

William & Mary Law Review

Volume 35 (1993-1994)
Issue 1 *Symposium: The American Criminal
Justice System Approaching the Year 2000*

Article 7

October 1993

The Central Meaning of the Fourth Amendment

Tracey Maclin
tmaclin@bu.edu

Follow this and additional works at: <https://scholarship.law.wm.edu/wmlr>



Part of the [Fourth Amendment Commons](#)

Repository Citation

Tracey Maclin, *The Central Meaning of the Fourth Amendment*, 35 Wm. & Mary L. Rev. 197 (1993), <https://scholarship.law.wm.edu/wmlr/vol35/iss1/7>

Copyright c 1993 by the authors. This article is brought to you by the William & Mary Law School Scholarship Repository.

<https://scholarship.law.wm.edu/wmlr>

THE CENTRAL MEANING OF THE FOURTH AMENDMENT

TRACEY MACLIN*

I. INTRODUCTION

The Fourth Amendment to the United States Constitution, which guarantees our right to be free from unreasonable government searches and seizures,¹ presents a quandary for society. For some it embodies, inter alia, the right of every person "to retreat into his own home and there be free from unreasonable governmental intrusion."² That conception of the amendment partially explains the familiar maxim: "a man's home is his castle."³ The Fourth Amendment also "reflects experience with police excesses."⁴ It makes plain, perhaps more than any other provision of the Bill of Rights, that the Constitution does not tolerate the tactics of a police state. Unquestionably, the protections of the Fourth Amendment are fundamental.

* Copyright Tracey Maclin (1993). Professor of Law, Boston University. B.A. 1980, Tufts University; J.D. 1983, Columbia University. The author would like to thank Steve Thel, Ron Bacigal, and Steve Shiffrin for their very helpful comments in the preparation of this Essay. He would also like to thank members of the Cornell Law School, Fordham University Law School, the University of Texas School of Law, and Western New England College School of Law faculty workshops for their suggestions and comments.

1. The Fourth Amendment provides:

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 or affirmation, and particularly describing the place to be searched, and the persons or things to be seized.

U.S. CONST. amend. IV

2. *Silverman v. United States*, 365 U.S. 505, 511 (1961).

3. This maxim is not a product of the English common law; rather, it dates back much further. "Even in ancient times there were evidences of that same concept in custom and law, partly as a result of the natural desire for privacy, partly an outgrowth, in all probability, of the emphasis placed by the ancients upon the home as a place of hospitality, shelter, and protection." NELSON B. LASSON, *THE HISTORY AND DEVELOPMENT OF THE FOURTH AMENDMENT TO THE UNITED STATES CONSTITUTION* 13 (1970).

4. *Davis v. United States*, 328 U.S. 582, 597 (1946) (Frankfurter, J., dissenting).

At the same time, "not very nice people"⁵ raise most Fourth Amendment claims. For some, this fact makes the Fourth Amendment the scourge of the criminal justice system. Fourth Amendment rules handcuff the police in their never ending battle to bring criminals to book. Moreover, many people believe that the amendment is responsible for releasing dangerous felons simply because the police have failed to obey its technical requirements.⁶

Thus, the Fourth Amendment poses an enormous dilemma. How important is privacy and personal security? How much power should the police have? The entity primarily responsible for educating the public and the police about the Fourth Amendment—the United States Supreme Court—has often tried, without much success, to alleviate society's confusion about the amendment.⁷ In the last two decades, the modern Court, led by Chief Justices Warren Burger and William Rehnquist, has articulated its view of the central meaning of the provision.

According to the Court, the central meaning of the Fourth Amendment is "reasonableness."⁸ The Court wants us to believe

5. *United States v. Rabinowitz*, 339 U.S. 56, 69 (1950) (Frankfurter, J., dissenting).

6. Despite this public perception, many scholars have argued that the impact of the exclusion of evidence in criminal prosecutions because of police violations of the Fourth Amendment has been greatly exaggerated by the Court. See, e.g., Donald Dripps, *Living with Leon*, 95 YALE L.J. 906, 915-16 (1986); Silas Wasserstrom & William J. Mertens, *The Exclusionary Rule on the Scaffold: But Was It a Fair Trial?*, 22 AM. CRIM. L. REV. 85, 87-89 (1984); see generally Thomas Y. Davies, *A Hard Look at What We Know (and Still Need to Learn) About the "Costs" of the Exclusionary Rule: The NIJ Study and Other Studies of "Lost" Arrests*, 1983 AM. B. FOUND. RES. J. 611 (concluding that the 1982 National Institute of Justice study, which claims that the exclusionary rule has a major impact on the disposition of felony arrests, is misleading and exaggerated); Peter F. Nardulli, *The Societal Cost of the Exclusionary Rule: An Empirical Assessment*, 1983 AM. B. FOUND. RES. J. 585 (illustrating that exclusionary rules exact marginal societal costs).

7. One scholar argues, for instance, that the confusing nature of the Fourth Amendment is

the result of the Court's attempt to pursue a compromise between considering cases flexibly, on the grounds of the reasonableness of police behavior, and setting forth clear rules, which, if the police fail to follow them, will lead to evidentiary exclusion. The Court purports to set forth clear rules while actually adjusting them constantly to accommodate each new fact situation.

Craig M. Bradley, *Two Models of the Fourth Amendment*, 83 MICH. L. REV. 1468, 1472 (1985).

8. It is important to note that the term "reasonableness" may have two different meanings. "Students of the fourth amendment quickly learn that for courts and commentators 'reasonableness' is both a term of art synonymous with constitutionality and a convenient

that the provision merely commands that law enforcement officers act rationally and pursue reasonable goals when they intrude upon individuals and their possessions. Whether a particular search or seizure is reasonable is generally determined by balancing the competing interests at stake—the government's interest in effective law enforcement versus the individual's interest in privacy and personal security.

As an intuitive matter, the Fourth Amendment appears to support a reasonableness test to judge police intrusions because it speaks of "unreasonable searches and seizures." The question is how the Court decides what is "reasonable" under the Fourth Amendment. The Court, of course, could define reasonableness as requiring that the police obtain a warrant before invading an individual's privacy or personal security unless an exigency makes that requirement impractical or impossible.⁹ The Court, however, defines what is reasonable under the Fourth Amendment in a very different manner. Under the Court's analytical model, law enforcement officials rarely must comply with the procedural safeguards of the amendment's Warrant Clause—safeguards that include probable cause, judicial oversight of police intrusions, and warrants particularly describing the place to be searched or persons to be seized.

Instead, Fourth Amendment questions are resolved using a test that approximates the rational basis standard, which is the test used to decide equal protection and due process challenges to social and economic legislation.¹⁰ Under the Court's analysis, Fourth

shorthand denoting a process of rational analysis." Ronald J. Bacigal, *The Fourth Amendment in Flux: The Rise and Fall of Probable Cause*, 1979 U. ILL. L. FORUM 763, 763.

9. See *California v. Acevedo*, 111 S. Ct. 1982, 1992 (1991) (Scalia, J., concurring) ("Although the Fourth Amendment does not explicitly impose the requirement of a warrant, it is of course textually possible to consider that implicit within the requirement of reasonableness.").

10. See, e.g., *Collins v. City of Harker Heights*, 112 S. Ct. 1061, 1070 (1992) (holding that a city's failure to train or warn its employees about risks of harm was not arbitrary or conscience-shocking to amount to a substantive due process violation, and that the Court presumes that "the administration of Government programs is based on a rational decision-making process that takes account of competing social, political, and economic forces"); *Kadrmas v. Dickinson Public Schools*, 487 U.S. 450, 457-58 (1987) (stating that a statute normally "survive[s] an equal protection attack so long as the challenged classification is rationally related to a legitimate governmental purpose"). Other scholars have made a similar argument in critiquing the Court's Fourth Amendment rules. See, e.g., Ronald J. Bacigal,

Amendment complaints are upheld only when the police act irrationally. If the Court can identify any plausible goal or reason that promotes law enforcement interests, the challenged police intrusion is considered reasonable and the constitutional inquiry is over.

Throughout the twenty-plus years of the Burger and Rehnquist Courts, some of the Justices have attempted to bolster this view of the central meaning of the Fourth Amendment by pointing to the text of the amendment, as well as the history surrounding its adoption. These Justices correctly note that the language of the Fourth Amendment does not mandate expressly that law enforcement officials obtain warrants prior to every search or seizure.¹¹ The amendment simply guarantees a right to be free from unreasonable searches and seizures.

These Justices also argue that the history of the Fourth Amendment provides no support for the view that all warrantless searches and seizures were condemned by those who framed and ratified the amendment.¹² Far from requiring judicial warrants for all government intrusions, the framers of the Fourth Amendment viewed judicial warrants as an evil and sought to limit their use. Numerous statutes, regulations, and common law rules authorizing warrantless intrusions, all on the books during the colonial era and after the adoption of the Constitution, appear to support the claim that many early Americans were not concerned with warrantless searches and seizures.¹³ The history surrounding the Fourth Amendment, so the argument goes, provides no support for the notion that the amendment grants individuals a right to be free from warrantless searches and seizures.¹⁴ On the contrary, the plain language and original understanding of the freedoms guaranteed by

Some Observations and Proposals on the Nature of the Fourth Amendment, 46 GEO. WASH. L. REV. 529, 564 (1978); Nadine Strossen, *Michigan Department of State Police v. Sitz: A Roadblock to Meaningful Judicial Enforcement of Constitutional Rights*, 42 HASTINGS L.J. 285, 288 (1991).

11. See *Acevedo*, 111 S. Ct. at 1992 (Scalia, J., concurring); *Robbins v. California*, 453 U.S. 420, 438 (1981) (Rehnquist, J., dissenting).

12. *Payton v. New York*, 445 U.S. 573, 611 (1980) (White, J., dissenting).

13. See, e.g., Gerard V. Bradley, *Present at the Creation? A Critical Guide to Weeks v. United States and Its Progeny*, 30 ST. LOUIS U. L.J. 1031, 1041-46 (1986).

14. *Id.*

the Fourth Amendment do no more than prescribe that government intrusions be limited to reasonable measures.¹⁵

This Essay discusses whether the text, historical background, and purpose of the Fourth Amendment support the Court's current model for constructing constitutional principles in today's society. My purpose here is not to provide a comprehensive survey of Fourth Amendment jurisprudence of the last twenty years. Rather, my goal is to sketch some of the main arguments in support of the Court's theory that the Fourth Amendment merely requires rational police behavior, and outline some of the difficulties I see in this particular jurisprudential model of search and seizure law.

While questioning the merit of the Court's current model, I hope to show that the Court has ignored or distorted the history of the Fourth Amendment. The constitutional lodestar for understanding the Fourth Amendment is not an ad hoc reasonableness standard; rather, the central meaning of the Fourth Amendment is distrust of police power and discretion.¹⁶ When viewed this way, the Fourth

15. In the view of one scholar, the "prime purpose" of the framers of the Fourth Amendment "was to prohibit the oppressive use of warrants, and they were not at all concerned about searches without warrants. They took for granted that arrested persons could be searched without a search warrant, and nothing gave them cause for worry about warrantless searches." TELFORD TAYLOR, *TWO STUDIES IN CONSTITUTIONAL INTERPRETATION* 43 (1969).

16. I am not suggesting that police officers are inherently untrustworthy or bad people. Instead, my point concerns who controls police power. Playing on society's ignorance and natural fear of crime, police officers and their representatives argue that only they know what it is like to be a cop. They contend that "outsiders" are in no position to second-guess their conduct. See, e.g., H. RICHARD UVILLER, *TEMPERED ZEAL* 24 (1988) ("[T]he cop believes deep down that he himself is most favorably positioned to perceive the action, understand the behavior of the players, and recognize the dictates of justice.").

For the most part, the public has accepted this argument. Understandably, society has aligned itself with law enforcement interests. People do trust the police. A diminishment of law enforcement power can be, and often is, characterized as a threat to the well-being of society. See *Miranda v. Arizona*, 384 U.S. 436, 542-43 (1966) (White, J., dissenting). More than 20 years ago, Fred Graham wrote that "society has proved more fearful of police impotence than of police brutality." FRED P. GRAHAM, *THE SELF-INFLICTED WOUND* 123 (1970). Things have not changed much.

Society, however, should wean itself off the notion that the police do not need to be regulated by citizens or judges. Where officers must act quickly to protect themselves or others from danger, the police have the authority to take decisive actions. But an officer's decision to make an arrest, to detain and question a person or search a motorist's purse or car, can and should be subjected to vigorous and independent oversight. The pursuit of perceived criminal behavior is a "competitive enterprise" that often results in zealous and excessive police reactions. *Johnson v. United States*, 333 U.S. 10, 13-14 (1948). The Fourth Amendment is a counterweight to such reactions. It is also a reminder to all of us that the Consti-

Amendment synchronizes with other parts of the Constitution designed to limit governmental powers.¹⁷ At a minimum, the Fourth Amendment commands compelling reasons, or at least a substantial justification, before a warrantless search or seizure is declared reasonable.

This Essay starts by discussing whether the Fourth Amendment's text mandates the current model now utilized for constructing search and seizure rules. It then sketches and considers the two central historical premises of those who advocate this model: that at the time of the framing of the Bill of Rights, our constitutional ancestors (1) were not concerned with warrantless searches, and (2) saw judges and warrants as potent tools of oppressive governmental power. Finally, the Essay considers one area of the Court's Fourth Amendment doctrine, the search of private containers, to illustrate the dangers a rational basis model poses for Fourth Amendment freedoms.

II. DOES THE FOURTH AMENDMENT MERELY REQUIRE RATIONAL POLICE INTRUSIONS, OR ARE WARRANTS THE PREFERRED MODE OF PROCEDURE FOR SEARCHES AND SEIZURES?

During the twentieth century, debate among the Justices and between scholars has focused on the relationship between the Fourth Amendment's two clauses. One side of the debate argues that the clauses of the amendment are independent declarations. The first clause, the Reasonableness Clause, merely guarantees a freedom from unreasonable searches and seizures. The second clause, the Warrant Clause, merely specifies the form and content of search and arrest warrants. Accordingly, the proponents of a rational basis model contend that the Fourth Amendment does not always require that police intrusions be authorized by a judicial warrant.¹⁸

tution places our individual interests in privacy, personal security, and human dignity on a higher plane than society's interest in catching criminals.

17. Cf. Bacigal, *supra* note 10, at 558 ("The Bill of Rights in general and the fourth amendment in particular are restrictions on unfettered governmental power rather than reflections of natural law rights.") (footnote omitted).

18. For instance, the Supreme Court in *United States v. Rabinowitz*, 339 U.S. 56 (1950), stated:

It is appropriate to note that the Constitution does not say that the right of the people to be secure in their persons should not be violated without a search

The classic application of this model was *United States v. Rabinowitz*.¹⁹ Relying on the language and history of the amendment, a majority of the Court wrote that “[i]t is unreasonable searches that are prohibited by the Fourth Amendment,” and it “was recognized by the framers of the Constitution that there were reasonable searches for which no warrant was required.”²⁰ How would the Court know whether a challenged police intrusion violated the Fourth Amendment? Eschewing clear rules, the *Rabinowitz* majority explained that the question of reasonableness “must find resolution in the facts and circumstances of each case.”²¹

The other side of the debate favors the “warrant preference” rule. Initially led by Justice Frankfurter,²² this side contends that the Warrant Clause modifies the first clause—a reasonable search depends upon the authorization of a valid warrant.²³ While not an

warrant if it is practicable for the officers to procure one. The mandate of the Fourth Amendment is that the people shall be secure against unreasonable searches.

Id. at 60. See also *Harris v. United States*, 331 U.S. 145, 150 (1947) (“The Fourth Amendment has never been held to require that every valid search and seizure be effected under the authority of a search warrant.”).

19. 339 U.S. 56 (1950).

20. *Id.* at 60 (citations omitted).

21. *Id.* at 63; see also *id.* at 66 (“The relevant test is not whether it is reasonable to procure a search warrant, but whether the search was reasonable. That criterion in turn depends upon the facts and circumstances—the total atmosphere of the case.”).

Interestingly, *Rabinowitz*’s ringing endorsement of a reasonableness model apparently contradicted the view articulated in *Trupiano v. United States*, 334 U.S. 699 (1948), which had been decided a year and a half earlier. In ruling that the Fourth Amendment barred the warrantless seizure of contraband materials discovered on private property, materials which the government had known of for several weeks, the *Trupiano* majority declared:

It is a cardinal rule that, in seizing goods and articles, law enforcement agents must secure and use search warrants wherever reasonably practicable. This rule rests upon the desirability of having magistrates rather than police officers determine when searches and seizures are permissible and what limitations should be placed upon such activities.

Id. at 705 (citations omitted).

22. See *Rabinowitz*, 339 U.S. at 68-86 (Frankfurter, J., dissenting); *Harris*, 331 U.S. at 162 (Frankfurter, J., dissenting); *Davis v. United States*, 328 U.S. 582, 605 (1946) (Frankfurter, J., dissenting).

23. In his dissenting opinion in *Rabinowitz*, Justice Frankfurter wrote:

What is the test of reason which makes a search reasonable? There must be a warrant to permit search, barring only inherent limitations upon that requirement when there is a good excuse for not getting a warrant, i.e., the justifications that dispense with search warrants when searching the person in his

absolutist view, this position held that a warrant was a necessary precondition of a reasonable search, unless there was a compelling reason for proceeding without one.²⁴ Proponents of the warrant preference rule do not claim that the text of the amendment requires this rule.²⁵ Instead, they argue that history and the experience of the founding fathers support the view that a search is unreasonable unless authorized by a warrant.²⁶

The warrant preference rule grew in stature during the latter half of the 1960's and the early 1970's.²⁷ Emphasizing the importance of a judicial check on intrusive governmental searches, the Court often declared that "searches conducted outside of the judicial process, without prior approval by judge or magistrate, are per se unreasonable under the Fourth Amendment—subject only to a

extension, which is his body and that which his body can immediately control, and moving vehicles.

Rabinowitz, 339 U.S. at 83 (Frankfurter, J., dissenting).

In his dissent in *Harris*, Justice Frankfurter explained that the Fourth Amendment's reference to "unreasonable" searches means "that, with minor and severely confined exceptions, inferentially a part of the Amendment, every search and seizure is unreasonable when made without a magistrate's authority expressed through a validly issued warrant." *Harris*, 331 U.S. at 162 (Frankfurter, J., dissenting).

24. *Rabinowitz*, 339 U.S. at 70 (Frankfurter, J., dissenting) ("[T]he framers said with all the clarity of the gloss of history that a search is 'unreasonable' unless a warrant authorizes it, barring only exceptions justified by absolute necessity.>").

25. *But cf.* *Payton v. New York*, 445 U.S. 573, 585 (1980) (stating that it is "perfectly clear that the evil the Amendment was designed to prevent was broader than the abuse of a general warrant," and that "[u]nreasonable searches or seizures conducted without any warrant at all are condemned by the plain language of the first clause of the Amendment").

26. *See Rabinowitz*, 339 U.S. at 69-70 (Frankfurter, J., dissenting); *Davis*, 328 U.S. at 605 (Frankfurter, J., dissenting); *see generally* Anthony G. Amsterdam, *Perspectives on the Fourth Amendment*, 58 MINN. L. REV. 349, 396-97 (1974) (discussing the scope, application and restrictions of the Fourth Amendment).

27. *See Payton*, 445 U.S. at 585; *Mincey v. Arizona*, 437 U.S. 385, 390 (1978); *United States v. Chadwick*, 433 U.S. 1, 8 (1977); *United States v. U.S. Dist. Court*, 407 U.S. 297, 309-10 (1972); *Katz v. United States*, 389 U.S. 347, 359 (1967); *United States v. Ventresca*, 380 U.S. 102, 105-07 (1965). The above citations notwithstanding, it would be disingenuous to pretend that the Court of the late 1960's and the 1970's applied the warrant preference rule in a principled or consistent manner. *See, e.g.*, *United States v. Watson*, 423 U.S. 411, 414-24 (1976) (holding a routine warrantless arrest valid even where officers had time to obtain warrant prior to arrest); *United States v. Edwards*, 415 U.S. 800, 807 (1974) (holding a warrantless search of a detainee's clothing reasonable while he was in custody after arrest and that the constitutional standard is not "whether it was reasonable to procure a search warrant, but whether the search itself was reasonable"); *Cady v. Dombrowski*, 413 U.S. 433, 448 (1973) (finding a warrantless search of a vehicle's trunk reasonable notwithstanding the fact that the vehicle was completely under the control of the police).

few specifically established and well-delineated exceptions.”²⁸ While the warrant preference rule appeared to guide much of the Court’s search and seizure doctrine during this time, a persistent opposition always existed which prevented the Court from speaking with a unified voice on the central meaning of the Fourth Amendment. For example, Justice White often challenged the view that a warrant was necessary for upholding a challenged search or seizure, and he urged the Court to adopt a balancing model for judging the validity of governmental intrusions.²⁹ After he was appointed to the Court, then-Justice Rehnquist followed Justice White’s lead by arguing that the Fourth Amendment only required that police intrusions be reasonable.³⁰

As the Court enters the 1990’s led by Chief Justice Rehnquist, its view of the Fourth Amendment has traveled full circle. As was the case when *Rabinowitz* was decided, the Court again formulates Fourth Amendment rules around an ad hoc test, and provides only occasional lip service to the warrant preference rule.³¹ While Chief

28. *Katz*, 389 U.S. at 357 (footnotes omitted).

29. See *Payton*, 445 U.S. at 607-20 (White, J., dissenting); *United States v. Watson*, 423 U.S. 411, 423 (1976); *Coolidge v. New Hampshire*, 403 U.S. 443, 522 (1971) (White, J., concurring in part and dissenting in part); *Chmel v. California*, 395 U.S. 752, 772-73 (1969) (White, J., dissenting).

30. See, e.g., *Robbins v. California*, 453 U.S. 420, 438 (1981) (Rehnquist, J., dissenting) (criticizing the “judicially created preference for a warrant as indicating satisfaction of the reasonableness requirement of the Fourth Amendment” by arguing that “nothing in the Fourth Amendment itself requires that searches be conducted pursuant to warrants,” but rather, “[t]he terms of the Amendment simply mandate that the people be secure from unreasonable searches and seizures, and that any warrants which *may* issue shall only issue upon probable cause”); *Steagald v. United States*, 451 U.S. 204, 224-25 (1981) (Rehnquist, J., dissenting) (arguing that reasonableness is the “ultimate standard” in Fourth Amendment cases, and that the pre-existence of a valid arrest warrant is “highly relevant” to the question of whether it is reasonable for the police to search for the subject of that arrest warrant in the home of a third party without first obtaining a search warrant); *Mincey v. Arizona*, 437 U.S. 385, 406 (1978) (Rehnquist, J., concurring in part and dissenting in part) (“[T]he constitutionality of a particular search is a question of reasonableness and depends on ‘a balance between the public interest and the individual’s right to personal security free from arbitrary interference by law officers.’”) (quoting *United States v. Brignoni-Ponce*, 422 U.S. 873, 878 (1975)).

31. The Court continues to pay lip service to the notion that warrantless searches are the exception rather than the rule. See, e.g., *Skinner v. Railway Labor Executives’ Ass’n*, 489 U.S. 602, 619 (1989) (noting in dicta that “[i]n most criminal cases, [the Court] strike[s] th[e] balance in favor of the procedures described by the Warrant Clause of the Fourth Amendment”). In many cases, however, including criminal cases, the Court’s holdings indicate that the Warrant Clause is not being applied in a serious manner. See, e.g., *California*

Justice Rehnquist's views are well known, other members of the Court have also endorsed the current rational basis standard.³² In-

v. Acevedo, 111 S. Ct. 1982 (1991); *Illinois v. Rodriguez*, 497 U.S. 177 (1990); *Florida v. Riley*, 488 U.S. 445 (1989); *California v. Greenwood*, 486 U.S. 35 (1988); *Griffin v. Wisconsin*, 483 U.S. 868 (1987). For a critical review of some of these cases, see Tracey Maclin, *Justice Thurgood Marshall: Taking the Fourth Amendment Seriously*, 77 CORNELL L. REV. 723 (1992). For a notable exception to this charge, see *Arizona v. Hicks*, 480 U.S. 321 (1987), where a majority of the Court rejected the rational basis model urged by the dissenters, and instead, adhered to "the textual and traditional standard of probable cause" to invalidate a warrantless search. *Id.* at 329.

Of course, it might be said that the Court's latest shift away from the warrant preference rule is attributable to the consolidation of a certain political majority on the Court rather than the product of sincere confusion about the central meaning of the Fourth Amendment. Professor Lloyd Weinreb stated that declarations from the Court

which casually reject or disregard what was said before and treat the warrant clause either as an insignificant hurdle or as a *deus ex machina* with which to strike down a disfavored search, do no more than announce the latest shift of emphasis to one clause or the other, according to a result reached on other grounds.

Lloyd L. Weinreb, *Generalities of the Fourth Amendment*, 42 U. CHI. L. REV. 47, 48-49 (1974).

32. Justice Blackmun's dissenting opinions in *Arkansas v. Sanders*, 442 U.S. 753, 772 (1979), and *United States v. Chadwick*, 433 U.S. 1, 19-20 (1977), and his majority opinion in *California v. Acevedo*, 111 S. Ct. 1982 (1991), which overruled *Sanders*, indicated opposition to the warrant preference rule, at least in the context of private container searches. Similarly, Justice Stevens' majority opinion in *United States v. Ross*, 456 U.S. 798 (1982), showed little concern with the interests protected by the Warrant Clause. Justice Stevens seemed to back away from this view, however, in his dissent to *Acevedo*, in which he stated that "even proof beyond a reasonable doubt will not justify a warrantless search that is not supported by one of the exceptions to the warrant requirement." *Acevedo*, 111 S. Ct. at 2000.

Justice Kennedy's majority opinion in *National Treasury Employees Union v. von Raab*, 489 U.S. 656 (1989), upholding suspicionless drug testing for customs officers, minimized the importance of the Warrant Clause's procedural safeguards. Justice Kennedy stated that "neither a warrant nor probable cause, nor any measure of individualized suspicion, is an indispensable component of reasonableness in every circumstance [to support a search]." *Id.* at 665 (citations omitted). Justice O'Connor generally has favored a balancing model that determines reasonableness on a case by case basis. *See, e.g., Tennessee v. Garner*, 471 U.S. 1, 25-26 (1985) (O'Connor, J., dissenting). Her opinion for the Court in *United States v. Johns*, 469 U.S. 478 (1985), enlarged police authority to conduct warrantless searches of private containers even when no exigency justified such a search. *Id.* at 487-88. In *Johns*, Justice O'Connor stated that "inasmuch as the Government was entitled to seize the packages and could have searched them immediately without a warrant, we conclude that the warrantless search three days after the packages were [secured] was reasonable and consistent with our precedent involving searches of impounded vehicles." *Id.* Justice Scalia's views are discussed *infra* notes 60, 147-55 and accompanying text.

As of the time this Essay was written, neither Justice Souter nor Justice Thomas had authored an opinion expressing his views on the Fourth Amendment, although Justice Sou-

deed, for the foreseeable future, the rational basis model likely will remain the constitutional test for judging government intrusions, whereas the importance and need to obtain warrants likely will continue to decline.

III. WHAT CAN WE LEARN ABOUT THE CENTRAL MEANING OF THE FOURTH AMENDMENT FROM THE TEXT OF THE PROVISION?

Is the Court's embrace of a rational basis model constitutionally justifiable? To be sure, the Fourth Amendment's language does not require that all searches and seizures be authorized by a warrant.³³

ter has joined several of the Court's opinions that adopt the current rational basis model. See *Acevedo*, 111 S. Ct. at 1982; *Rodriguez*, 497 U.S. at 177; *Florida v. Wells*, 495 U.S. 1 (1990). Both Justices Souter and Thomas joined the Court's opinion in *Minnesota v. Dickerson*, 113 S. Ct. 2130 (1993), where the Court once again extended the rationale of *Terry v. Ohio*, 398 U.S. 1 (1968), to allow the seizure of contraband discovered through an officer's sense of touch during a protective frisk for weapons.

33. See, e.g., *Skinner*, 489 U.S. at 619 ("For the Fourth Amendment does not proscribe all searches and seizures, but only those that are unreasonable."); see also Akhil R. Amar, *The Bill of Rights as a Constitution*, 100 YALE L.J. 1131, 1179-80 (1991) (criticizing the modern Court for ignoring the plain language of the Fourth Amendment, and arguing that "[i]t is not that a search or seizure *without* a warrant was presumptively unreasonable, as the Court has assumed; rather, a search or seizure *with* a warrant was presumed reasonable as a matter of law—and thus immune from jury oversight."); Yale Kamisar, *Does (Did) (Should) the Exclusionary Rule Rest on a "Principled Basis" Rather than an "Empirical Proposition"?*, 16 CREIGHTON L. REV. 565, 576 (1983) ("Although the Fourth Amendment establishes guidelines for the issuance of search warrants, it has nothing to say specifically about *warrantless searches*."); Silas J. Wasserstrom, *The Fourth Amendment's Two Clauses*, 26 AM. CRIM. L. REV. 1389, 1390 (1989) (observing that the warrant preference rule seems to be "at odds with a literal reading of the fourth amendment"). *But cf.* Weinreb, *supra* note 31, at 47 ("A thoughtful and strict grammarian might conclude from the structure of the amendment that the second clause is a partial explication of the first, so that any search conducted without a warrant is, by that fact alone, unreasonable.")

While conceding that the text of the amendment does not mandate warrants for all searches and seizures expressly, advocates of the warrant preference rule have raised several arguments supporting the view that the text and structure of the Fourth Amendment justify a warrant requirement for most searches. For example, one commentator argued that

[t]he general right of security from unreasonable search and seizure was given a sanction of its own [in the Reasonableness Clause] and the amendment thus intentionally given a broader scope. That the prohibition against "unreasonable searches" was intended, accordingly, to cover something other than the form of the warrant is a question no longer left to implication to be derived from the phraseology of the Amendment.

LASSON, *supra* note 3, at 103 (footnote omitted). Another commentator contended that the Fourth Amendment made no provision for the warrantless search any more than it did for the general search warrant. It would be strange, to say the

Conceding this fact, however, does not end the matter. When construing any constitutional provision, the language of the document is the obvious place to begin the analysis. Yet, when interpreting the Fourth Amendment one should be careful about the weight placed on its literal terms,³⁴ particularly if the reader is trying to ascertain the "original intent" of the framers and those who ratified the provision.

There is good reason to believe that the precise language of the Fourth Amendment was not particularly important to the founding fathers. The precept that was initially proposed by James Madison to govern the issuance of warrants underwent significant changes due to the enterprising efforts of a single congressman.³⁵

least, for the amendment to specify stringent warrant requirements, after having in effect negated these by authorizing judicially unsupervised "reasonable" searches without warrant. To detach the first clause from the second is to run the risk of making the second virtually useless.

JACOB W LANDYNSKI, *SEARCH AND SEIZURE AND THE SUPREME COURT* 43-44 (1966). See also *Payton v. New York*, 445 U.S. 573, 585 (1980) ("It is thus perfectly clear that the evil the Amendment was designed to prevent was broader than the abuse of a general warrant. Unreasonable searches or seizures conducted without any warrant at all are condemned by the plain language of the first clause of the Amendment."); Kamisar, *supra*, at 574 (contending that it was incumbent upon the judiciary to interpret the amendment "to prohibit indiscriminate, arbitrary and unjustified *warrantless* searches as well").

34. Like other general provisions in the Constitution, the text of the Fourth Amendment leaves many important questions, including the relationship of the amendment's two clauses, unanswered. The Warrant Clause, for instance, does not explain "who may issue a warrant, how it must be executed, [and] in what circumstances seized property may be retained." Weinreb, *supra* note 31, at 47 n.1.

35. Madison's original draft was aimed only at improper warrants. It stated:

The rights of the people to be secured in their persons, their houses, their papers, and their other property, from all unreasonable searches and seizures, shall not be violated by warrants issued without probable cause, supported by oath or affirmation, or not particularly describing the places to be searched, or the persons or things to be seized.

1 ANNALS OF CONG., cols. 434-35 (Joseph Gales ed., 1789).

Madison's draft was reported to the full House of Representatives with a few minor changes, but the essence of his original proposal remained and was directed against general warrants. LASSON, *supra* note 3, at 101. Congressman Benson, however, was not satisfied with the reported provision. He proposed several changes that he felt would strengthen the provision, but his alterations were rejected by the House. *Id.*

Benson, however, did not accept defeat. As chairman of a committee appointed to arrange the amendments, Benson replaced the agreed-upon amendment with the defeated version he had proposed. *Id.* Benson's substitute provision was never "noticed or assented to as such by the House." *Id.* at 102-03. The altered provision was later enacted by both houses of Congress, and subsequently ratified by the States. *Id.* at 103.

Madison's proposal, "a one-barrelled affair, directed apparently only to the essentials of a valid warrant,"³⁶ was altered by Congressman Benson to a "double-barrelled form"³⁷ that seems to provide for "two constitutional mandates where only one had existed before."³⁸ The changes to Madison's draft escaped the notice of members of the House and Senate, and the altered provision was approved by Congress and ratified by the state constitutional conventions without extensive discussion regarding the precise language of what later became the Fourth Amendment to the Constitution.³⁹

When considering this undisputed history, "there is little reason to suppose that a literal interpretation of the fourth amendment will accurately reflect the intentions of its Framers or help us determine what, if anything, they thought about the relationship between the amendments' [sic] two clauses."⁴⁰ Thus, it is "especially bizarre"⁴¹ for the current Court to point to the text of the Fourth Amendment to justify its rejection of the warrant preference rule. The framers and ratifiers did not focus on the precise language of the amendment, and their thoughts on the relationship between the amendment's two clauses remain a mystery.⁴² If our constitu-

36. LASSON, *supra* note 3, at 103. Professor Lasson explained that under Madison's original version, "[t]he general principle of freedom from unreasonable search and seizure seems to have been stated only by way of premise, and the positive inhibition upon action by the Federal Government limited consequently to the issuance of warrants without probable cause, etc." *Id.*

37. Amsterdam, *supra* note 26, at 468 n.465.

38. Clark D. Cunningham, *A Linguistic Analysis of the Meanings of "Search" in the Fourth Amendment: A Search for Common Sense*, 73 IOWA L. REV. 541, 552 (1988). The significance of the changes made to Madison's draft remains a subject of debate. Professor Lasson, for example, concluded that after Congressman Benson's changes, "[t]he general right of security from unreasonable search and seizure was given a sanction of its own and the amendment thus intentionally given a broader scope." LASSON, *supra* note 3, at 103. Professor Taylor, on the other hand, after asserting that "it was the warrant which was the initial and primary object of the [fourth] amendment," concluded that "[n]othing in the legislative history of the fourth amendment sheds much light on the purpose of the first clause." TAYLOR, *supra* note 15, at 43.

39. LASSON, *supra* note 3, at 101-03.

40. Wasserstrom, *supra* note 33, at 1391.

41. *Id.*

42. As Professor Bacigal noted, "[h]istory has thus identified the question of the relationship of the amendment's clauses, but has not provided an answer." Ronald J. Bacigal, *Dodging a Bullet, but Opening Old Wounds in Fourth Amendment Jurisprudence*, 16 SETON HALL L. REV. 597, 609 (1986).

tional ancestors were not preoccupied with a narrow, textual view of the Fourth Amendment, how can today's Court adopt such a view in the name of "original intent"?

Another reason why a literal reading of the Fourth Amendment fails to support the Court's rational basis model is that the model makes no sense when utilized as a tool for interpreting the first clause of the Fourth Amendment. The framers of the amendment believed that they were providing substantive protection against governmental invasions of persons, homes, papers and effects.⁴³ Even assuming that the Warrant Clause does not explicate the Reasonableness Clause, the Court still must explain the purpose of the Reasonableness Clause. That clause guarantees "[t]he right of the people to be secure in their persons, houses, papers, and effects, against unreasonable searches and seizures."⁴⁴ Under the current test, the Court decides whether the police have violated this guarantee of reasonable searches and seizures by asking whether they have acted in a reasonable and rational manner. Such a formula lacks content, and amounts to nothing more than

43. See, e.g., *Payton v. New York*, 445 U.S. 573, 610 (1980) (White, J., dissenting) (stating that the Reasonableness Clause "reaffirms the basic principle of common law [prohibitions against unreasonable searches and seizures, and] assumes an existing right against actions in excess of that inherent power and ensures that it remain inviolable"); Bacigal, *supra* note 42 (noting throughout the article, cases in which the Court has recognized substantive values contained in the Reasonableness Clause that are unrelated to the procedural standards of the Warrant Clause); Arnold H. Loewy, *Police-Obtained Evidence and the Constitution: Distinguishing Unconstitutionally Obtained Evidence from Unconstitutionally Used Evidence*, 87 MICH. L. REV. 907, 909 (1989) ("First and foremost, fourth amendment rights are substantive as opposed to procedural rights."); Eric Schnapper, *Unreasonable Searches and Seizures of Papers*, 71 VA. L. REV. 869, 874 (1985) ("[S]eizures of papers were condemned in eighteenth-century England without respect to the validity of any underlying warrant, and the [Reasonableness Clause] thus embodies requirements independent of the warrant clause."); see also *Warden, Md. Penitentiary v. Hayden*, 387 U.S. 294, 321 (1967) (Douglas, J., dissenting) ("By reason of the Fourth Amendment the police may not rummage around among [certain] personal effects, no matter how formally perfect their authority may appear to be. Any invasion whatsoever of those personal effects is 'unreasonable' within the meaning of the Fourth Amendment.").

Even Telford Taylor, the academic trailblazer for those rejecting the warrant preference rule, acknowledges that the amendment's first clause embodies a value that "transcends the procedural safeguards of particularity and probability in the second clause." TAYLOR, *supra* note 15, at 67.

44. U.S. CONST. amend. IV

an ad hoc judgment about the desirability of certain police intrusions.⁴⁵

One solution for this standardless process is to seek refuge in the common law.⁴⁶ Under this alternative, the Reasonableness Clause grants the same protection that the common law provided.⁴⁷ But this response does not justify rejection of the warrant preference

45. Justice Frankfurter put it well when he noted:

To say that the search must be reasonable is to require some criterion of reason. It is no guide at all either for a jury or for district judges or the police to say that an "unreasonable search" is forbidden—that the search must be reasonable. *What is the test of reason which makes a search reasonable?*

United States v. Rabinowitz, 339 U.S. 56, 83 (1950) (Frankfurter, J., dissenting) (emphasis added).

In a similar vein, Professor White has observed that a reasonableness model inherently is subject to manipulation by the Court: "We may be on the threshold of a Fourth Amendment jurisprudence in which the only question is whether the Supreme Court believes a police practice to be 'reasonable.' No one can know what meaning will be given such a term." James B. White, *The Fourth Amendment as a Way of Talking About People: A Study of Robinson and Matlock*, 1974 Sup. Ct. Rev. 165, 171.

Finally, Professor Amsterdam aptly noted that under an ad hoc reasonableness model, "reasonableness is in the first instance for the [trial court] to determine."

What it means in practice is that appellate courts defer to trial courts and trial courts defer to the police. What other results should we expect? If there are no fairly clear rules telling the policeman what he may and may not do, courts are seldom going to say that what he did was unreasonable.

Amsterdam, *supra* note 26, at 394 (quoting *Rabinowitz*, 339 U.S. at 63) (footnote omitted).

46. See Bradford Wilson, *Enforcing the Fourth Amendment: The Original Understanding*, 28 CAT. LAW. 173, 186 (1983) ("By incorporating the common law doctrine regarding searches and seizures into its charter of national existence, the people of the United States gave it constitutional status, thereby placing all controversies arising under that law within the realm of the federal judicial power.").

47. See, e.g., *California v. Acevedo*, 111 S. Ct. 1982, 1993 (1991) (Scalia, J., concurring) (asserting that the confusion surrounding the amendment's interpretation can be resolved "by returning to the first principle that the 'reasonableness' requirement of the Fourth Amendment affords the protection that the common law afforded"); *Tennessee v. Garner*, 471 U.S. 1, 26 (1985) (O'Connor, J., dissenting) (criticizing the Court's conclusion that "the Fourth Amendment proscribes a police practice that was accepted at the time of the adoption of the Bill of Rights and has continued to receive the support of many state legislatures" and arguing instead that "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") (citations omitted); *Steagald v. United States*, 451 U.S. 204, 227 (1981) (Rehnquist, J., dissenting) (relying upon the common law that "existed at the time of the framing of the Fourth Amendment, which incorporated the standard of 'reasonableness'"); *Payton v. New York*, 445 U.S. 573, 610 (1980) (White, J., dissenting) (arguing that the Reasonableness Clause "was directed towards safeguarding the rights at common law").

rule; it only begs the question why law enforcement practices accepted by the common law should be the measure of the amendment today.⁴⁸ Nothing magical about the English common law existed at the time the Fourth Amendment was ratified. Indeed, construction of Fourth Amendment principles from English common law rules seems inapt because the American colonists "rebelled against English search and seizure practices."⁴⁹ Moreover, the common law rules of that era provide only a "snapshot" of the authority of constables and customs officers in 1791. Times have changed. Law enforcement methods have become more complicated and serious. Our notions of privacy and personal security have also changed. Indeed, in certain instances, a rigid or sentimental attachment to common law rules may aggravate social tensions, leading to more community harm and less, rather than more, effective law enforcement.⁵⁰

As a practical matter, common law rules are insufficient for deciding current Fourth Amendment cases. Those who framed and

48. As Justice Thurgood Marshall cogently noted:

The common-law rules governing searches and arrests evolved in a society far simpler than ours is today. Crime has changed, as have the means of law enforcement, and it would therefore 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.

Steagald, 451 U.S. at 217 n.10.

49. Joseph D. Grano, *Probable Cause and Common Sense: A Reply to the Critics of Illinois v. Gates*, 17 U. MICH. J.L. REF. 465, 478 (1984).

50. The use of deadly and excessive force by the police often generates tension between the police and minority citizens. See Anna Quindlen, *Deadly Force*, N.Y. TIMES, Feb. 4, 1990, at E23 (stating that people who live in minority neighborhoods "think white police officers are quick on the trigger in neighborhoods like theirs, where the people are all black or Hispanic"); see also Report of the Independent Commission on the Los Angeles Police Department 69 (1991) (Police officers polled in a Los Angeles Police Department survey agreed that "racial bias on the part of officers toward minority citizens currently exists and contributes to a negative interaction between police and the community." The same survey revealed that 27% of the officers agreed that "an officer's prejudice towards the suspect's race may lead to the use of excessive force.'").

The common law, however, permitted the use of deadly force to apprehend a fleeing felon even in cases where the escaping suspect posed no threat to an officer or the public. In *Tennessee v. Garner*, 471 U.S. 1 (1985), the Court ruled that the use of deadly force under such circumstances violated the Fourth Amendment. *Id.* at 7-22. "[A]lthough the common law pedigree of Tennessee's rule is pure on its face, changes in the legal and technological context mean the rule is distorted almost beyond recognition when literally applied." *Id.* at 15.

ratified the Fourth Amendment undoubtedly opposed the general warrants used in England and the writs of assistance utilized by colonial customs officers. There is universal agreement that these law enforcement tools were the specific evils the framers intended to condemn through the Fourth Amendment.⁵¹ But can (or should) we infer from this history that the framers and ratifiers had no qualms about other law enforcement practices that were not atop the Revolutionary list of grievances during the late 1780's?⁵² I think not. Professor Amsterdam is surely correct to note that "[t]he agreement of many minds upon the decision to disapprove particular practices does not signify the least agreement to approve other practices not upon the agenda."⁵³

When constructing Fourth Amendment rules for modern society, the Court should not be preoccupied with the permissible law enforcement practices of the eighteenth century. Instead, the Court must focus on the "underlying *vision*"⁵⁴ of the amendment, which "places the magistrate as a buffer between the police and the citizenry, so as to prevent the police from acting as judges in their

51. See *Marshall v. Barlow's, Inc.*, 436 U.S. 307, 311 (1978); *United States v. Chadwick*, 433 U.S. 1, 7-8 (1977); *Boyd v. United States*, 116 U.S. 616, 625-27 (1886); LASSON, *supra* note 3, at 51-105; TAYLOR, *supra* note 15, at 38-44.

52. It is interesting to note that the Declaration of Independence did not contain "any direct reference to general warrants, writs of assistance, or the principle of freedom from unreasonable search." LASSON, *supra* note 3, at 80.

53. Amsterdam, *supra* note 26, at 398; see also John Apol, *The Fourth Amendment: Historical Perspective, Warrantless Searches, and a Solution to the Exclusionary Rule Debate*, 1991 DET. C.L. REV. 1205, 1210. The Supreme Court used similar reasoning in *United States v. Chadwick*, 433 U.S. 1 (1977). In rejecting the government's argument that the Warrant Clause was exclusively aimed at unjustified intrusions into private homes, and not intended to cover warrantless searches of effects outside of the home, the Court noted:

The absence of a contemporary outcry against warrantless searches in public places was because, aside from searches incident to arrest, such warrantless searches were not a large issue in colonial America. Thus, silence in the historical record tells us little about the Framers' attitude toward application of the Warrant Clause to the search of respondents' footlocker.

Id. at 8-9.

54. LAURENCE H. TRIBE, *AMERICAN CONSTITUTIONAL LAW* 537 (2d ed. 1988). In analyzing the Privileges and Immunities Clause of Article IV, § 2, Professor Tribe writes that "the underlying *vision* of the framers—that the states not war with one another by discriminating against one another's citizens without good reason—should nonetheless be regarded as giving rise to the dominant meaning of the clause even if the framers themselves may have had a more limited set of *examples* in mind." *Id.*

own cause.”⁵⁵ The framers undoubtedly feared general warrants, and eighteenth century litigants apparently harbored no particular objection to searches incident to arrest.⁵⁶ But can we confidently predict that our constitutional ancestors believed that government eavesdropping and the use of undercover police spies and informants were reasonable practices?⁵⁷ And, of course, it is impossible to discern what early Americans thought, for example, about random drug testing or warrantless aerial observations.⁵⁸

55. Jacob W Landynski, *In Search of Justice Black's Fourth Amendment*, 45 *FORDHAM L. REV.* 453, 462 (1976).

56. See TAYLOR, *supra* note 15, at 45.

57. One scholar, for instance, noted the tension between a judicial order authorizing electronic surveillance and the “original understanding” of the Reasonableness Clause:

[T]he same logic which supports an *ex parte* order for a clandestine trespass to install a[n electronic] bug would equally justify an order authorizing a King's messenger to secrete himself in Wilkes' or Entick's home to overhear and report any seditious or libellous murmurings. I am sure such a thing would have been thought outrageously unlawful, and if there is a considered consensus to the contrary today, I think it is a change for the worse.

Id. at 84-85. By contrast, Justice Black argued in *Katz v. United States*, 389 U.S. 347 (1967), that

[t]apping telephone wires, of course, was an unknown possibility at the time the Fourth Amendment was adopted. But eavesdropping (and wiretapping is nothing more than eavesdropping by telephone) was “an ancient practice which at common law was condemned as a nuisance.” There can be no doubt that the Framers were aware of this practice, and if they had desired to outlaw or restrict the use of evidence obtained by eavesdropping, I believe that they would have used the appropriate language to do so in the Fourth Amendment.

Id. at 366 (Black, J., dissenting) (citations omitted); see also Geoffrey R. Stone, *The Scope of the Fourth Amendment: Privacy and the Police Use of Spies, Secret Agents, and Informers*, 1976 *AM. B. FOUND. RES. J.* 1193, 1235 (pointing out the difficulty in knowing whether the framers of the Fourth Amendment ever considered explicitly the problem of secret government spies “and decided that the practice did not pose a sufficiently serious threat to privacy to warrant constitutional treatment or, rather, whether they simply did not consider the problem at all”).

58. Even in the case of the archetypal invasion—a forcible entry and search of an individual's home, an intrusion the founding fathers knew well—the Court has been divided sharply over the relevant common law rule. See *Steagald v. United States*, 451 U.S. 204, 220 (1981) (noting that the common law “sheds relatively little light” on the legality of a warrantless intrusion of a third party's home in search of the subject of a valid arrest warrant); *Payton v. New York*, 445 U.S. 573, 598 (1980) (“In all events, the issue [whether the police can conduct a warrantless intrusion of a home to effectuate a routine felony arrest] is not one that can be said to have been definitively settled by the common law at the time the Fourth Amendment was adopted.”).

The modern Court itself often finds that common law rules are no panacea when devising constitutional principles for search and seizure problems.⁵⁹ Even Justice Scalia, perhaps the Court's most forceful advocate in relying upon the common law to give content to constitutional precepts, resists an absolutist's view that the scope of the Fourth Amendment's protective shield cannot expand beyond the freedoms then existing at common law.⁶⁰ Likewise, Jus-

59. See, e.g., *Warden, Md. Penitentiary v. Hayden*, 387 U.S. 294, 300-10 (1967) (overruling the common law rule that "mere evidence" could not be seized by government officials); *United States v. Katz*, 389 U.S. 347, 352-53 (1967) (rejecting the traditional view that Fourth Amendment interests were not implicated unless there was a physical trespass by government officials of protected property); *Camara v. Municipal Ct.*, 387 U.S. 523 (1967) (reversing the historically accepted rule that municipal health inspections did not require a warrant for entry into a private home).

Even Chief Justice Rehnquist has acknowledged, in a number of cases, the limits of a strict adherence to the common law in devising Fourth Amendment rules. For example, in *Steagald* he noted the

basic error in the Court's treatment of the common law is its reliance on the adage that "a man's home is his castle." Though there is undoubtedly early case support for this in the common law, it cannot be accepted as an uncritical statement of black letter law which answers all questions in this area.

Steagald, 451 U.S. at 229. In *Rakas v. Illinois*, 439 U.S. 128 (1978), then-Justice Rehnquist explained that "[e]xpectations of privacy protected by the Fourth Amendment, of course, need not be based on a common-law interest in real or personal property, or on the invasion of such an interest." *Id.* at 143 n.12. In *United States v. Santana*, 427 U.S. 38 (1976), Justice Rehnquist concluded that a person standing in the doorway of her house was subject to a warrantless arrest. Such an arrest was valid under the Fourth Amendment although common law conceptions of property would suggest otherwise. Justice Rehnquist explained:

While it may be true that under the common law of property the threshold of one's dwelling is "private," as is the yard surrounding the house, it is nonetheless clear that under the cases interpreting the Fourth Amendment Santana was in a "public" place. She was not in an area where she had any expectation of privacy.

Id. at 42. Finally, in *United States v. Robinson*, 414 U.S. 218 (1973), Justice Rehnquist noted that common law authorities were often "sparse" and "silent" on the question of whether an officer has an unqualified authority to search incident to a lawful arrest. *Id.* at 230.

60. See *Minnesota v. Dickerson*, 113 S. Ct. 2130, 2140 (1993) (Scalia, J., concurring) (suggesting that a frisk for weapons on less than probable cause—although impermissible under the common law—might be lawful today because the current availability of concealed weapons "might alter the judgment of what is 'reasonable' under the original standard"); *California v. Acevedo*, 111 S. Ct. 1982, 1993 (1991) (noting that changes in the relevant legal rules may make a warrant necessary to reasonableness where it was not required under the common law); *County of Riverside v. McLaughlin*, 111 S. Ct. 1661, 1672 (1991) (Scalia, J., dissenting) (arguing that a balancing analysis may be appropriate in "resolving novel questions of search and seizure under the 'reasonableness' standard that the Fourth Amendment sets forth" but that such a balancing approach may not be appropriate "in resolving those ques-

tice White, who often urged the adoption of common law rules during the 1960's and 1970's, recognized that common law principles do not always provide adequate solutions to search and seizure questions.⁶¹

In sum, the text and ratification of the Fourth Amendment reveal little about how the framers intended the Fourth Amendment to be interpreted. Moreover, a literal interpretation of the Reasonableness Clause produces tautological reasoning, and there is no positive indication that the framers intended for common law search and seizure rules to define the scope of the amendment.⁶² Nevertheless, critics of the warrant preference rule argue that the framers were not concerned with warrantless searches, and saw judges and warrants as the tools of oppressive government. I will now consider both of these objections.

IV WARRANTLESS SEARCHES V JUDGES AND MAGISTRATES: WHO WAS THE FRIEND AND WHO WAS THE FOE?

In 1969, Telford Taylor, the most widely cited critic of the warrant preference rule, wrote that "our constitutional fathers were not concerned about warrantless searches, but about overreaching warrants."⁶³ Other scholars, following Taylor's lead, question

tions on which a clear answer already existed in 1791 and has been generally adhered to by the traditions of our society ever since").

61. In *Tennessee v. Garner*, 471 U.S. 1 (1985), Justice White wrote for the majority that "reliance on the common-law rule [regarding the use of deadly force to apprehend a fleeing felon] in this case would be a mistaken literalism that ignores the purposes of a historical inquiry." *Id.* at 13. Similarly, in *Camara v. Municipal Court*, 387 U.S. 523 (1967), Justice White's majority opinion rejected the historic tradition that permitted administrative inspection without a warrant, which the Court had previously recognized as having "antecedents deep in our history." *Id.* at 527 (quoting *Frank v. Maryland*, 359 U.S. 360, 367 (1959)). Justice White also joined the majority opinions in several decisions that rejected narrow, common law applications of the term "seizure" under the Fourth Amendment. See *McLaughlin*, 111 S. Ct. at 1665; *Terry v. Ohio*, 392 U.S. 1, 34-35 (1968); *Katz*, 389 U.S. at 362-64; *Hayden*, 387 U.S. at 295, 310, 312.

62. See *Amsterdam*, *supra* note 26, at 467 n.464 (noting the absence in the "pre-constitutional history [of] any affirmative evidence that the framers intended to make law enforcement practices commonly used in their time, or even such practices as had then been judicially approved, the measure of the amendment").

63. TAYLOR, *supra* note 15, at 41. Taylor draws support for this conclusion from the "great cases of the early 1760's." *Id.* at 38-39 (referring to *Money v. Leach*, 97 Eng. Rep. 1075 (K.B. 1765); *Entick v. Carrington*, 95 Eng. Rep. 807 (K.B. 1765); *Huckle v. Money*, 95 Eng. Rep. 768 (K.B. 1763); and *Wilkes v. Wood*, 98 Eng. Rep. 489 (C.P. 1763)). These cases,

whether reliance upon warrants to promote Fourth Amendment rights is consistent with history or wise constitutional policy⁶⁴ In fact, one prominent scholar, arguing that juries played the primary role in protecting Fourth Amendment freedoms, claims that warrants were “disfavored” during colonial times, and that “[j]udges and warrants are the heavies, not the heroes, of [the Fourth Amendment’s] story”⁶⁵

Two central premises fuel the critics’ complaint against the warrant preference rule. The first holds that many warrantless searches did not trouble the framers of the Fourth Amendment. The second concerns the institutional role of judges and warrants under the Fourth Amendment. Judges were often the primary source for issuing warrants, and because the framers saw warrants as devices to expand governmental authority rather than constrain it, the critics suggest that Fourth Amendment interests would be

according to Taylor, “involved searches under the authority of warrants, and none of the parties was at all concerned about warrantless searches incident to arrest.” *Id.* at 39.

Taylor further asserts that the framers did not envision the judicial “warrant as a protection against unreasonable searches, [but] saw it as an authority for unreasonable and oppressive searches.” *Id.* at 41. Taylor also is not surprised by the fact that the Fourth Amendment lacks an express prohibition against warrantless searches:

The framers did not do this because their prime purpose was to prohibit the oppressive use of warrants, and they were not at all concerned about searches without warrants. They took for granted that arrested persons could be searched without a search warrant, and nothing gave them cause for worry about warrantless searches.

Id. at 43.

The consequence of Taylor’s thesis for current search and seizure law has not escaped critical review. *See, e.g.,* LANDYNSKI, *supra* note 33, at 43-44; Amsterdam, *supra* note 26, at 410-14; Wasserstrom, *supra* note 33, at 1395-96.

64. *See* Amar, *supra* note 33, at 1175-81; Ronald J. Bacigal, *A Case for Jury Determination of Search and Seizure Law*, 15 U. RICH. L. REV. 791 (1981); William J. Stuntz, *Warrants and Fourth Amendment Remedies*, 77 VA. L. REV. 881, 897-98 (1991); *cf.* Gerard V Bradley, *The Constitutional Theory of the Fourth Amendment*, 38 DEPAUL L. REV. 817, 831, 862 (1989) (asserting that the “enumerated requisites of a valid warrant form the only operative portion of the [fourth] amendment” and that the “‘reasonableness clause’ has no operative significance,” but rather “places the government on notice that the measure of appropriate search and seizure is that with which the people would burden themselves if delegation of lawmaking authority to Congress was not obliged by the extended sphere of the republic”); Bradley, *supra* note 13, at 1041 (“Warrantless searches, then as now, were the rule rather than the exception, and each of the thirteen colonies, and then states, as a common statutory practice, authorized them.”).

65. Amar, *supra* note 33, at 1179.

better served if the influence of judges and warrants was diminished.⁶⁶ Both of these propositions are open to question.

The first point—that the “framers” were not concerned with warrantless searches—is hard to prove. If the term “framers” is meant literally, the critics are probably right. James Madison’s original draft for restraining the search and seizure powers of the federal government was “directed against improper warrants only”⁶⁷ On the other hand, if attention is focused not on what Madison perceived to be the chief evil of governmental search powers, but rather on what angered “the people” about governmental intrusions,⁶⁸ then we discover that larger concerns animated those early Americans who fought against British searches.

The Court often explains that our constitutional attitudes toward governmental search and seizure power derive from the abuses generated by writs of assistance and general warrants used by British customs officials against colonial merchants and businessmen.⁶⁹ Yet, before the writs of assistance became a major legal battle in the colonies during the latter part of the eighteenth century, and before John Wilkes attacked the use of the general war-

66. *See id.* at 1179-81.

67. LASSON, *supra* note 3, at 100. Of course, we now know that although Madison provided the initial wording of the provision, he did not have the last word on the Fourth Amendment’s ultimate phraseology. *See supra* note 35 and accompanying text.

68. After all, the Fourth Amendment speaks of the “right of the people,” not the rights of the “framers,” “citizens,” or even the “property-owning” class of the United States. In light of what we now know about how the Fourth Amendment’s language came to be, *see supra* notes 35-42 and accompanying text, it makes a lot more sense to focus on the perspective of “the people” who fought against the writs of assistance rather than on the intent of the few individuals who actually wrote the Constitution.

Moreover, when one considers that today “the people” who often assert Fourth Amendment claims include the poor, racial and ethnic minorities and the disfavored members of society (i.e., alleged criminals), constructing Fourth Amendment principles based upon the “original intent” of the framers borders on the absurd. Whether the framers intended, for example, to include blacks within the scope of the amendment’s protection is open to debate. *See LASSON, supra* note 3, at 95 n.61 (noting that proposals at the Virginia and New York Constitutional Conventions provided that “every freeman” had a right to be free from unreasonable searches and seizures, while at the Rhode Island Constitutional Convention “pains were deliberately taken to substitute ‘person’ for ‘freeman’”).

69. *Marshall v. Barlow’s, Inc.*, 436 U.S. 307, 311-12 (1978); *Boyd v. United States*, 116 U.S. 616, 625-27 (1886); *see also* Potter Stewart, *The Road to Mapp v. Ohio and Beyond: The Origins, Development and Future of the Exclusionary Rule in Search-and-Seizure Cases*, 83 COLUM. L. REV. 1365, 1369-71 (1983).

rant in his famous 1763 trial in England,⁷⁰ a particular type of warrantless search caused considerable controversy in the Massachusetts Bay Colony and elsewhere. This was the search *ex officio* conducted by British customs officers. The modern Court, however, has not focused on this controversy, nor considered its impact upon the historical events leading to the adoption of the Fourth Amendment. More importantly, the Court has overlooked the significance of this period in constructing a general theory about the central meaning of the Fourth Amendment.

The warrantless searches executed by British customs officers in the early 1750's, "under which customs officers assumed a power of forcible entry *ex officio* and which had been resisted physically or contested at law," led to the landmark Writs of Assistance Case of 1761.⁷¹ Customs officers, acting without warrants or other judicial authorization, forcibly entered private dwellings and warehouses looking for smuggled goods.⁷² Customs officials claimed that their

70. *Wilkes v. Wood*, 98 Eng. Rep. 489 (C.P. 1763).

71. M.H. SMITH, *THE WRITS OF ASSISTANCE CASE* 108 (1978). Smith's book is "an impressive accomplishment" and "a truly exhaustive study" of the English and colonial American history of the period before and after the famous Writs of Assistance Case of 1761. Bruce H. Mann, *The Writs of Assistance Case*, 11 CONN. L. REV. 353, 354, 355 (1979) (book review). Anyone interested in understanding the history and events that led to the adoption of the Fourth Amendment should read Smith's book. As one reviewer wrote: "[t]he scholar who stands on Smith's shoulders to study the fourth amendment will have a remarkable view." *Id.* at 366.

72. The convergence of two interrelated events may help explain why *ex officio* searches generated substantial agitation among merchants and business traders in mid-eighteenth century Massachusetts.

First, prior to the 1750's, the vice-admiralty courts were ineffective institutions in combating illegal smuggling. Vice-admiralty courts were weak and ineffective because the Massachusetts Superior Court, more influenced by "provincial politics" than the vice-admiralty courts, had been quite willing to issue writs of prohibition to the vice-admiralty courts. SMITH, *supra* note 71, at 68-69. The writ of prohibition was an order from a common law court to an inferior court to cease the adjudication of a matter on the grounds that the inferior court did not have the jurisdiction to hear the matter. Up until the 1750's, the vice-admiralty court was a "frequent target" of the superior court's writ of prohibition. *Id.* All of this changed, however, when Governor William Shirley made two judicial appointments to the Superior Court of individuals who were less beholden to local merchants and more deferential to vice-admiralty proceedings and executive power. *Id.* at 86-87.

The second event, somewhat related to the first, that may have helped increase *ex officio* searches concerned a notice to local customs officers in Boston "to be very vigilant in discovering and seizing all Contraband Goods." *Id.* at 74 (quoting an announcement run by Sir Henry Frankland, Collector of Customs, in the *BOSTON GAZETTE*, Feb. 20, 1753). It is possible that customs officers read this notice "not merely as an order to make searches but

authority for these warrantless searches derived from their commissions or deputations.⁷³ This claim not only lacked legal support,⁷⁴ but many people in Massachusetts also strongly and violently contested it.⁷⁵ So vehement was the opposition to *ex officio*

as implying that what their commissions said about a power of search meant a power to break in." *Id.* at 118.

73. 3 THOMAS HUTCHINSON, *THE HISTORY OF THE COLONY AND PROVINCE OF MASSACHUSETTS-BAY* 67 (Lawrence S. Mayo ed., 1936).

74. In *THE WRITS OF ASSISTANCE CASE*, Smith explains that "a power of search was not something a customs officer could snatch out of the air: there had to be statutory foundation for it." SMITH, *supra* note 71, at 117. This rule, however, was not always followed by customs officers. "Some commissions cited no statute at all for the power of search they asserted; and where that was not the case and the commission did identify the statute it drew upon, that particular statute in fact said nothing whatever about a power of search." *Id.*

Notwithstanding the flimsy legal foundation that supported many customs officers' commissions, Smith explains that warrantless customs searches continued to occur without undue resistance until customs officers utilized heavy-handed methods of law enforcement:

What went wrong in Massachusetts perhaps was that moderation ceased to be observed. According to the account in [Chief Justice Thomas] Hutchinson's *History*, the "assumed authority" that people bridled at was customs officers having "forcibly entered warehouses, and even dwellings houses." The operative word, one suspects, is "forcibly." It needed little more than a riddle through familiar lawbooks—Hale's *History of the Pleas of the Crown*, for instance—for any lawyer worth his fee to see that a power of forcible entry was by no means to be inferred from a power of entry, and that without clear statutory authority it could not lawfully exist.

Id. at 118.

75. *Id.* at 116-18. Joseph Frese also describes two incidents outside of Massachusetts in which customs officers attempted warrantless searches, but were opposed by disgruntled persons:

On one occasion in South Carolina, in 1715, the deputation does not seem to have been of much value, for the customs officer was forcibly prevented from searching even a ship. In Rhode Island, in 1718, the collector of the customs found five smuggled hogsheads of claret but it is not known whether he used his deputation or a search warrant. It made little difference for a mob gathered, four of the barrels were staved in, and the collector threatened with his life.

Joseph Frese, *Writs of Assistance in the American Colonies 1660-1776*, at 180 (1951) (unpublished Ph.D. dissertation, Harvard University) (footnotes omitted).

Additional colonial resistance to warrantless search powers was also evident in Massachusetts in the year 1754 when a "noisy" pamphlet war erupted regarding an excise reform bill designed to "close a loophole through which significant quantities of wine and spirits had hitherto passed into consumption untaxed." SMITH, *supra* note 71, at 111. Although the proposed law did not authorize searches of private dwellings, this fact did not quell the hostility of many who saw the scheme as another effort to expand government search power. The depth of the opposition to the bill was captured in the tone of one editorial:

But besides the Excise itself, the propos'd Manner of exacting it, is what cannot but give very great Disgust, that it should be in the Power of a petty Of-

search powers, that Governor William Shirley in the summer of 1753 began issuing his own warrants to customs officers, hoping that public hostility would subside.⁷⁶ These gubernatorial warrants, however, rested on equally flimsy legal grounds.⁷⁷ Soon, they too were abandoned in favor of the writs of assistance.⁷⁸ Because writs of assistance were generally issued by courts, rather than the governor himself, they had a stronger legal basis than the gubernatorial warrant.

In retrospect, when the critics of the warrant preference rule write that pre-Revolutionary Americans were not bothered by warrantless searches, they are overlooking a little-discussed,⁷⁹ but very important, segment of constitutional history I do not mean to imply that this obscure piece of history provides every clue about how our constitutional ancestors approached search and seizure questions. Nor am I suggesting that the quarrel over forcible ex officio searches left as lasting an impression in the colonial consciousness as did James Otis, Jr.'s fiery 1761 speech attacking the

ficer to come into a Gentleman's House, and with an Air of Authority, demand an Account upon Oath of the Liquor he has drank in his Family for the year past.

Id. at 112. While the 1754 reform bill was enacted eventually, the pamphlet war against the bill "showed how acutely sensitive people in Massachusetts could be to anything that seemed to threaten the sanctity of their dwellings." *Id.* at 114.

76. SMITH, *supra* note 71, at 115.

77. *Id.* at 118-21. Smith explains that Governor Shirley probably looked to the Act of Frauds of 1662, officially entitled An Act for preventing Frauds, and regulating Abuses in His Majesty's Customs, 1662, 13 & 14 Car. 2, ch.11 (Eng.), as the legal basis for his gubernatorial warrants. SMITH, *supra* note 71, at 120-21.

The 1662 Act of Frauds permitted the issuance of writs of assistance, but the writs themselves did not authorize any power of search: the writ of assistance was not a search warrant, but "a sort of identity card by which the customs officer could establish himself as a man to be heeded." *Id.* at 39. The power of entry and search allowed under the 1662 Act of Frauds was "condition[ed] upon the presence of a constable or other local public officer. The writ of assistance merely ordered the constable to assist the customs officer in his search—a search that rested on [the] statutory authority [of the 1662 Act of Frauds]." Mann, *supra* note 71, at 356.

The legal snag for Governor Shirley was that the 1662 Act did not authorize governors to issue writs of assistance. As Smith notes: "The 1662 act expressly laid down that the writ of assistance should be from the Court of Exchequer, which identity no governor of provincial Massachusetts conceivably could pretend to." SMITH, *supra* note 71, at 121.

78. LASSON, *supra* note 3, at 56; SMITH, *supra* note 71, at 122.

79. Professor Lasson makes only a passing reference to this period in his classic study on the history and development of the Fourth Amendment. See LASSON, *supra* note 3, at 55.

writs of assistance.⁸⁰ I do submit, however, that these events undermine the broad claim that the colonists were indifferent about warrantless searches. The controversy over forcible ex officio searches marked the beginning of a larger concern that eventually led to the great battle over the writs of assistance.

Telford Taylor argues that colonial litigants were not "at all concerned about warrantless searches incident to arrest."⁸¹ It is, however, a long leap from this narrow proposition to the larger claim that "the people" who battled British customs officers were unconcerned and untroubled by warrantless searches generally.⁸² And it is a hop, skip, and a world record jump to the conclusion that current warrantless searches should be measured by a rational basis model because eighteenth century Americans did not object to warrantless searches incident to arrest. We do know that some Massachusetts colonists, subjected to forcible ex officio searches by British customs officers, did strongly object to such searches, both in the courts and in the streets.⁸³ It might even be said that in the minds of the people, an ex officio search and a writ of assistance search were two different sides of the same coin. Both allowed

80. In *Boyd v. United States*, 116 U.S. 616 (1886), the Court remarked that the 1761 debate over the legality of the writs of assistance

was perhaps the most prominent event which inaugurated the resistance of the colonies to the oppressions of the mother country. "Then and there," said John Adams, "then and there was the first scene of the first act of opposition to the arbitrary claims of Great Britain. Then and there the child Independence was born."

Id. at 625.

81. TAYLOR, *supra* note 15, at 39.

82. As an intuitive matter, Professor Taylor's interpretation of the Fourth Amendment is troubling. He states: "[O]ur constitutional fathers were not concerned about warrantless searches, but about overreaching warrants." *Id.* at 41. In his view, the framers did not envision "the warrant as a protection against unreasonable searches, [but] saw it as an authority for unreasonable and oppressive searches." *Id.* If Professor Taylor's interpretation is correct, we are forced to conclude that the colonists would have felt better about British customs officers conducting warrantless, unchecked searches of their homes and businesses than having those officers' discretion restrained by an order from a judge or magistrate. The very existence of the Fourth Amendment's Warrant Clause, however, indicates at least a concern with, if not distrust of, warrantless searches. Do Professor Taylor and other critics of the warrant preference rule want us to believe that the colonists who opposed the discretionary powers of British customs officers would not have "vigorously opposed *warrantless* searches exhibiting *the same characteristics* as general warrants and writs and thus impairing privacy and freedom to the same degree?" Kamisar, *supra* note 33, at 575.

83. See *supra* notes 74-75 and accompanying text.

broad, discretionary governmental search power without any requirement of specific cause or judicial oversight. For the current Supreme Court and some Fourth Amendment scholars, the dispute over forcible ex officio searches may appear as only a minor skirmish in comparison to the battle fought against the writs of assistance. The objections that impelled the residents of eighteenth century Massachusetts to fight against forcible ex officio searches, however, derived from the same principle that launched the attack on the writs of assistance. That principle—the distrust of discretionary police power—still motivates modern day objections to warrantless police intrusions.

The second premise of those who criticize the warrant preference rule is even harder to understand than their acceptance of warrantless searches. The critics suggest that judges were the “bad guys” and warrants were the “weapons” used by judges to oppress the people.⁸⁴ To be sure, some judges played an ignoble part in the story that is the history of the Fourth Amendment.⁸⁵ But the critics paint a misleading picture when they imply that judges and magistrates were insensitive to the complaints of colonists aggrieved by British search and seizure tactics.

As one scholar of the Writs of Assistance Case has noted, “judges in colonial America were defying and defeating British overlordship years before a single soldier took to the field.”⁸⁶ What motivated these judges “was not spearhead radicalism, but a genu-

84. Professor Taylor writes:

[O]ur constitutional fathers were not concerned about warrantless searches, but about overreaching warrants. It is perhaps too much to say that they feared the warrant more than the search, but it is plain enough that the warrant was the prime object of their concern. Far from looking at the warrant as a protection against unreasonable searches, they saw it as an authority for unreasonable and oppressive searches, and sought to confine its issuance and execution in line with the stringent requirements applicable to common-law warrants for stolen goods

TAYLOR, *supra* note 15, at 41.

85. Probably the most well-known judge in the history surrounding the origins of the Fourth Amendment is Chief Justice Thomas Hutchinson of the Massachusetts Superior Court. Appointed to a court that had been inclined to rule that writs of assistance were illegal, Hutchinson diligently worked, first to postpone an adverse ruling against the writs, SMITH, *supra* note 71, at 388, and then sought the assistance of a customs official in England in furnishing legal grounds that would convince his judicial colleagues of the legal validity of the writs. *See id.* at 388-437.

86. *Id.* at 5.

me belief that the general writ did not accord with true legal principle."⁸⁷ When James Otis, Jr. attacked the legality of the writs of assistance in the Massachusetts Superior Court, he did not argue that judges played a minor role in protecting the security of the people, nor did he claim that all warrants were bad. On the contrary, Otis emphasized that the absence of judicial oversight was one of the prime evils inherent in the writs. The writ of assistance gave customs officers an open-ended license to invade the homes and businesses of individuals.⁸⁸ Writs of assistance, unlike special warrants under the common law, were not based on sworn information presented to a magistrate, nor did they specify the place to be searched.⁸⁹ Furthermore, because the writs lasted for the life of the reigning monarch, customs officers were not required to return to court to account for their actions.⁹⁰

Although Otis' arguments did not persuade Massachusetts' highest court, similar arguments were raised throughout the colonies.⁹¹ Ultimately, the colonial judges, articulating many of the same themes raised by Otis, sided with the people, and sounded the death knell for the writs. These judges stood as the bulwark against the efforts of high British officials demanding legalization of the writs of assistance.⁹²

87. *Id.*

88. *Id.* at 342-44.

89. *Id.*

90. *Id.* at 343. A writ of assistance, although sometimes characterized as a type of warrant, was quite different in scope and authority from the common law warrants issued for stolen goods. *Id.* at 37-40. In essence, "[t]he writ was a sort of identity card by which the customs officer could establish himself as a man to be heeded." *Id.* at 39.

91. See O.M. Dickerson, *Writs of Assistance as a Cause of the Revolution, in THE ERA OF THE AMERICAN REVOLUTION* 40, 43 (Richard B. Morris ed., 1939) ("There was popular objection to [the writs of assistance], not merely in Massachusetts but in practically all the colonies.").

92. Dickerson wrote:

It took courage for judges to refuse writs of assistance when demanded by the customs officers, since they held their commissions at the will of the Crown and were dependent for their salaries upon the revenues collected by the Customs Commissioners. In the face of such formidable pressure from official sources it is surprising that the judiciary from Connecticut to Florida, with one exception, stood firm in opposing the legality of the particular form of writ demanded of them and continued in their judicial obstinacy through six years of nearly constant efforts to force them to yield.

Id. at 74.

For example, in March of 1769, Connecticut Chief Justice Jonathan Trumbull, while purposefully delaying action on an application for a writ of assistance, privately told customs officials that the "superior court could do nothing contrary to the sense of the people."⁹³ A short time later, judges of the Pennsylvania Supreme Court expressly refused to issue writs of assistance.⁹⁴ The judges "claimed there was no law authorizing them to grant such general standing writs, but promised to issue particular writs upon the oath of the customs officer that he had information that prohibited goods were lodged in a particular place."⁹⁵

During the same period, the Virginia Supreme Court also rejected a request for writs of assistance. The actions of Virginia's high court were significant because Virginia was one of the colonies "where the issue over writs of assistance was most stubbornly fought. It was the largest and most populous colony and had more ports of entry than any other."⁹⁶ Instead of yielding to an "impressive array of legal opinion from England"⁹⁷ urging the issuance of general writs, the Virginia court ordered the colony's attorney gen-

93. Frese, *supra* note 75, at 259-60. A similar hostility towards the writs prevailed in the Rhode Island judiciary. Customs officials twice applied for the writs in 1768 and 1769. This fact notwithstanding,

the [Rhode Island] judges appeared before the general assembly in 1771 and stated that no application had been made. It is not necessary to assume that the judges were not telling the truth. Under the procedure of the common law and [the relevant British statute], they had never received a legal application for a writ of assistance. That procedure required that the applicant should state on oath that he had information that uncustomed goods were in a particular place. The application by the customs officers had not alleged any specific violation of the law nor named any specific place to be searched. Failing this, their applications were without legal standing and the judges ignored them.

Dickerson, *supra* note 91, at 51.

94. Dickerson, *supra* note 91, at 58-61.

95. Frese, *supra* note 75, at 264. Dickerson further notes that the actions of the Pennsylvania court, lead by Chief Justice William Allen, in refusing to issue the writs came after it had been specifically overruled by an opinion of the attorney general of England. It took courage for a colonial chief justice, himself a Tory, to persist in his ruling when he had before him an opinion specifically referring to him and quoting adversely from his own decision.

Dickerson, *supra* note 91, at 61.

96. Dickerson, *supra* note 91, at 72. According to Dickerson, "[w]hat happened in Massachusetts [was] tame compared with the struggle in Virginia." *Id.* at 73.

97. *Id.* at 73.

eral to prepare an application for a writ that was consistent with the requirements of a specific writ.⁹⁸

The chief justice of East Florida followed a similar path. When customs officials requested a writ, Chief Justice William Drayton denied their request, writing:

In Answer to your Application to me for Writs of Assistance to be lodged in the Hands of the Custom House Officers in this Province to search for & to seize prohibited or uncustomed Goods with the same, I must inform you: That I am, & always shall be ready to issue such Writs to search all Places, which by Oath made before me shall be suspected to know to contain Goods of that Kind. But I do not think myself justified by Law to issue General Writs for that Purpose, to be lodged in the Hands, & to be executed discretionaly, (perhaps without any Foundation) at the Will of subordinate Officers, to the Injury of the Rights of His Majesty's other loyal Subjects.⁹⁹

These actions by judges in Connecticut, Pennsylvania, Virginia, and East Florida are a few examples of the "unsung record of courage and fidelity to what they believed to be the law of the land[,] and "must be considered in any appraisal of the colonial judiciary[']s]" willingness to protect against expansive and discretionary governmental search powers.¹⁰⁰ In the end,

[f]rom the time of the opposition of Otis in 1761 to the last petition of the customs officials in 1773, the colonial courts had been remarkably united in resisting the demands for a general search warrant. Not even the attorney general in England nor the colonial secretary could force their hand.¹⁰¹

The only courts to comply with British requests to issue writs of assistance were Massachusetts, New Hampshire, and South Carolina.¹⁰²

98. Frese, *supra* note 75, at 269.

99. *Id.* at 290.

100. Dickerson, *supra* note 91, at 74.

101. Frese, *supra* note 75, at 292.

102. *Id.* Frese notes:

New York had issued a writ which for some unknown reason proved unsatisfactory. Rhode Island, Connecticut, Pennsylvania, Virginia, Georgia, and East Florida had all refused applications; and [there are] only notices of failures in Newfoundland, St. John's, Nova Scotia, and New Jersey. Quebec, North Caro-

Considering the history surrounding the writs of assistance, it is difficult to conclude that most colonial judges were insensitive to civil liberties, or anxious to expand the search powers of governmental officials. Rather, this evidence indicates that many judges, along with other colonists¹⁰³ and colonial juries,¹⁰⁴ strongly opposed practices that granted custom officers the discretion to invade the privacy and personal security of individuals. Yes, the colonists

lina, West Florida, Bermuda, and the Bahamas, were unheard from. It was a high percentage of failure.

Id. at 292-93.

103. James Otis, Jr.'s place in history as a hero in the fight against governmental search and seizure power seems quite secure, undoubtedly assisted by John Adams' memory:

I do say in the most solemn manner, that Mr. Otis's oration against the Writs of Assistance breathed into this nation the breath of life. [Otis] was a flame of fire! Every man of a crowded audience appeared to me to go away, as I did, ready to take arms against Writs of Assistance. Then and there was the first scene of the first Act Opposition to the arbitrary Claims of Great Britain. Then and there the child Independence was born. In 15 years, namely in 1776, he grew to manhood, and declared himself free.

10 CHARLES F. ADAMS, *THE LIFE WORKS OF JOHN ADAMS* 247-48, 276 (1880).

Similarly, Patrick Henry was a "vivid and forceful leader" of those who opposed ratification of the Constitution without a Bill of Rights. LASSON, *supra* note 3, at 92. Without such protection, Henry told his colleagues, federal officers would be free to "go into your cellars and rooms, and search, ransack, and measure everything you eat, drink, or wear." *Id.* at 93. See generally Dirk Hoerder, *Boston Leaders and Boston Crowds, 1765-1776*, in *THE AMERICAN REVOLUTION* 233 (Alfred F. Young ed., 1976).

104. Professor Amar wants us to examine the Fourth Amendment "with fresh eyes." Amar, *supra* note 33, at 1179. He notes that under a warrant preference rule, "[a] warrant issued by a judge or magistrate—a permanent government official, on the government payroll—has had the effect of taking a later trespass action away from a jury of ordinary Citizens." *Id.* (emphasis omitted). Because, in Amar's view, "juries [can] be trusted far more than judges to protect against government overreaching," *id.*, judicial warrants are not the ideal way to protect Fourth Amendment interests. *But cf.* Dripps, *supra* note 6, at 935 & n.154 (1986) (emphasizing the "executive discretion" inherent in warrants as warrant applications are rarely denied by judges, occasionally warrants that are issued are not executed, and that, "[a]ccordingly, it is entirely inappropriate to speak of the warrant as a judicial rather than an executive creature").

Professor Amar argues that warrantless intrusions should be judged in a different light. Rather than being seen as presumptively illegal, a jury subsequently should assess its reasonableness. Amar, *supra* note 33, at 1179. Thus,

[i]f the jury deemed the search "unreasonable," the plain words of the Fourth Amendment would render the search unlawful. Defendant official could thus be held strictly liable in damages. [T]he Seventh Amendment, in combination with the Fourth, would require the federal government to furnish a jury to any plaintiff-victim who demanded one, and protect that jury's finding of fact from being overturned by any judge or other government official.

Id.

vented their anger against judges who issued writs of assistance,¹⁰⁵ and yes, they certainly opposed open-ended warrants.¹⁰⁶ But those who opposed the unchecked power of British customs officials undoubtedly applauded the actions of many colonial courts in refusing to issue writs of assistance.¹⁰⁷ Thus, the critics of the warrant preference rule seem wide of the mark when they intimate that the judges were the villains in the history and development of the Fourth Amendment.

V A REASONABLENESS MODEL IS A "BLANK CHECK" FOR THE POLICE

What does the above history teach us about the central meaning of the Fourth Amendment? Concededly, this history does not offer proof positive that the framers would have supported a vigorous warrant preference rule. On the other hand, "there is certainly nothing in it to suggest, let alone require, a narrow or a static view of the fourth amendment's broad language."¹⁰⁸ In addition, the historical record casts considerable doubt on the modern Court's rational basis model for analyzing Fourth Amendment questions. Eighteenth century Americans who fought against British customs officers expected more from constitutional principle than a simple utterance that judges defer to rational and pragmatic search and seizure practices. They demanded that discretionary search and seizure powers be restrained.¹⁰⁹

105. During the Stamp Act Riots in August of 1765, a mob destroyed the home of Massachusetts Chief Justice Thomas Hutchinson. JOSEPH QUINCY, JR., *REPORTS OF CASES ARGUED AND ADJUDGED IN THE SUPERIOR COURT OF JUDICATURE OF THE PROVINCE OF MASSACHUSETTS BAY, BETWEEN 1761-1772*, app. I at 416 (1865).

106. See *supra* notes 88-90 and accompanying text.

107. Cf. Frese, *supra* note 75, at 300 ("The real significance of the battle over the writs of assistance with the American Commissioners of Customs lies in the almost universal opposition of the colonial courts.").

108. Amsterdam, *supra* note 26, at 401.

109. As Patrick Henry told the Virginia Constitutional Convention:

The officers of Congress may come upon you now, fortified with all the terrors of paramount federal authority. Excisemen may come in multitudes; for the limitation of their numbers no man knows. They may, unless the general government be restrained by a bill of rights, or some similar restriction, go into your cellars and rooms, and search, ransack, and measure everything you eat, drink, or wear. They ought to be restrained within proper bounds.

This historical evidence reflects “the people[’s]” commitment to the values embodied in the Fourth Amendment. What were those values? The Fourth Amendment’s Reasonableness Clause, like some of the Constitution’s other general provisions, “due process of law,” “freedom of speech,” “cruel and unusual punishments,” and “equal protection of the laws,” is one of what Chief Justice John Marshall called the “great outlines” of the Constitution.¹¹⁰ The framers declared a broad principle about governmental power in guaranteeing freedom from unreasonable search and seizure. Under that broad principle, government authority and discretion would not go unchecked.¹¹¹ Put in simpler terms relevant to our current times, the broad principle embodied in the Reasonableness Clause is that discretionary police power implicating Fourth Amendment interests cannot be trusted. The modern Court, nonetheless, insists that a rational basis model fulfills the central purpose of the Fourth Amendment. The law controlling the search of private containers exemplifies how the Court’s current model promotes police power at the expense of Fourth Amendment freedoms.

LASSON, *supra* note 3, at 93 (quoting 3 DEBATES ON THE ADOPTION OF THE FEDERAL CONSTITUTION 448-49 (Jonathan Elliot ed., 1988)).

110. *McCulloch v. Maryland*, 17 U.S. (4 Wheat.) 316, 406 (1819).

111. Employing different descriptive terms, many others have recognized the broad principle embodied in the Fourth Amendment’s cryptic prohibition against unreasonable searches and seizures. *See, e.g., Olmstead v. United States*, 277 U.S. 438, 478 (1928) (Brandeis, J., dissenting) (The framers “conferred, as against the Government, the right to be let alone—the most comprehensive of rights and the right most valued by civilized men. To protect that right, every unjustifiable intrusion by the Government upon the privacy of the individual, whatever the means employed, must be deemed a violation of the Fourth Amendment.”); *Boyd v. United States*, 116 U.S. 616, 635 (1886) (“[C]onstitutional provisions for the security of person and property should be liberally construed. A close and literal construction deprives them of half of their efficacy, and leads to gradual depreciation of the right, as if it consisted more in sound than in substance. It is the duty of courts to be watchful for the constitutional rights of the citizen, and against any stealthy encroachments thereon.”). LANDYNSKI, *supra* note 33, at 47 (“[T]he Fourth Amendment embodies a spiritual concept: the belief that to value the privacy of home and person and to afford it constitutional protection against the long reach of government is no less than to value human dignity, and that this privacy must not be disturbed except in case of overriding social need, and then only under stringent procedural safeguards.”); *cf. Amsterdam, supra* note 26, at 352, 403 (recognizing the difficulty and complexity of articulating a single, comprehensive Fourth Amendment theory, but ultimately urging that Fourth Amendment decisionmaking involves a “value judgment” about how much privacy and security is needed in a free and open society).

A. *Search and Seizure Doctrine as Applied to Private Containers: The Fourth Amendment as an Odious Right*

As an intuitive matter, the Court's approach to police searches of private possessions is difficult to fathom. Even the most ardent foe of a broad interpretation of civil liberties is hard pressed to deny that the Fourth Amendment ranks as a fundamental right deserving strict judicial protection. Unlike many of the rights recognized by some of the more controversial civil liberties rulings of the last few decades, the right against unreasonable search and seizure is specifically set forth in the Bill of Rights.¹¹²

The right against unreasonable search and seizure is not some leftover relic of the eighteenth century. Most individuals understand the value of privacy, property, and personal security, and the need to check discretionary police power that intrudes upon these interests. Consider, for example, the context of a police search of a private container. For the average layperson, the private nature of one's purse, briefcase or luggage is self-evident. Opening another's purse or wallet without permission is rude and offensive. Private containers are typically not transparent for a reason—individuals do not wish disclosure of their contents. Briefcases, for instance, have locks because their owners want to prevent others from obtaining access to the contents. People provide identification markers on luggage and other private containers in order to avoid confusing their possessions with the items of other persons.

If these privacy expectations are accurate and reasonable for the general public, it follows a fortiori that the Fourth Amendment strongly addresses police intrusions that jeopardize these same privacy interests.¹¹³ Because the Fourth Amendment applies to items such as luggage, purses, and briefcases,¹¹⁴ one would expect the

112. Cf. ROBERT BORK, *THE TEMPTING OF AMERICA* 246 (1990) ("The Fourth Amendment's protection of the privacy of the home from unreasonable searches is an illustration" that the "Constitution does protect defined aspects of an individual's privacy.").

113. Of course, the Fourth Amendment applies only to government actors. The intrusive actions of private actors are beyond its reach. See *Burdeau v. McDowell*, 256 U.S. 465, 475 (1921).

114. See, e.g., *Robbins v. California*, 453 U.S. 420, 426 (1981) (plurality opinion) ("Th[e] [Fourth] Amendment protects people and their effects, and it protects those effects whether they are 'personal' or 'impersonal.'"); *United States v. Chadwick*, 433 U.S. 1, 8 (1977) (holding that a warrant was necessary to search locked personal luggage secured in the arrestee's

Court to be particularly vigilant in its review of police searches of closed containers.¹¹⁵ If checking police discretion and authority is a relevant concern of the Fourth Amendment, one might also suspect that the Court would narrow, not expand, the instances in which the police are free to conduct warrantless searches of private containers. The Court's rational basis model, however, has followed a direction that is diametrically opposed to these natural expectations.

In 1982, the Court considered whether the police should be free to conduct warrantless searches of private containers found during the course of a routine automobile search.¹¹⁶ Instead of looking to the requirements of the Warrant Clause, the Court relied upon an ad hoc balancing formula.¹¹⁷ In resolving the balance, the Court ruled warrantless searches of private containers valid despite the commands of the Warrant Clause because "[w]hen a legitimate search is under way, . . . nice distinctions between . . . glove compartments, upholstered seats, trunks, and wrapped packages, in the case of a vehicle, must give way to the interest in the prompt and efficient completion of the task at hand."¹¹⁸ In other words, the need for "prompt and efficient" police searches holds a higher value in the Court's eyes than personal privacy and judicial supervision of police intrusions.

Similarly, the Court refused to "second-guess" police departments that search the private possessions of an arrestee prior to incarceration, even cases in which the police have no suspicion for

car); cf. *United States v. Ross*, 456 U.S. 798, 822 (1982) (finding that the Fourth Amendment permits no distinction between "worthy" and "unworthy" containers).

115. As Justice Thurgood Marshall has noted: "One need not carry contraband to prefer that the police not examine one's private possessions. Indeed, that preference is the premise of the Fourth Amendment." *South Dakota v. Opperman*, 428 U.S. 364, 393 (1976) (Marshall, J., dissenting).

116. *United States v. Ross*, 456 U.S. 798 (1982).

117. *Id.* at 825. *Ross* considered "the extent to which police officers—who have legitimately stopped an automobile and who have probable cause to believe that contraband is concealed somewhere within it—may conduct a probing search of compartments and containers within the vehicle whose contents are not in plain view." *Id.* at 800. Importantly, no exigency existed to justify an immediate search under the facts in *Ross*. See *id.* at 830-32 (Marshall, J., dissenting). The Court concluded that although an individual has a legitimate privacy interest in the contents of a private container, that interest must yield to the government's interest in conducting the search. *Id.* at 822-23.

118. *Id.* at 821 (footnote omitted).

a search and less intrusive methods are available to serve the state's interests.¹¹⁹ Citing the advantages of unsupervised police intrusions, the Court emphasized that "every consideration of orderly police administration benefiting both police and the public points toward the appropriateness" of allowing suspicionless searches.¹²⁰ The Fourth Amendment interests of the individual were given short shrift.

Despite the Court's crabbed interpretation, a person who has been arrested and who will soon be incarcerated should be protected against the exercise of unnecessary police power.¹²¹ As Professor Weinreb has noted:

The "search" of possessions that a person carries with him can be a means for imposing one's will on him and making it clear to him that he is not in control. The contents of a wallet can be spread out on a table, handled, commented on ("Who's this babe?" "Whatcha got his picture for?"), and sullied. Items that

119. *Illinois v. Lafayette*, 462 U.S. 640, 642-43 (1983). The question in *Lafayette* was whether, "at the time an arrested person arrives at a police station, the police may, without obtaining a warrant, search a shoulder bag carried by that person." *Id.* at 641. The Court ruled that such a search was permissible. *Id.* at 648.

120. *Id.* at 645-46. The Court listed the following interests that justify inventory searches of the private possessions of incarcerated persons: a search protects the arrested person's possessions against the possibility of theft by government officials; searches deter the assertion of false claims by the arrestee; and searches inhibit the introduction of dangerous and contraband materials into jail facilities. *Id.* at 646. According to the Court, "[i]t is immaterial whether the police actually fear any particular package or container; the need to protect against such risks arises independent of a particular officer's subjective concerns." *Id.*

121. Some of the Justices are evidently prepared to find that the Fourth Amendment offers slight, if any, protection concerning the privacy of arrestees. *See, e.g., Hudson v. Palmer*, 468 U.S. 517, 538 (1984) (O'Connor, J., concurring) ("The fact of arrest and incarceration abates all legitimate Fourth Amendment privacy and possessory interests in personal effects, and therefore all searches and seizures of the contents of an inmate's cell are reasonable.") (citations omitted); *Bell v. Wolfish*, 441 U.S. 520, 558-60 (1979) (holding that strip searches and visual body cavity searches of pretrial detainees after every contact visit with a person from outside the institution do not violate the Fourth Amendment); *United States v. Edwards*, 415 U.S. 800, 808-09 (1974) (holding that a lawful arrest permits the police "for at least a reasonable time and to a reasonable extent—[to] take [the arrestee's] privacy out of the realm of protection from police interest in weapons, means of escape, and evidence") (quoting *United States v. DeLeo*, 422 F.2d 487, 493 (1st Cir.), *cert. denied*, 397 U.S. 1037 (1970)); *United States v. Robinson*, 414 U.S. 218, 237-38 (1973) (Powell, J., concurring) ("If the arrest is lawful, the privacy interest guarded by the Fourth Amendment is subordinated to a legitimate and overriding governmental concern.").

are intimate not intrinsically but because of long, familiar association can be exposed.¹²²

A majority of the Court, however, is unwilling or incapable of recognizing the legitimate privacy interests that all human beings possess. Even more troubling, the Court ignores these interests even in cases lacking an overriding need for a police intrusion.¹²³ Indeed, when confronted with the fact that the state's interests are adequately served without permitting suspicionless inventory searches, the Court responds that its rational basis analysis does not require strict judicial oversight of administrative police procedures that invade the private possessions of arrestees.¹²⁴

More recent evidence of the Court's disinterest in Fourth Amendment freedoms is abundant. Should the police be free to conduct suspicionless searches of private containers found inside impounded and inventoried cars?¹²⁵ Certainly a motorist's alleged violation of the traffic laws does not diminish or waive her privacy interests in the contents of her purse or suitcase.

Violation of a traffic law does not justify an officer's search of a motorist's purse or briefcase, even though the officer may be forced to remain in close proximity to the motorist during questioning

122. Weinreb, *supra* note 31, at 78.

123. *Id.* ("Nothing about an arrest makes [a police inventory search of private possessions] incidental or reasonable; the need to inventory personal property or maintain security in cells requires only that the property be placed in a locker by the person himself.").

124. In *Illinois v. Lafayette*, 462 U.S. 640 (1983), the Court conceded, as it had to, that the police had no grounds for a search, *id.* at 643, and that less intrusive means may have been available to promote the state's interests. *Id.* at 648. Nevertheless, the Court explained:

[T]he real question is not what "could have been achieved," but whether the Fourth Amendment *requires* such steps[.]. The reasonableness of any particular governmental activity does not necessarily or invariably turn on the existence of alternative "less intrusive" means. We are hardly in a position to second-guess police departments as to what practical administrative method will best deter theft by and false claims against its employees and preserve the security of the station house. It is evident that a station-house search of every item carried on or by a person who has lawfully been taken into custody by the police will amply serve the important and legitimate governmental interests involved.

Id. at 647-48 (citations omitted).

125. See *Colorado v. Bertine*, 479 U.S. 367 (1987) (holding that opening a closed backpack pursuant to a suspicionless inventory search does not violate the Fourth Amendment).

about the infraction and presentation of the traffic ticket. The Court has held that the *interior* of an automobile should receive less protection than the interior of one's home.¹²⁶ It does not follow from this proposition, however, that the lesser expectation of privacy accorded an automobile's interior automatically extends to a sealed handbag, locked briefcase, or zippered backpack. There is a big difference between spreading a group of photographs on the backseat of a car, and placing those same photographs in a closed suitcase that happens to sit on the same backseat. The Court, however, has concluded that suspicionless searches of private containers during a routine inventory are reasonable.¹²⁷

The Court offers several reasons supporting a suspicionless search of private containers found during a police inventory. First, a police inventory of an automobile's contents, including private containers located therein, is unrelated to the investigation of criminal conduct.¹²⁸ In addition, allowing the search enables the state to protect "an owner's property while it is in the custody of the police, to insure against claims of lost, stolen, or vandalized property, and to guard the police from danger."¹²⁹ These state interests, in the Court's eyes, "outweigh[] the individual's Fourth Amendment" rights.¹³⁰

Are these reasons convincing, or is the Court simply assuming that the public will tolerate a crabbed view of private possessions in order to book a few criminals? Certainly the Court's initial justification for ignoring the commands of the Warrant Clause—that an inventory search is not a criminal investigation—will not suffice.

126. See, e.g., *California v. Carney*, 471 U.S. 386, 390-94 (1985); *United States v. Chadwick*, 433 U.S. 1, 12-13 (1977); *Carroll v. United States*, 267 U.S. 132, 153 (1924).

127. In *Bertine*, the Court ruled that the Fourth Amendment did not bar the police from conducting a suspicionless search of a closed backpack found during the inventory of a vehicle that was about to be taken to an impoundment lot. *Bertine*, 479 U.S. at 369.

128. *Id.* at 371 (determining that inventory searches are an exception to the warrant requirement and that the policies underlying the warrant requirement and the concept of probable cause are not implicated by inventory searches); see also *South Dakota v. Opperman*, 428 U.S. 364, 370 n.5 (1976) ("The standard of probable cause is peculiarly related to criminal investigations, not routine, non-criminal procedures. The probable-cause approach is unhelpful when analysis centers upon the reasonableness of routine administrative care-taking functions, particularly when no claim is made that the protective procedures are a subterfuge for criminal investigations.").

129. *Bertine*, 479 U.S. at 372.

130. *Id.*

It is too late in the day to argue that the Fourth Amendment only protects the private possessions of criminals.¹³¹ Such statements will encourage the notion that the Fourth Amendment “has become constitutional law for the guilty.”¹³²

The Court’s other, equally unpersuasive, reason for disregarding the dictates of the Warrant Clause is the state’s interest in protecting a motorist’s property and police departments from false claims and dangerous contraband.¹³³ Nor should the police have *carte blanche* authority because inventory searches are deemed “rou-

131. See, e.g., *O'Connor v. Ortega*, 480 U.S. 709, 715 (1987); *Camara v. Municipal Court*, 387 U.S. 523, 530 (1967).

132. *County of Riverside v. McLaughlin*, 111 S. Ct. 1661, 1677 (1991) (Scalia, J., dissenting).

The anomalous nature of the Court’s Fourth Amendment theory is reflected in the greater constitutional protection accorded private possessions when the police suspect the existence of criminal conduct than when such suspicion is absent. Under current law, if the police arrest Joe Guilty as he exits a taxi cab or walks down the street, they may not immediately search a suitcase that he is carrying even though they have probable cause to believe that contraband may be inside. See, e.g., *United States v. Chadwick*, 433 U.S. 1 (1977). On the other hand, if Charley Innocent forgets to feed the parking meter and his car is towed to an impoundment lot, the police are free to search any and all private possessions found inside the car, even in the absence of any reason to believe that contraband or evidence of a crime is likely to be discovered. See *Florida v. Wells*, 495 U.S. 1 (1990); *Colorado v. Bertine*, 479 U.S. 367 (1987).

133. As noted, the Court in both *Opperman* and *Bertine* justified inventory searches on the grounds that such searches serve three state interests: (1) “the protection of the [vehicle] owner’s property while it remains in police custody;” (2) “the protection of the police against claims or disputes over lost or stolen property;” and (3) “the protection of the police from potential danger.” *Opperman*, 428 U.S. at 369; see also *Bertine*, 479 U.S. at 372.

The first state interest is adequately addressed by “the use of secure impoundment facilities.” *Bertine*, 479 U.S. at 382 (Marshall, J., dissenting). Further, even when provision of such facilities may not be practical for a police department to provide, administrative convenience is an insufficient reason to permit routine searches of an individual’s private possessions, especially in light of the Fourth Amendment’s vital role in the Bill of Rights.

Similarly, inventory searches will not completely guarantee the second state interest—protection against false claims—“since there remains the possibility of accompanying such claims with an assertion that an item was stolen prior to the inventory or was intentionally omitted from the police records.” *Opperman*, 428 U.S. at 379 (Powell, J., concurring).

Finally, the third state interest—protection from potential danger—is unpersuasive because “there is little danger associated with impounding unsearched automobiles.” *Id.* at 378 (Powell, J., concurring). Indeed, as Justice Marshall has noted, this interest is plainly unconvincing: “Not only is protecting the police from dangerous instrumentalities an attenuated justification for most automobile inventory searches, but opening closed containers to inventory the contents can only increase the risk.” *Bertine*, 479 U.S. at 384 (Marshall, J., dissenting).

tine" police work.¹³⁴ Doubtlessly from an officer's perspective, searching thousands of handbags, wallets, and backpacks is a "routine" and mundane matter. From the perspective of the individual, however, the so-called "routine" search of a wallet or purse invades privacy no less than a deliberately planned search. Moreover, even though governmental intrusions seem to occur more frequently in our increasingly urban society, hopefully society does not yet condone as routine police searches of our handbags, wallets, and other private possessions.¹³⁵

If the Court's justifications seem pretextual or halfhearted, another explanation for the Court's actions may exist. The Court is uninterested in placing the Fourth Amendment in the category of preferred constitutional rights, including the rights of free speech, freedom of religion, and freedom from racial discrimination, despite its specific placement in the Bill of Rights. When the Court considers whether government action violates those rights, it usually employs strict judicial scrutiny.¹³⁶ In other words, the Court determines whether compelling state interests justify invasion of a

134. *South Dakota v. Opperman*, 428 U.S. 364, 370 n.5 (1976).

135. Cf. Christopher Slobogin & Joseph E. Schumacher, *Reasonable Expectations of Privacy and Autonomy in Fourth Amendment Cases: An Empirical Look at "Understandings Recognized and Permitted by Society,"* 42 DUKE L.J. 727, 738-39 (1993) (in an empirical study on the degree of intrusiveness associated with different police investigative methods, searches of luggage found in cars received a relatively high rating of intrusiveness). Even those who empathize with the complaints often raised by the police have indicated a marked discomfort with the reasons proffered by the Court for allowing inventory searches. See *Opperman*, 428 U.S. at 379-80 (Powell, J., concurring); cf. 3 WAYNE R. LAFAVE, *SEARCH AND SEIZURE* § 7.4(a), at 101-16 (1987) (criticizing the reasoning of *Opperman*).

136. See, e.g., *R.A.V. v. City of St. Paul*, 112 S. Ct. 2538, 2547-48 (1992) (holding that strict scrutiny applied to a city ordinance which prohibited the display of a symbol known to arouse anger in others on the basis of race, color, creed, religion or gender, and which allegedly violated the freedom of speech); *Burson v. Freeman*, 112 S. Ct. 1846, 1851 (1992) (holding that a content-based restriction on political speech in a public forum must serve a compelling state interest and be narrowly drawn to achieve that interest); *Simon & Schuster, Inc. v. Members of the N.Y. State Crime Victims Bd.*, 112 S. Ct. 501, 509 (1991) (applying strict scrutiny to a state law which allegedly violated the First Amendment's protection of free speech); *City of Richmond v. J.A. Croson Co.*, 488 U.S. 469, 493 (1989) ("[T]he purpose of strict scrutiny is to 'smoke out' illegitimate uses of race by assuring that the legislative body is pursuing a goal important enough to warrant use of a highly suspect tool."); see also *Church of the Lukumi Babalu Aye, Inc. v. City of Hialeah*, 113 S. Ct. 2217, 2243-44 (1993) (Souter, J., concurring in part and concurring in the judgment) (noting that the Court has applied strict scrutiny in its review of laws burdening religious practice on numerous occasions).

constitutional right, and whether the means chosen by the government are narrowly tailored to achieve those interests.

Fourth Amendment claims, however, do not receive similar judicial review. Thus, in the automobile inventory search case, when confronted with the reality that less intrusive means were readily available as a substitute for a suspicionless search, the Court responded that “[t]he real question is not what “could have been achieved,” but whether the Fourth Amendment *requires* such steps. The reasonableness of any particular governmental activity does not necessarily or invariably turn on the existence of alternative “less intrusive” means.’”¹³⁷

This sort of reasoning seldom is tolerated when the Court decides claims concerning preferred constitutional rights. For example, when needlessly broad legislative measures implicate the preferred rights of freedom from racial discrimination or freedom of speech, the Court normally will declare the state’s action invalid.¹³⁸ Likewise, when other fundamental rights are at stake, the Court generally is unwilling to defer to government claims of necessity.¹³⁹ Why are Fourth Amendment claims treated differently?¹⁴⁰ One an-

137. *Bertine*, 479 U.S. at 374 (quoting *Illinois v. Lafayette*, 462 U.S. 640, 647 (1983)).

138. *See, e.g., R.A.V.*, 112 S. Ct. at 2549 (noting that the “‘danger of censorship’ presented by a facially content-based statute requires that [a content-based law] be employed only where it is ‘necessary to serve the asserted [compelling] interest’”) (quoting *Burson v. Freeman*, 112 S. Ct. 1846, 1852 (1992); *Leathers v. Medlock*, 111 S. Ct. 1438, 1444 (1991)); *Simon & Schuster*, 112 S. Ct. at 512 (acknowledging the state’s compelling interest, but concluding that the law “is not narrowly tailored to advance [the state’s] objective [and therefore] is inconsistent with the First Amendment”); *Croson*, 488 U.S. at 500 (“[W]hen a legislative body chooses to employ a suspect classification, it cannot rest upon a generalized assertion as to the classification’s relevance to its goals.”).

139. *See Croson*, 488 U.S. at 501 (“The history of racial classification in this country suggests that blind judicial deference to legislative or executive pronouncements of necessity has no place in equal protection analysis.”); *see also Lukumi*, 113 S. Ct. at 2233 (“A law that targets religious conduct for distinctive treatment or advances legitimate governmental interests only against conduct with a religious motivation will survive strict scrutiny only in rare cases.”).

140. A skeptic might observe that unlike the other constitutional rights noted above, the text of the Fourth Amendment, with its emphasis on reasonableness, invites the balancing test that the Burger and Rehnquist Courts have employed. While this is a fair point, as I have argued, no proof has been offered that the framers intended such a literalist interpretation of the provision. Furthermore, this view diminishes the Warrant Clause, and leaves the Court with no guiding principle to structure search and seizure law. *See New Jersey v. T.L.O.*, 469 U.S. 325, 370 (1985) (Brennan, J., concurring in part and dissenting in part) (“[T]he presence of the word ‘unreasonable’ in the text of the Fourth Amendment does not

swer may be that minimum judicial review is condoned in search and seizure cases because the Court has "relegated [the Fourth Amendment] to a deferred position."¹⁴¹

Why is the Fourth Amendment considered a second-class right?¹⁴² My guess is that the Court sees the typical Fourth Amendment claimant as a second-class citizen, and sees the typical police officer as being overwhelmed with the responsibilities and duties of maintaining law and order in our crime-prone society¹⁴³ This dual perception may explain the Court's reluctance to subject police conduct to vigorous judicial oversight.

Rather than require that government officials meet the same heightened constitutional standard as in the context of other preferred rights, the Court employs a rational basis test offering only minimal judicial oversight. Under this test, warrantless searches are approved when they serve government interests of administrative convenience and efficiency To be sure, concerns about police

grant a shifting majority of this Court the authority to answer all Fourth Amendment questions by consulting its momentary vision of the social good."). Finally, even assuming that the Fourth Amendment envisions a balance between the interests of law enforcement and the interests of individual privacy and personal security, one still must explain why the modern Court almost always finds that the interests of the individual are subordinate to the government's interest of administrative convenience and efficiency.

141. *Brinegar v. United States*, 338 U.S. 160, 180 (1949) (Jackson, J., dissenting). In an article written in the early 1980's, Professor LaFave described the modern Court's treatment of the Fourth Amendment in less charitable terms: "[I]t is almost as if a majority of the Court was hellbent to seize any available opportunity to define more expansively the constitutional authority of law enforcement officials." Wayne R. LaFave, *Fourth Amendment Vagaries (of Improbable Cause, Imperceptible Plain View, Notorious Privacy, and Balancing Askew)*, 74 J. CRIM. L. & CRIMINOLOGY 1171, 1222 (1983). Professor LaFave's characterization remains accurate ten years later.

142. *Cf. Dripps, supra* note 6, at 936. Professor Dripps analyzes the Court's unwillingness to apply the exclusionary rule in *United States v. Leon*, 468 U.S. 897 (1984). *Leon* held that the exclusionary rule requiring the suppression of evidence is not to be applied where police officials act in reliance on a search warrant that was subsequently declared to be constitutionally invalid. Dripps argues the holding in *Leon* reflects the value of the Fourth Amendment in the eyes of the Court: "[T]he refusal to apply [the exclusionary rule sanction] or anything else expresses the judgment that the underlying norm is of little importance. *Leon* teaches that Fourth Amendment violations do not matter." Dripps, *supra* note 6, at 936 (footnote omitted).

143. Professor Alschuler addresses this latter point: "A rule of reason [for deciding Fourth Amendment issues] that takes an officer's unhappy lot as its starting point may be fairer, not only from the perspective of the sound administration of public justice, but also from the perspective of the officer himself." Albert Alschuler, *Bright Line Fever and the Fourth Amendment*, 45 U. PITT. L. REV. 227, 234 (1984) (footnote omitted).

“prompt[ness] and efficien[cy]”¹⁴⁴ are rational state interests, but these interests are rarely characterized as “compelling” or even “important” when official action threatens other fundamental rights.¹⁴⁵ Likewise, the Court accepts suspicionless searches even when other less intrusive means are available both to serve police interests and to promote Fourth Amendment protections. Under the rational basis test, warrantless searches will be upheld if the Court concludes that they promote legitimate state interests or are administratively convenient. The Court does not employ this type of reasoning when civil liberties outside of the Fourth Amendment context are implicated by state action.¹⁴⁶

B. Fourth Amendment Theory in the Future: Will It Be Based on a Recognition of Its Placement in the Bill of Rights?

Despite the above objections, the Court’s commitment to a rational basis model appears quite solid. In the future, some Justices undoubtedly will seek to expand this model even further to reverse Fourth Amendment claims which the modern Court previously has recognized. Consider, for instance, Justice Scalia’s recent complaints in *California v. Acevedo*¹⁴⁷ regarding the anomalies of the Court’s rules regarding searches of private containers.

The Court in *Acevedo* held that the police were not required to obtain a warrant to open a closed container found during the search of an automobile because they had probable cause to believe that the object of their search was in the container.¹⁴⁸ While agreeing with this result, Justice Scalia criticized the Court for not going further in allowing the police to search any closed container seized outside of a privately owned building as long as probable

144. *United States v. Ross*, 456 U.S. 798, 821 (1982).

145. *See, e.g., Craig v. Boren*, 429 U.S. 190, 198 (1976) (noting precedents that rejected “administrative ease and convenience as sufficiently important objectives to justify gender-based classifications”).

146. *See id., Shapiro v. Thompson*, 394 U.S. 618, 636-38 (1969) (rejecting the argument that a one year waiting period serves as an administratively efficient guideline for determining eligibility for welfare assistance and holding that such a requirement is not a compelling state interest that justifies infringement upon the fundamental right to travel from state to state).

147. 111 S. Ct. 1982 (1991).

148. *Id.* at 1991.

cause existed.¹⁴⁹ Currently, if the police seize a container on the street, such as a suitcase or a footlocker, they may not search it without judicial authorization unless exigent circumstances call for an immediate search.¹⁵⁰ If the police seize that same container inside an automobile, however, *Acevedo* allows a warrantless search.

Under Justice Scalia's vision of the Fourth Amendment, the police would be allowed to seize and search any closed container when they have probable cause for their actions. Justice Scalia thought it absurd for the Court to permit the police to arrest a suspect found on the street, search the arrestee's person and the area within his grasp, and then inventory the contents of his possessions at the station house, all without prior judicial authorization, but not allow the police to "take the less intrusive step of stopping [an] individual on the street and demanding to see the contents of his briefcase."¹⁵¹ According to Justice Scalia, a rule of reasonableness would permit the latter search.¹⁵²

What makes the search of an individual's briefcase "reasonable" simply because the police have probable cause to suspect its contents? The Court's precedents do not support Justice Scalia's position.¹⁵³ Of course, if the police are not allowed to search a

149. *Id.* at 1992-94 (Scalia, J., concurring). Sixteen years ago the Solicitor General presented a very similar argument to the Court in *United States v. Chadwick*, 433 U.S. 1 (1977). *See id.* at 6-7. The Court rejected the government's position. *See id.* at 7-11 (stating that private possessions carried by an individual in public are protected by the Warrant Clause).

150. *Chadwick*, 433 U.S. at 15 & n.9. *Cf.* *Smith v. Ohio*, 494 U.S. 541 (1990) (per curiam) (rejecting the argument that a warrantless search of a package that provides probable cause for an arrest can nonetheless be justified as an incident search of that same arrest).

151. *Acevedo*, 111 S. Ct. at 1993-94 (Scalia, J., concurring).

152. *Id.* at 1994.

153. *See Chadwick*, 433 U.S. 1 (holding that a private container seized from an individual may not be searched without a warrant). Also relevant are *United States v. Van Leeuwen*, 397 U.S. 249 (1970) and *Ex parte Jackson*, 96 U.S. 727 (1878), which stated, in dictum, that letters and packages placed in the mail may not be searched without complying with the safeguards of the Warrant Clause. *Van Leeuwen*, 397 U.S. at 251; *Ex parte Jackson*, 96 U.S. at 733; *see United States v. Jacobsen*, 466 U.S. 109, 114 (1984) ("Letters and other sealed packages are in the general class of effects in which the public at large has a legitimate expectation of privacy; warrantless searches of such effects are presumptively unreasonable.") (footnote omitted). Justice Scalia has not explained why the Fourth Amendment forbids the warrantless search of a package placed in the mail, but should permit a warrantless search of that same package if carried on the street.

The heart of Justice Scalia's position rests on the following logic: We allow the police to effectuate warrantless arrests. An arrest and the intrusions incident to that arrest are signif-

container or purse they suspect, they may choose to arrest the in-

icantly more intrusive than a search of a briefcase. In light of the permitted greater intrusion, it is irrational not to allow the lesser intrusion associated with a warrantless search. See *Acevedo*, 111 S. Ct. at 1992-94 (Scalia, J., concurring).

One problem with this "greater includes the lesser" reasoning is the lack of connection between the sanctioning of warrantless arrests and the approval of warrantless searches. A warrantless arrest, although probably more intrusive on personal security than a warrantless search, see *United States v. Watson*, 423 U.S. 411, 425-33 (1976) (Powell, J., concurring); 2 LAFAVE, *supra* note 135, § 5.1(b), at 400 (stating that it "cannot be readily assumed that personal rights are less deserving of protection than property rights"), is considered constitutional because of its historical acceptance. See *Watson*, 423 U.S. at 418-22. Although LaFave correctly describes the Court's opinion in *Watson* as "remarkable for its lack of analysis" in concluding that a routine warrantless arrest is consistent with the Fourth Amendment, 2 LAFAVE, *supra* note 135, § 5.1(b), at 399, the historical acceptance of warrantless arrests does not provide a determinative reason for allowing warrantless searches.

Beyond the historical grounds supporting warrantless arrests, the exigency concerns associated with fleeing felons and the impracticality of obtaining a magistrate's warrant authorizing the arrest in such circumstances provide the only principled justification for allowing warrantless arrests. See *id.* at 400-03.

No similar justification supports warrantless searches of private containers. Once the police have seized a briefcase or purse, the item cannot possibly flee the jurisdiction before the issuance of a magistrate's warrant. Moreover, although a seizure negates an owner's possessory interest in the container, that owner still retains a privacy expectation in the contents of the container. See *Texas v. Brown*, 460 U.S. 730, 747-51 (1983) (Stevens, J., concurring).

Another problem with the "greater includes the lesser" rationale extends beyond the context of private containers and implicates larger considerations of Fourth Amendment theory. If this reasoning were applied in a serious manner, the entire structure of Fourth Amendment law would be called into question.

For example, the average person unversed in the intricacies of the Court's Fourth Amendment doctrine might find that an arrest is a greater intrusion than a warrantless search of a home. When considering the time and indignities associated with an arrest—seizure by the police, a full-scale search of one's body and possessions, being transported to the local jail for booking and administrative processing, receiving an arrest record, the likelihood of custodial interrogation, and the possibility of being held for almost two days without the chance to have a neutral official consider whether the arrest was valid—many individuals might prefer a search of their home to the trauma and humiliation of an arrest.

The problem with this rationale is that the parade takes over the town. Under a "greater includes the lesser" theory, one might argue that a warrantless search of a home, or a warrantless entry of a home to obtain an arrest, is constitutional because it constitutes a lesser interference when compared to the greater indignity associated with a public arrest, which can be effectuated without a warrant. See *Payton v. New York*, 445 U.S. 573, 617 (1980) (White, J., dissenting) (arguing that a warrantless "front-door" arrest of a suspect at his home "is no more intrusive on personal privacy" than the public warrantless arrests upheld in *United States v. Watson*, 423 U.S. 411 (1976)); *Chimel v. California*, 395 U.S. 752, 776 (1969) (White, J., dissenting) (stating that it was illogical to argue that the Fourth Amendment forbids a warrantless search of a home where "the invasion and disruption of a man's life and privacy which stem from his arrest are ordinarily far greater than the relatively minor intrusions attending a search of his premises").

dividual. Presumably the police have probable cause that the individual is in possession of contraband or other criminal evidence. This fact can and should be explained to the individual on the street. If that individual chooses to undergo an arrest in exchange for the chance to have a judge consider the need for the search, as well as the justification for the arrest, that choice should be his.¹⁵⁴ The police should not be given the authority to conduct a search eliminating that choice.

Justice Scalia, however, believes that searching the personal possessions of a suspect is reasonable, and thus constitutional, because it is "less intrusive" than what the police *might* have done under the circumstances.¹⁵⁵ This position is akin to arguing that the "greater power includes the lesser power."¹⁵⁶ The belief that the greater power automatically justifies use of the lesser power is a troublesome position when considering essentially unchecked police intrusions.

I do not doubt the logic of Justice Scalia's view. After all, if the police can arrest an individual, search his person and possessions, and detain the individual for up to two days before a neutral official evaluates the strength of the state's evidence, prohibiting the lesser intrusion of a warrantless search of a private container does not seem worth the candle. In the abstract, allowing a search of a backpack or purse is indeed a *lesser* invasion than the intrusion and indignity of an arrest. It does not follow, however, that the police should be free to conduct warrantless searches of private containers.

The above analysis omits a *realpolitik* that the Court and the public often do not discuss. In the ordinary street arrest, an officer, before making an arrest, might consider other sanctions and variables that have little to do with the Fourth Amendment. The of-

This type of logic can work havoc on Fourth Amendment freedoms. Under this theory, only those searches and seizures that surpass some undefined and unknown degree of intrusiveness will be subject to the warrant requirement. If such a regime is ever accepted by the Justices, the Court "would simply have read the Fourth Amendment out of the Constitution." *Coolidge v. New Hampshire*, 403 U.S. 443, 480 (1971) (plurality opinion).

154. See *Chambers v. Maroney*, 399 U.S. 42, 64 (1970) (Harlan, J., concurring in part and dissenting in part).

155. *Acevedo*, 111 S. Ct. at 1993-94 (Scalia, J., concurring).

156. See generally William J. Stuntz, *Implicit Bargains, Government Power, and the Fourth Amendment*, 44 STAN. L. REV. 553 (1992) (exploring a similar line of reasoning).

ficer who contemplates arresting an individual for loitering in a park after midnight or disorderly conduct and resisting arrest, has to consider the possibility that the arrestee might turn out to be the slovenly dressed son of a prominent citizen, or worse, actually innocent of the charges.

The officer also knows that because an arrestee is likely to perceive the intrusion as a major infringement on his freedom and personal security, the arrestee might file a complaint with a police review board or seek redress from a representative on the city council or in the mayor's office. The possible adverse consequences and publicity of a "bad" arrest can act as an independent check to undertaking the arrest.¹⁵⁷ As a general matter, police officers have a profound distaste for having to explain or justify—particularly to citizen review panels and the media—why they made a certain arrest, especially when the person arrested has the wherewithal to bring independent scrutiny upon the actions of the police.¹⁵⁸

157. Of course, a few officers have no qualms about arresting innocent persons. Paul Chevigny wrote about abuse of police authority in New York:

A citizen does not have to be poor or black or even to live in the ghetto to be summarily arrested in a street dispute with a policeman. Just a little defiance will suffice.

A rude reply to a policeman, not to speak of a refusal to obey, even when it is given in response to an unlawful order, or to rudeness on the part of the police, is an invitation to arrest.

PAUL CHEVIGNY, *POLICE POWER: POLICE ABUSES IN NEW YORK CITY* 96 (1969). See also JEROME H. SKOLNICK & JAMES J. FYFE, *ABOVE THE LAW* 103 (1993) (A female motorist who complained about an officer's harassment was arrested for an alleged traffic violation. According to the authors, the motorist had committed "two police cultural crimes: She was a white driver in a black neighborhood where drugs were sold, and she had challenged the authority of the officer, a serious transgression in the police cultural statute book, where it is an offense to talk back to a cop."); Constance L. Hays, *Damage Awards in False Arrests*, N.Y. TIMES, Apr. 10, 1991, at B3; Todd S. Purdum, *Prosecuting Officers; False-Arrest Case Shows It Can Take Time and Publicity to Redress Wrongs*, N.Y. TIMES, Mar. 16, 1989, at B3 (describing criminal convictions and damage awards in cases involving the wrongful arrest of innocent minority persons by New York City Transit Police officers.).

158. See, e.g., SKOLNICK & FYFE, *supra* note 157, at 226; UVILLER, *supra* note 16, at 13-14; James C. McKinley Jr., *Dinkins Denounces Police Protest As Evidence of Widespread Bias*, N.Y. TIMES, Sept. 18, 1992, at A1. Phil Caruso, President of the Patrolmen's Benevolent Association of New York City, asserts

that officers regard the review board as a tool that criminals use to harass the police by making phony claims when they are arrested. "There is nothing more humiliating or demoralizing to a police officer than in the pressures of making an arrest, they then have to answer to charges made by the person they arrested."

Similar concerns do not constrain the typical search of a backpack or briefcase. The press and elected officials are not likely to become upset over a police search of a zippered backpack or closed purse, for the very same reasons warrantless searches do not disturb Justice Scalia. In the larger scheme of police-citizen encounters, even when the police have erred, this form of police activity is not so troublesome. In police jargon, these are low-visibility affairs. Even though individual privacy has been invaded, individuals subjected to such searches are not likely to complain because it is probably not worth the bother. As a result, these searches are not likely to be brought to the attention of police supervisors, nor are they likely to merit the concern of politicians or the press. Police officers understand this phenomenon. As a result, they know they have *carte blanche* to undertake these searches just about whenever they please.¹⁵⁹

Id.

159. Not all police searches are initiated with an eye toward future prosecution. Often police undertake searches to discover contraband or to harass suspicious individuals. Such searches reflect the fact that the average officer "sees his job as ferreting out crime." JEROME SKOLNICK, *JUSTICE WITHOUT TRIAL* 220 (2d ed. 1975).

It is part of the policeman's job to locate and confiscate illegal substances. Thus, even if a search revealing possession of an unlawful weapon or an unlawful narcotic was conducted not as "incident" to an arrest, the policeman would have done part of his job simply through the act of retrieval. By failing to make the putatively "unreasonable" search, the policeman would not only have failed to gain a conviction, but would also have missed collecting objects or substances regarded as dangerous. In the policeman's view, only good can come of a search legally defined as "unreasonable," provided the search jibes with the normative assumptions of the police organization about reasonableness.

Id.

Of course, occasionally, arbitrary searches locate evidence leading to a prosecution. In those cases,

cops may insert a little invention to fortify the probable cause upon which a fruitful search was predicated. Add a small but deft stroke to the facts—say, a visible bulge at the waistband of a person carrying a pistol. Just enough to put some flesh on the hunch that actually induced the officer to give the man a toss; it might make all the difference.

UVILLER, *supra* note 16, at 116. See also MIKE ROTHMILLER & IVAN G. GOLDMAN, *L.A. SECRET POLICE: INSIDE THE LAPD ELITE SPY NETWORK* 31-34 (1992) (describing how Los Angeles police officers falsify arrest reports); CHEVIGNY, *supra* note 157, at 87 ("The effort to convict a prisoner is likewise to be commended, and shaving the facts a little to bring about that conviction is less reprehensible than avoiding the arrest altogether.").

The lengths to which some police officers will go to obtain convictions was recently revealed in upstate New York. To date, three high-ranking members of an elite criminal in-

Moreover, there are other practical reasons why an officer would not knowingly arrest an individual without probable cause. An arrest and its aftermath is a time-consuming and multi-layered process. The officer generally has to justify the arrest to his commanding sergeant or lieutenant. The arrestee must be put through the booking process, which requires making a record of the circumstances of the arrest, and normally includes fingerprinting and photographing the arrestee. The arrestee may be held in police

investigation unit of the New York State Police have plead guilty to fabricating evidence in criminal prosecutions. These three officers have also implicated other members of the State Police. Their admissions "paint[] a picture of almost routine fabrication of evidence in criminal cases." *Police Investigation Supervisor Admits Faking Fingerprints*, N.Y. TIMES, July 30, 1993, at B5; see Jon Nordheimer, *Trooper's Fall Shakes Both Police and Public*, N.Y. TIMES, Nov. 15, 1992, at 41.

This type of case demonstrates the perspective of many police officers. As one former officer wrote:

Officers, seeing the crush of everyday crime, believed they were under siege, that extralegal procedures were necessary to counter all those constitutional rights guaranteed to the enemy. If the suspect happened to be innocent of this crime, then he was no doubt guilty of another one anyway, so it was better to guarantee a conviction when you had the chance.

ROTHMILLER & GOLDMAN, *supra*, at 33. For the officer, arbitrary searches, wrongful arrests of innocent persons, perjury and fabricating evidence, are "part of the job." Like it or not, this is how some police officers view their work. The Court, however, continues to formulate search and seizure rules out of touch with the reality on the streets and in the trial courts. *Minnesota v. Dickerson*, 113 S. Ct. 2130 (1993), demonstrates this navete.

Dickerson stated that if an officer engaged in a lawful frisk for weapons feels an object whose incriminating nature is immediately apparent, he may remove and seize that object from an individual's pocket even though the officer believed the seized object was not a weapon. *Id.* at 2136-37. Under the facts before the Court, "the officer's own testimony 'belies any notion that he "immediately"' recognized the lump as crack cocaine." *Id.* at 2138 (quoting *State v. Dickerson*, 481 N.W.2d 840, 844 (Minn. 1992)). Accordingly, the Court ruled that the search was impermissible.

The upshot of *Dickerson* is easy to predict. An officer is given substantial incentive to "search first and ask questions later." When an officer feels a suspicious or unusual item his first reaction will be to search. If the object turns out to be contraband, he can say that its incriminating nature was "immediately apparent" upon touch. If the item is not contraband, then it can be returned to the suspect. In the end, what the Court has done is authorize officers to frisk for contraband, *cf.*, *Arguments Before The Court: Criminal Law and Procedure*, 61 U.S.L.W. 3641, 3642 (1993) (reporting Justice Scalia's remark that "what we'll be authorizing is a *Terry* stop and search for contraband")—which at one time was impermissible under the Fourth Amendment. See *Sibron v. New York*, 392 U.S. 40, 65-66 (1968) (holding that an officer's search of a suspect's pocket for narcotics violated the Fourth Amendment, stating that "[t]he search was not reasonably limited in scope to the accomplishment of the only goal which might conceivably have justified its inception—the protection of the officer by disarming a potentially dangerous man").

custody overnight or for a day or two. Eventually, the arrest record will land on the desk of a district attorney who has to decide whether to prosecute the case. Finally, the arrestee will be brought before a judge who will review the case.

A warrantless search, on the other hand, is not a complicated process. A search can be prompted by curiosity, the desire to hassle an individual, or as a device to quickly assert the officer's authority during a street encounter. If the search reveals contraband or other evidence, probable cause can be easily manufactured. If the search discloses nothing, the encounter can be quickly terminated and the officer and the individual will go their separate ways.

In sum, the theory that the greater power automatically justifies use of the lesser power is incomplete in its analysis. The outside scrutiny that is present in "greater" intrusions is absent in "lesser," low-visibility police intrusions. Under the existing system, unreasonable searches are more likely than unreasonable arrests. It does not follow that the lesser intrusion also implies reduced constitutional scrutiny. If anything, these lesser intrusions should receive greater attention from the Court because there are fewer restraints on the police and the police know it. Regrettably, the pragmatism urged by Justice Scalia does not take this concern into account.

I suspect Justice Scalia's views on the search of private containers rests on no more than his own value judgment that this type of police behavior is reasonable.¹⁶⁰ Put another way, Justice Scalia believes there is nothing wrong with warrantless searches outside the home. This analysis, however, omits the need to check discretionary police power. Justice Scalia seems perfectly willing to trust the authority and judgment of police officers regarding the search of private possessions.

Unlike Justice Scalia, I do not trust the police with this power. Where the police need to act quickly to protect themselves or others from danger, they *must* be given the authority to act without prior judicial authorization. But in the typical search of a

160. Cf. George Kannar, *The Constitutional Catechism of Antonin Scalia*, 99 YALE L.J. 1297 (1990) (arguing that Justice Scalia's criminal procedure opinions reflect either a literalist or formalist model, or a desire to construct formulaic rules).

purse or briefcase, no exigency exists to justify warrantless action. Justice Scalia thinks a search is valid because the police believe evidence may be found; thus, such a search is not irrational and is sustainable under the Fourth Amendment. I think the search is illegitimate because police judgment alone is not sufficient to justify intrusions upon an individual's Fourth Amendment interests.¹⁶¹

VI. CONCLUSION

Jacob Landynski once wrote that the Fourth Amendment "as finally drafted and adopted, had both the virtue of brevity and the vice of ambiguity"¹⁶² He also commented that "[n]owhere in the amendment is the term 'unreasonable' defined or the relationship of the two parts clarified."¹⁶³ Our current Supreme Court has exploited the amendment's linguistic and historical vacuum to fashion its own analytical model for deciding search and seizure questions. The Court's rational basis model essentially asks whether the police have acted irrationally while intruding upon the Fourth Amendment rights of individuals. The Court's model rarely requires warrants authorizing searches, disfavors vigorous judicial oversight of police searches, and prefers deference to police procedures as the mode of constitutional decisionmaking.

This Essay has tried to identify some of the analytical and historical gaps inherent in a rational basis model. A literal reading of the language of the amendment does not dictate this model. Nor does the model adequately take account of pre-Revolutionary attitudes toward warrantless searches that occurred during the era preceding the battle over the writs of assistance in the colonies. Finally, the model subordinates judges and warrants to a secondary status in Fourth Amendment analysis. This view is inconsis-

161. Justice Frankfurter put it well:

The progress is too easy from police action unscrutinized by judicial authorization to the police state. The founders wrote into the Constitution their conviction that law enforcement does not require the easy but dangerous way of letting the police determine when search is called for without prior authorization by a magistrate.

United States v. Rabinowitz, 339 U.S. 56, 82 (1950) (Frankfurter, J., dissenting).

162. LANDYNSKI, *supra* note 33, at 42.

163. *Id.*

tent with the historical role judges played in pre-independence America as they resisted British efforts to expand the search and seizure power of its customs officers by obtaining writs of assistance.

Most importantly, a rational basis model severely diminishes our rights under the Fourth Amendment. As the private container cases demonstrate, a rational basis model does not subject police searches to vigorous judicial check. In many instances, the police are free to undertake unsupervised and suspicionless searches, even when less intrusive means are available to serve the state's interests. In other contexts, warrantless searches are permitted when the only justification for such a search is police convenience.

In the end, the Court finds that all of these searches are reasonable because they rationally serve legitimate state interests. This degree of deference to police searches is at odds with the central purpose of the Fourth Amendment, which is distrust of discretionary police power. The Fourth Amendment was not inserted in the Bill of Rights so that judges could meekly defer to government intrusions of privacy; rather, the amendment was designed to control such intrusions.¹⁶⁴ The colonists who battled the British did not trust or defer to the judgments of British customs officials.¹⁶⁵ They

164. As Professor Joseph Grano wrote:

[W]e premise much of our fourth amendment law on the belief that a neutral and detached magistrate, not a police officer, should decide whether privacy must yield to the government's desire to arrest or search. A rigorously enforced warrant requirement would require that a judicial officer, whenever practicable, decide whether that discretion should be exercised. It would have the magistrate, not the police officer, decide whether privacy interests should yield to law enforcement interests or whether the police should investigate further before such individual sacrifice is demanded. [U]nder the fourth amendment, [judicial] review is more appropriate, and more meaningful, if it occurs *before* the event.

Grano, *supra* note 49, at 510.

165. Daniel Malcolm, a colonial merchant and one of the original parties in the Writs of Assistance Case of 1761, typified the attitude of those colonists who fought against search and seizure powers of British customs officials. In one incident, he challenged the authority of customs officers to search his home:

His colleagues esteemed [Malcolm] of seasoned hard timber, and a man so wholly unafraid must have been a continuing delight to the heart of James Otis. It was a man of substance and resolution who determined to resist invasion of his dwelling. Why was it that since neither Malcolm nor Mackay [a colleague who shared a cellar with Malcolm] had contraband they did not

wanted the discretionary power of customs officers restrained.¹⁶⁶ Today, objections to warrantless police searches do not stem from a view that police officers are inherently bad people. Instead, objections are raised against this form of police authority because “[p]ower is a heady thing[,] and history shows that the police acting on their own cannot be trusted.”¹⁶⁷ This distrust of police power is the central meaning of the Fourth Amendment.

gratify the officers [who sought access to their cellar]? Malcolm answered that the officers declined to name the informer, a formality he thought the law required; that [a customs official] had used him with great rudeness, and that for his part he would risk life rather than submit to search unless the law allowed it!

Wolkins, Daniel Malcolm And Writs of Assistance, Massachusetts Historical Society, Vol. LVIII at 15, 18.

166. *Trupiano v. United States*, 334 U.S. 699, 709-10 (1948) (“The people of the United States insisted on writing the Fourth Amendment into the Constitution because sad experience had taught them that the right to search and seize should not be left to the mere discretion of the police, but should as a matter of principle be subjected to the requirement of previous judicial sanction wherever possible.”); *Dripps, supra*, note 6, at 938 (“The Framers meant not just to establish a government, but to limit its power over individuals. They viewed official power with an almost paranoid suspicion; and they believed that suspicion justified by power’s *inherent* nature.”) (footnote omitted).

167. *McDonald v. United States*, 335 U.S. 451, 456 (1948).