investigative activity, the Court would later cite the common law as one of many interpretive tools in determining reasonableness. In many decisions, the Court identified the common law as one factor to be considered in the overall reasonableness analysis. Under this approach, the Court gave itself wide discretion to advance or diminish the underlying interests protected by the common law.

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have "negated" statements in *Olmstead* "that a conversation passing over a telephone wire cannot be said to come within the Fourth Amendment's enumeration of 'persons, houses, papers, and effects'").

88. *Katz*, 389 U.S. 347 (1967).

89. *Id.* at 361 (Harlan, J., concurring).

90. *See, e.g.*, Smith v. Maryland, 442 U.S. 735, 740 (1979).

91. *See, e.g.*, Oliver v. United States, 466 U.S. 170, 183 (1984). The *Oliver* Court described the common law of trespass as a "guide" in determining "what areas are protected by the Fourth Amendment." *Id.* The common law, according to the Court, may protect interests not safeguarded by the Fourth Amendment: "the common law of trespass furthers a range of interests that have nothing to do with privacy and that would not be served by applying the strictures of trespass law to public officers." *Id.* at 183 n.15.

92. Rakas v. Illinois, 439 U.S. 128, 143 n.12 (1979).

93. *Id.* The Court later characterized officials' flying over and taking pictures of an industrial complex as viewing an area "falling somewhere between 'open fields' and curtilage, but lacking the critical characteristics of both." Dow Chemical v. United States, 476 U.S. 227, 236 (1986) (recasting these property questions as ones relating to society's privacy expectations). The Court's use of "curtilage" was rooted in the common law, which granted the area around the home the "same protection under the law of burglary." United States v. Dunn, 480 U.S. 294, 300, 301 (1987); *see also* California v. Greenwood, 486 U.S. 35, 37, 41 (1988) (stating that homeowner had no reasonable expectation of privacy in trash discarded in opaque bags left in an area "outside the curtilage of a home").

The Court, however, used the common law term "curtilage" in this context to mean that officers may view this area without implicating the Fourth Amendment. *See, e.g.*, California v. Ciraolo, 476 U.S. 207, 212 (1986) (quoting *Oliver*, 466 U.S. at 180 (quoting Boyd v. United States, 116 U.S. 616, 630 (1886))) (noting that "[a]t common law, the curtilage is the area to which extends the intimate activity associated with the 'sanctity of a man's home and the privacies of life,'" but the fact that "the area is within the curtilage does not itself bar all police observation").

Numerous cases reveal how the common law became a rhetorical tool for the Court to highlight or downplay in its reasonableness determinations.

For example, in the Court's classic reasonableness decision, *Terry v. Ohio*,[94] it cited the common law, not to frame the Fourth Amendment inquiry, but rather to characterize a suspect's interest in "personal security."[95] The Court quoted from an 1891 decision describing this interest: "No right is held more sacred, or is more carefully guarded, by the common law, than the right of every individual to possession and control of his own person, free from all restraint or interference of others, unless by clear and unquestionable authority of law."[96]

Although the Court in *Terry* declined to use the common law to construct a Framers' intent argument,[97] it has done so in other cases.[98] For example, the Court has used the common law as a "guide" in interpreting the Fourth Amendment and discussing Framers' intent.[99] It has also stated that the "common law may, within limits, be instructive in determining what sorts of searches the Framers of the Fourth Amendment regarded as reasonable," with one limit being a recognition that "the common law of searches and arrests evolved in a society far simpler than ours is today."[100] It has also viewed the common law as "shed[ding] light on the obviously relevant, if not entirely dispositive consideration of what the Framers of the Amendment might have thought to be reasonable,"[101] subject to the Court's awareness that it "has not simply frozen into constitutional law those enforcement practices that existed at the time of the Fourth Amendment's passage."[102]

The Court also used the common law as a factor when it compared and contrasted the common law with modern state practices to assess the reasonableness of a police practice. It questioned whether state legislatures or state courts had adopted or sanctioned a similar practice when the Fourth Amendment was adopted

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94. Terry v. Ohio, 392 U.S. 1 (1968).

95. *Terry*, 392 U.S. at 8-9.

96. *Id.* at 9 (quoting Union Pac. Ry. Co. v. Botsford, 141 U.S. 250, 251 (1891)).

97. *See* Minnesota v. Dickerson, 508 U.S. 366, 380-81 (1993) (Scalia, J., concurring) (noting that because *Terry* did not consider whether the common law permitted stop and frisks, he would apply the common law himself to justify an investigative stop, but not a frisk for drugs). Justice Scalia in his concurrence in *Dickerson* attacked the *Terry* opinion for not considering "original meaning": "I might also vote to exclude [the drugs found during a frisk] if I agreed with the original-meaning-is-irrelevant, good-policy-is-constitutional-law school of jurisprudence that the *Terry* opinion represents." *Id.* at 382.

98. *See, e.g.*, Payton v. New York, 445 U.S. 573, 591 (1980) (noting that the common law could be "dispositive" of the Fourth Amendment issue, but that the Court would not "freeze" the Fourth Amendment by simply adopting the practices allowed at common law).

99. *See, e.g.*, Gernstein v. Pugh, 420 U.S. 103, 114-116 (1975) (stating that our conclusion "has historical support in the common law that has guided interpretation of the Fourth Amendment" and that "there are indications that the Framers of the Bill of Rights regarded [the common law practice of "prompt" judicial review of officer's warrantless arrest] as a model for a 'reasonable' seizure").

100. Steagald v. United States, 451 U.S. 204, 217 & n.10 (1981).

101. *Payton*, 445 U.S. at 591.

102. *Id.* at 591 n.33.

in 1791.[103] Sometimes the Court used modern adherence as a factor supporting its reasonableness determination,[104] and other times the Court minimized adherence as a factor by discussing the states' trend away from the common law practice.[105]

Similarly, the Court also sometimes questioned whether early federal statutes and practices reflected the common law rule.[106] For example, in *United States v. Watson*,[107] the Court first noted that early state practices had adopted the common

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103. *See, e.g.*, *Payton*, 445 U.S. at 598-99 ("At this time, 24 States permit such warrantless entries; 15 States clearly prohibit them, though 3 States do so on federal constitutional grounds; and 11 states have apparently taken no position on the question."); *id.* at 599 ("Virtually all of the state courts that have had to confront the constitutional issues directly have held warrantless entries into the home to be invalid in the absence of exigent circumstances."); United States v. Watson, 423 U.S. at 420, 421 (1976) (stating that the common-law rule on warrantless arrests "generally prevailed in the States" after adoption of the Fourth Amendment and "has survived substantially intact"); *id.* at 430 (Powell, J., concurring) ("The historical momentum for acceptance of historical arrests, already strong at adoption of the Fourth Amendment, has gained strength during the ensuing two centuries."). *See generally* Tennessee v. Garner, 471 U.S. 1, 32 (1985) (O'Connor, J., dissenting) (stating that the majority "'lightly brushe[s] aside' . . . a long-standing police practice that predates the Fourth Amendment and continues to receive the approval of nearly half of the state legislatures") (quoting *Payton*, 445 U.S. at 600).

104. *See, e.g.*, *Watson*, 423 U.S. at 419-20, 421 (noting that the "common-law rule of authorizing arrests without a warrant generally prevailed in the States" after adoption of the Fourth Amendment in 1791 and that the rule "has survived substantially intact" during modern times).

105. *See, e.g.*, *Garner*, 471 U.S. at 18 (1985) (stating that although there is no "constant or overwhelming trend away from the common-law rule," "the long-term movement has been away from the rule that deadly force may be used against any fleeing felon, and that remains the rule in less than half the states").

In *Payton*, the Court observed that "[o]nly 24 of the 50 States currently sanction warrantless entries into the home to arrest . . . and there is an obvious declining trend. Further, the strength of the trend is greater than the numbers alone indicate" because seven state courts have declared the practice to be a violation of their "*State* Constitutions." 445 U.S. at 600 (emphasis in original).

106. *See, e.g.*, United States v. Villamonte-Marquez, 462 U.S. 579, 585 (1983) (noting that "'no Act of Congress can authorize a violation of the Constitution,'" yet stating that "the enactment of this statute by the same Congress that promulgated the constitutional amendments that ultimately became the Bill of Rights gives the statute an impressive historical pedigree") (quoting Almeida-Sanchez v. United States, 413 U.S. 266, 272 (1973)); *Steagald*, 451 U.S. at 220, 221 n.13 (even though "the common law thus sheds relatively little light on the narrow question before [the Court], the history of the Fourth Amendment" and the "present policy of the Drug Enforcement Administration" aid it in determining reasonableness); *see also Payton*, 445 U.S. at 601 (noting that "[n]o congressional determination that warrantless entries into the home are "reasonable" has been called to our attention" and adding that "[n]one of the federal statutes cited in the *Watson* opinion reflects any such legislative judgment"); *id.* at 614 (White, J., dissenting) (stating that "applicable federal statutes are relevant to the reasonableness of the type of arrest in questions"); *Watson*, 423 U.S. at 442-43 (Marshall, J., dissenting). Justice Marshall criticized the *Watson* Court for relying on "numerous states and federal statutes codifying the common-law rule." *Id.* at 442. He stated that the Court had ignored its duty under *Marbury v. Madison*, 1 Cranch 137 (1803), to evaluate the constitutionality of a governmental practice. 423 U.S. at 443. In evaluating the burdens of requiring officers to get an arrest warrant to apprehend a suspect in public, Justice Marshall for support cited "the standard practice of the Federal Bureau of Investigation," which was "to present its evidence to the United States Attorney, and to obtain a warrant, before making an arrest." *Id.* at 449; *see also* Colonnade Catering Corp. v. United States, 397 U.S. 72, 76 (1970) (recognizing that common law authorized the seizure of stolen goods and that early Congressional statutes recognized this broad authority). *See generally Garner*, 471 U.S. at 21 (rejecting the common law rule that officers may use deadly force against a burglar, and citing the FBI's classification of burglary as a "'property' rather than a 'violent' crime").

107. United States v. Watson, 423 U.S. 411 (1976).

law by allowing warrantless arrests for felonies.[108] The Court buttressed the significance of state practices by citing a statute, enacted by the Second Congress, which gave "United States marshals the same power as local peace officers." It added that Congress had "several times re-enacted" this statute.[109] In a footnote, the Court buried a citation to a federal statute that was more restrictive of police officers' arrest powers.[110]

In addition, the Court at times characterized the common law as unclear and providing little guidance.[111] It has also minimized the significance of a common law practice by characterizing the common law rule as inconsistent with changes in technology and modern laws.[112] The changes in modern law referred to not only current distinctions between felonies and misdemeanors,[113] but also to those

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108. *Id.* at 420 (stating that "the common-law rule authorizing arrests without a warrant generally prevailed in the States" and citing state cases decided in the early 1800s).

109. *Id.* at 420-21.

110. *Id.* at 423 n.13.

111. *See, e.g.*, Steagald v. United States, 451 U.S. 204, 220 (1981) (stating that the common law "sheds relatively little light on the narrow question before" the Court); Payton v. New York, 445 U.S. 573, 596 (1980). In *Payton*, the majority did not rhetorically frame its reasonableness determination with the common law because it characterized the common law as unclear and constructed a Framers' intent argument from general interests in privacy:

> It is obvious that the common-law rule on warrantless home arrests was not as clear as the rule on arrests in public places. Indeed, particularly considering the prominence of Lord Coke, the weight of authority as it appeared to the Framers was to the effect that a warrant was required, or at the minimum that there were substantial risks in proceeding without one. The common-law sources display a sensitivity to the privacy interests that could not have been lost on the Framers.

Id. In contrast, the dissent not only characterized the common-law rule as "highly relevant," it also described the common-law rule as sufficiently clear to uphold an officer's power to arrest a felony suspect in his home without a warrant. *Id.* at 604, 611 (White, J., dissenting) (stating that "the Amendment preserved common-law rules of arrest," and that "it was not considered generally unreasonable at common law for officers to break doors to effect a warrantless felony arrest").

112. *See, e.g.*, Tennessee v. Garner, 471 U.S. 1, 15 (1985) (stating that "changes in the legal and technological context mean the [common-law] rule is distorted almost beyond recognition when literally applied"); *Steagald*, 451 U.S. at 218 n.10 (stating that the Court would "be naive to assume that those actions a constable could take in an English or American village three centuries ago should necessarily govern what we, as a society, now regard as proper"); *Payton*, 445 U.S. at 591, 600 (stating that "it should be noted that the common-law rules of arrest developed in legal contexts that substantially differ from the cases now before us" and that a "longstanding, widespread practice is not immune from constitutional scrutiny"). *But see Garner*, 471 U.S. at 26 (O'Connor, J., dissenting):

> Although the Court has recognized that the requirements of the Fourth Amendment must respond to the reality of social and technological change, fidelity to the notion of *constitutional*–as opposed to purely judicial–limits on governmental action requires us to impose a heavy burden on those who claim that practices accepted when the Fourth Amendment was adopted are now constitutionally impermissible.

Id. (citations omitted).

113. The classification changes in felonies and misdemeanors were important in the Court's reasonableness standard as applied to deadly force during arrests, but not as applied to warrantless public arrests for felonies. *Compare Garner*, 471 U.S at 12, 13 (stating that "the common-law rule, which allowed the use of whatever force was necessary to effect the arrest of a fleeing felon," "is best understood in light of the fact that it arose at a time

decisions of the Court that discarded Fourth Amendment doctrines previously built on the common law.[114] In short, the Court has characterized reliance on the common law rule as "mistaken literalism," one that "ignores the purposes of a historical inquiry."[115]

C. Common Law as a Frame Again–Sometimes

In the 1990s, the common law sometimes functioned as an "element" in the Court's reasonableness determination,[116] while at other times it actually framed the reasonableness inquiry. The Court had precedents supporting both of these constructions. Thus, whenever the Court framed its decision with the common law, the justices were in reality embracing the values embodied in the common law for the Court could have easily treated common law as just one factor worthy of consideration.

Justice Scalia in the early 1990s more directly expressed his framing focus for reasonableness: he used his view of the common law to reconsider the stop-and-frisk doctrine created by *Terry v. Ohio,* which he characterized as based on "the original-meaning-is irrelevant, good-policy-is-constitutional-law school of jurisprudence."[117] In 1991, Justice Scalia authored the majority opinion in *California v. Hodari D.*,[118] which invoked the common law as the basis for defining a Fourth Amendment "seizure."[119]

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when virtually all felonies were punishable by death"), *and Watson*, 423 U.S. 411, 438 (1976) (Marshall, J., dissenting) (stating that "a felony at common law and a felony today bear only slight resemblance, with the result that the relevance of the common-law rule of arrest to the modern interpretation of our Constitution is minimal"), *with Watson*, 423 U.S. at 412-25 (failing to mention the classification changes, even though the dissent discussed the changes at great length).

114. *See, e.g.*, *Payton*, 445 U.S. at 591 n.33 (referring to the Court's rejection of the "mere evidence rule," which had limited officers to seizing only "contraband or instrumentalities of crime," and its rejection of trespass law to define the scope of Fourth Amendment search and seizure) (citing Warden v. Hayden, 387 U.S. 294, 309-10 (1967), *overruling* Gouled v. United States, 255 U.S. 292 (1921), *and* Katz v. United States, 389 U.S. 347 (1967), *overruling* Olmstead v. United States, 277 U.S. 438 (1928)).

115. *Garner*, 471 U.S. at 13.

116. *See, e.g.*, United States v. Ramirez, 523 U.S. 65, 73 (1998) (stating that precedent indicated that "the common-law principle of announcement is 'an element of the reasonableness inquiry under the Fourth Amendment'" and that "the principle 'was never stated as an inflexible rule requiring announcement under all circumstances'") (quoting Wilson v. Arkansas, 514 U.S. 927, 934 (1995)).

117. Minnesota v. Dickerson, 508 U.S. 366, 382 (1993) (Scalia, J., concurring) ("I adhere to original meaning, however. And though I do not favor the mode of analysis in *Terry*, I cannot say that its result was wrong."); *see also* California v. Acevedo, 500 U.S. 565, 583-84 (1991) (stating that "the supposed 'general rule' that a warrant is always required does not appear to have any basis in the common law") (citations omitted); County of Riverside v. McLaughlin, 500 U.S. 44, 60, 67 (1991) (Scalia, J., dissenting) (stating that "a clear answer already existed in 1791 and has been generally adhered to by the traditions of our society" and that "the purpose of the Fourth Amendment [was] to put this matter beyond time, place, and judicial predilection, incorporating the traditional common-law guarantees against unlawful arrest").

118. *California v. Hodari D.*, 499 U.S. 621 (1991).

119. *Id.* at 626 n.2. Justice Scalia selectively used the common law in reconstructing the definition of "seizure" created in *Terry v. Ohio*: "[o]nly when the officer, by means of physical force or show of authority, has in some

Four years later, a unanimous Court framed its reasonableness inquiry using the common law in *Wilson v. Arkansas*,[120] in an opinion authored by Justice Thomas. The Court, however, muted the common law more than did Justice Scalia in his 1990s concurring opinions. The Court stated that in deciding the "scope of [the Fourth Amendment], we have *looked* to the traditional protections against unreasonable searches and seizures afforded by the common law at the time of framing."[121] The more muted tone also appeared in the Court's statement that "our effort to give content to this term [reasonableness] *may be guided* by the meaning ascribed to it by the Framers of the Amendment."[122] To justify its use of the common law, the *Wilson* Court cited the 1925 case of *Carroll v. United States*,[123] a case cited not only by *Olmstead v. United States*[124] to justify its use of the common law of trespass to frame the Fourth Amendment, but also by several modern Court decisions to create a new more prominent role for the common law.[125] The *Carroll* Court stated, "The Fourth Amendment is to be construed in the light of what was deemed an unreasonable search and seizure when it was adopted, and in a manner which will conserve public interests as well as interests and rights of individual citizens."[126] For the *Wilson* Court, the common law was mainly a "guide."[127]

At other times, however, the Court construed *Carroll* to create a two-part inquiry, with the historical framing dispositive of the Fourth Amendment issue whenever the Court characterized the common law as "clear." For example, only one month after deciding *Wilson*, the Court in *Vernonia School District 47J v. Acton*[128] did not cite *Carroll*, but nevertheless breathed more life into the role of the common law when defining reasonableness under the Fourth Amendment. In an opinion authored by Justice Scalia, the Court stated:

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way restrained the liberty of a citizen may we conclude that a 'seizure' has occurred." Terry v. Ohio, 392 U.S. 1, 19 n.16 (1968). For Scalia, the "mere touching of a person" for the purpose of arresting him constituted a "seizure," but a "simple show of authority" was insufficient and the common law's recognition of an action for an unlawful seizure was irrelevant to the Fourth Amendment. *Hodari D.*, 499 U.S. at 624-25 & 626 n.2.

To narrow the *Terry* "show of authority" definition of a "seizure," Scalia employed a common rhetorical argument to limit precedent: the prior case, *Terry*, stated "a *necessary*, but not a *sufficient*, condition for seizure – or, more precisely, for seizure effected through a 'show of authority.'" *Id.* at 628 (emphasis in original).

120. Wilson v. Arkansas, 514 U.S. 927, 929 (1995) ("In this case, we hold that this common-law 'knock and announce' principle forms a part of the reasonableness inquiry under the Fourth Amendment.").

121. *Wilson*, 514 U.S. at 931 (emphasis added).

122. *Id.* (emphasis added).

123. Carroll v. United States, 267 U.S. 132 (1925).

124. Olmstead v. United States, 277 U.S. 438 (1928), *overruled in part by* Katz v. United States, 389 U.S. 347 (1967), *and* Berger v. New York, 388 U.S. 41 (1967).

125. *See infra* text accompanying notes 147-49, 164-68, 202.

126. *Carroll*, 267 U.S. at 149.

127. *Wilson*, 514 U.S. at 931("[O]ur effort to give content to th[e] term [reasonable] may be guided by the meaning ascribed to it by the Framers of the Amendment.").

128. Vernonia v. Acton, 515 U.S. 646 (1995).

> At least in a case such as this, where there was no clear practice, either approving or disapproving the type of search at issue, at the time the constitutional provision was enacted, whether a particular search meets the reasonableness standard 'is judged by balancing its intrusion on the individual's Fourth Amendment interests against its promotion of legitimate governmental interests.'[129]

For the majority, the common law did not provide a clear answer as to the constitutionality of suspicionless drug testing of student athletes. The Court therefore balanced competing interests, employing the common law as a means to characterize the student's diminished right to liberty.[130] In contrast, the dissent argued that the common law was not helpful in determining reasonableness.[131]

In *Wyoming v. Houghton*,[132] the Court more directly relied on the common law by recasting its decisions in *Wilson* (in which the common law had been an "element" of reasonableness) and *Vernonia* (in which the common law had been unclear).[133] The Court constructed reasonableness to be defined by "clear"

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129. *Id.* at 652-53 (quoting Skinner v. Ry. Labor Executives' Ass'n, 489 U.S. 602, 619 (1989) (quoting Delaware v. Prouse, 440 U.S. 648, 654 (1979))).

130. 515 U.S. at 655 (stating that "[t]raditionally at common law, and still today, unemancipated minors lack some of the most fundamental rights of self-determination–including the right of liberty in its narrow sense, *i.e.*, the right to come and go," and quoting a 1769 treatise by Blackstone).

131. *Id.* at 681 n.1. Justice O'Connor criticized how the majority described what common law was relevant to deciding the constitutionality of suspicionless drug-testing of students:

> The Court says I pay short shrift to the original meaning of the Fourth Amendment as it relates to searches of public school children. . . . As an initial matter, the historical materials on what the Framers thought of official searches of children, let alone of public school children (the concept of which did not exist at the time . . .), are extremely scarce. Perhaps because of this, the Court does not itself offer an account of the original meaning, but rather resorts to the general proposition that children had fewer recognized rights at the time of framing than they do today. But that proposition seems uniquely unhelpful in the present case, for although children may have had fewer rights against the private schoolmaster at the time of the framing than they have against public school officials today, *parents* plainly had *greater* rights then than now.

Id. Justice O'Connor's criticism thus highlights that, even when the justices agree to frame the reasonableness inquiry by using the common law, deciding what common law is relevant and how to characterize it are just as significant as the historical frame.

In addition, the dissent stated that "what the Framers of the Fourth Amendment most strongly opposed, with limited exceptions wholly inapplicable here, were general searches—that is, searches by general warrant, by writ of assistance, by broad statute, or by any other similar authority." *Id.* at 669 (citations omitted).

The dissent also constructed arguments from precedent, accusing the majority of ignoring "history and precedent" in upholding the school's drug-testing program. *Id.* at 676.

132. Wyoming v. Houghton, 526 U.S. 295 (1999).

133. *Id.* at 299-300 (stating that the initial inquiry as to whether a specific action violates the Fourth Amendment is whether such action "was regarded as an unlawful search or seizure under the common law when the Amendment was framed") (citing Wilson v. Arkansas, 514 U.S. 927, 931 (1995)). The Court went on to state that when a determination cannot be made from the initial inquiry, the search is then evaluated "under traditional standards of reasonableness by assessing, on the one hand, the degree to which it intrudes upon an individual's privacy and, on the other, the degree to which it is needed for the promotion of legitimate governmental interests." *Houghton*, 526 U.S. at 300, citing Vernonia Sch. Dist. 47J v. Acton, 515 U.S. 646, 652-53 (1995).

common law: if the common law was not clear, then general balancing applied; if the common law was clear, then the Court was not to balance interests. For the former proposition, it cited *Wilson*, which had considered the common law only as a "guide," not as the potentially dispositive question. For the latter proposition, the Court cited *Vernonia*, which had only decided that the common law was unclear, not that the common law was potentially decisive in determining reasonableness.

The Court in *Houghton*, however, was ambiguous in deciding the "clarity" of the common law. At issue was whether the common law clearly answered the question of whether officers may search a passenger's purse in a vehicle when the officers have probable cause to believe that the car contained illegal drugs. It stated that "[e]ven if the historical evidence . . . were thought to be equivocal, we would find that the balancing of the relative interests weighs decidedly in favor of allowing searches of passenger's belongings."[134] This argument in the alternative led the dissent in *Houghton* to question whether the common law was ever dispositive,[135] a question that has surfaced in more recent cases as well.[136]

The dissent also criticized the majority for its newly constructed two-part inquiry, in which balancing of interests applies only if the common law "inquiry yields no answer."[137] According to the dissent, the Court had never restricted itself "to a two-step Fourth Amendment approach wherein the privacy and governmental interests at stake must be considered only if 18th century common law 'yields no answer.' . . . Neither the precedent cited by the Court, nor the majority's opinion in this case, mandate that approach."[138]

Since issuing its *Houghton* decision in 1999, the Court has extensively relied on precedent to decide Fourth Amendment cases.[139] In four decisions, however, the

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134. *Id.* at 303.

135. *Id.* at 311 n.3 (Stevens, J., dissenting) (noting that the "Court does attempt to address contemporary privacy and governmental interests" and that "[e]ither the majority is unconvinced by its own recitation of the historical materials, or it has determined that considering additional factors is appropriate in any event").

136. *See, e.g.*, Atwater v. City of Lago Vista, 532 U.S. 318, 326 (2001) (stating that "[i]n reading the Amendment, we are guided by 'the traditional protections against unreasonable searches and seizures afforded by the common law at the time of framing,'" (quoting Wilson, 514 U.S. at 931)). The Court further noted that "[a]n examination of the common-law understanding of an officer's authority to arrest sheds light on the obviously relevant, if not entirely dispositive, consideration of what the Framers of the Amendment might have thought to be reasonable." *Atwater*, 532 U.S. at 326 (quoting Payton v. New York, 445 U.S. 573, 591 (1980)).

Justice O'Connor dissented in *Atwater*, allowing Justice Souter the opportunity to criticize her for not invoking her prior practice of using the common law to assess reasonableness. 532 U.S. at 345 n.14. Justice O'Connor had previously dissented from the Court's rejection of the common law rule that allowed officers to shoot fleeing felons. Tennessee v. Garner, 471 U.S. 1, 26 (1985) (O'Connor, J., dissenting). In her *Atwater* dissent, Justice O'Connor viewed history as "just one of the tools we use in conducting the reasonableness inquiry." *Atwater*, 532 U.S. at 361 (O'Connor, J., dissenting).

137. *Houghton*, 526 U.S. at 311 n.3 (Stevens, J., dissenting).

138. *Id.*

139. *See, e.g.*, Board of Educ. v. Earls, 536 U.S. 822, 837-38 (2002) (upholding drug-testing of students participating in competitive extracurricular activities based on prior decision allowing student athletes to be tested for drugs); Kirk v. Louisiana, 536 U.S. 635, 638 (2002) (per curiam) (holding that precedent required officers to have exigent circumstances and probable cause to enter a suspect's home without a warrant); United States v.

Court gave history a prominent rhetorical role: *Florida v. White*,[140] *Wilson v. Layne*,[141] *Atwater v. City of Lago Vista*,[142] and *Kyllo v. United States*.[143] These four recent decisions reflect the Court's shifting views on the role of history in deciding what constitutes a reasonable police practice under the Fourth Amendment.[144]

Drayton, 536 U.S. 194, 203, 206 (2002) (noting that "the police did not seize [the suspects] when they boarded the bus and began questioning passengers," and observing that the Court had rejected the argument "that police officers must always inform citizens of their right to refuse when seeking permission to conduct a warrantless consent search"); United States v. Arvizu, 534 U.S. 266, 275-77 (2001) (deciding that officer had reasonable suspicion to stop driver); Saucier v. Katz, 533 U.S. 194, 207-08 (2001) (assuming, but not deciding, that officers' use of physical force violated the Fourth Amendment based on precedent); Arkansas v. Sullivan, 532 U.S. 769, 771-72 (2001) (reaffirming Court's interpretation that an officer's "subjective motivation for making [a traffic] stop" is irrelevant in determining reasonableness); Ferguson v. City of Charleston, 532 U.S. 67, 79 (2001) (striking down suspicionless drug-testing program of pregnant woman and stating that the "critical difference between . . . four [prior] drug-testing cases and this one . . . lies in the nature of the 'special need' asserted as justification for the warrantless searches"); Illinois v. McArthur, 531 U.S. 326, 333 (2001) (upholding warrantless seizure of homeowner because of exigent need of officer to preserve evidence in the home and stating that "[o]ur conclusion that the restriction was lawful finds significant support in this Court's case law"); City of Indianapolis v. Edmond, 531 U.S. 32, 37, 48 (2000) (stating that the "Fourth Amendment requires that searches and seizures be reasonable" and relying on precedent to declare unconstitutional roadblocks having a "primary purpose" of detecting unlawful drug possession); Bond v. United States, 529 U.S. 334, 337-39 (2000) (applying precedent and creating a distinction for officers' engaging in tactile as opposed to visual surveillance in determining what constitutes a search); Florida v. J.L., 529 U.S. 266, 272 (2000) (holding that officers lack reasonable suspicion to make a *Terry* stop and that it would not create a "firearm exception" to *Terry*); Illinois v. Wardlow, 528 U.S. 119, 123-25 (2000) (stating that the constitutionality of the stop "is governed by the analysis we first applied in *Terry*" and holding that suspect's flight upon seeing officers in a high crime neighborhood constituted reasonable suspicion, justifying investigatory stop); Flippo v. West Virginia, 528 U.S. 11, 14 (1999) (per curiam) (reversing lower court which had created "'murder scene exception' to the Warrant Clause of the Fourth Amendment," contrary to Court's decision in *Mincey v. Arizona*); Maryland v. Dyson, 527 U.S. 465, 467 (1999) (per curiam) (reversing lower court because its holding that "the 'automobile exception' requires a separate finding of exigency in addition to a finding of probable cause is squarely contrary to our holdings in *Ross* and *Labron*"). *But see Edmond*, 531 U.S. at 56 (Thomas, J., dissenting) ("I am not convinced that *Sitz* and *Martinez-Fuerte* were correctly decided. Indeed, I rather doubt that the Framers of the Fourth Amendment would have considered 'reasonable' a program of indiscriminate stops of individuals not suspected of wrongdoing.").

140. 526 U.S. 559 (1999).

141. 526 U.S. 603 (1999).

142. 532 U.S. 318 (2001).

143. 533 U.S. 27 (2001). When the Court used precedent to decide Fourth Amendment reasonableness, one could construct an argument that the Court implicitly considered history as embedded in its prior decisions. See, for example, *Florida v. White*, in which dissenting Justice Stevens viewed the Court's reliance on precedent as invoking history, but a history not applicable to the question of whether officers, without exigent circumstances, may seize a car as contraband without a warrant:

> There is some force to the majority's reliance on *United States v. Watson*, which held that no warrant is required for felony arrests made in public. . . . With respect to the seizures at issue in *Watson*, however, I consider the law enforcement and public safety interests far more substantial, and the historical and legal traditions more specific and engrained, than those present on the facts of this case.

526 U.S. at 571 n.5 (1999) (Stevens, J., dissenting) (internal citations omitted).

144. Yet, some precedents plainly did not consider history, but rather engaged in balancing interests to determine reasonableness. For example, in its 2001 decision of *United States v. Knights*, 534 U.S. 112 (2001), the Court skipped over *Houghton*'s first prong – the common law – and quoted only the second prong, which balanced interests, as it resolved the reasonableness of searching a probationer's home without a search warrant. The Court

The Court in *Florida v. White*,[145] in an opinion authored by Justice Thomas, held that officers did not need exigent circumstances to justify a warrantless seizure of a car in a public place when officers have probable cause to believe that the car itself constituted "contraband," after the owner used it to distribute illegal drugs. In deciding the reasonableness of the warrantless seizure, the Court described history as important; it did not indicate that it was potentially dispositive.[146] It instead recast *Houghton*'s two-part inquiry (which provided that history could be the decisive factor): "In deciding whether a challenged governmental action violates the Amendment, we have taken care to inquire whether the action was regarded an unlawful seizure when the Amendment was framed."[147] The Court also quoted *Carroll*, in which balancing of interests is a part of reasonableness, not just a fall-back position if the common law is not clear: "The Fourth Amendment is to be construed in light of what was deemed an unreasonable search and seizure when it was adopted, and in a manner which will conserve public interests as well as the interests and rights of individual citizens."[148] The Court then characterized the *Carroll* decision, with its historical analysis, as applicable to the reasonableness question before the Court: "The principles underlying the rule in *Carroll* and the founding-era statutes upon which they are based fully support the conclusion that the warrantless seizure of [the suspect's] car did not violate the Fourth Amendment."[149] Finally, the Court also relied on more recent cases to justify its reasonableness decision.[150]

One week after deciding *Florida v. White*, the Court in *Wilson v. Layne*[151] similarly invoked history, as well as precedent, to decide that officers acted unreasonably in allowing the media to be present during the execution of a search warrant. The Court unanimously held that having the media present violated the Fourth Amendment, but disagreed as to the clarity of Fourth Amendment precedent giving officers notice that their invitation to the media was unreasonable. The Court quoted a 1604 English case to characterize the privacy interests historically associated with the home: "the house of every one is to him as his castle and fortress, as well as for his defence against injury and violence, as for his

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stated that the "touchstone of the Fourth Amendment is reasonableness, and the reasonableness of a search is determined 'by assessing, on the one hand, the degree to which it intrudes upon a individual's privacy and, on the other, the degree to which it is needed for the promotion of legitimate governmental interests.'" *Id.* at 118-19 (quoting Wyoming v. Houghton, 526 U.S. 295 (1999)).

145. 526 U.S. at 566.

146. *See id.* at 563-64.

147. *Id.* at 563 (citing Wyoming v. Houghton, 526 U.S. 295, 299 (1999) and Carroll v. United States 267 U.S. 132 (1925)).

148. *Id.* at 564 (quoting *Carroll*, 267 U.S. at 149).

149. *Id.*

150. *See id.* at 1565-66 (citing cases discussing the "special considerations recognized in the context of moveable items" and the "greater latitude" given officers when "exercising their duties in public places").

151. 526 U.S. 603 (1999).

repose."[152] The Court also quoted from Blackstone's *Commentaries on the Law* from 1765-1769[153] to support its conclusion that "[t]he Fourth Amendment embodies this centuries-old principle of respect and privacy for the home."[154]

The Court then characterized history as offering "basic principles" and looked to precedent to justify its conclusion.[155] In *Payton v. New York*,[156] it noted, the Court had taken the position that the common law was not clear as to whether officers could enter a home without a warrant for a felony arrest; in that case, the Court used the historic interest in privacy to support the conclusion that officers needed a warrant to enter the home.[157] The *Layne* Court in dicta also noted that the common law, the 1765 English decision of *Entick v. Carrington*,[158] and its 1886 decision in *Boyd v. United* States[159] all indicated that third parties could accompany officers if their purpose was to identify stolen property.[160]

The majority and the dissent, however, differently characterized the clarity of history and precedent in giving officers notice that the media's presence was unreasonable. For the majority, reasonable officials would not have known in 1992 that their actions were unreasonable;[161] for the dissent, history was clear.[162] The dissent invoked two historical sources: "our English forefathers' traditional respect for the sanctity of the private home and the American colonists' hatred of the general warrant."[163]

With history forefronted in both *Wilson v. Layne* and *Florida v. White*, the Court in *Atwater v. City of Lago Vista*[164] similarly looked to history, this time offering a tremendously lengthy historical justification for its determination that an officer acted reasonably in arresting a driver for offenses that had the penalty of a fine but no jail time.[165] In an opinion written by Justice Souter, the Court responded to the driver's argument that the arrest was unreasonable because "'founding-era common-

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152. *Id.* at 609 (quoting Semayne's Case, 77 Eng. Rep. 194, 5 Co. Rep. 91a, 91b, 195 (K.B.)).

153. *Id.* at 610 (citing WILLIAM BLACKSTONE, 4 COMMENTARIES ON THE LAW OF ENGLAND 223 (1765-1769)).

154. *Id.*

155. *Id.*

156. 445 U.S. 573 (1980).

157. 526 U.S. at 610-11.

158. 19 How. St. Tr. 1029, 1067 (K.B. 1765).

159. 116 U.S. 616 (1886).

160. 526 U.S. at 611-12.

161. *See id.* at 615 ("We hold that it was not unreasonable for a police officer in April 1992 to have believed that bringing media observers along during the execution of an arrest warrant . . . was lawful.").

162. *See id.* at 618 (Stevens, J., dissenting) ("[T]he homeowner's right to protection against this type of trespass was clearly established long before April 16, 1992.").

163. *Id.* at 619-20.

164. 532 U.S. 318 (2001).

165. *Id.* at 324-45 ("We granted certiorari to consider whether the Fourth Amendment, either by incorporating common-law restrictions on misdemeanor arrests or otherwise, limits police officers' authority to arrest without warrant for minor criminal offenses.") The officer charged Atwater with "driving without her seatbelt fastened, failing to secure her children in seatbelts, driving without a license, and failing to provide proof of insurance. *Id.* at 324.

law rules' forbade peace officers to make warrantless misdemeanor arrests except in cases of 'breach of the peace,' a category she claimed covered only those nonfelony offenses 'involving or tending toward violence.'"[166] Although the Court characterized this argument as "by no means insubstantial,"[167] it found that the common law did not provide a sufficiently clear basis for holding that the arrest was unreasonable. With the common law unclear, the Court then recast *Houghton*'s second prong – requiring a balancing of interests – to diminish the Court's power to construct case-by-case reasonableness, except when the facts are "extraordinary."[168]

The Court's historical framing of the Fourth Amendment issue resembled *Houghton*'s first prong, which gave the Court's construction of the common law great weight in deciding reasonableness. The Court initially invoked *Wilson* to state that the common law was a guide, but then proceeded to invoke that portion of the *Payton v. New York* decision that resembled *Houghton*: "[a]n examination of the common-law understanding of an officer's authority to arrest sheds light on the obviously relevant, if not entirely dispositive, consideration of what the Framers of the Amendment might have thought reasonable."[169] It did not quote that portion of *Payton* that stated that "[the] Court has not simply frozen into constitutional law those law enforcement practices that existed at the time of the Fourth Amendment's passage."[170]

The Court then examined the following historical sources: "pre-founding English common law;"[171] English commentaries published as early as 1736;[172] English statutes dating back to 1285;[173] American "framing-era documentary history;"[174] and state practices "[d]uring the period leading up to and surrounding the framing of the Bill of Rights."[175]

The Court noted that the early English commentators supported Atwater's construction of the common law, but used the classic argument to undermine their

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166. *Id.* at 327 (quoting Brief for Petitioners at 13).

167. *Id.*

168. Atwater v. City of Lago Vista, 532 U.S. 318, 353 (2001). The Court examined what "prior cases [had] intimated: the standard of probable cause 'applie[s] to all arrests, without the need to 'balance' the interests and circumstances involved in particular situations.'" *Id.* at 354 (quoting Dunaway v. New York, 442 U.S. 200, 208 (1979)). With this "categorical treatment of Fourth Amendment claims," the Court also looked to precedent for constructing an exception to this bright-line rule; hence, case-by-case analysis occurs when the seizure was "conducted in an extraordinary manner." *Id.* at 352-53 (quoting Whren v. United States, 517 U.S. 805, 818 (1996)).

169. *Id.* at 326 (quoting Payton v. New York, 445 U.S. 573, 591 (1980)) (citation omitted).

170. Payton v. New York, 445 U.S. 573, 591 n.33. (1980)

171. Atwater v. City of Lago Vista, 532 U.S. 318, 327 (2001).

172. *Id.* at 329-31 (2001) (citing E. FOSS, THE JUDGES OF ENGLAND 113 (1864), which discussed Sir Matthew Hale, Chief Justice of the King's Bench from 1671-1676).

173. *Id.* at 333 (discussing the Statute of Winchester, a "so-called 'nightwalker' statute," passed in 1285 and repealed in 1827).

174. *Id.* at 336.

175. *Id.*

significance – invoking precedent as sometimes stating a necessary condition and sometimes merely a sufficient condition. The Court stated that these commentators "spoke only to the sufficiency of breach of the peace as a condition to warrantless misdemeanor arrest, not to its necessity."[176] The Court then used English statutes to argue that the statutory exceptions undermined Atwater's view of the common law and to declare that "the law of the mother country would [not] have left the Fourth Amendment's Framers" with Atwater's view.[177] With respect to its invocation of early American state practice, the Court candidly noted that "the Fourth Amendment did not originally apply to the States," but then argued that they were nevertheless relevant to "unearthing the Amendment's original meaning" because the Framers had considered state constitutional search-and-seizure provisions as models for the Fourth Amendment.[178]

The Court also had to diminish the weight of its own prior construction of the common law in *Carroll v. United States*, which had characterized the common law rule in a manner consistent with *Atwater*'s construction.[179] The *Atwater* Court noted that *Carroll* had quoted from an English treatise providing:

> [I]n cases of misdemeanor, a peace officer like a private person has at common law no power of arresting without a warrant except when a breach of the peace has been committed in his presence or there is reasonable ground for supposing that a breach of peace is about to be committed or renewed in his presence.[180]

In addition, the *Carroll* Court had further explained that the "reason for the arrest for misdemeanors without a warrant at common law was promptly to suppress breaches of the peace,"[181] a statement not quoted in *Atwater*. Facing this description of the common law in *Carroll*, the *Atwater* Court dismissed its prior characterization in two ways. First, it emphasized that the quote from *Carroll* had described only the "usual rule," not the only rule.[182] Second, it declared that the "authorities" on the common law did not have a "uniform" view of the common law.[183] Thus, the Court used the lack of uniformity as a way to construct the common law as unclear.

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176. *Id.* at 329-30.

177. Atwater v. City of Lago Vista, 532 U.S. 318, 335 (2001).

178. *Id.* at 338-39.

179. *See Atwater*, 532 U.S. at 328-29; Carroll v. United States, 267 U.S. 132, 156-58 (1925) (discussing whether the right of seizure by an officer under the National Prohibition Act should be limited by the common law rule as to the circumstances justifying an arrest without warrant for a misdemeanor).

180. *Atwater*, 532 U.S. at 328 (citing *Carroll*, 267 U.S. at 157 (quoting 9 HALSBURY, LAWS OF ENGLAND § 612, at 299 (1909))).

181. *Carroll*, 267 U.S. at 157 (explaining the rule that a police officer may only arrest without a warrant for a misdemeanor if it was committed in his presence).

182. *Atwater*, 532 U.S. at 329 ("[T]he isolated quotation tends to mislead. In *Carroll* itself we spoke of the common-law rule as only 'sometimes expressed' that way.").

183. *Id.* ("Thus, what *Carroll* illustrates ... is that statements about the common law of warrantless misdemeanor arrest simply are not uniform.").

In addition, the Court rejected Atwater's interpretation of the Fourth Amendment by questioning whether the common law rule "has been generally adhered to by the traditions of our society,"[184] quoting from a dissenting opinion authored by Justice Scalia, who at that time wedded Fourth Amendment interpretation to the common law.[185] The Court looked to current state and federal practices as well as legal commentaries, noting that they did not embrace Atwater's perspective on the common law.[186] It described these practices as allowing officials to conduct such warrantless arrests.[187] The Court thus examined historical sources as well as modern sources as a part of its historical inquiry.

Ironically, the Court's characterization of the common law's clarity depended upon whether it was rejecting Atwater's proposed rule or criticizing the dissent. With respect to Atwater, the Court stated, "This, therefore, is simply not a case in which the claimant can point to a 'clear answer [that] existed in 1791 and has been generally adhered to by the traditions of our society ever since.'"[188] But when discussing the common law to criticize the dissent, the Court stated that "the historical record is not nearly as murky as the dissent suggests"[189] and that "the dissent bears the 'heavy burden' of justifying a departure from the historical understanding."[190] The historical understanding, for the majority, differed from Atwater's construction: "[H[istory . . . has expressed a decided, majority view that the police need not obtain an arrest warrant merely because a misdemeanor stopped short of violence or a threat of it."[191] The Court thus characterized history as "not unequivocal," but sufficiently clear to reject Atwater's construction of the common law.[192] The Court, even after its long exegesis of different views of the common law, nevertheless criticized the dissent for viewing history as "just 'one of the tools' relevant to a Fourth Amendment inquiry."[193] Yet, because the Court constructed history to include thirteenth century English practices as well current state and federal practice, one can more easily understand how "history" appeared to be a persuasive rhetorical framing for the majority.

The *Atwater* Court also invoked precedent to characterize a limited role for the

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184. *Id.* at 345 (quoting County of Riverside v. McLaughlin, 500 U.S. 44, 60 (1991) (Scalia, J., dissenting)).

185. *McLaughlin*, 500 U.S. at 66 (Scalia, J., dissenting) ("It was the purpose of the Fourth Amendment to put this matter [of holding an arrested person without a judicial probable-cause determination] beyond time, place, and judicial predilection, incorporating the traditional common-law guarantees against unlawful arrest.").

186. Atwater v. City of Lago Vista, 532 U.S. 318, 344-45 (2001) (noting that "all 50 States and the District of Columbia permit warrantless misdemeanor arrests by at least some (if not all) peace officers without requiring any breach of the peace," and observing that the "American Law Institute has long endorsed the validity of such legislation").

187. *Id.*

188. *Id.* at 345 (quoting McLaughlin, 500 U.S. at 60) (Scalia, J., dissenting)).

189. *Id.* at 345 n.14.

190. *Id.* (quoting Tennessee v. Garner, 471 U.S. 1, 26 (1985)).

191. *Id.* at 345.

192. Atwater v. City of Lago Vista, 532 U.S. 318, 345 (2001).

193. *Id.* at 345 n.14.

Court in balancing interests, the second prong of *Houghton*.[194] As discussed below, the Court's rhetorical framing of precedent allowed it to step back from the specific facts of this case, in which the Court criticized the officer for exercising "extremely poor judgment."[195] In contrast, the dissent did not view precedent as supporting the Court's "new rule" and characterized the majority opinion as finding history to be "inconclusive."[196] As a result, the dissent also relied on its characterizations of precedent to support Atwater's view of reasonableness.[197]

Finally, the difficulties of using history to decide Fourth Amendment reasonableness did not deter the Court in *Kyllo v. United States* from trying to rhetorically frame its decision using history, even when modern technology was at issue.[198] *Kyllo* determined that officers' use of a thermal imager to detect heat loss was a "search" within the meaning of the Fourth Amendment because this technology was "not in general public use."[199] In an opinion authored by Justice Scalia, the Court stated, "we must take the long view, from the original meaning of the Fourth Amendment forward."[200] Although *Kyllo* examined what constituted a "search," rather than whether a search or seizure was reasonable, it reveals the Court's interest in at times constructing an historical frame for even issues involving modern technology. In contrast to the early Fourth Amendment decisions in which the common law framed whether a search or seizure had occurred, the *Kyllo* decision combined the modern *Katz* standard – whether a person subjectively and reasonably had an expectation of privacy – with an historical perspective.[201] *Kyllo* quoted *Carroll*'s two-part inquiry, one that looked to the common law and to a general balancing of interests to determine Fourth Amendment reasonableness.[202]

In deciding what constitutes a reasonable police practice under the Fourth Amendment, the Court has thus used historical arguments in contrasting ways. In addition, what constitutes relevant "history" has also differed among opinions, with some decisions looking to thirteenth century English practices and some

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194. *Id.* at 344-355.

195. *Id.* at 346-47.

196. *Id.* at 361 (O'Connor, J., dissenting).

197. *Id.* at 371 ("Measuring 'the degree to which [Atwater's custodial arrest was] needed for the promotion of legitimate governmental interests,' against 'the degree to which it intrud[ed[upon [her] privacy,' it can hardly be doubted that [the officer's] actions were disproportionate to Atwater's crime.") (internal citation omitted).

198. *See Kyllo*, 533 U.S. 27, 40 (2001) (holding that Thermovision imaging of a person's home by the police without a valid warrant would constitute an unlawful search under the Fourth Amendment).

199. *See id.* at 40.

200. *Id.*

201. In *Kyllo*, the Court concluded that:

> In the case of the search of the interior of homes . . . there is a ready criterion, with roots deep in the common law, of the minimal expectation of privacy that *exists*, and that is acknowledged to be *reasonable*, [and that the Court's holding] assures preservation of that degree of privacy against government that existed when the Fourth Amendment was adopted.

Id. at 34 (emphasis in original).

202. *Id.* at 40.

looking at English and American practices surrounding adoption of the Fourth Amendment. Sometimes the decisions have used English practices to construct Framers' intent arguments to reject what the English had done; sometimes they have used English practices to demonstrate what the Framers intended reasonableness to mean. In addition, the Court looked at state and federal practices to assess reasonableness – to discern whether these practices embraced or rejected the common law practices. Sometimes adherence to the common law indicated reasonableness; at other times it did not, with the Court characterizing a "trend" away from the common-law practice. The Court also invoked the common law sometimes to frame its reasonableness inquiry and sometimes just as a factor in deciding reasonableness. The Court also used the common law to characterize an individual's interest protected by the Fourth Amendment.

In invoking historical arguments, the Court has thus selectively used and reframed precedent. *Boyd* first employed English history to construct the Fourth Amendment; yet, the Court's varied use of historical arguments since *Boyd*, as illustrated above, demonstrates that precedent itself is a rhetorical tool for the Court. For example, the Court has characterized the common law as dispositive of the reasonableness issue, as not important because the states manifest a trend away from the common law rule, as a factor it uses along with a balancing of interests, and as a means to characterize a person's interest in personal security. With these different perspectives of history, the Court has great latitude to construct an opinion reaching its desired conclusion.

III. PRECEDENTIAL REASONABLENESS

The Court has rhetorically characterized precedent in a variety of ways to justify its determination that a police practice complied with or violated the Fourth Amendment.[203] It has viewed precedent as standing for various general, categorical propositions about Fourth Amendment reasonableness – propositions that the Court has rewritten in later cases. For example, it has viewed the accretion of precedent as indicating that probable cause marked an important line in determining reasonableness. Under that construction, the Fourth Amendment permits balancing of interests only in "extraordinary" circumstances. Later the Court changed this important reasonableness proposition as encompassing reasonable suspicion as well as probable cause. The Court has also characterized the accretion of precedent as providing different constructions for analyzing the significance of an officer's subjective motivations. In addition to the Court's construction of broad, shifting reasonableness propositions, it has also inconsistently characterized the Fourth Amendment as requiring bright-line rules or case-by-case adjudication. Furthermore, the Court has used its power to highlight or undercut precedent

203. For a discussion of the Court's selective invocation and characterization of precedent for its historical arguments, see *supra* text accompanying notes 179-83, 194, 201-02.

by declaring precedent to be dispositive[204] or distinguishable,[205] depending upon how it has characterized the facts and legal interests under consideration. Finally, the Court has also occasionally chosen to ignore precedents that are arguably relevant to its reasonableness determinations.[206] With these rhetorical tools, the modern Court has generally furthered the government's ability to investigate while significantly limiting the individual's interest in liberty, privacy, personal security, and property.

A. Accretion and Categorization of Precedent: The Shifting Nature of Reasonableness

In describing how to evaluate Fourth Amendment reasonableness, the Court has often synthesized cases to construct propositions that are supposedly intended to provide future guidance. Using a variety of interpretive processes, the Court, however, has frequently modified these propositions, sometimes even without explanation. For example, a unanimous Court offered two important propositions about reasonableness in *Whren v. United States*.[207] First, when officers have probable cause for a traffic stop, the Court is not to examine the subjective intentions of the police officers in determining the reasonableness of the seizure.[208] Second, when officers have probable cause for a search or seizure, reasonableness does not require the Court to engage in a balancing of interests, except in

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204. *See, e.g.*, Maryland v. Wilson, 519 U.S. 408, 410 (1997). The Court framed its analysis by asking whether it should extend the rule of a prior case to the present one: "In this case we consider whether the rule of *Pennsylvania v. Mimms*, 434 U.S. 106 (1977) (per curiam), that a police officer may as a matter of course order the driver of a lawfully stopped car to exit his vehicle, extends to passengers as well." *Id.* By similarly characterizing the balance of interests in both cases, the Court decided to extend *Mimms*.

205. *See, e.g.*, Knowles v. Iowa, 525 U.S. 113, 118 (1998). In *Knowles*, the Court considered whether "to extend" the "bright-line rule" of *United States v. Robinson*, 414 U.S. 218 (1973), which authorized officers to conduct a search incident to an arrest, to a search incident to a traffic citation. The *Knowles* Court declined to extend *Robinson* to searches incident to citations because it characterized the interests in each case differently. 525 U.S. at 117-19.

206. *See, e.g.*, United States v. Knights, 534 U.S. 112 (2001). In *Knights*, the Court determined that an officer acted reasonably in searching a probationer's home because he had reasonable suspicion to believe that the probationer was involved in criminal activity. *Id.* at 121. No one on the Court mentioned or distinguished any cases emphasizing an individual's privacy interest in the home. *See, e.g.*, Kyllo v. United States, 533 U.S. 27, 40 (2001) ("We have said that the Fourth Amendment draws 'a firm line at the entrance to the house.'") (quoting Payton v. New York, 445 U.S. 573, 590 (1980)); Wilson v. Layne, 526 U.S. 603, 612 (1999) (referring to "the importance of the right of residential privacy at the core of the Fourth Amendment"); Welsh v. Wisconsin, 466 U.S. 740, 748, 754 (1984) (stating that "the 'physical entry of the home is the chief evil against which the wording of the Fourth Amendment is directed'" and that a "warrantless home arrest cannot be upheld simply because evidence of the [suspect]'s blood-alcohol level might have dissipated while the police obtained a warrant" for a minor noncriminal offense) (quoting United States v. United States District Court, 407 U.S. 297, 313 (1972)); *Payton*, 445 U.S. at 590 (stating that "[a]bsent exigent circumstances, . . . [the home's] threshold may not reasonably be crossed without a warrant").

207. 517 U.S. 806 (1996).

208. *Id.* at 813.

"extraordinary" circumstances.[209]

Since *Whren,* however, the Court has re-characterized its created probable cause demarcation, selecting reasonable suspicion as the line in examining subjective motivations. It has also selectively invoked its "extraordinary" circumstances exception.

Because the Court has a variety of rhetorical tools for declaring precedent to be either dispositive, relevant, or irrelevant, the Court's nominally precedent-based decisions in fact have reflected its own values regarding the need for the particular police practice at issue. An examination of *Whren* and its progeny reveals how the Court has re-characterized its past decisions to achieve its desired results.

1. Police Officers' Subjective Motivations: Creating a Probable-Cause Line and Later Shifting it to a Reasonable-Suspicion Line

The *Whren* Court unanimously held that undercover police officers acted reasonably when they stopped an African-American motorist and his black passenger for minor traffic offenses.[210] At issue was the alleged pretextual nature of the traffic stop, which led officers to discover illegal drugs.[211] The motorists, who did not dispute that the officers had probable cause to make a traffic stop,[212] argued that Fourth Amendment reasonableness required the Court to consider "whether a police officer, acting reasonably, would have made the stop for the reason given."[213] Although precedent had inconsistently treated the role of an officer's subjective motivations in assessing Fourth Amendment reasonableness, the Court asserted that "only an undiscerning reader would" fail to note that the cases fell into two broad categories:[214] when officers had probable cause for a search and when they did not.

The Court characterized the cases discussing motivation as "addressing the validity of a search conducted in the *absence* of probable cause,"[215] such as

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209. *Id.* at 818. The Court cited four cases exemplifying the exception, which allowed the Court to balance interests, even when the officers had probable cause. The "extraordinary" search or seizure cases involved using deadly force to seize a fleeing suspect, *Tennessee v. Garner,* 471 U.S. 1, 3 (1985); entering a home without a warrant for a minor offense, *Welsh v. Wisconsin,* 466 U.S. 740, 742 (1984); entering the home with a warrant but failing to knock and announce the officers' presence, *Wilson v. Arkansas,* 514 U.S. 927, 929 (1995); and seeking a warrant to remove a bullet from a suspect's body, *Winston v. Lee,* 470 U.S. 753, 755 (1984).

210. 517 U.S. at 808-09, 819. When an unmarked police car did a U-turn to position itself behind a truck, the truck turned without signaling and sped away. *Id.*

211. *Id.* at 810-11 (summarizing motorists' contentions that "'in the unique context of traffic regulations' probable cause is not enough" because officers may too easily use traffic violations as a pretext for stops motivated by the race of the driver).

212. *Id.* at 810.

213. Whren v. United States, 517 U.S. 806, 810 (1996).

214. *Id.* at 811.

215. *Id.* (emphasis in original).

inventory or administrative searches.[216] It attempted to distinguish precedent involving both probable cause and reference to subjective motivations as either unclear dictum in a *per curiam* opinion or as unimportant to its conclusion that a search was reasonable.[217] The Court concluded, "Subjective intentions play no role in ordinary, probable-cause Fourth Amendment analysis."[218]

The *Whren* Court characterized precedent as supporting its conclusion,[219] rather than admitting that prior decisions had left open the question of whether pretextual stops are constitutional. For example, the *Whren* Court inconsistently characterized *United States v. Robinson*,[220] a case examining the constitutionality of a search incident to a lawful arrest. The *Whren* Court characterized *Robinson* as supporting its dismissal of pretextual inquiries when officers have probable cause for a traffic stop. The Court selectively quoted from a footnote in *Robinson*, which stated in part:

> [The driver] argued below that [the officer] may have used the subsequent traffic violation arrest as a mere pretext for a narcotics search which would not have been allowed by a neutral magistrate had [the officer] sought a warrant. The Court of Appeals found that [the officer] had denied he had any such motive, and for the purposes of its opinion accepted the Government's version

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216. The Court quoted from several decisions that discussed an officer's motives: "'an inventory search must not be a ruse for a general rummaging in order to discover incriminating evidence,'" 517 U.S. at 811 (quoting Florida v. Wells, 495 U.S. 1, 4 (1990)); in upholding an inventory search, the Court noted that "'the police, who were following standardized procedures, [had not] acted in bad faith or for the sole purpose of investigation,'" 517 U.S. at 811 (quoting Colorado v. Bertine, 479 U.S. 367, 372 (1987)); in approving of a "warrantless administrative inspection," the Court stated "that the search did not appear to be 'a pretext' for obtaining evidence of . . . violation of . . . penal laws,'" 517 U.S. at 811 (quoting New York v. Burger, 482 U.S. 691, 716-17 n.27 (1987)).

217. The *Whren* Court noted that in *Colorado v. Bannister*, 449 U.S. 1, 4 n.4 (1980) (per curiam), it had stated "that 'there was no evidence whatsoever that the officer's presence to issue a traffic citation was a pretext to confirm any other previous suspicion about the occupants' of the car." Whren v. United States, 517 U.S. 806, 812 (1996). In attempting to diminish the significance of this statement in *Bannister*, the *Whren* Court characterized the statement as "dictum [that] *at most* demonstrates that the Court in *Bannister* found no need to inquire into the question now under discussion; not that it was certain of the answer." *Id.* (emphasis in original). It also emphasized that the statement had appeared in a footnote and was made in a per curiam decision. *Id.* In addition, the *Whren* Court invoked precedent that had dismissed pretextual assertions (even if the relevant language had occurred in a footnote). *Id.* at 812-13. The Court cited to the following cases: United States v. Villamonte-Marquez, 462 U.S. 579, 584 n.3 (1983) (upholding custom officials' warrantless boarding of a boat, even though the search occurred in the company of "a Louisiana state policeman," who was "following an informant's tip that a vessel in the ship channel was thought to be carrying marihuana'"); United States v. Robinson, 414 U.S. 218, 221 n.1 (1973) (upholding a search incident to "a traffic violation arrest" and rejecting the pretext claim because the arrest was both lawful and "not a departure from established police department policy"); Gustafson v. Florida, 414 U.S. 260, 266 (1973) (upholding a search incident to an arrest, even though the officer did not subjectively believe that the arrested driver was armed); Scott v. United States, 436 U.S. 128, 138 (1978) (characterizing *Robinson* as not examining the officer's subjective state of mind, "'as long as the circumstances, viewed objectively, justify that action'").

218. Whren v. United States, 517 U.S. 806, 813 (1996).

219. *Id.* ("We think these cases foreclose any argument that the constitutional reasonableness of traffic stops depends on the actual motivations of the individual officers involved.").

220. 414 U.S. 218 (1973).

> of that factual question, since even accepting that version it still found the search involved to be unconstitutional. We think it is sufficient for purposes of our decision that [the driver] was lawfully arrested for an offense, and that [the officer's] placing him in custody following that arrest was not a departure from established police department practice. We leave for another day questions which arise on facts different from these.[221]

The *Robinson* Court thus rejected the driver's claim because the officer had lawfully arrested the driver *and* because the arrest was consistent with department procedures. But in examining the question of pretextual police practices, the *Whren* Court separated the above footnote into two parts, characterizing them in dramatically different ways. It described the first part as stating a holding: "In *United States v. Robinson*, we *held* that a traffic-violation arrest . . . would not be rendered invalid by the fact that it was a 'mere pretext for a narcotics search.'"[222] It then described the second part – acting pursuant to department procedures – as "not even a dictum that purports to provide an answer, but merely one that leaves the question open."[223] Thus, the *Whren* Court used the first part of *Robinson*'s footnote to characterize precedent as permitting pretextual arrests when officers have probable cause, even though the adherence to official departmental procedures aided the *Robinson* Court's dismissal of the driver's claim.[224] The *Whren* Court's re-characterization of *Robinson,* which had emphasized the officer's performance of a lawful arrest conducted pursuant to departmental procedures, rhetorically set the stage for declaring irrelevant the fact that the officers in *Whren* had acted *contrary* to departmental procedures (an issue relevant in other contexts, such as inventory searches,[225] which according to *Whren* belong to a different Fourth Amendment category because the issue is the presence or lack of probable cause).

Ironically, referring to the companion case to *Robinson*, *Gustafson v. Florida*,[226] Justice Powell, in his *Robinson* concurrence, stated that the Court had not decided

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221. *Id.* at 221 n.1 (citation omitted).

222. *Whren*, 517 U.S. at 813 (emphasis added) (quoting Robinson, 414 U.S. at 221 n.1).

223. *Id.* at 816.

224. The *Whren* Court also used another decision's characterization and selective discussion of *Robinson* to support its dismissal of the pretextual claim. Whren v. United States, 517 U.S. 806, 813 (1996). The *Whren* Court quoted from *Scott v. United States*, 436 U.S. 128, 138 (1973), which pulled out a part of *Robinson* that stated that the officer did not need to subjectively believe that the arrested person was armed in order to justify the search incident to the arrest. *Id.* The *Scott* Court broadly characterized this proposition from *Robinson*: "We have since held that the fact the officer does not have the state of mind which is hypothecated by the reasons which provide legal justification for the officer's action does not invalidate the action taken as long as the circumstances, viewed objectively, justify that action." *Scott,* 436 U.S. at 138. The *Scott* Court did not examine footnote one of the *Robinson* decision, which explicitly discussed pretext and noted that the arrest was both lawful and consistent with department procedure.

225. *See, e.g.*, Florida v. Wells, 495 U.S. 1, 4 (1990) (striking down practice of opening locked suitcase during an inventory search because the Florida Highway patrol had no policy about when to open closed containers).

226. 414 U.S. 260 (1973).

how to handle pretextual questions.[227] He stated, "*Gustafson* would have presented a different question if the [driver] could have proved that he was taken into custody only to afford a *pretext* for a search actually undertaken for collateral objectives."[228] Thus, Justice Powell's view of *Robinson* directly conflicts with the *Whren* Court's characterization of *Robinson*. In the end, the *Whren* Court rhetorically framed *Robinson* to stand for the proposition that pretextual claims are irrelevant in determining the reasonableness of traffic stops.

Later, the Court invoked *Whren*, with its selective characterization of *Robinson*, to justify its refusal to consider an officer's subjective motivations in arresting a driver for minor traffic offenses.[229] Four justices, in a similar decision,[230] disagreed that *Whren* had any application to arrests for traffic violations; these justices limited *Whren* to its facts, stating that "our words [should not] be taken beyond their context,"[231] and that "[t]here are significant qualitative differences between a traffic stop and a full custodial arrest."[232]

Even though *Whren* characterized precedent as giving probable cause a special role in evaluating pretext-based claims, a majority of the Court in subsequent decisions gradually shifted the probable cause line to a "reasonable suspicion" line. Initially, in *City of Indianapolis v. Edmond*,[233] the Court described *Whren* as a "probable cause" case,[234] stating that *Whren* "does not preclude an inquiry into programmatic purpose"[235] when officials establish a roadblock, a practice in which officers lack both probable cause and reasonable suspicion. The Court also merged subjective motivation questions with purpose inquiries under the Fourth Amendment.[236] Yet three dissenting justices characterized *Whren* as barring subjective motivation inquiries, even in the absence of reasonable suspicion.[237]

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227. *Robinson*, 414 U.S. at 218 n.2. (Powell, J., concurring).

228. *Id.* (emphasis added).

229. Arkansas v. Sullivan, 532 U.S. 770, 1878 (2001) (per curiam). The *Sullivan* Court extended *Whren* to a different context—custodial arrests for minor traffic violations:

> That *Whren* involved a traffic stop, rather than a custodial arrest, is of no particular moment; indeed, *Whren* itself relied on *United States v. Robinson*, for the proposition that 'a traffic-violation arrest . . . [will] not be rendered invalid by the fact that it was a mere pretext for a narcotics search.'

Id. (quoting Whren, 517 U.S. at 812-13).

230. Atwater v. City of Lago Vista, 532 U.S. 318, 362 (2001) (O'Connor, J., dissenting). Joining the dissenting opinion were Justices Stevens, Ginsburg, and Breyer.

231. *Id.* at 363.

232. *Id.*

233. Indianapolis v. Edmond, 531 U.S. 32 (2000).

234. *Id.* at. 45.

235. *Id.* at 46.

236. *Id.* at 45.

237. *Id.* at 51 (Rehnquist, C.J., dissenting). Joining the dissenting opinion were Justices Scalia and Thomas. The characterization dispute between the majority and dissent in *Edmond* centered on a brief comment the Court made about *Whren* in *United States v. Bond*, 529 U.S. 334 (2000), a case discussing whether officers had conducted a "search."

In *Bond*, the Court held that an officer had conducted a Fourth Amendment "search" when he "squeezed" a bus

A majority of the Court eventually re-characterized *Whren* in *United States v. Knights*.[238] The *Knights* Court stated that subjective intentions are not relevant to Fourth Amendment reasonableness when officers have "reasonable suspicion" of criminal activity,[239] a standard considerably less demanding than "probable cause." The *Knights* Court did not directly distinguish *Whren*'s emphasis on the issue of probable cause.[240] Instead, the *Knights* Court changed the line from probable cause to reasonable suspicion by reinterpreting *Whren*: subjective intentions are not relevant in determining reasonableness when reviewing "ordinary" or "general" criminal investigations.[241] Selectively quoting from *Whren*, the Court stated, "With the limited exception of some special needs and administrative search cases . . . 'we have been unwilling to entertain Fourth Amendment challenges based on the actual motivations of individual officers.'"[242] Only Justice Souter, in an concurring opinion, admitted that *Whren* had not decided the proposition assumed by the Court: that subjective intentions are not relevant when officers have only reasonable suspicion, not probable cause, of criminal activity.[243]

The *Knights* Court held that purpose inquiries are relevant to "some special needs and administrative search cases" but not to "ordinary" criminal investigations.[244] It examined the facts of the case under its construction of an "ordinary"

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passenger's canvas bag. *Bond*, 529 U.S. at 339. The Court mentioned both aspects of the *Katz* "search" standard: the challenged governmental action must implicate both an individual's subjective as well as objective expectation of privacy, one that "society is prepared to recognize as reasonable." *Id.* at 338. After mentioning the second aspect, the Court, in a footnote, noted that neither party asserted that the officer's motivation in squeezing the bag was relevant. *Id.* at 338 n.2. The *Bond* Court quoted *Whren*: "'we have been unwilling to entertain Fourth Amendment challenges based on the actual motivations of individual officers.'" *Id.* (quoting *Whren*, 517 U.S. at 813). The *Bond* Court explained that when considering whether a "search" occurred "the issue is not [the officer's] state of mind, but the objective effect of his actions." *Id.* Two dissenting justices reiterated this perspective of *Whren* as applied to the search question: "[I]n determining whether an expectation of privacy is reasonable, it is the *effect*, not the purpose, that matters." *Id.* at 341 (Breyer, J., dissenting) (emphasis in original).

When the *Edmond* majority and dissent interpreted *Bond*'s discussion of *Whren*, they characterized differently what the Court meant. For the majority in *Edmond*, the *Bond* decision described *Whren* only to state that it had no application when the preliminary issue is whether a "search" occurred. Indianapolis v. Edmond, 531 U.S. 32, 46 (2000). The majority did not view *Bond* as extending *Whren*. "[N]othing in *Bond* suggests that we would extend the principle of *Whren* to all situations where individualized suspicion was lacking." *Id.* In contrast, the dissent viewed *Bond* as "applying *Whren* to determine if an officer's conduct amounted to a "search" under the Fourth Amendment." *Id.* at 52 (Rehnquist, C.J., dissenting). For the dissent, the suspicionless roadblocks furthered the valid purposes of preventing drunken driving and furthering licensing and registration of drivers, even if officers subjectively intended to interdict drugs. *Id.* at 51.

238. *See* 534 U.S. 112, 121 (2001).

239. *Id.* at 122.

240. *See id.*

241. *See id.*

242. United States v. Knights, 534 U.S. 112, 122 (2001) (quoting *Whren v. United States*, 517 U.S. 806, 813 (1996)).

243. *Id.* at 123 (Souter, J., concurring) ("I would therefore reserve the question whether *Whren*'s holding, that '[s]ubjective intentions play no role in ordinary, probable-cause Fourth Amendment analysis' . . . should extend to searches based only upon reasonable suspicion.").

244. *Id.* at 122.

criminal investigation,[245] thus dismissing the "special needs" line of cases in which purpose was at issue.

The criminal defendant in *Knights* relied on *Griffin v. Wisconsin*,[246] a case in which the Court used the "special needs" line of cases to decide the protections that the Fourth Amendment provides to a probationer.[247] In contrast, the government argued for application of the Fourth Amendment consent doctrine because, as a condition of his probation, Knights had agreed to warrantless, suspicionless searches.[248] The Court ultimately refused to decide the case under either doctrine, choosing instead to broadly characterize the case as an "ordinary" criminal case,[249] one in which it must merely balance interests. Yet the *Knights* decision does not read like an "ordinary" criminal case, because not a single justice invoked the long line of precedents discussing the special Fourth Amendment protection associated with the home – the need for probable cause and a warrant, or the existence of exigent circumstances. Although the *Knights* Court mentioned both probable cause and a warrant, it quickly dismissed their application because what mattered was that officials searched the home of a probationer rather than that of an "ordinary" citizen.[250]

The facts in *Knights* resembled, but were not identical to, those in *Griffin*. In *Knights*, a probationer challenged the warrantless search of his home, admitting that the officers had reasonable suspicion that he had engaged in criminal activity while on probation.[251] The basis of his challenge was that the officials had searched his home without a warrant for an "investigative" purpose as opposed to a "probationary" purpose.[252] In *Griffin*, where a probationer challenged the warrantless search of his home for a gun, the Court explained that the case was "different from the ordinary case,"[253] in which officers would need both a warrant and probable cause, or probable cause and exigent circumstances. In short, *Griffin* viewed the probation system as creating a "special need" to further "an ongoing supervisory relationship – and one that is not, or at least not entirely, adversarial – between the object of the search and the decisionmaker."[254] The *Knights* Court stated that it did not need to apply *Griffin* because it had left this discourse path unexplored in *Griffin*; the *Griffin* Court had stated that it was "'unnecessary to consider whether' warrantless searches of probationers were otherwise reasonable

245. *See id.*

246. 483 U.S. 868, 873-874 (1987).

247. The *Knights* Court described *Griffin* as a "special needs" case. *Knights*, 534 U.S. 112, 117 (2001) ("We held [in *Griffin*] that a State's operation of its probation system presented a 'special need' for the 'exercise of supervision to assure that [probation] restrictions are in fact observed.'") (quoting *Griffin*, 483 U.S. at 875).

248. United States v. Knights, 534 U.S. 112, 118 (2001).

249. *Id.* at 122.

250. *Id.* at 121.

251. *Id.* at 122.

252. *Id.* at 117.

253. Griffin v. Wisconsin, 483 U.S. 868, 878 (1987).

254. *Id.* at 879.

within the meaning of the Fourth Amendment."[255] Ironically, the *Griffin* Court expressly refused to consider the path later used in *Knights* because it would require the Court "to embrace a new principle of law;" it instead opted for the "special needs" path, which it characterized as having "well-established principles."[256]

Even though the *Knights* Court did not apply *Griffin*'s special needs analysis to the case, it ironically quoted *Griffin* (a "special needs" case) repeatedly to characterize how it should strike the balance of interests (in this "ordinary" criminal case).[257] In both cases, the Court characterized the probationer as having a diminished interest in liberty,[258] and the government as having dual interests in furthering the rehabilitation and protecting society from future crime.[259] The *Knights* Court thus balanced the same interests it identified in *Griffin*, but under a different paradigm. The *Knights Court* constructed a difference in the paradigms by declaring that in the "ordinary" criminal case "official purpose" is not an issue.[260] The Court stated that its balancing led it to conclude that reasonable suspicion was sufficient to justify a warrantless search of a home, citing *Terry v. Ohio* for support.[261]

Thus, even though the *Knights* Court tersely noted that "the Fourth Amendment ordinarily requires the degree of probability embodied in the term 'probable cause,'"[262] it found this case different, in part because the search was of a probationer's home, not of "an ordinary citizen."[263] This type of rhetorical argument – this case is different – ironically is also part of the "special needs" analysis of *Griffin*.[264] By refusing to apply *Griffin*, the *Knights* Court avoided ascertaining whether the officers' purpose in searching the home furthered a "special need," but only because the Court expanded *Whren* to include searches based on reasonable suspicion. Thus, the *Knights* Court reinterpreted the subjective motivations question: the decisive consideration was no longer the presence of probable cause, but the line between "ordinary" criminal investigations (of probationers) and those involving special needs and administrative searches.

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255. United States v. Knights, 534 U.S. 112, 117-118 (2001) (quoting *Griffin*, 483 U.S. at 880).

256. *Griffin*, 483 U.S. at 872-873.

257. *See Knights*, 534 U.S. at 118-120.

258. *Id.* at 119 (noting that "probationers do not enjoy 'the absolute liberty to which every citizen is entitled'") (quoting *Griffin*, 483 U.S. at 874).

259. *Id.* at 119-120 (stating that the primary goals of probation are "rehabilitation and protecting society from future criminal violations" and that "'the very assumption of the institution of probation' is that the probationer 'is more likely than the ordinary citizen to violate the law'") (quoting *Griffin*, 483 U.S. at 875, 880).

260. *Id.* at 122 ("Because our holding rests on ordinary Fourth Amendment analysis that considers all the circumstances of a search, there is no basis for examining official purpose.").

261. United States v. Knights, 534 U.S. 112, 121 (2001) (citing Terry v. Ohio, 392 U.S. 1 (1968)).

262. 534 U.S. at 121.

263. *Id.*

264. *See* Griffin v. Wisconsin, 483 U.S. 868, 873-874 (1987) ("A State's operation of a probation system, like its operation of a school, government office or prison, or its supervision of a regulated industry, likewise presents 'special needs' beyond normal law enforcement that may justify departures from the usual warrant and probable-cause requirements.").

2. *Police Officers Possessing Probable Cause: Balancing Interests Only In "Extraordinary" Circumstances*

Whren and its progeny also reveal the Court's shifting perspectives on when a Fourth Amendment case requires it to balance interests. Under *Whren*, the Court does not need to engage in a separate balancing of interests to determine the reasonableness of a search or seizure supported by probable cause, unless officers acted "in an extraordinary manner."[265] In contrast, both before and after *Whren*, the Court has at times construed precedent to require balancing of interests to create a new rule for reasonableness, even when officers had probable cause; this line of precedent indicated that balancing was necessary when the common law was not clear. These two contrasting precedential paths surfaced recently in *Atwater v. City of Lago Vista*,[266] with the majority declaring *Whren*'s general "no balancing rule" applicable,[267] and the dissent invoking precedent to require balancing.[268] An examination of *Whren* and the contrasting framings of precedent in *Atwater* reveal how rhetorical framings matter in assessing reasonableness: the majority upheld the arrest for a minor traffic offense, and the dissent declared it unreasonable under its balancing of interests.

In *Whren*, the stopped motorists asked the Court to determine the reasonableness of stopping individuals for minor offenses by balancing the interests.[269] The *Whren* Court admitted "that in principle every Fourth Amendment case, since it turns upon a 'reasonableness' determination, involves a balancing of all relevant factors."[270] Yet, even with this admission, the Court used the presence of probable cause to bar balancing, except in "rare" cases.[271] Again, the *Whren* Court attempted to use probable cause as a line, this time for determining when a court is to balance interests. The Court defined the exception to its general rule by characterizing balancing in the presence of probable cause to be permissible when the officers conducted searches or seizures "in an extraordinary manner, unusually harmful to an individual's privacy or even physical interests."[272]

The Court cited four cases as examples illustrating its exception to the general no-balancing rule when officers act with probable cause, two of which involved the infliction of harm to a suspect's body, and two of which concerned the entering of a suspect's home.[273] In *Tennessee v. Garner*,[274] the Court balanced competing

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265. Whren v. United States, 517 U.S. 806, 818 (1996).
266. 532 U.S. 318, 354 (2001).
267. *See id.*
268. *See id.* at 361 (O'Connor, J., dissenting).
269. Whren v. United States, 517 U.S. 806, 816 (1996).
270. *Id.* at 817.
271. *Id.*
272. *Id.* at 818.
273. *See id.*
274. 471 U.S. 1 (1985).

interests to determine that officers could use deadly force to seize a fleeing suspect only when the officers had probable cause that the suspect had "committed a crime involving the infliction or threatened infliction of serious physical harm" or posed a threat of "serious physical harm, either to the officer[s] or to others."[275] In *Winston v. Lee*,[276] the Court held that even in the presence of probable cause and a court order authorizing surgery to remove a bullet from a suspect, the removal of the bullet would be unreasonable.[277] The balance of interests, for the *Winston* Court, did not justify such a serious intrusion into an individual's body.[278]

When the intrusion involved privacy interests associated with the home, the Court in *Wilson v. Arkansas*[279] stated that the common law "may" guide the Court's assessment of the "Fourth Amendment's flexible requirement of reasonableness;"[280] it held that officers generally must knock and announce their presence in executing search warrants.[281] And in *Welsh v. Wisconsin*,[282] the Court held that entering a home to arrest a person for a non-jailable offense was unreasonable.[283] The *Welsh* Court characterized the state's interest in arresting a person for driving while intoxicated as not weighty because the state had made the first violation a non-jailable offense.[284] For the *Whren* Court, each of these cases was "extraordinary," allowing the Court to balance interests despite the presence of probable cause.

In contrast, the modern Court has selectively invoked and re-characterized another line of precedent to decide reasonableness, construing it to create a two-part inquiry. First, the Court determines whether the common law considered the challenged action unlawful; if the common law was unclear as to the particular action, then the Court was to balance interests. Initially, in the 1925 decision of *Carroll v. United States*,[285] the Court phrased these as joint inquiries: "The Fourth Amendment is to be construed in the light of what was deemed an unreasonable search and seizure when it was adopted, and in a manner which will conserve public interests as well as the interests and rights of individual citizens."[286] In

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275. *Id.* at 11.
276. 470 U.S. 753 (1985).
277. *Id.* at 767.
278. *See id.* at 759, 766.
279. 514 U.S. 927 (1995).
280. *Id.* at 931, 934.
281. *Id.* at 936 ("We need not attempt a comprehensive catalog of the relevant countervailing factors here. For now, we leave to the lower courts the task of determining the circumstances under which an unannounced entry is reasonable under the Fourth Amendment."). The *Wilson* Court remanded the case for an examination of the facts to determine if the officers acted reasonably despite their failure to knock and announce their presence when they executed the search warrants.
282. 466 U.S. 740 (1984).
283. *Id.* at 754.
284. *Id.*
285. 267 U.S. 132 (1925).
286. *Id.* at 148.

Carroll, the Court determined that officers acted reasonably in stopping a car without a warrant when they had probable cause to believe that it was carrying contraband. In time, the Court would re-characterize the first question – how did the common law view the challenged action – from being a "guide"[287] to being a "relevant, if not entirely dispositive consideration of what the Framers might have thought to be reasonable."[288]

Whren and *Carroll* and their progenies represented two contrasting lines of precedent regarding the Court's need to balance interests. *Whren* barred balancing when an officer had probable cause for a traffic stop. And *Carroll* had two prongs, one considering the clarity of the common law practice and the other permitting balancing. These two precedential lines eventually collided in *Atwater v. City of Lago Vista*, which upheld an officer's authority to arrest a driver for fine-only violations. Initially, both the majority and dissent invoked the modern version of *Carroll*'s two-part inquiry, questioning whether the common law was clear. The majority and dissent disagreed regarding how to characterize the application of both inquires, but the more dramatic precedential collision occurred with respect to the balancing inquiry.

The Court equivocated in describing the clarity of the historical inquiry. It stated that "history, if not unequivocal, has expressed a decided, majority view that the police need not obtain an arrest warrant merely because a misdemeanor stopped short of violence or threat of it."[289] The dissent, in contrast, characterized the majority's historical review as "inconclusive."[290] With the majority discerning a general historical view of reasonableness, it then characterized the second prong as not requiring a case-by-case assessment of reasonableness. Although the majority admitted that it might find the officer's conduct unreasonable if it were to examine the totality of the circumstances, it declared that precedent required a bright-line rule, not case-by-case analysis. It stated that it had "traditionally recognized that a responsible Fourth Amendment balance is not well served by standards requiring sensitive, case-by-case determinations of government need, lest every discretionary judgment in the field be converted into an occasion for constitutional review."[291]

In addition, the majority specifically invoked *Whren* to justify its refusal to balance interests. It noted that the officer had probable cause for the arrest[292] and the facts were not "extraordinary" as described by *Whren*. The majority thus refused to balance interests, both because it construed precedent to require a

287. Wilson v. Arkansas, 514 U.S. 927, 931 (1995).

288. Payton v. New York, 445 U.S. 573, 591 (1980). The majority opinion in *Atwater v. City of Lago Vista*, 532 U.S. 315, 326 (2001), quoted this framing of reasonableness.

289. Atwater v. City of Lago Vista, 532 U.S. 318, 345 (2001).

290. *Id.* at 361 (O'Connor, J., dissenting).

291. *Id.* at 321.

292. *Id.* at 354-54.

bright-line rule and because it described *Whren* as barring balancing for an arrest that was not "extraordinary."

The dissent, however, went down a different precedential path because it characterized the second prong as requiring case-by-case analysis and characterized *Whren* as inapplicable. The dissent invoked *Terry v. Ohio*'s balancing of interests, which examined the facts of the particular case; the majority, citing *Whren*, determined that *Terry* did not apply because the officer in *Terry* lacked probable cause.[293] The dissent also characterized *Whren* as inapplicable because of factual differences: *Whren* addressed the reasonableness of traffic stops; *Atwater* concerned the reasonableness of "a full custodial arrest."[294] In addition, the dissent characterized *Atwater* as a case of first impression, stating that "we have never considered the precise question presented here."[295]

Thus, in the end, if case-by-case analysis applied, a unanimous Court probably would have held that the arrest for a fine-only violation was unreasonable. Yet, because the majority and dissent chose different precedential reasonableness paradigms to frame their reasonableness assessment, they were able to come to different conclusions. The Court's divergent interpretations of precedent thus give rise to different ways of defining reasonableness.

B. Bright-line Rules Versus Case-by-Case Analysis

The Court has often characterized its past decisions as providing for either case-by-case analysis or bright-line rules. These choices are murky, however, for even the justices have disagreed as to when a past decision created a rule that is "bright"[296] and clear enough for officers to implement easily.[297] Moreover, the

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293. *Id.* at 347 n.16.

294. Atwater v. City of Lago Vista, 532 U.S. 318, 363 (2001) (O'Connor, J., dissenting).

295. *Id.* at 362.

296. *See, e.g.*, Robbins v. California, 453 U.S. 420, 437 (1981) (Rehnquist, J., dissenting), *overruled by* United States v. Ross, 456 U.S. 798, 824 (1982). In his *Robbins* dissent, Justice Rehnquist strongly undercut the idea of a "bright-line" rule. 453 U.S. at 437 ("Our entire profession is trained to attack 'bright lines' the way hounds attack foxes. Acceptance by the courts of argument that one thing is the 'functional equivalent' of the other, for example, soon breaks down what might have been a bright line into a blurry impressionistic pattern.").

297. Whether a decision had embraced or rejected a rule as "bright" depends on a particular justice's perspective. The classic case highlighting this conflict is *New York v. Belton*, 453 U.S. 454 (1981), in which the majority characterized the following rule as "workable," giving officers in the field guidance: "when a policeman has made a lawful custodial arrest of the occupant of an automobile, he may, as contemporaneous incident of that arrest, search the passenger compartment of that automobile." *Id.* at 460.

In contrast, the dissent stated that "the Court's attempt to forge a 'bright-line' rule fails on its own terms." *Id.* at 469 (Brennan, J., dissenting). The dissent characterized the majority's rule as confusing officers on many issues, such as what constitutes a "contemporaneous" search (five minutes, 30 minutes, three hours after the arrest?); what if officers developed probable cause after the suspect left the vehicle; does the rule apply to other contexts; may officers open "locked glove compartments, the interior door panels, or the areas under floorboards;" and does the rule apply to station wagons and "hatchbacks." *Id.* at 470.

When the government sought to extend searches incident to a traffic citation, the Court refused, declaring that the rationale did not apply. *See* Knowles v. Iowa, 525 U.S. 113, 119 (1998) (refusing "to extend that 'bright-line

Court has at times created exceptions for some "bright-line" rules.[298] At other times, it has created a presumptive rule for reasonableness.[299] In addition, the terms of a "bright-line" rule may also create difficulties; for example, even when the Court announces that probable cause or reasonable suspicion signifies reasonableness, officers still face the task of knowing whether particular facts create "probable cause" or "reasonable suspicion" of criminal activity.[300]

Unsurprisingly, the Court has not offered a grand theory explaining when it will create a bright-line rule (or a presumption) and when it will engage in case-by-case construction. It has inconsistently characterized its presumptive choice—sometimes describing bright-line rules as the norm,[301] and sometimes describing case-by-case adjudication as the Court's traditional path.[302] Thus, these two paths

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rule' [created in *Belton* and *United States v. Robinson*, 414 U.S. 218 (1973)] to a situation where the concern for officer safety is not present to the same extent and the concern for destruction of evidence is not present at all"). *See also* Kyllo v. United States, 533 U.S. 27, 47 (2001) (Stevens, J., dissenting) ("Despite the Court's attempt to draw a line that is 'not only firm but also bright,' . . . the contours of its new rule are uncertain because its protection apparently dissipates as soon as the relevant technology is 'in general public use.'").

298. *See, e.g.*, United States v. Whren, 517 U.S. 806, 813, 818 (1996) (holding that officers act reasonably when they stop a driver for a traffic offense based on probable cause, regardless of their subjective intentions, but stating that probable cause does not *per se* signify reasonableness in certain extraordinary circumstances).

299. *See, e.g.*, County of Riverside v. McLaughlin, 500 U.S. 44, 56-57 (1991). In *McLaughlin*, the Court stated that officials act presumptively reasonably when they provide detained suspects a judicial probable-cause determinations within forty-eight hours of arrest. Suspects may nevertheless challenge such detentions if the purpose of the detention was to gather "additional evidence to justify the arrest," if the officials acted with "ill will," or, in the Court's words, if they engaged in "delay for delay's sake." *Id* at 56. Yet the government can challenge the forty-eight hours presumption by "demonstrat[ing] the existence of a bona fide emergency or other extraordinary circumstance." *Id.* at 57.

With these reasonableness rules, both suspects and the government have litigated the meaning of the Court's exceptions to the forty-eight hour presumption as well as the remedy for noncompliance. *See, e.g.*, Powell v. Nevada, 511 U.S. 79, 84 (1994) (holding that *McLaughlin* applied retroactively to all cases "'pending on direct review or not yet final,'" but leaving open what remedy applies to the government's failure to provide a timely judicial determination of probable cause) (quoting Griffith v. Kentucky, 479 U.S. 314, 328 (1987)).

In addition, the modern Court has described the warrant "requirement" as an aspect of reasonableness, as it noted the numerous exceptions that had evolved through the years. *See supra* text accompanying notes 12-15.

300. *See, e.g.*, Illinois v. Wardlow, 528 U.S. 119, 126 (2000) (holding that officers had reasonable suspicion to justify investigatory stop); Alabama v. White, 496 U.S. 325, 332 (1990) (deciding that officers had reasonable suspicion of criminal activity); United States v. Sokolow, 490 U.S. 1, 11 (1989) (deciding that officers had reasonable suspicion to justify an investigatory stop). The difficulty of determining whether information adds up to probable cause or reasonable suspicion relates to the Court's totality of circumstances approach to both standards. *See, e.g., id.* at 7 (stating that the "concept of reasonable suspicion, like probable cause, is not 'readily, or even usefully, reduced to a neat set of legal rules'") (quoting Illinois v. Gates, 462 U.S. 213, 232 (1983)).

301. *See, e.g.*, Atwater v. City of Lago Vista, 532 U.S. 318, 347 (2001) ("[W]e have traditionally recognized that a responsible Fourth Amendment balance is not well served by standards requiring sensitive, case-by-case determinations of government need, lest every discretionary judgment in the field be converted into an occasion for constitutional review.").

302. Maryland v. Wilson, 519 U.S. 408, 413 n.1 (1997) (explaining the fact "that we typically avoid *per se* rules concerning searches and seizures does not mean that we have always done so").

In the context of deciding whether interactions between an officer and a person were voluntary or whether a seizure occurred, the Court has frequently rejected *per se* rules. *See, e.g.*, United States v. Drayton, 536 U.S. 194, 201 (2002) (in examining whether a seizure occurred, the Court noted that "for the most part *per se* rules are inappropriate in the Fourth Amendment context"); Ohio v. Robinette, 519 U.S. 33, 39 (1996) (in rejecting rule that

offer the Court very different rhetorical framings for its decisions: one is supposedly limited to the facts of the case, while the other is intended to govern all cases falling within the Court's categorical rule.

Although case-by-case analysis affords the Court the option of declaring a holding limited to the facts of the particular case, the nature of precedent itself also allows the Court to extend the reasoning of one case to another case with different facts.[303] This

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officer must inform drivers that they are free to leave before requesting consent to search their cars, Court stated that it had "consistently eschewed bright-line rules" and had "emphasiz[ed] the fact-specific nature of the reasonableness inquiry"). The *Robinette* Court quoted from several decisions to support is case-by-case approach:

> [I]n *Florida v. Royer*, 460 U.S. 491 (1983), we expressly disavowed "any 'litmus-paper test' or single 'sentence or . . . paragraph . . . rule," in recognition that of the "endless variations in the facts and circumstances implicating the Fourth Amendment. . . . Then, in *Michigan v. Chesternut*, 486 U.S. 567 (1988), when both parties urged "brightline rule[s] applicable to all investigatory pursuits, we rejected both proposed rules as contrary to our "traditional contextual approach." . . . And again, in *Florida v. Bostick*, 501 U.S. 429 (1991), when the Florida Supreme Court adopted a *per se* rule that questioning aboard a bus always constitutes a seizure, we reversed, reiterating that the proper inquiry necessitates a consideration of "all the circumstances surrounding the encounter."

519 U.S. at 39. The *Robinette* Court also noted that its consent doctrine also had rejected *per se* rules. *Id.* (citing Schneckloth v. Bustamonte, 412 U.S. 218 (1978), which rejected a *per se* rule requiring officers to tell suspects they have a Fourth Amendment right to refuse the officers' request for voluntary cooperation).

303. *See, e.g.*, Colorado v. Bertine, 479 U.S. 367 (1987). In *Bertine*, a majority upheld an inventory of a car, declaring that "principles enunciated in [prior] cases govern the present one." *Id.* at 376. The majority explicitly declared precedent "distinguishable," but nevertheless characterized the "principles" of precedent that led it to its reasonableness determination. *Id.* In contrast, the dissent in *Bertine* stated that the "distinctive facts of this case require a different result." *Id.* at 377 (Marshall, J, dissenting). In addition, the Court has also characterized a case as having a significant distinction from decided cases, with the Court using this difference to justify its different result. For example, in *United States v. Villamonte-Marquez*, 462 U.S. 579, 592 (1983), the Court distinguished vessels in open areas from vehicles on public roads:

> Random stops without any articulable suspicion of vehicles away from the border are not permissible under the Fourth Amendment . . . but stops at fixed checkpoints and roadblocks are. . . . The nature of waterborne commerce in waters providing ready access to open sea is sufficiently different from the nature of vehicular traffic on highways as to make possible alternatives to the sort of "stop" made in this case less likely to accomplish the obviously essential governmental purposes involved.

Id. at 592-93. Even when the Court has purported to create a "rule," it may nevertheless end up with endless case-by-case adjudication as to reasonableness. For example, in *Tennessee v. Garner*, 471 U.S. 1, 11 (1985), the Court rejected the common-law rule that officers may use deadly force in apprehending fleeing felons and adopted the following more limited "rule":

> Where the officer has probable cause to believe that the suspect poses a threat of serious physical harm, either to the officer or to others, it is not constitutionally unreasonable to prevent escape by using deadly force. Thus, if the suspect threatens the officer with a weapon or there is probable cause to believe that he has committed a crime involving the infliction or threatened infliction of serious physical harm, deadly force may be used if necessary to prevent escape, and if, where feasible, some warning has been given.

Garner, 471 U.S. at 11-12. Since *Garner*, the courts have offered numerous contrasting constructions of when officers may use deadly force. *See, e.g.*, Kathryn R. Urbonya, *Dangerous Misperceptions: Protecting Police Officers, Society, and the Fourth Amendment Right to Personal Security*, 22 HAST. CON. L. Q. 623 (1995). The Court later explicitly described the reasonableness inquiry as applied to non-deadly force to be a totality of

progressive extension represents the common law approach to constitutional interpretation.

For example, in *Terry v. Ohio*,[304] the Court created reasonable suspicion as a measure of reasonableness under the particular facts, an investigatory stop and frisk of possibly armed thieves.[305] In time, the justices not only disagreed as to how "to give some flesh to the bones of *Terry*,"[306] that is, how it applied to different kinds of criminal investigatory stops and frisks,[307] but also as to whether *Terry*'s reasonable suspicion standard extended to regulatory, civil searches, such

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circumstances standard. In *Graham v. Connor*, the Court listed relevant factors for deciding whether officials used reasonable force: "the severity of the crime at issue, whether the suspect poses an immediate threat to the safety of the officers or others, and whether he is actively resisting arrest." 490 U.S. 386, 396 (1989). Relying upon this standard of examining "the facts and circumstances of each particular case," *id.*, the Court recently explained that this amorphous standard would allow officers to have qualified immunity when they do in fact use unreasonable force in some circumstances. *See* Saucier v. Katz, 533 U.S. 194, 205-06 (2001) ("*Graham* does not always give a clear answer as to whether a particular application of force will be deemed excessive by the courts. This is the nature of a test which must accommodate limitless factual circumstances."). The Court further declared, "qualified immunity can apply in the event the mistaken belief was reasonable." *Id.* at 206.

304. 392 U.S. 1, 30 (1968). For a discussion of the *Terry* Court's rhetorically framing the text of the Fourth Amendment to create a "reasonable suspicion" standard for investigatory stops and frisks, see *supra* notes 20-29.

305. 392 U. S. at 30. The Court explicitly declared that its new *Terry* standard described a case-by-case approach to examining police officers' investigatory stops and frisks: "Each case of this sort will, of course, have to be decided on its own facts." *Id.* Rhetorically the Court invoked the word "merely" as if to signify that it had not actually created a dramatic shift in Fourth Amendment jurisprudence:

> We *merely* hold today that where a police officer observes unusual conduct which leads him reasonably to conclude in light of his experience that criminal activity may be afoot and that the persons with whom he is dealing with may be armed and presently dangerous, where in the course of investigating this behavior he identifies himself as a policeman and makes reasonable inquiries, and where nothing in the initial stages of the encounter serves to dispel his reasonable fear for his own or others' safety, he is entitled for the protection of himself and others in the area to conduct a carefully limited search of the outer clothing of such persons in an attempt to discover weapons which might be used to assault him. Such a search is a reasonable search under the Fourth Amendment, and any weapons seized may properly be introduced in evidence against the person from whom they were taken.

Id. at 30-31. (emphasis added).

306. Adams v. Williams, 407 U.S. 143, 153 (1972) (Marshall, J., dissenting). In criticizing the Court's expansion of *Terry*, Justice Marshall continued his analogy: "Unfortunately, the flesh provided by today's decision cannot possibly be made to fit on *Terry*'s skeletal framework." *Id.* at 154.

307. *See, e.g., id.* at 148. In *Adams*, the majority held that *Terry* applied to investigatory stops for possessory offenses of drugs and weapons, *id.* at 148-49; three justices rejected the extension, *id.* at 149, 150-51 (Douglas, J., dissenting, joined by Justice Marshall); *id.* at 151 (Brennan, J., dissenting); and two dissenting justices required the officer to have personal knowledge of the alleged criminal activity rather than rely on an informant's details, *id.* at 158 (Marshall, J., dissenting). Marshall invoked a classic rhetorical device to limit precedent by describing it to contain a "central" focus: "It was central to our decision in *Terry* that the police officer acted on the basis of his own personal observations and that he carefully scrutinized the conduct of his suspects before interfering with them in any way." *Id.*

Since *Terry*, however, the Court has at times refused to extend its reasoning. *See, e.g.*, Florida v. J.L. 529 U.S. 266, 272-72 (2000) (refusing to create a "firearms" exception to *Terry*, which would have justified a stop and frisk when officers receive a "tip alleging an illegal gun" that "would fail standard pre-search reliability"); Minnesota v. Dickerson, 508 U.S. 366, 374-75 (1993) (holding that police officers may seize illegal drugs during a *Terry* frisk only if their ordinary touch gives rise to probable cause).

as the government's search of a student's purse,[308] and its drug testing of employees[309] and school children.[310] In addition, the justices considered whether reasonable suspicion justified officials' "cursory" inspections of objects,[311] cursory inspections of homes while executing an arrest warrant to make sure other individuals would not "unexpectedly launch an attack,"[312] and unannounced entry into a house while executing a search warrant.[313]

The Court has, however, at times rejected *Terry*'s case-by-case analysis and opted for supposed "bright-line rules."[314] This approach gives rise to a number of

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308. *See* New Jersey v. T.L.O., 469 U.S. 325, 341 (1985). The *T.L.O.* Court directly looked to *Terry* to frame the reasonableness question of whether a public school official violated the Fourth Amendment when searching a student's purse. *Id.* The Court quoted *Terry*:

> Determining the reasonableness of any search involves a twofold inquiry: first, one must consider "whether the . . . action was justified at its inception". . .second, one must determine whether the search as actually conducted "was reasonably related in scope to the circumstances which justified the interference in the first place."

Id. (quoting *Terry*, 392 U.S. at 20). In applying *Terry*'s reasonable suspicion standard, the *T.L.O.* Court upheld the search. *See id.* at 346-47. Yet, in later cases, a majority of the Court would invoke *T.L.O.* to justify drug-testing students even in the absence of reasonable suspicion. *See* Board of Educ. v. Earls, 536 U.S. 822, 828 (2002) (upholding suspicionless drug testing of students engaged in competitive extracurricular activities); Vernonia v. Acton, 515 U.S. 646, 653 (1995) (upholding suspicionless drug testing of student athletes).

309. *See* Chandler v. Miller, 520 U.S. 305, 309 (1997) (striking down state's requirement of drug testing candidates running for state office); Nat'l Treasury Employees Union v. Von Raab, 489 U.S. 656, 679 (1989) (upholding suspicionless drug testing of custom agents and officers carrying guns, but remanding for reconsideration of drug testing employees handling classified information); Skinner v. Ry. Labor Exec. Ass'n., 489 U.S. 602, 616, 633-34 (1989) (upholding both a reasonable suspicion and no suspicion standard for drug testing railroad employees in certain contexts).

310. *See Earls*, 536 U.S. at 824 (upholding suspicionless drug testing of students engaged in competitive extracurricular activities); *Vernonia*, 515 U.S. at 665 (upholding suspicionless drug testing of student athletes).

311. *See* Arizona v. Hicks, 480 U.S. 321, 326-28 (1987). In *Hicks*, officers moved expensive stereo equipment to view serial numbers; they had reasonable suspicion, but not probable cause, that the equipment was stolen. *Id.* at 323, 326. The majority held that the officers needed probable cause to justify their search. *Id.* at 329. The majority declared, "A search is a search, even if it happens to disclose nothing but the bottom of a turntable." *Id.* at 325. For the majority, Fourth Amendment reasonableness had two guidelines: officers may move an object in plain view if they have probable cause that the object is evidence of a crime, and they may view all objects in plain view without any suspicion because such viewings are not "searches" within the meaning of the Fourth Amendment. *Id.* at 328-29. It invoked a textual argument to justify it holding: "we choose to adhere to the textual and traditional standard probable cause." *Id.* at 329.

In contrast, Justice O'Connor in her dissent invoked the reasonable suspicion standard, asserting that such an intrusion was a mere "cursory inspection." Arizona v. Hicks, 480 U.S. 321, 333 (1987). (O'Connor, J., dissenting). She argued for a middle ground between these two rules, declaring that a reasonable suspicion signified a reasonable search when the search is "cursory." *Id.* at 338 (arguing that the "additional intrusion caused by an inspection of an item in plain view for its serial number is minuscule").

312. *See* Maryland v. Buie, 494 U.S. 325, 333 (1990).

313. *See* Richards v. Wisconsin, 520 U.S. 385, 394 (1997) (declaring that "police must have reasonable suspicion that knocking and announcing their presence, under the circumstances, would be dangerous or futile, or that it would inhibit the effective investigation of crime by, for example, allowing the destruction of evidence").

314. *See, e.g.*, Atwater v. City of Lago Vista, 532 U.S. 318, 354-55 (2001) (declaring that custodial arrest was justified under probable cause, without considering whether the offense was trivial); Knowles v. Iowa, 525 U.S. 113, 119 (1998) (creating bright-line rule that officers may not search a car incident to a traffic citation); Maryland v. Wilson, 519 U.S. 408, 415 (1997) (creating bright-line rule that officers may order a passenger out of a lawfully

jurisprudential issues: for example, what justifies the creation of a bright-line rule[315] or the "minting of a new rule"[316] – as disparagingly characterized by some justices;[317] whether a rule as applied in other situations will be "bright," thus allowing police officers guidance in what they can and cannot constitutionally

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stopped car without any suspicion of wrongdoing); *Hicks*, 480 U.S. at 326 (declaring probable cause, not reasonable suspicion, as the standard to justify moving an object in plain view); Pennsylvania v. Mimms, 434 U.S. 106, 111 (1977) (per curiam) (creating bright-line rule that officers may order a driver out of a lawfully stopped car).

In *Mimms*, the majority and dissent rhetorically used *Terry* in contrasting ways. The majority cited *Terry*'s general reasonableness standard to justify its balancing of interests to derive a bright-line rule – an officer may order a driver out of a car during a valid traffic stop. *Id.* at 109, 111. In contrast, the dissent used *Terry* to stand for the proposition that a police officer must consider the particular circumstances of a stop, opting for a case-by-case approach to the question whether the officer reasonably ordered the driver out of the vehicle. *Id.* at 113 (Marshall, J., dissenting) (characterizing *Terry* as limiting "the nature of the intrusion by reference to the reason for the stop").

Twenty years later, the Court addressed in *Wilson*, 519 U.S. at 411, whether officers had to have reasonable suspicion to order a passenger out of a car during a valid traffic stop. The majority invoked the general balancing framework of *Mimms*, holding that reasonableness did not require reasonable suspicion. *Id.* In contrast, the dissent invoked *Terry*, which would have supported requiring reasonable suspicion. *Id.* at 415-16 (Stevens, J., dissenting). The majority specifically left open whether "an officer may forcibly detain a passenger for the entire duration of the stop." *Id.* at 415 n.3.

315. *See, e.g.*, Illinois v. Wardlow, 528 U.S. 119, 127 (2000) (Stevens, J., dissenting). In *Wardlow,* all nine justices agreed to reject the "*per se*" rules advocated by the parties:

> The State of Illinois asks this Court to announce a "bright-line rule" authorizing the temporary detention of anyone who flees at the mere sight of a police officer. . . [The suspect] counters by asking us to adopt the opposite *per se* rule–that the fact the person flees upon seeing the police can never, by itself, be sufficient to justify a temporary investigative stop of the kind authorized in *Terry* . . . The Court today wisely endorses neither *per se* rule.

Id. The dispute among the justices was whether the officer had reasonable suspicion for the stop; all nine justices opted for a "'totality of circumstances'" standard. *Id.* (quoting United States v. Sokolow, 490 U.S. 1, 7-8 (1989)).

316. *See, e.g., Atwater*, 532 U.S. at 345-46. The court criticized the petitioner as follows:

> [Petitioner] asks us to mint a new rule of constitutional law on the understanding that when the historical practice fails to speak conclusively to a claim grounded in the Fourth Amendment, courts are left to strike a current balance between individual and societal interests by subjecting particular contemporary circumstances of traditional standards of reasonableness.

Id.

317. *See, e.g.*, Wyoming v. Houghton, 526 U.S. 295, 310-11 (1999) (Stevens, J., dissenting) (criticizing the Court for its "newly minted test" and stating that "the Court fashions a new rule that is based on a distinction between property contained in clothing worn by a passenger and property contained in a passenger's briefcase or purse."). *See generally* Kyllo v. United States, 533 U.S. 27, 41 (2001) (Stevens, J., dissenting). Justice Stevens criticized the *Kyllo* Court for its new definition of a Fourth Amendment "search," which he claimed at once sweeps both too broadly and too narrowly:

> The newly minted rule encompasses "obtaining [1] by sense-enhancing technology [2] any information regarding the interior of the home [3] that could not otherwise have been obtained without physical intrusion into a constitutionally protected area . . . [4] at least where (as here) the technology in question was not in general public use."

Id. at 46 (quoting 533 U.S. at 34).

do;[318] and which bright-line rule to select,[319] one favoring the individual or the

318. The need to guide police officers has been a part of the Court's Fourth Amendment jurisprudence because, for the Court, a "single familiar standard is essential to guide police officers, who have only limited time and expertise to reflect on and balance the societal and individual interests involved in the specific circumstances they confront." *See* Dunaway v. New York, 442 U.S. 200, 213-14 (1979).

Quoting this aspect of *Dunaway*, the Court, in the renowned case of *New York v. Belton*, 453 U.S. 454, 458 (1981), attempted to create a bright-line rule to guide officers. The question for the Court was whether the officers could search the car's passenger compartment after they had arrested the passengers outside the vehicle. *Id.* at 455. The Court upheld the search by adding a bright-line construction to its prior search incident to arrest doctrine: the passenger compartment of a car is within the area of control of a passenger arrested outside the car. *Id.* at 460-61. Under the search incident to arrest doctrine, the Court noted, officers may contemporaneously search the arrested person and the area within the suspect's immediate control. *Id.* at 457 (citing Chimel v. California, 395 U.S. 752, 763 (1969)). In declaring that officers may thus contemporaneously search passenger compartments during traffic stop arrests, the alleged bright-line was officers' ability to lawfully search this known area–the passenger compartment and its containers. Yet, the Court needed to add more lines to this already bright-line of the passenger compartment by defining what is a "container":

> "Container" here denotes any object capable of holding another object. It thus includes closed or open glove compartments, consoles, or other receptacles located anywhere within the passenger compartment, as well as luggage, boxes, bags, clothing, and the like. Our holding encompasses only the interior of the passenger compartment of an automobile and does not encompass the trunk.

Id. at 460 n.4. In time, the line between passenger compartments and trunks also blurred as hatchbacks came into existence. *See also* Colorado v. Bertine, 479 U.S. 367, 375 (1987) (using need to guide officers to support it inventory doctrine, which allowed officers to search stopped driver's van, including the backpack in it).

319. *See, e.g.*, Richards v. Wisconsin, 520 U.S. 385, 387 (1997); Maryland v. Buie, 494 U.S. 325, 327 (1990). In *Richards*, the Court addressed when officers do not need to knock and announce their presence before executing a search warrant of a dwelling. The Court rejected the rule created by the Wisconsin Supreme Court, which stated that officers were "*never* required to knock and announce their presence when executing a search warrant in a felony drug investigation." *Richards*, 520 U.S. at 387-88. Instead, the Court selected reasonable suspicion–not the state's *per se* rule or probable cause–to govern the officers' ability to forego knocking and announcing: "In order to justify a 'no-knock' entry, the police must have reasonable suspicion that knocking and announcing their presence, under the particular circumstances, would be dangerous or futile, or that it would inhibit the effective investigation or the crime by, for example, allowing destruction of evidence." *Id.* at 394. The Court declared that reasonable suspicion, not probable cause, struck "the appropriate balance between the legitimate law enforcement concerns at issue in the execution of search warrants and the individual privacy interests affected by no-knock entries." *Id.*

In *Buie*, the Court similarly questioned what standard of suspicion applied to a "protective sweep," which it defined as follows:

> A "protective sweep" is a quick and limited search of premises, incident to an arrest and conducted to protect the safety of police officers or others. It is narrowly confined to a cursory inspection of those places in which a person may be hiding.

494 U.S. at 327. It considered three proposed bright-line rules: (1) apply the warrant requirement with its probable cause standard; (2) apply *Terry*'s reasonable suspicion standard; or (3) require no suspicion, as it had in *Pennsylvania v. Mimms*. *See* 434 U.S. 106 (1977) (per curiam) (allowing officers to order a driver out of a lawfully stopped car to further officer safety). The *Buie* Court selected reasonable suspicion, even though in *Arizona v. Hicks*, it had rejected reasonable suspicion to justify a "cursory inspection" of objects. *See Hicks*, 480 U.S. 321, 335 n.3 (1987). The *Buie* Court attempted to distinguish *Hicks* by emphasizing that the protective sweep involved officer safety, a concern mentioned in *Terry*. *See Buie*, 494 U.S. at 335 n.3 (maintaining that the Court's reliance on the cursory nature of the search was not inconsistent with *Hicks*).

government.[320] As a result, the Court has considered many *per se* rules, adopting some[321] and rejecting others.[322] Although no coherent theory undergirds the Court's creation of bright-line rules, the Court has often cited the following objectives: to guide police officers in later situations;[323] to protect police officers from danger;[324] to secure incriminating evidence;[325] and to protect an individual's property and privacy interest in a home.[326] In short, whether the Court has described a case as creating a "rule" or has offered a standard for case-by-case construction, the paths have nevertheless often overlapped, for even the Court's "rules" require clarification when applied in novel circumstances. The Court has thus carved out numerous rhetorical devices for constructing and construing

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320. *See, e.g.*, Wyoming v. Houghton, 526 U.S. 295, 302 (1999). In *Houghton*, a majority of the Court adopted the rule "that police officers with probable cause to search a car may inspect passengers' belongings found in the car that are capable of concealing the object of the search." *Id.* In contrast, the dissent sought to adopt a rule more protective of passenger's privacy: "a rule requiring a warrant or individualized probable cause to search passenger belongings is every bit as simple as the Court's rule; it simply protects more privacy." *Id.* at 312 (Stevens, J., dissenting).

321. *See, e.g.*, Atwater v. City of Lago Vista, 532 U.S. 318, 321-22 (2001) (stating that "the probable-cause standard applies to all arrests, without the need to balance the interests and the circumstances involved in particular situations") (quoting Dunaway v. New York, 442 U.S. 200, 208 (1979))); Maryland v. Wilson, 519 U.S. 408, 415 (1997) (holding that "an officer making a traffic stop may order passengers to get out of the car pending completion of the stop"); Pennsylvania v. Mimms, 434 U.S. 106, 111 n.6 (1977) (per curiam) (holding that an officer during a valid traffic stop may order a driver out the vehicle).

322. *See, e.g.*, Knowles v. Iowa, 525 U.S. 113, 119 (1998) (refusing all officers to search a vehicle incident to a traffic citations); Tennessee v. Garner, 471 U.S 1, 13 (1985) (rejecting common-law rule that officers may use deadly force in apprehending all fleeing felons); *see also Atwater*, 532 U.S. at 346 (rejecting a rule that officers may not arrest a person who has committed an offense that does not have jail time as a penalty, absent a "compelling need for immediate detention"; characterizing the rule as not sufficiently "bright" to guide officers and inconsistent with precedent).

323. *See* cases cited *supra* note 318.

324. *See, e.g.*, *Richards*, 520 U.S. at 394 (allowing officers not to knock and announce their presence before executing a warrant if this notice is "dangerous"); Maryland v. Buie, 494 U.S. 325, 333 (1990) (creating the protective sweep doctrine to protect officers from harm by others while executing an arrest warrant in a dwelling).

325. *See, e.g.*, Richards v. Wisconsin, 520 U.S. 386, 394 (1997)(adopting rule that officers need not knock and announce their presence before executing a warrant if they have reasonable suspicion if to do so would "inhibit effective investigation of crime by, for example, allowing the destruction of evidence"); *Houghton*, 526 U.S. at 307. In *Houghton*, the Court held that when officers have probable cause to believe that a vehicle contains incriminating evidence, they may search a passenger's purse left in the car as well as the vehicle itself. *Id.* The Court specifically rejected a proposed rule of reasonableness that would have limited officers' ability to gather incriminating evidence:

> To require that the investigating officer have positive reason to believe that the passenger and driver were engaged in a common enterprise, or positive reason to believe that the driver had time and occasion to conceal the item in the passenger's belongings, surreptitiously or with friendly permission, is to impose requirements so seldom met that a 'passenger's property' rule would dramatically reduce the ability to find and seize contraband and evidence of crime.

Id. at 305.

326. *See, e.g.*, *Richards*, 520 U.S. at 393 n.5 (stating the knock-and-announce requirement before executing a warrant at a home may "avoid the destruction of property occasioned by a forcible entry" and that a "brief interlude between announcement and entry with a warrant may be the opportunity that an individual has to pull on clothes to get out of bed").

precedent to justify its holdings on the permissibility of police practices under the Fourth Amendment.

IV. STRUCTURAL REASONABLENESS

In cases such as *Marbury v. Madison*[327] and *Cooper v. Aaron*,[328] the Court has repeatedly asserted the power to declare both federal statutes and state practices unconstitutional. Yet in deciding whether governmental searches and seizures violated the Fourth Amendment, the Court has ironically at times looked to state and federal practices to guide it in assessing whether a particular police activity violated the Fourth Amendment.[329] When considering such practices, the Court has counted the number of states that have enacted a particular law, noted the lack of evidence indicating an abuse of authority by policing officials, deferred to a state's assessment of its resources for policing power, and highlighted the need to have a reasonableness frame that affords the states flexibility in processing criminals. These rhetorical framings seek to justify the Court's deferring to the judgments of other governmental actors; in a sense, therefore, the Court has created rhetorical frames that represent a type of structural argument.[330] Even if designated structural, these framings, however, do not decisively constrain the choices of the Court, which has been careful to retain the ultimate authority to reject even well established practices in applying its power of judicial review.

Atwater v. City of Lago Vista[331] provides a useful example of the Court's reliance on structural deference. The reasonableness question in *Atwater* related to an officer's authority to arrest a driver for a minor traffic offense punishable only by fines, not imprisonment.[332] Although the decision relied on many different kinds of rhetorical tools, the Court nonetheless looked to state statutes, District of Columbia laws, and "a host of congressional enactments"[333] to support its decision

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327. 5 U.S. 137 (1803).

328. 358 U.S. 1 (1958).

329. *See, e.g.*, *supra* notes 100-103 and accompanying text; United States v. Villamonte, 462 U.S. 579, 585, 592 (1983) (referring twice to an early Congressional statute as creating "an impressive historical pedigree" when deciding whether it was constitutional, yet still noting that "'no Act of Congress can authorize a violation of the Constitution'") (quoting Almedia-Sanchez v. United States, 413 U.S. 266, 272 (1973)); Watson v. United States, 423 U.S. 411, 442-443 (1976) (Marshall, J., dissenting) (criticizing the *Watson* Court for relying on "numerous states and federal statutes codifying the common-law rule" and stating that the Court had ignored its duty under *Marbury v. Madison*, 1 Cranch 137 (1803), to evaluate the constitutionality of a governmental practice).

330. *See, e.g.*, County of Riverside v. McLaughlin, 500 U.S. 44, 53 (1991) (declaring that it had given "proper deference to the demands of federalism" when it had created a flexible standard for probable cause determinations provided by states in deciding Gerstein v. Pugh, 420 U.S. 103 (1975)). *See generally* Colorado v. Bertine, 479 U.S. 367, 374 (1987) (concluding that "reasonable police regulations relating to inventory procedures administered in good faith satisfy the Fourth Amendment, even though courts might as a matter of hindsight be able to devise equally reasonable rules requiring different procedure").

331. 532 U.S. 318 (2001).

332. *Id.* at 323.

333. *Id.* at 344.

that such authority was reasonable under the Fourth Amendment. In noting that all these other governmental entities permitted arrest for minor offenses, the Court observed that there was a "dearth of horribles demanding redress"[334] and that "the country is not confronting anything like an epidemic of unnecessary minor-offense arrests."[335] The Court put the burden of proving a problem of potential abuse on the arrested driver by requiring her to prove an actual current problem: "Noticeably absent from the [dissent's] parade of horribles is any indication that the 'potential for abuse' has ever ripened into a reality."[336] The Court refused to rely on its own view of the actual arrest at issue in *Atwater*, which it described as a "pointless indignity," reflecting "at best" the arresting officer's "extremely poor judgment" and imposing "merely gratuitous humiliations." [337]

In justifying its posture of deference, the Court expressed trust that officers would not abuse the power to arrest for minor offenses – a power now constitutionally permitted under the Fourth Amendment. This deference, according to the Court, took into account that state legislatures, which grant arrest powers, are "politically accountable" governmental bodies.[338] It added that any kind of limitation should come from the state legislatures, which are capable of carefully crafting rules that would properly balance interests.[339] Finally, the Court also noted that "[i]t is easier to derive a minor-offense limitation by statute than to derive one through the Constitution, simply because the statute can let the arrest power turn on any sort of practical consideration without having to subsume it under a broader principle."[340]

The Court had similarly invoked the need to defer to the judgment of politically accountable officials in *Michigan v. Sitz*.[341] At issue in *Sitz* was whether the state's establishment of suspicionless roadblocks to apprehend intoxicated drivers was reasonable under the Fourth Amendment.[342] The Court applied a three-part test, which balanced the government's interest, the individual's interest, and the effectiveness of the police practice at issue.[343] When the Court discussed the third factor, the effectiveness of the roadblocks, it declared that it would not conduct a "searching examination"[344] of the government's decision to use roadblocks because of the need to defer to the political branches. It cited officials' "unique understanding of, and responsibility for, limited public resources, including a finite

334. *Id.* at 353.
335. *Id.*
336. *Id.* at 354 n.25.
337. 532 U.S. 318, 346-347 (2001).
338. *Id.* at 353.
339. *Id.* at 352.
340. *Id.*
341. 496 U.S. 444 (1990).
342. *Id.* at 447.
343. *Id.* at 449.
344. *Id.* at 454.

number of police officers."[345] As a result of this broad deference, the Court was not disturbed that the roadblock resulted in about 1.6% of the stopped individuals being arrested for drunk driving.[346]

In addition, the Court in *Gerstein v. Pugh*[347] similarly gave states initial flexibility in deciding how long they may detain suspects without probable cause hearings.[348] Yet in *County of Riverside v. McLaughlin*,[349] the Court attempted to espouse deference to states while nevertheless bounding their reasonableness constructs.[350] In *McLaughlin*, the Court posited forty-eight hours as a presumptive rule of reasonableness, with other factors allowing for more or less time.[351] In declaring forty-eight hours as presumptively reasonable, the Court attempted to characterize its determination as respectful of local governments in that it permitted a longer detention time than the dissent, which advocated for probable cause determinations "as soon as [the entity] complete[d] the administrative steps incident to arrest"[352] or within twenty-four hours.[353] Ironically, the Court had stated that its prior decision giving states flexibility had resulted in "putting federal judges in the role of making legislative judgments and overseeing local jailhouse operations."[354]

In other decisions, the Court has looked not to current states practices, but to

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345. *Id.* at 453-54.

346. *Id.* at 455.

347. 420 U.S. 103 (1975).

348. *Id.* at 113-114 (stating that "a policeman's on the scene assessment of probable cause provides legal justification for arresting a person suspected of crime, and for a brief detention to take the administrative steps incident to arrest").

349. 500 U.S. 44 (1991).

350. *Id.* In *McLaughlin*, the Court described its previous decision in *Gerstein v. Pugh*, 420 U.S. 103 (1975), in which the Court "held unconstitutional Florida procedures under which persons arrested without a warrant could remain in police custody for 30 days or more without a judicial determination of probable cause." 500 U.S. at 52. It described *Gerstein* as recognizing the importance of "federalism" as it gave states flexibility in deciding how and when to give these probable cause determinations:

> [In *Gerstein*, we] recognized that "state systems of criminal procedures vary widely" in the nature and number of pretrial procedures they provide, and we noted that there is no single "preferred" approach. . . . We explained further that "flexibility and experimentation by the States" with respect to integrating probable cause determinations was desirable and that each State should settle upon an approach "to accord with [the] State's pretrial procedure viewed as a whole." . . . Our purpose in *Gerstein* was to make clear that the Fourth Amendment requires every State to provide prompt determinations of probable cause, but that the Constitution does not impose on the States a rigid procedural framework.

Id. at 53.

351. 500 U.S. at 56. For a discussion of *McLaughlin*, *see supra* text accompanying notes 53, 299.

352. *Id.* at 59 (Marshall, J., dissenting); *id.* at 61 (Scalia, J., dissenting) (advocating for common law rule that probable-cause determination occur "'as soon as [officer] reasonably can'" see a magistrate) (quoting 2 M. HALE, PLEAS OF THE CROWN 95, n.13 (1st Am. ed. 1847)).

353. *Id.* at 68 (Scalia, J., dissenting) (citing data that "certainly no more than 24 hours is needed").

354. *Id.* at 56.

what it viewed to be "the long-term movement"[355] in policing. In doing so, the Court impliedly sought to create a standard that seems workable to trained professionals. In this manner, the Court deferred to state and federal officials.[356] Yet, because the Court has selectively and unpredictably deferred to state and federal practices, structural deference has constituted a rhetorical tool, one that the Court has used (at times) to construct its reasonableness determination.

V. CONCLUSION: EMBEDDED POLICY CHOICES IN SELECTED DISCOURSE PATHS

In deciding what constitutes a reasonable governmental search or seizure, the Supreme Court has used a variety of rhetorical discourse paths. The Court's multiple discourse paths arise from the nature of interpreting written texts – whether the Fourth Amendment itself or prior Supreme Court decisions. The Court's multiple and shifting constructions of reasonableness reveal its perceived need for a particular governmental practice, rather than some fixed constitutional notion of individual liberty, privacy, personal security, or property.[357] The rhetoric of reasonableness masks the modern Court's disposition to generally expand the scope of police powers. Although the Court has rhetorically characterized its selected discourse paths as mandated by the Fourth Amendment and its precedents, the justices' values nevertheless determine which discourse paths they will use for their decisions as well has how they will characterize the values embedded in them. By their creation, selection, and subsequent characterization of the discourse

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355. Tennessee v. Garner, 471 U.S. 1, 18 (1985) (stating that the "long term movement" in law enforcement has been "away from the rule that deadly force may be used against any fleeing felon).

356. Yet, as the dissent noted in *Atwater v. City of Lago Vista,* 532 U.S. 318, 372 (2001) (O'Connor, J., dissenting), the Court could have characterized a need to check police discretion, even when the states have authorized such power. Under this alternative construction, the Fourth Amendment checks "unfettered discretion." *Id.* (asserting that Court had unreasonably given officers "constitutional carte blanche to effect an arrest"). In addition, the Court could have constructed a "current" problem by relating the issue of racial profiling, the stopping of individuals, with the power to arrest stopped individuals. Instead the Court characterized precedent as creating no need to review officials' subjective or objective motivations in either situation, the stopping or arresting of an individual. *Id.* at 348 n.16.

357. For example, the significance of history has also varied not only from case to case, *see supra* text accompanying notes 13, 55, 70, 144, but also for a single justice. In *Wyoming v. Houghton*, 526 U.S. 295 (1999), Justice O'Connor joined the majority's paradigm that history was a dispositive inquiry in deciding reasonableness. *Id.* at 299. In *Tennessee v. Garner*, 471 U.S. 1, 32 (1985), she dissented in part because the majority refused to rely on the common law in deciding whether officers may shoot fleeing felons. *Id.* at 32 (O'Connor dissenting) (criticizing majority for "'lightly brush[ing] aside' ... a long-standing practice that predates the Fourth Amendment and continues to receive the approval of nearly half of the state legislatures.") (quoting Payton v. New York, 445 U.S. 573, 600 (1980). Yet, in *Atwater v. City of Lago Vista,* 532 U.S. 318 (2001), she characterized history as "just one of the tools we use in conducting the reasonableness inquiry" and underplayed the majority's reliance on the states' practices authorizing the arrest of a person committing a fine-only offense. *Id.* at 361, 371 (O'Connor, J., dissenting) ("To be sure, such state laws are valid and wise exercises of the States' power to protect the public and welfare. My concern lies not with the decision to enact or enforce these laws, but rather with the manner in which they may be enforced.").

paths, the Court thus hides the "policy" choices it makes from the bench.[358] When the Court employs several of these discourse paths in a decision or argues in the alternative, it may later "recast" this precedent in a subsequent opinion, citing only one of the discourse paths and ignoring others.[359]

The Court's decisions involve different constructions of reasonableness, with no one discourse path actually being dispositive. As previously discussed, the Court has created conflicting approaches even within a particular discourse path. Textual framings have emphasized either the warrants clause or the word "unreasonable." When it has decided to protect privacy of the home, the Court has often invoked its decisions emphasizing the need for officers to have a warrant. Yet when it has decided to expand police powers, it has often emphasized the word "unreasonable."

The Court has similarly created multiple "historical" paradigms to construct reasonableness. At times, the Court has declared that an historical inquiry may be dispositive; but even then justices may disagree as to how far back in time to conduct the historical investigation and as to which common law applies. In other cases, the Court has declared history to be a relevant but not dispositive factor in determining reasonableness. In those cases, the Court has emphasized that it should not "freeze" the Fourth Amendment to the 1791 view of reasonableness. Instead, it has cited changes in modern technology and law to justify its departure from early practices.

The Court's inconsistent characterization of history's role in framing reasonableness has thus resulted in distinct lines of precedent that the Court may selectively invoke to justify its favored outcomes. In addition to manipulating precedent to emphasize or downplay history's role, the Court has naturally contended that the facts and reasoning of particular cases do or do not apply to a case under

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358. For example, Justice Scalia has ironically declared that by applying the common law, the Court prevents itself from acting according to its own "judicial predilection." County of Riverside v. McLaughlin, 500 U.S. 44, 66 (1991) (Scalia, J., dissenting) ("It was the purpose of the Fourth Amendment to put this matter [of holding an arrested person without a judicial probable-cause determination] beyond time, place and judicial predilection, incorporating the traditional common-law guarantees against unlawful arrest."); *see also* Minnesota v. Dickerson, 508 U.S. 366, 382 (1993) (Scalia, J., concurring) (noting that because *Terry* did not consider whether the common law permitted stop and frisks, he would apply the common law himself to justify an investigative stop, but not a frisk for drugs).

Justice Scalia has also declared that the *Terry* Court's balancing of interests rejects his construction of "original meaning." *See, e.g., id.* ("I might also vote to exclude [the drugs found during a frisk] if I agreed with the original-meaning-is irrelevant, good-policy-is-constitutional-law school of jurisprudence that the *Terry* opinion represents."). Yet, Justice Scalia's values determine his interest in selecting the common law, a practice that he himself has selectively invoked. *See supra* note 119.

359. *See, e.g.*, Wyoming v. Houghton, 526 U.S. 295, 311 n.3 (1999) (Stevens, J., dissenting) (characterizing the Court as not only creating a new historical paradigm for Fourth Amendment analysis but also criticizing the Court for balancing interests after declaring that an historical framing was supposedly "dispositive"); *see also* Smith, *supra* note 4, at 1358 ("Instead of overruling Warren Court precedents it deemed to be erroneous, the Rehnquist Court has distinguished, created exceptions to, and reinterpreted such precedents. Rarely is this approach analytically elegant . . . .").

consideration. Although argumentation rooted in precedent anticipates arguments for or against extension, it does not necessarily support the Court's selective re-characterization or recasting of decisions.

Similarly, the Court has described Fourth Amendment precedents in conflicting terms: it has stated that reasonableness sometimes requires bright-line rules but at other times requires case-by-case adjudication. Even when the Court creates a bright-line rule, it often changes the line or recasts its reasoning in subsequent cases. And when balancing emerges as the basis for a decision, the Court's rhetorical characterizations of the interests weighed ultimately determine the reasonableness of the challenged practice.

In addition, the Court has selectively cited modern state and federal practices to justify its reasonableness determinations. Although the Court has repeatedly asserted its power to assess the constitutionality of federal statutes and state practices, it has often narrowed this power by declaring a need to defer to the expertise of police officers and state legislatures. At other times, however, the Court has invoked modern state practices only to dismiss them.

In the end, viewing the Court's shifting discourse paths helps to unmask the Court's hidden values in constructing Fourth Amendment reasonableness. The presence of multiple rhetorical tools provides the Court with the power to select, in any given case, the particular path leading to its desired result. The modern Court has chosen paths that generally further the goal of expanding police powers. In time, however, the Court may look to the road less traveled, by choosing paths and characterizations more protective of the individual's interests in liberty, privacy, personal security, and property.