WHAT CAN FOURTH AMENDMENT DOCTRINE LEARN FROM VAGUENESS DOCTRINE?

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INTRODUCTION

On April 5, 1999, the Supreme Court ruled that the police search of Sandra Houghton's purse was constitutional. Houghton was one of two female passengers in a car that was stopped for speeding and driving with a faulty brake light. When an officer questioned the driver about a hypodermic syringe in his shirt pocket, the driver said he used the syringe to take drugs. The occupants of the car were then ordered out. The police searched Houghton's purse, which was on the backseat, and they discovered narcotics inside. The Court held that the search was permissible even though the police had no reason to believe that the purse contained drugs. It reasoned that probable cause to believe that narcotics present in a car gives the police discretion to search all containers in the car capable of holding narcotics.¹

Two months after Houghton was decided, the Court invalidated Chicago's gang congregation ordinance. Chicago v. Morales² concerned a law that barred criminal street gang members from loitering with one another or with others in a public place. The law had four components. First, a police officer must have had probable cause to believe that one of the two or more persons present in a public place is a street gang member. Second, the persons involved must have been "loitering," which was defined as remaining in a public place "with no apparent purpose." Third, the officer must have ordered the persons to leave the area. Fourth, any person who disobeyed the dispersal order would be arrested. Six members of the Court concluded that the ordinance was too vague because it failed to provide minimal guidelines to control police discretion when enforcing the law.

The main source of discretionary police power was the ordinance's definition of "loitering." Under the ordinance, if an officer

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believed that a gang member and others were in a public space "with no apparent purpose," such conduct constituted loitering. The ordinance provided officers with no guidelines or criteria for deciding whether a group of persons in a public place had an apparent purpose. According to the Court, "[t]he 'no apparent purpose' standard for making that decision is inherently subjective because its application depends on whether some purpose is 'apparent' to the officer on the scene." The Court was also troubled by the scope of the ordinance. Not only did the ordinance affect a substantial amount of innocent conduct, but it also applied to "everyone in the city who may remain in one place with one suspected gang member as long as their purpose is not apparent to an officer observing them." In sum, the Court invalidated the ordinance because it did not provide sufficient minimal standards to guide police.

Viewed doctrinally, Houghton and Morales are like apples and oranges. Houghton is the most recent application of the Court's automobile search doctrine. Where police have probable cause that contraband or criminal evidence may be inside a car, they have unchecked discretion to search anywhere in the car and anything therein that is capable of holding the object of the search. The absence of any evidence that suggested Houghton's purse contained drugs is irrelevant. "A passenger's personal belongings, just like the driver's belongings or containers attached to the car like a glove compartment, are 'in' the car, and the officer has probable cause to search for contraband in the car." Therefore, although the search of a woman's purse is a severe intrusion of privacy and the cause for such an intrusion in this case was unjustified, the Court determined

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3 The Illinois Supreme Court had interpreted "no apparent purpose" as "provid[ing] absolute discretion to police officers to determine what activities constitute loitering." Id. at 61 (quoting Chicago v. Morales, 687 N.E.2d 53, 63 (Ill. 1997)). The Morales Court explained that it had "no authority to construe the language of a state statute more narrowly than the construction given by that State's highest court." Id. (footnote omitted).

4 Id. at 62.

5 Id. at 62-63.

6 Houghton, 526 U.S. at 302.

7 See New Jersey v. T.L.O., 469 U.S. 325, 375 (1985) ("The search of a young woman's purse by a school administrator is a serious invasion of her legitimate expectations of privacy."); United States v. Welch, 4 F.3d 761, 764 (9th Cir. 1993) ("[A] purse is a type of container in which a person possesses the highest expectation of privacy."); State v. Johnston, 645 P.2d 63, 64 (Wash. Ct. App. 1982) ("It would be difficult to define an object more inherently private than the contents of a woman's purse."); 3 WAYNE R. LAFAVE, SEARCH AND SEIZURE § 7.2, at 69 (3d ed. Supp. 2000) (remarking that containers such as purses "seldom contain anything other than the passenger's personal effects"); Christopher Slobogin & Joseph E. Schumacher, Reasonable Expectations of Privacy and Autonomy in Fourth Amendment Cases: An Empirical Look at "Understanding Recognized and Permitted by Society," 42 DUKE L.J. 727, 738 (1993) (noting that the search of a high school student's purse was ranked within the top ten most intrusive "search and seizure scenarios" in a public survey of expectations of privacy); Marianne Means, A Purse Is More Than a Container, SUN-SENTINEL (Ft. Lauderdale), Apr. 10, 1999, at 13A (arguing that a warrantless search of a woman's purse is an invasion of her privacy).

8 The officer who searched Houghton's purse testified at the suppression hearing that he
that the search of Houghton's purse was "reasonable" under the Fourth Amendment. Arguably, Houghton authorizes a general search. See Erin Morris Meadows, Case Note, Better-Off Walking: Wyoming v. Houghton Exemplifies What Acevedo Failed to Rectify, 34 U. RIC. L. REV. 329, 349-50 (2000) ("The upshot of Houghton is that a general search of a vehicle and all of its contents is permitted, even if probable cause attached to only one person or container. Before Houghton, if a police officer had specific probable cause relating to just one bag, that one bag was all he could search. With the new Houghton rule, if probable cause exists to believe that one person is transporting drugs, then the scope of the warrantless search includes all the occupants' belongings located within the vehicle." (footnotes omitted)). See also Sara L. Shaeffer, Note, Another Dent in Our Fourth Amendment Rights: The Supreme Court's Precarious Extension of the Automobile Exception in Wyoming v. Houghton, 45 S.D. L. REV. 422, 448 (2000). Shaeffer maintains that in the absence of individualized suspicion, "the search of a container that belongs to a passenger, whom police do not suspect of a crime, would be supported only by the theory of guilt by association," which the Court has previously rejected. Id. (citations omitted). The Houghton decision, however, legitimizes the theory of guilt by association and deprives all persons traveling in vehicles the right to be free from unreasonable searches." Id.

9 Arguably, Houghton authorizes a general search. See Erin Morris Meadows, Case Note, Better-Off Walking: Wyoming v. Houghton Exemplifies What Acevedo Failed to Rectify, 34 U. RIC. L. REV. 329, 349-50 (2000) ("The upshot of Houghton is that a general search of a vehicle and all of its contents is permitted, even if probable cause attached to only one person or container. Before Houghton, if a police officer had specific probable cause relating to just one bag, that one bag was all he could search. With the new Houghton rule, if probable cause exists to believe that one person is transporting drugs, then the scope of the warrantless search includes all the occupants' belongings located within the vehicle." (footnotes omitted)). See also Sara L. Shaeffer, Note, Another Dent in Our Fourth Amendment Rights: The Supreme Court's Precarious Extension of the Automobile Exception in Wyoming v. Houghton, 45 S.D. L. REV. 422, 448 (2000). Shaeffer maintains that in the absence of individualized suspicion, "the search of a container that belongs to a passenger, whom police do not suspect of a crime, would be supported only by the theory of guilt by association," which the Court has previously rejected. Id. (citations omitted). The Houghton decision, however, legitimizes the theory of guilt by association and deprives all persons traveling in vehicles the right to be free from unreasonable searches." Id.

10 See Flippo v. West Virginia, 528 U.S. 11 (1999) (per curiam). Decided during the Term after Houghton, Flippo ruled that police violated the Fourth Amendment when they searched a briefcase that had been found at a murder scene inside Flippo's cabin without first obtaining a search warrant. For a fuller discussion of Flippo, see Milton Hirsch & David O. Markus, Fourth Amendment Forum: The Supreme Court's Latest Word: Get a Warrant!, THE CHAMPION, APR. 2000, at 49.
paradox in the Court’s thinking: the Court is clearly of two minds regarding the Constitution’s tolerance for police discretion.\textsuperscript{11} Despite an explicit reference in the Constitution’s text that limits governmental intrusions, the Court’s Fourth Amendment cases regularly allow police broad discretion in conducting searches and seizures. At the same time, the Court’s vagueness cases have invalidated criminal statutes—even when they do not directly affect any enumerated right—when the statutes grant police too much discretion. This tension in the Court’s thinking was highlighted by Justice Thomas’s dissent in \textit{Morales}. Justice Thomas disagreed with the majority’s conclusion that Chicago’s ordinance granted too much discretion to police. In particular, he noted that the ordinance did nothing more than “confirm the well-established principle that the police have the duty and the power to maintain the public peace, and, when necessary, to disperse groups of individuals who threaten it.”\textsuperscript{12} In Justice Thomas’s view the ordinance maintained the right balance between providing objective guidelines for police and not constraining their every move. He noted:

\begin{quote}
Just as we trust officers to rely on their experience and expertise in order to make spur-of-the-moment determinations about amorphous legal standards such as “probable cause” and “reasonable suspicion,” so we must trust them to determine whether a group of loiterers contains individuals (in this case members of criminal street gangs) whom the city has determined threaten the public peace.\textsuperscript{13}
\end{quote}

Simply put, Justice Thomas believed that the reasoning and result in \textit{Morales} could not be reconciled with the Court’s Fourth Amendment rulings.\textsuperscript{14}

Justice Thomas’s conclusions in \textit{Morales} were both right and wrong. Although his cursory reference to the probable cause and reasonable suspicion standards hardly makes the point, Justice Thomas correctly noted that the police discretion authorized by Chicago’s ordinance is quite similar to the police discretion routinely sanctioned by the Court’s Fourth Amendment jurisprudence. For

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\item[11] Thanks to David Cole for helping me see how the Court’s thinking can be revealed by doctrinally dissimilar cases. \textit{See}, e.g., David Cole, \textit{The Value of Seeing Things Differently: Boerne v. Flores and Congressional Enforcement of the Bill of Rights}, 1997 \textsc{Sup. Ct. Rev.} 31 (exemplifying how a basic tension in the Court’s interpretation of the Constitution may be explored by comparing two cases that appear to have little in common).
\item[12] \textit{Morales}, 527 \textsc{U.S.} at 101-02 (Thomas, J., dissenting).
\item[13] Id. at 109-10 (Thomas, J., dissenting).
\item[14] Id. (“In sum, the Court’s conclusion that the ordinance is impermissibly vague because it ‘necessarily entrusts lawmaking to the moment-to-moment judgment of the policeman on his beat,’ cannot be reconciled with common sense, longstanding police practice, or this Court’s Fourth Amendment jurisprudence.” (internal citation omitted)); \textit{see also} Debra Livingston, \textit{Gang Loitering, The Court, and Some Realism About Police Patrol}, 1999 \textsc{Sup. Ct. Rev.} 141, 179 [hereinafter Livingston, \textit{Gang Loitering}] (“The Court’s Fourth Amendment jurisprudence, however, substantially undercuts the persuasiveness of the majority’s position that the ‘no apparent purpose’ language in Chicago’s ordinance conferred on police a ‘vast discretion’ too extravagant to be endured.” (footnote omitted)).
\end{footnotes}
example, in the two Terms prior to Morales, the Court issued three opinions affording police substantial discretion to search or seize citizens during ordinary encounters. In one case, the Court ruled that police could arbitrarily order passengers out of cars during routine traffic stops.\(^{15}\) In a second case, the Court held that a motorist who has been stopped for a traffic violation need not be informed of his right to leave the scene before being questioned by a police officer about the contents of his vehicle and his willingness to allow a consent search of his car.\(^{16}\) Finally, in a third case, the Court ruled that pretextual traffic stops did not violate the Fourth Amendment.\(^{17}\)

\(^{15}\) Maryland v. Wilson, 519 U.S. 408 (1997). Twenty years earlier, in Pennsylvania v. Minnix, 434 U.S. 106 (1977) (per curiam), the Court ruled that police could arbitrarily order drivers out of their cars during routine traffic stops.

\(^{16}\) Ohio v. Robinette, 519 U.S. 33 (1996).

\(^{17}\) Whren v. United States, 517 U.S. 806 (1996). Whren establishes that a "decision to stop an automobile is reasonable where the police have probable cause to believe that a traffic violation has occurred." Id. at 810. The officer's motivation for the stop is irrelevant. Id. at 813. Criticism of Whren is widespread. See, e.g., Janet Koven Levit, Pretextual Traffic Stops: United States v. Whren and the Death of Terry v. Ohio, 28 Loy. U. Chi. L.J. 145 (1996) (arguing that with Whren drivers and passengers have lost virtually all of their Fourth Amendment protections); Tracey Maclin, Race and the Fourth Amendment, 51 Vand. L. Rev. 333, 340 (1998) ("In light of past and present tensions between the police and minority groups, it is startling that the Court would ignore racial concerns when formulating constitutional rules that control police discretion to search and seize persons on the street."); William J. Stuntz, The Uneasy Relationship Between Criminal Procedure and Criminal Justice, 107 Yale L.J. 1, 67 n.229 (1997) ([Whren gives police] a grant of discretionary power to stop, question, and [in jurisdictions that classify traffic offenses as crimes] search and arrest suspects based on unarticulated suspicion of other crimes, or worse, based on the officer's whim or prejudice."); Chris K. Visser, Comment, Without a Warrant, Probable Cause, or Reasonable Suspicions: Is There Any Meaning to the Fourth Amendment While Driving a Car?, 35 Hous. L. Rev. 1685, 1706 (1999) ("For a motorist . . . there is little safeguard left [against arbitrary police invasions] because, under Whren, a vehicle stop is 'reasonable' whenever it is supported by probable cause that a mere traffic violation has occurred."); Lisa Walter, Comment, Eradicating Racial Stereotyping from Terry Stops: The Case for an Equal Protection Exclusionary Rule, 71 U. Colo. L. Rev. 255, 279 (2000) (criticizing Whren for not recognizing that there is no suppression remedy under the Equal Protection Clause). Because every motorist will commit a traffic violation sooner or later, Whren effectively overrules Delaware v. Prouse, 440 U.S. 648 (1979), thereby eliminating Fourth Amendment scrutiny of the decision to make a traffic stop. Cf. William J. Stuntz, The Distribution of Fourth Amendment Privacy, 67 Geo. Wash. L. Rev. 1265, 1271-72 (1999) [hereinafter Stuntz, Distribution] ("Traffic violations are sufficiently common that, if this authority were used widely enough, automobile stops could become effectively unregulated. In an odd way, Whren shows how broad police authority over pedestrians is, for Whren does no more than narrow the gap between Fourth Amendment protection for drivers and the rules for police-citizen encounters. The police can, after all, already 'stop' pedestrians without cause, given that every street encounter is functionally a stop."). For additional criticism of Whren, see 1 WAYNE R. LAFAVE, SEARCH AND SEIZURE § 1.4, at 12-28 (3d ed. Supp. 2000); David A. Harris, Car Wars: The Fourth Amendment's Death on the Highway, 66 Geo. Wash. L. Rev. 556, 558-61 (1998) [hereinafter Harris, Car Wars]; David A. Harris, "Driving While Black" and All Other Traffic Offenses: The Supreme Court and Pretextual Traffic Stops, 87 J. Crim. L. & Criminology 544, 554 (1997); Jennifer A. Larrabee, "DWB (Driving While Black)" and Equal Protection: The Realities of an Unconstitutional Police Practice, 6 J.L. & POL'y 291 (1997); Wesley MacNeil Oliver, With an Evil Eye and an Unequal Hand: Pretextual Stops and Doctrinal Remedies to Racial Profiling, 74 Tul. L. Rev. 1409 (2000); David A. Sklansky, Traffic Stops, Minority Motorists, and the Future of the Fourth Amendment, 1997 Sup. Ct. Rev. 271; Anthony C. Thompson, Stopping the Usual Suspects: Race and the Fourth Amendment, 74 N.Y.U. L. Rev. 956 (1999); Christopher Hall, Note, Challenging Selective Enforcement of Traffic Regulations After the Disharmonic Convergence: Whren v.
Moreover, during the same Term in which *Morales* was decided, the Court handed down two other rulings—in addition to *Houghton*—that gave police discretionary power to exercise particularly intrusive conduct. *Florida v. White*\(^{18}\) held that police have the power to seize a vehicle from a public place when they have probable cause that it is forfeitable contraband, even though the owner of the vehicle is in custody and the police give no reasons for their failure to obtain a warrant authorizing the seizure. In the second case, *Minnesota v. Carter*,\(^{19}\) which was decided six months before *Morales*, the Court ruled that houseguests may not always rely upon the security and privacy of their host's home to challenge suspicionless surveillance of the home by the police.

If one considers the various types of police power authorized by the Court's Fourth Amendment cases immediately preceding *Morales*, the Chicago ordinance appears to grant a reasonable degree of police authority. Under Chicago's ordinance, an officer's power to arrest was conditioned upon a determination of probable cause that a criminal gang member was present in a public place with no apparent purpose, in addition to a refusal to obey an unequivocal order to leave the scene. If the Court were applying a "reasonableness" analysis, surely this degree of police discretion and authority would be a permissible law enforcement tool, particularly where the record showed that "a continuing increase in criminal street gang activity was largely responsible for the city's rising murder rate, as well as an escalation of violent and drug related crimes."\(^{20}\) Indeed, one could credibly argue that the discretion authorized by Chicago's ordinance fits comfortably within a constitutional jurisprudence that allows the police arbitrarily to order motorists and passengers out of their cars during routine traffic stops, that permits the search of a woman's purse without specific cause, and that allows police arbitrarily to monitor the activities inside a private home by peering through gaps in closed window blinds.\(^{21}\) When seen in this light, Justice Thomas's assertion that the result in *Morales* cannot be reconciled with the Court's Fourth Amendment doctrine seems understated, to say the least.

Although Justice Thomas accurately notes that the discretion authorized under Chicago's ordinance was similar to the type of police discretion that the Court routinely sanctions in Fourth Amend-

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\(^{21}\) *Cf. Livingston, Gang Loitering*, supra note 14, at 166-67 ("[T]he Court's own Fourth Amendment jurisprudence—its endorsement of warrantless police actions premised on admittedly nebulous concepts like probable cause—vests police with a significant degree of street-level discretion that is hard to reconcile with the *Morales* majority's condemnation of the discretion involved in applying Chicago's gang loitering ordinance.").
ment cases, Justice Thomas reaches the wrong conclusion in *Morales*. Chicago's ordinance was unconstitutional because it afforded police too much discretion to order people to "move on." Instead of shaping vagueness doctrine to mirror the discretion afforded officers under the Fourth Amendment, as Justice Thomas would have it, Fourth Amendment doctrine should recognize and adopt "the more important aspect of vagueness doctrine," which is the establishment of "guidelines to prevent 'arbitrary and discriminatory enforcement' of the law." In other words, now that the constitutional norm of controlling police discretion is an essential feature of vagueness law and provides an independent basis to invalidate a criminal statute that does not implicate a constitutional right, then that same constitutional principle can (and should) assist the Court in determining whether a challenged police intrusion violates the guarantees of the Fourth Amendment.

Using the result in *Morales* as a starting point, this article will examine the constitutional norm of controlling police discretion. My focus will be on the Fourth Amendment. However, *Morales*'s conclusion that the Constitution requires the establishment of guidelines and rules to prevent arbitrary and discretionary law enforcement will be the underlying theme that connects the discussion of Fourth Amendment cases that might otherwise appear dissimilar.

Part I examines the legal principle emerging from *Morales*. First, because *Morales* has received heavy criticism from some quarters, I consider whether the norm of controlling police discretion is a legitimate constitutional principle that justifies judicial invalidation of a statute. Next, I assess whether the norm of requiring minimal guidelines to control police discretion, which is now a robust component of vagueness doctrine, is an appropriate device for deciding the constitutionality of police intrusions under the Fourth Amendment. Part I concludes that the norm of controlling police discretion is not only an appropriate tool for measuring the constitutionality of police

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23 *Morales*, 527 U.S. at 64-65 (O'Connor, J., concurring in part and concurring in the judgment).
24 See Alfred Hill, *Vagueness and Police Discretion: The Supreme Court in a Bog*, 51 Rutgers L. Rev. 1289, 1290 (1999) ("If the statute itself must now contain additional guidelines to forestall [police] misconduct, what should such guidelines be? This question is not easily answered . . . . The Court created this dilemma not by a process of reasoning but by stumbling."); Livingston, *Gang Loitering*, supra note 14, at 164 ("On closer inspection, . . . *Morales* evinces a deeper problem—a real inability on the part of the majority to offer even a facially plausible account of the role that the vagueness doctrine actually plays in constraining the opportunity for arbitrary and discriminatory law enforcement by local police."); see also Dan M. Kahan & Tracey L. Meares, *Foreword: The Coming Crisis of Criminal Procedure*, 86 Geo. L.J. 1153, 1167 (1998) (criticizing the Court for closely scrutinizing police discretion affecting minority citizens because minority communities can protect their legal rights through the political process). But cf. Dorothy E. Roberts, *Foreword: Race, Vagueness, and the Social Meaning of Order-Maintenance Policing*, 89 J. Crim. L. & Criminology 775, 780-89 (1999) (applauding the result in *Morales* because vague laws give police license to harass and arrest people based on race-based suspicions).
searches and seizures, but actually better promotes the central purpose of the Fourth Amendment than the "reasonableness" analysis currently employed by the Court.

Part II of the article considers how some of the Court’s most recent search and seizure cases might have been decided if controlling police discretion, instead of reasonableness, were the touchstone of Fourth Amendment analysis. First, I will examine the Court’s methodology for deciding whether Fourth Amendment protection is triggered in a particular context. The Court’s current method for deciding whether police conduct is a "search" meriting constitutional scrutiny constitutes a malleable, *ad hoc* test. This section concludes that the norm of controlling police discretion can do a better job than the "reasonable expectations of privacy" model currently employed by the Court. Second, I examine the Court’s automobile search doctrine. Here, I conclude that car search law is based on the practical concerns of the police and is divorced from the Fourth Amendment’s ultimate purpose of restraining police discretion.

I. WHAT CAN FOURTH AMENDMENT DOCTRINE LEARN FROM THE MOST CRITICAL COMPONENT OF THE VAGUENESS CASES?

A. Controlling Police Discretion is a Legitimate Constitutional Norm

*Morales* is certainly "a major decision bearing on the problem of police discretion." 25 Although it was a fractured ruling, six of the Jus-

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tices did agree on one crucial point: the Constitution requires that criminal statutes provide police officers with minimal standards and clear criteria for enforcing them. These Justices concluded that the Chicago ordinance violated the vagueness doctrine for three related reasons. First, the ordinance contained no criteria or clear standards to guide officers in enforcing the law. Second, the broad scope of the ordinance covered a substantial amount of innocent behavior. Finally, because the ordinance lacked clear standards and covered "a broad range of innocent conduct," the ordinance invited subjective judgments by officers and did nothing to discourage arbitrary and biased enforcement by the officer in the field.

Although the law may have provided sufficient notice to citizens to avoid arrest, these three concerns were sufficient to invalidate Chicago's ordinance. Moreover, the Morales majority voided the ordinance without having to conclude that the behavior targeted by the law—loitering for innocent purposes—was constitutionally protected conduct. Lastly, the city's legitimate interest in eliminating or restraining the criminal aspects of street gang activity was not enough to persuade the Court to put aside whatever concerns it might harbor about police discretion to allow Chicago the means necessary "to preserve the city's streets and other public places so that the public may use such places without fear." If the Court's concerns about broad police discretion were enough to override Chicago's legitimate law enforcement interests in these circumstances, then the principle of requiring minimal guidelines to control police authority must be a particularly important constitutional norm.

Justice Stevens's opinion for the Court concluded that the ordinance violated the Constitution because it provided no guidelines regarding enforcement. Justice Stevens was unpersuaded by the City's arguments that the ordinance sufficiently limited police discretion. Although the ordinance did not apply to persons who were moving,

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26 Morales, 527 U.S. at 69 (Kennedy, J., concurring in part and concurring in the judgment).
27 See id. at 53. The Court rejected respondents' Free Speech argument, because "[t]he ordinance does not prohibit speech . . . . [I]t is also clear that it does not prohibit any form of conduct that is apparently intended to convey a message." Id. However, a plurality of the Court suggested that the ordinance might infringe the freedom of movement protected by the Due Process Clause of the Fourteenth Amendment. Id. at 52 (leaving undecided whether the impact of the ordinance would support a facial challenge under the overbreadth doctrine).
28 Id. at 47 (quoting Chicago v. Morales, 687 N.E.2d 53, 58 (Ill. 1997) (quoting CHICAGO, ILL., CODE § 8-4-015 (June 17, 1992))).
29 Vagueness doctrine is rooted in the Due Process Clauses of the Fifth and Fourteenth Amendments. The classic treatment of vagueness doctrine is Professor Anthony Amsterdam's student note. See Amsterdam, supra note 25.
30 The City claimed that the ordinance restrained police discretion in three ways. First, it does not permit the officer to issue a dispersal order to anyone who is moving along or who has an apparent purpose. Second, it does not permit an arrest if individuals obey a dispersal order. Third, no order can issue unless the officer reasonably believes that one of the loiterers is a member of a criminal street gang. Morales, 527 U.S. at 61.
that limitation on an officer's discretion merely begged the question of "how much discretion the police enjoy in deciding which stationary persons to disperse under the ordinance." Nor was Justice Stevens convinced that police discretion would be checked by the fact that no dispersal order could issue unless a group of loiterers contained a gang member and that no loiterer could be arrested unless he or she disobeyed the dispersal order. According to Justice Stevens, the latter requirement "does not provide any guidance to the officer deciding whether such an order should issue." And the requirement that a group of loiterers contain a gang member did not diminish the broad reach of the ordinance: "friends, relatives, teachers, counselors, or even total strangers might unwittingly engage in forbidden loitering if they happen to engage in idle conversation with a gang member."

Justice O'Connor also highlighted the lack of standards within the ordinance. According to Justice O'Connor, the ordinance "fails to provide police with any standard by which they can judge whether an individual has an 'apparent purpose.' Indeed, because any person standing on the street has a general 'purpose'—even if it is simply to stand—the ordinance permits police officers to choose which purposes are permissible." The ordinance did not require any threat to the public peace; simply presence with a gang member was enough. The constitutional vice here was plain: any person standing with a gang member in a public place can be ordered to disperse at the whim of any Chicago police officer.

Justice Breyer, who joined Justice O'Connor's concurrence, wrote a separate opinion that emphasized both the scope of the ordinance's reach and the absence of standards for officers to apply. For Justice Breyer, "the ordinance violates the Constitution because it delegates too much discretion to a police officer to decide whom to order to move on, and in what circumstances." Thus, "[t]he ordinance is unconstitutional, not because a policeman applied this discretion wisely or poorly in a particular case, but rather because the policeman enjoys too much discretion in every case."

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51 Id. at 61-62 (footnote omitted).
52 Id. at 62.
53 Id. at 63.
54 Id. at 66 (O'Connor J., concurring in part and concurring in the judgment).
55 Id.
56 Id.
57 In Justice Breyer's view, the ordinance's two limitations did not check police discretion. The limitation that a group of loiterers contain a gang member did not narrow the law's reach because non-gang members could still be ordered to disperse. The limitation that a person must remain in public "with no apparent purpose," according to Justice Breyer, was "not a limitation at all." Id. at 70 (Breyer J., concurring in part and concurring in the judgment). This part of the ordinance invites subjective judgment by officers regarding the purpose of those remaining in a public place. Id.
58 Id. at 71.
The combined statements and conclusions of the Justices comprising the *Morales* majority indicate that a penal statute may be declared unconstitutional if it does not provide "sufficient minimal standards to guide law enforcement officers." This aspect of *Morales* has been severely criticized for doing "more harm than good to the project of placing reasonable constraints on police." Professor Alfred Hill, for example, believes *Morales* "has disquieting implications." Professor Hill argues that if a criminal statute provides sufficient notice to a citizen of what constitutes an offense, then that notice is sufficient to guide the police. "[A] statute that sufficiently defines the offense was traditionally thought by the Court to furnish adequate guidance to the police." According to Professor Hill, the principle upheld in *Morales* is flawed for at least two other reasons. First, he claims *Morales* entrenches an unworkable rule because the issue of whether a law grants too much discretion to the police "would have to be decided from case to case on what could only be a subjective basis." Second, he asserts that the principle affirmed in *Morales* "lacks a firm foundation" in the Court's prior vagueness cases.

Professor Hill's criticism of *Morales* is unpersuasive. He believes that if a statute gives sufficient notice of what constitutes an offense, that is enough to satisfy vagueness concerns. Professor Hill too easily dismisses the constitutional vice inherent in a statute that grants broad police discretion. Like the "fair notice" norm, restraining police discretion promotes "rule of law" values. Providing one explanation of the interests served by "rule of law" values, Professor John Jeffries writes:

The rule of law signifies the constraint of arbitrariness in the exercise of government power. In the context of the penal law, it means that the agencies of official coercion should, to the extent feasible, be guided by rules—that is, by openly acknowledged, relatively stable, and generally applicable statements of prescribed conduct. The evils to be retarded are caprice and whim, the misuse of government power for private ends, and the unacknowledged reliance on illegitimate criteria of selection. The goals to be advanced are regularity and evenhandedness in the admini-

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59 Id. at 43 (O'Connor, J., concurring in part and concurring in the judgment); id. at 72 (Breyer, J., concurring in part and concurring in the judgment).
60 Livingston, *Gang Loitering*, supra note 14, at 145.
41 Hill, supra note 24, at 1306.
42 Id. at 1307.
43 Id.
44 Id.
45 Id. (["A] statute that sufficiently defines the offense was traditionally thought by the Court to furnish adequate guidance to the police. If the police engaged in misconduct anyway, it was not deemed to be for lack of guidance in the statute.").
The interests described by Professor Jeffries are pertinent and appropriate criteria for determining the constitutionality of Chicago’s ordinance. Indeed, judicial scrutiny of the type of police power and discretion authorized by Chicago’s ordinance is critical precisely because enforcement of that statute depended upon the subjective judgments of police officers. In this context:

The power to define a vague law is effectively left to those who enforce it, and those who enforce the penal law characteristically operate in settings of secrecy and informality, often punctuated by a sense of emergency, and rarely constrained by self-conscious generalization of standards. In such circumstances, the wholesale delegation of discretion naturally invites its abuse, and an important first step in constraining that discretion is the invalidation of indefinite laws.

Chicago’s ordinance gave police the power to order any person standing in public with a suspected gang member to “move on.” Even assuming that Chicago’s ordinance gave fair notice of what constituted the criminal offense (i.e. refusing an officer’s dispersal order), the ordinance still gave officers unguided discretion to order people, who are otherwise violating no law, to leave a public place. Thus, Professor Hill’s conclusion that a statute that gives adequate notice to the offender also gives adequate guidance to the police, fails to address the potential for arbitrary and discriminatory law enforcement. Professor Hill’s theory of vagueness would leave intact a statute that provides adequate notice of an offense but no criteria for restraining police discretion to order otherwise law-abiding people off the streets. Thirty-five years ago, the Court adamantly declared that the Constitution would not tolerate such a law.

Professor Hill’s other criticism of Morales, that the ruling “lacks a firm foundation,” is misplaced. The result in Morales is neither surprising, nor without foundation, in light of Kolender v. Lawson. In
Kolender, the Court invalidated a California criminal statute “that require[d] persons who loiter or wander on the streets to provide a ‘credible and reliable’ identification and to account for their presence” when requested by a police officer who has reasonable suspicion of criminal conduct to detain the person.\(^5\) The Court concluded that the law was too vague because it failed to “clarify what is contemplated by the requirement that a suspect provide a ‘credible and reliable’ identification.”\(^6\) Writing for a seven-Justice majority, Justice O’Connor described the California law as follows:

[It] contain[ed] no standard for determining what a suspect has to do in order to satisfy the requirement to provide a ‘credible and reliable’ identification. As such, the statute vests virtually complete discretion in the hands of the police to determine whether the suspect has satisfied the statute and must be permitted to go on his way in the absence of probable cause to arrest.\(^5\)

As in Morales, the Court in Kolender was concerned about the potential for discriminatory and arbitrary enforcement of a state statute.\(^5\) Indeed, when the rulings in Kolender and Morales are combined, a solid majority of the Court is committed to restraining broad police discretion, particularly when such discretion threatens the exercise of civil liberties, like freedom of speech or the right to freedom of movement.\(^5\)

of the vagueness doctrine in eliminating a potential for police abuse, but had never suggested that the existence of such a potential was an independent basis for invalidating a statute.” Id. at 1303 (footnote omitted). But he concedes that “[f]or years the Court had spoken of the vagueness doctrine as addressed to four concerns,” including “avoidance of a potential for discriminatory and arbitrary enforcement.” Id. at 1303-04 (footnote omitted). Indeed, in several opinions pre-dating Kolender, the Court had stated that a vague law violates due process because it authorizes the power for “arbitrary street enforcement, arbitrary arrest and similar harassments” by police. Amsterdam, supra note 46, at 221 (citing cases). Thus, Professor Hill’s objection that “Morales lacks a firm foundation” rests on the Court’s willingness to rely upon criteria other than fair notice grounds as a basis for ruling a penal statute unconstitutionally vague.

Although Morales and Kolender represent a change in emphasis, they fit comfortably with the Court’s past pronouncements regarding vagueness doctrine.

53 461 U.S. at 353 (citing CAL. PENAL CODE ANN. § 647(e) (West 1970)).
54 Id. at 353-54.
55 Id. at 358.
56 See Jeffries, supra note 25, at 218 (“[The Kolender Court] focused on the right problem—namely, the susceptibility of the law in question to arbitrary and discriminatory enforcement. That is the only rationale that plausibly supports this decision, and in my view it is the most persuasive justification for vagueness review generally.”).
57 Kolender, 461 U.S. at 358 (“[U]nder the California statute, an] individual, whom police may think is suspicious but do not have probable cause to believe has committed a crime, is entitled to continue to walk the public streets ‘only at the whim of any police officer’ who happens to stop that individual under § 647(e). Our concern here is based upon the potential for arbitrarily suppressing First Amendment liberties ... . . . In addition, § 647(e) implicates consideration of the constitutional right to freedom of movement.” (citations omitted)); Morales, 527 U.S. at 52-56 (explaining that the Court need not decide whether Chicago’s ordinance had a sufficient impact on the freedom of movement to justify facial invalidation under the overbreadth doctrine); cf. Jeffries, supra note 25, at 217 (“The use of the vagueness doctrine to protect first amendment freedoms is ... closely linked to the rule of law: it presents, if you will, a special case of the dangers of discretion.”).
Professor Hill worries that Morales "promises mischief as courts try to determine the existence of a statutory potential for police abuse," and he contends that the "stability of the Morales rule is questionable." Concededly, the Court must be careful to articulate workable rules that can be understood and applied by the lower courts, legislators, and police officers alike. That being said, Professor Hill makes a fair point when he notes that Morales does not provide a precise measuring device for deciding when a statute allows too much police discretion. However, the rulings in Morales and Kolender are unlikely to grant judges a "veto" stamp for all types of criminal statutes. The constitutional vice in both cases was naked police power. Imagine, for a moment, the "mischief" for civil liberties if the Court had upheld the statutes in Kolender and Morales, as Professor Hill suggests the Court should have done. If the statute had been upheld in Kolender, police officers could arrest a suspicious person who failed to provide "credible and reliable" identification or failed to account for his presence to the extent that it would help in producing such identification. "It takes little imagination to perceive that [this law] operates simply as a charter of dictatorial power to the policeman." As noted, if Chicago's ordinance had been sustained, Chicago police officers would be free to order individuals found standing on a city sidewalk or chatting on a park bench with a gang member to leave the area, and they would have had the power to arrest anyone who disobeyed their orders. "Most Americans no doubt would be offended by police orders to move along; they certainly would find it hard to see their compliance with such orders as an exercise of liberty." Most importantly, the Court in Morales and Kolender was well aware of the potential that the challenged laws would be enforced in a racially uneven manner. When police are given wide discretion to wield power, selective and race-based law enforcement is likely, if not

58 Hill, supra note 24, at 1307.
59 Amsterdam, supra note 46, at 223.
60 See Aaron J. Mann, Casenote, A Plurality of the Supreme Court Asserts a Due Process Right To Do Absolutely Nothing in City of Chicago v. Morales, 33 CREIGHTON L. REV. 579, 629-30 (2000) (asserting that the Chicago ordinance unjustifiably authorizes a "standardless sweep" that "grants the police too much discretion and lends itself to arbitrary and discriminatory enforcement").
61 Roberts, supra note 24, at 812.
62 See Brief of Respondents 30-32, Chicago v. Morales, 527 U.S. 41 (1999) (No. 97-1121); Brief of Chicago Alliance for Neighborhood Safety, et. al. 26-28, Chicago v. Morales, 527 U.S. 41 (1999) (No. 97-1121); see also Roberts, supra note 24, at 780 ("Although this constitutional flaw can be explained in race-neutral terms, in Chicago it resulted in a particular racial injury; the gang-loitering law disproportionately violated the rights of Black and Latino citizens." (footnote omitted)). In Kolender v. Lawson, 461 U.S. 352 (1983), Edward Lawson, an economically successful, well-educated, innocent black man was repeatedly hassled, questioned, detained, and arrested by police officers in southern California. When police officers were harassing him, Lawson was a thirty-six year old San Francisco business consultant who wore his hair in dreadlocks. Lawson was detained or arrested fifteen times by the police while walking late at night in white neighborhoods in San Diego. See Dan Stormer & Paul Berstein, The Impact of Kolender v. Lawson on Law Enforcement and Minority Groups, 12 HASTINGS CONST. L.Q. 105, 105 (1984).
inevitable—particularly when officers have multiple encounters with racial and ethnic minorities. The Fourteenth Amendment's Equal Protection Clause was specifically designed to address racial discrimination by state actors. But nothing in the Constitution precludes the Court from developing other legal norms to address the evils of selective and arbitrary law enforcement that do not rise to the level prohibited by the Court's equal protection cases. Of course, as an abstract matter, few people would want to live in a society where police officers had no discretion regarding law enforcement. Thus, "[e]very legal system will have some resort to discretion." But acknowledging the reality that our legal regime tolerates different levels of discretion by government officers should not prevent the Court from recognizing another reality of our legal regime: racial bias. In *Morales* and *Kolender*, the Court properly acted to prevent the evils of racial and other forms of discrimination that inevitably emerge when police officers are given unchecked discretion to enforce the law. When the Court acts to counter selective and arbitrary police enforcement, it promotes rule-of-law values:

Greater conformity to the rule of law discourages resort to illegitimate criteria of selection and enhances our ability to discover and redress such abuses when they occur. Lesser adherence to that ideal facilitates abusive

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63 See Cole, supra note 25, at 1083 ("The problem with discretionary authority—and the need for judicial control—is that discretion permits law enforcement to target those whose complaints are least likely to be heard by the rest of the community. This is true whether the community is heterogeneous or homogeneous."); Roberts, supra note 24, at 786 ("The discriminatory impact of discretion is magnified tremendously by laws that leave not only the determination of suspicion but the very definition of offending conduct almost entirely to an officer's judgment."). The recent reports of the New Jersey and New York Attorneys General reveal the nexus between discretionary police authority and race-based law enforcement:

Police officers necessarily exercise considerable discretion in performing their sworn duties. This is especially true in the context of highway patrol . . . . [T]he legitimate criteria for selecting vehicles in these circumstances have never been clearly spelled out in written standard operating procedures or formal training curricula. Rather, the criteria used by troopers in exercising their discretion have been developed in an ad hoc fashion over the years, passed on through informal 'coaching,' tempered by each trooper's own experience and enforcement priorities, and strongly influenced by an official policy to reward troopers who find major drug shipments. This situation may invite both intentional and unintentional abuse and provides a management environment that allows the use of stereotypes to go undetected.


64 Jeffries, supra note 25, at 213; cf. KENNETH CULP DAVIS, POLICE DISCRETION 119 (1975) ("Possibly most important of all is the idea that rulemaking can reduce injustice by cutting out unnecessary discretion, which is one of the prime sources of injustice. Necessary discretion must be preserved, including especially the needed individualizing—adapting of rules to the unique facts of each case." (emphasis added)).
and discriminatory law enforcement and makes that evil more difficult to identify and control. Thus, the "worst case" breakdown of the rule of law is not random whim or caprice but hidden bias and prejudice. And the single most potent concern at issue here is not an abstract interest in the postulates of a just legal order but a specific commitment to end discrimination based on race or ethnicity. In the specific historical context in which we live, inhibiting racial discrimination in law enforcement is very much a part of what the rule of law is all about.65

Finally, one could imagine a variation of Chicago's ordinance that applied to everyone. If that hypothetical ordinance were enforced throughout the city, the opportunities for arbitrary or discretionary enforcement might diminish. But that ordinance would never be enacted, or if it were enacted, would never be enforced, because even-handed enforcement would be politically imprudent. Certainly, police discretion will be restrained if a law is enforced against everyone.66 But if government is forced to target everyone in order to reach a few, the political process will prevent the government from targeting anyone. Chicago's gang congregation ordinance operated in the opposite direction. Governmental power was directed at a small group and left the majority of the population unaffected. When this type of law is enacted, discretionary police authority per-

65 Jeffries, supra note 25, at 213-14. Professor Debra Livingston has written extensively on the need for police discretion and contends that the vagueness doctrine should be reformulated to recognize changes in modern policing strategies. See Livingston, Police Discretion, supra note 25. Most recently, she argues that the assumption that judges can constrain capricious police enforcement—"an assumption expressed quite clearly in Morales"—is "significantly less plausible" when applied to modern laws like Chicago's ordinance. Livingston, Gang Loitering, supra note 14, at 166. In support of her thesis, Livingston notes that modern legal regimes "create substantial opportunities for police arbitrariness that do not raise traditional vagueness concerns." Id. According to Livingston, those opportunities exist in three contexts: (1) "broad, but clear laws—such as [a] juvenile curfew["] statute; (2) "narrow and specific, but commonly violated, low-level statutes and ordinances;" and (3) the Court's Fourth Amendment jurisprudence, which "vests police with a significant degree of street-level discretion . . . ." Id. I do not disagree with Professor Livingston's claim that other parts of the legal system create opportunities for police abuse that are beyond the reach of the vagueness doctrine. Indeed, a major premise of this article is that the Court's Fourth Amendment cases provide the means for arbitrary police power. I do, however, strongly disagree with Professor Livingston's proposal that courts employ a "reasonableness" analysis when deciding vagueness questions. See id. at 195-98 ("Simply stated, courts addressing difficult vagueness questions should consider whether the exercise of police discretion contemplated in challenged public order legislation will take place under conditions that provide reasonable assurances that the relevant police department will be accountable for the way in which it employs this discretion . . . . Like all tests premised on reasonableness, the one articulated here will permit many factors to be considered."). A vagueness doctrine based on "reasonableness" will produce the same degree of discretion and arbitrary police power that is currently authorized by Fourth Amendment doctrine. Cf. Silas J. Wasserstrom & Louis Michael Seidman, The Fourth Amendment as Constitutional Theory, 77 GEO. L.J. 19, 93-94 (1988) (describing the appropriateness of judicial intervention where the political process fails to value interests of politically less powerful groups and explaining that judicial intervention is needed "to assure that the tradeoff between privacy and law enforcement is that which a hypothetical political system would strike if everyone's interests were equally represented"); Erik G. Luna, Sovereignty and Suspicion, 48 DUKE L.J. 787, 894-98 (1999) (describing an "anti-discrimination" model of Fourth Amendment theory).
mits the state to pick and choose persons to subject to governmental power and diminishes regularity and accountability by state actors.

In sum, the norm of controlling police discretion is a legitimate constitutional principle when applied to overturn statutes like those involved in Morales and Kolender. Both cases involved penal statutes that afforded police substantial discretionary power to enforce the law, without providing concrete standards to guide officers or restrain their authority. Concededly, the constitutional rule adopted in Morales does not explain when a statute gives too much discretion to the police. We do know, however, that the ordinance at issue in Morales provided no means to restrain police power and gave officers a potent measure to enforce the criminal law in a selective and arbitrary manner. When the norm of controlling police discretion is applied in this setting, it properly advances rule-of-law interests of "regularity and evenhandedness in the administration of justice and accountability in the use of government power."\(^{67}\)

B. The Norm of Controlling Police Discretion is Consistent with the Fourth Amendment

Morales illustrates that the norm of controlling police discretion is an important feature of vagueness doctrine. That being true, one could properly ask whether the norm of restraining police discretionary power can, or should, be applied in other constitutional contexts.

Currently, Fourth Amendment law is controlled by a "reasonableness" model. For the modern Court, the main object of the Amendment is reasonable police behavior when conducting searches and seizures. Reasonableness is typically determined by balancing the government's interest in effective law enforcement against the individual's privacy and liberty interests.\(^{68}\) There are compelling reasons why the norm of controlling police discretion, rather than a reasonableness norm, is an appropriate tool for judging the legality of police searches and seizures.\(^{69}\) First, to the extent that history influences

\(^{67}\) Jeffries, supra note 25, at 212.

\(^{68}\) See, e.g., Maryland v. Buie, 494 U.S. 325, 331 (1990) ("Our cases show that in determining reasonableness, we have balanced the intrusion on the individual's Fourth Amendment interests against its promotion of legitimate governmental interests." (citations omitted)); Wyoming v. Houghton, 526 U.S. 295, 299-303 (1999) (finding "that the balancing of the relative interests weighs decidedly in favor of allowing searches of a passenger's belongings").

\(^{69}\) Of course, a "reasonableness" model for deciding search and seizure cases is consistent with the literal language of the Fourth Amendment, which grants to the People, a right "to be secure ... against unreasonable searches and seizures." U.S. Const. amend. IV. Nor does a "reasonableness" model necessarily preclude judicial efforts to control police discretion. See California v. Acevedo, 500 U.S. 565, 582 (1991) (Scalia, J., concurring in the judgment) ("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."); see also Sherry F. Colb, The Qualitative Dimension of Fourth Amendment "Reasonableness," 98 COLUM...
constitutional decision making, the norm of restraining police discretion is consistent, as a reasonableness model is not, with the "larger purpose" that the Framers had in mind when they adopted the Fourth Amendment. Second, even if historical concerns are put aside, the norm of controlling police discretion is a superior analytical tool to the Court’s reasonableness model. The Court’s reasonableness approach, which is applied in a variety of settings, is an ad hoc analysis that often lacks standards and rarely is applied with an underlying vision in mind. When applied to search and seizure cases, the norm of controlling police discretion can avoid the standardless decision-making inherent in the reasonableness model. For example,

L. Rev. 1642 (1998) (proposing a "reasonableness" model that includes greater substantive and procedural safeguards in Fourth Amendment analysis); Christopher Slobogin, The World Without a Fourth Amendment, 39 UCLA L. REV. 1, 8-38 (1991) (arguing that the "reasonableness" of a search or seizure should be assessed by balancing the state and individual interests and concluding that government officers be required to obtain third party authorization prior to any non-emergency search or seizure). Conversely, the "reasonableness" model typically employed by the modern Court is a balancing process "in which the judicial thumb apparently will be planted firmly on the law-enforcement side of the scales." United States v. Sharpe, 470 U.S. 675, 720 (1985) (Brennan, J., dissenting); see also JOSHUA DRE.ER, UNDERSTANDING CRML!NAL LAW § 11.01 [C], at 165 (2d ed. 1995) (“Language announcing a broad warrant requirement is now almost exclusively found in dissenting opinions. The clear and unmistakable trend of the law is toward the 'reasonableness' clause.”). When "balancing" becomes the touchstone of constitutional analysis, the Justices’ personal views may affect the outcome of certain cases. Cf. Mark Tushnet, Justice Lewis F. Powell and the Jurisprudence of Cen- trism, 93 Mich. L. Rev. 1854, 1877-78 (1995) (“When one seeks to balance interests, the result is likely to be distorted to the extent that one systematically undervalues the interests on one side of the balance while giving full weight to the interests on the other side.”). Rather than controlling police discretion, the modern Court’s "reasonableness" model often expands police discretion and authority. In other places, I have argued that the underlying vision of the Fourth Amendment is controlling police discretionary power. See, e.g., Tracey Maclin, Informants and the Fourth Amendment, 74 Wash. U. L.Q. 573, 584-85 (1996) [hereinafter Maclin, Informants]; Tracey Maclin, The Central Meaning of the Fourth Amendment, 35 WM. & MARY L. REV. 197, 201, 228-29 (1993); Tracey Maclin, When the Cure for the Fourth Amendment Is Worse than the Disease, 68 S. Cal. L. Rev. 1, 24-25 (1994). See also William J. Mertens, The Fourth Amendment and the Control of Police Discretion, 17 U. Mich. J.L. REFORM 551, 553 (1984) (arguing that the Fourth Amendment "performs a discretion control function").

70 See Thomas Y. Davies, Recovering the Original Fourth Amendment, 98 Mich. L. REV. 547, 591-600 (1999). Detailing the two-fold inconsistency between the Framers’ intent and the modern Court’s reasonableness analysis, Professor Davies writes:

The first is the [Framers’] widespread opposition to allowing officers to exercise discretionary search authority . . . . That opposition is inconsistent with the use of a relativistic reasonableness standard, which would have facilitated officers’ discretion to initiate intrusions. The second fact is a silence: reasonableness was not used as a standard for assessing searches or arrests in framing-era legal sources, and there is also no persuasive evidence of the use of any such standard during the framing of the state or federal constitutional provisions.

Id. at 591.

71 Id. at 556 (arguing against a return to the literal, original understandings of the Framers regarding the Fourth Amendment because that “would subvert the larger purpose for which the Framers adopted the text; namely to curb the exercise of discretionary authority by officers”); Morgan Cloud, Searching Through History; Searching for History, 63 U. Chi. L. REV. 1707, 1729 (1996) (“[T]he Framers acted to eliminate search and seizure methods that permitted the arbitrary exercise of discretion and were conducted without good cause, whether or not warrants were employed.” (footnote omitted)).
if restraining police discretion were the touchstone of Fourth Amendment law, suspicionless police searches and seizures would not be permitted. Finally, if the Court were to substitute the norm of controlling police discretion in place of its current reasonableness model, there is the possibility that Fourth Amendment cases would have an identifiable theme.

1. The Relevance of History for Fourth Amendment Norms

Mining constitutional norms from the Fourth Amendment’s complex history can be a problematic endeavor. As one historian pointed out, the text of the Amendment “mingles ambiguous and precise language, for it forbids all types of unreasonable searches and seizures but identifies only one unreasonable type and that one only implicitly.” Moreover, the historical background surrounding the Amendment’s development and adoption “did not illuminate all aspects of the Fourth Amendment equally, nor did [it] explain all of its original meaning. Th[e] historical documents, however, did explain a great deal of that meaning and were indispensable to its understanding.” Despite the density of the Amendment’s history and the uncertainty of its text, some Justices argue that the Framers intended a “reasonableness” requirement for all searches and seizures. And some of these Justices insist that the Amendment’s requirement of reasonableness “affords the protection that the common law afforded.” This manner of legal history will not advance Fourth

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73 Id. at ciii.
75 California v. Acevedo, 500 U.S. 565, 583 (1991) (Scalia, J., concurring). For an excellent critique of Justice Scalia’s view that, when applying the Fourth Amendment, judges should consider whether the challenged police conduct “was regarded as an unlawful search or seizure under the common law when the Amendment was framed,” Wyoming v. Houghton, 526 U.S. 295, 299 (1999), see David A. Sklansky, The Fourth Amendment and Common Law, 100 COLUM. L. REV. 1799 (2000). Professor Sklansky argues that “[n]either the text nor the background of the Fourth Amendment suggests it aims merely to codify eighteenth-century rules of search and seizure.” Id. at 1744. According to Professor Sklansky, “the Framers’ eighteenth-century rationalism offers little basis for concluding that they intended the opening clause of the Fourth Amendment to constitutionalize the then-existing rules of search and seizure. The common
Amendment interests, nor, incidentally, the intent of the Framers.

As an initial matter, it is highly unlikely that the Framers intended the Fourth Amendment to be interpreted in the *ad hoc* manner favored by the modern Court. Professor Thomas Davies's detailed scholarship on the history of the Amendment indicates that the Framers had no intention of creating or adopting the reasonableness analysis embraced by the Court for judging the legality of governmental searches and seizures. According to Professor Davies, the precise aim of the Framers was straightforward and narrow: to forbid legislation that would authorize the use of general warrants to intrude into private homes.  

More importantly, Professor Davies concludes that the reasonableness model of the modern Court "is especially distant from the Framers' meaning." A "reasonableness" construction of the Fourth Amendment "runs afoul of two historical facts." First, during the period immediately preceding adoption of the state and federal constitutional provisions on search and seizure, opposition to discretionary search authority was pervasive in the colonies. This opposition manifested itself in vigorous condemnation of general warrants and writs of assistance. According to Davies, this "opposition is inconsistent with the use of a relativistic reasonableness standard, which would have facilitated officers' discretion to initiate intrusions." The second historical fact that weakens the likelihood that the Framers intended to adopt reasonableness as the touchstone for Fourth Amendment analysis is their silence. According to Davies, the Framers perceived the threat to the right to be secure more precisely than we do today. They did not have a diffuse concern about the security of person and house—the common-law rules regarding search and arrest authority provided sufficient protection against unjustified intrusions. Instead, they were concerned about a specific vulnerability in the protections provided by the common law; they were concerned that legislation might make general warrants legal in the future, and thus undermine the right of security in person and house. Thus, the Framers adopted constitutional search and seizure provisions with the precise aim of ensuring the protection of person and house by prohibiting legislative approval of general warrants.

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Davies, supra note 70, at 591.

77 Id. at 736.

78 Id. at 591.


80 Davies, supra note 70, at 591.

81 Id. ("[R]easonableness was not used as a standard for assessing searches or arrests in framing-era legal sources, and there is also no persuasive evidence of the use of any such standard..."
ing to Davies’s research, the few isolated references to “unreasonable searches and seizures” do not provide convincing evidence that the Framers intended open-ended reasonableness to be the guiding principle for deciding the legality of searches and seizures. When the Framers spoke of the privacy and security of a man’s castle and condemned the evils they experienced with British customs searches, they had a specific target in mind: forcible intrusions into private homes authorized by general warrants and writs of assistance.

Having this history in mind, can a legal norm be extracted from the Fourth Amendment’s origins to guide modern interpretation of search and seizure law? I believe that the norm of controlling police discretion accurately captures the central meaning of the Fourth Amendment. Indeed, the norm of restraining discretionary police power is the overriding principle that emerges when one focuses on the Amendment’s underlying purpose. In the Framers’ era, that purpose was “controlling the discretion of government officials to invade the privacy and security of citizens, whether that discretion be directed toward the homes and offices of political dissidents, illegal smugglers, or ordinary criminals.”

Today that same purpose of controlling discretionary authority can and should be applied to the various types of police search and seizure conduct. Furthermore,
the constitutional norm of controlling police discretion, unlike a reasonableness model, works in concert with specific goals that the Framers contemplated when the Fourth Amendment was adopted. The Framers "banned general warrants in order to prevent the officer from exercising discretionary authority," and they "believed that specific warrants provided significant protections against arbitrary intrusions." In sum, the Framers sought to control the power and discretion of law enforcement officers. To the extent that the Court genuinely seeks to promote the underlying vision of the Fourth Amendment, those aims are more likely to be achieved by utilizing the norm of controlling police discretion as the touchstone of Fourth Amendment analysis.

2. The Norm of Controlling Police Discretion Prohibits Arbitrary Intrusions

Even if one believes that the Framers' intent should not dictate the outcome of modern Fourth Amendment doctrine, the norm of controlling police discretion remains superior to the Court's reasonableness model for deciding the legality of searches and seizures. As noted earlier, the Court decides whether a challenged governmental intrusion violates the Fourth Amendment by asking whether officials have acted in a reasonable manner. This formula lacks content and amounts to nothing more than an *ad hoc* judgment about the desirability of certain intrusions. Consider, as one example, the Court's resolution of an issue that affects millions of citizens: can police arbi-

("Police need discretion to do their work; indeed, it is impossible to imagine eliminating it. The questions are how much discretion comports with the Fourth Amendment, and how this discretion might be channeled most wisely." (footnote omitted)).

*See id. at 736-37. Davies writes, "framing-era common law resisted the sort of discretionary authority that 'reasonableness' analysis confers on modern officers. The modern notion of 'reasonableness' would have been distinctly ill suited to the Framers' concerns; it is such a soft, subjective, contentless notion that it fosters and enhances, rather than curbs, discretionary authority." Id. (footnotes omitted).

*See e.g., Houghton, 526 U.S. at 307 (Breyer, J., concurring) (expressing the "understanding that history is meant to inform, but not automatically to determine, the answer to a Fourth Amendment question"); 1 WAYNE R. LAFAVE, SEARCH AND SEIZURE § 1.1(a), at 6 (3d ed. 1996) (noting that reliance on the Framers' original intent "is of limited utility"); Anthony G. Amsterdam, Perspectives on the Fourth Amendment, 58 MINN. L. REV. 349, 401 (1974) (noting that technological advances, an expanding, urbanized population, and the "increased dangers of crime in an automated age" prevent reliance on the Framers' view of what the Fourth Amendment was specifically designed to accomplish; therefore, even if today's society "wanted to take exclusive counsel of the framers on the problems of our time, we could not do so"); Carol S. Steiker, Second Thoughts About First Principles, 107 HARV. L. REV. 820, 823-24 (1994) (arguing that an interpretation that focuses on the intent of the Framers ignores two crucial changes since the Fourth Amendment was adopted: first, the development of the armed, quasi-military professional police force, and second, the "intensification of inter-racial conflict" within society and the various ways "in which this conflict has intersected with law enforcement").
trarily order a motorist out of a car during a routine traffic stop? In 1977, in Pennsylvania v. Mimms, the Court ruled that police officers possessed unchecked authority to order drivers out of their vehicles during routine traffic stops. Twenty years later the "other shoe" fell, when Maryland v. Wilson extended the reasoning of Mimms to passengers, noting that the same officer-safety concerns that motivated the result in Mimms also justified giving police absolute discretion to order passengers out of cars during traffic stops.

The reasoning of Mimms and Wilson is sensible if constitutional reasonableness is determined on an *ad hoc* basis. Police safety is both a legitimate and weighty factor. Moreover, reasonable minds can certainly differ over whether a driver's or passenger's interest in remaining in a car during a traffic stop should trump the interest of police safety. The Court's balancing model is reasonable in the sense that rational persons could reach the conclusion that the interest in officer safety outweighs the interest in protecting motorists from arbitrarily being ordered to exit their cars. But this type of reasonableness should not be equated with the constitutional reasonableness demanded by the Fourth Amendment because it permits arbitrary police intrusion. If the underlying vision of the Amendment is a distrust of police discretion, then arbitrary police intrusions should *never* be allowed. As Justice Stevens noted in his dissent in Mimms, "to eliminate any requirement that an officer be able to explain the reasons for his actions signals an abandonment of effective judicial supervision of this kind of seizure and leaves police discretion utterly without limits."

The rulings in Mimms and Wilson are wrong for another reason. In the real world, police departments and individual officers will not exercise the authority conferred by these decisions constantly, or even frequently. A policy of *always* ordering drivers and passengers out of their cars would be politically unattractive and needlessly inconvenient if applied to every motorist stopped for a traffic violation. Instead, police officers will exercise this authority based on their individual predilections. As Professor LaFave comments about Wilson, "the likely impact of Wilson is not that all traffic stops passengers will be ordered out of their vehicles as a matter of routine, but instead that police will sometimes give such an order." That will mean that certain drivers and passengers will be ordered out of their vehicles, while the majority of motorists will not be subjected to this arbitrary order. Because Mimms and Wilson confer an absolute authority to order occupants of vehicles out of their cars during a traffic stop, not only will judicial review of this practice be unavailable, it is "very pos-

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92 519 U.S. 408 (1997).
93 Mimms, 434 U.S. at 122 (Stevens, J., dissenting).
sible that these decisions will be based on considerations having no legitimate connection with any risk of harm to the officer." Thus, Justice Kennedy did not exaggerate when he noted that the practical effect of the authority conferred in *Mimms* and *Wilson*, when combined with the discretion afforded by *Whren*, puts "tens of millions of [drivers and] passengers at risk of arbitrary control by the police."

Finally, the judgments in *Mimms* and *Wilson* show that the Court is incapable of applying its own "reasonableness" standard in a consistent or good faith manner. As Justice Scalia's questions during oral argument in *Wilson* revealed, the crux of the government's position was that the Court *not* apply any reasonableness analysis to an exit order directed at a passenger. The government asked for, and re-

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95 Id.

96 Maryland v. Wilson, 519 U.S. at 423 (Kennedy, J., dissenting). The "risk of arbitrary control" that Justice Kennedy described will not be limited to the exit orders specifically approved in *Mimms* and *Wilson*. As is true with most Fourth Amendment axioms articulated by the Court, police officers will consistently push the reach of these rules and test the judiciary's willingness to limit police discretion. *See* *Brinegar* v. United States, 338 U.S. 160, 182 (1949) (Jackson, J., dissenting) ("We must remember that the extent of any privilege of search and seizure without warrant which we sustain, the officers interpret and apply themselves and will push to the limit."). Police officers (or their legal advisors) have interpreted *Mimms* and *Wilson* as grounds not only to order motorists out of their vehicles, but also as authority to *detain* motorists inside or outside their vehicles. *See*, e.g., *Rogala* v. District of Columbia, 161 F.3d 44 (D.C. Cir. 1998) (affirming the district court's finding that officers may order passengers to remain in a vehicle during the administration of a field sobriety test, especially where the officer is alone or concerned for his safety); *United States v. Moorefield*, 111 F.3d 10, 15 (3rd Cir. 1997) (finding that officers may lawfully order passengers to remain in vehicles with their hands raised because such an order is a "minimal intrusion on personal liberty"); *Wilson v. State*, 734 So.2d 1107 (Fla. Dist. Ct. App. 1999) (rejecting officers' argument that they may routinely order a passenger to get back into a vehicle and remain inside for duration of traffic stop), *cert. denied*, 120 S. Ct. 1996 (2000); *People v. Gonzalez*, 704 N.E.2d 375 (Ill. 1998) (holding that police may detain a passenger who exits and attempts to leave the scene of a traffic stop, even absent reasonable suspicion, but leaving open the question whether police may detain a passenger for the entire duration of a traffic stop), *cert. denied*, 120 S. Ct. 75 (1999); *Tawdul v. State*, 720 N.E.2d 226 (Ind. Ct. App. 2000); *State v. Scimemi*, No. 94-CA-58, 1995 WL 329031, at *3-4 (Ohio Ct. App. June 2, 1995) (holding that an officer may briefly detain and order a passenger to remain in a vehicle during a traffic stop if the officer finds such an order necessary as a safety precaution, but declining to address the permissible period of detention of passengers).

97 *Cf.* *Harris*, *Ct Wars*, supra note 17, at 564 ("The operative parts of [*Wilson*] are nothing but policy judgments dressed up as principled judicial decisions.").

98 The following is an excerpt of some questions posed during oral arguments:

*Question:* General Reno, you want no reasonableness limitation on this. I suppose that means that a police officer could stop a bus and say, everybody off the bus. Or—you know, does vehicle size come into it?

*General Reno:* Yes, Your Honor. That might be a more difficult question for the Court, but—

*Question:* Well, not for you. You want no reasonableness limitation.

*General Reno:* Again, the bus situation can be an unknown situation for that officer, and he needs the opportunity, under our position, to be able to size up the situation, to determine and observe the people involved, and he may determine that he wishes them to stay in or to exit. Police practices indicate that both are appropriate, depending on the stage of the traffic stop and depending on the circumstances of the traffic stop. We are submitting that under the—this Court's rule in *Mimms*, it is the persons seated in the
ceived, the Court's approval to eliminate any requirement that a police officer explain why a motorist was ordered out of a vehicle during a traffic stop. Judicial review of exit orders was abolished. After Wilson, police have the power to order motorists in and out of cars without having to justify their actions to anyone. In a nation that prides itself on the rule of law, this is a curious result. If controlling police discretion were the touchstone of the Court's Fourth Amendment analysis rather than "reasonableness," then millions of drivers and passengers could not be seized solely on the arbitrary and unreviewable judgment of a police officer. If officers were required to justify these seizures, then the nation's motorists might be "more secure" against unreasonable seizures while travelling the nation's roads and highways.

3. The Norm of Controlling Police Discretion Should Guide Fourth Amendment Jurisprudence

Fourth Amendment law seems bewildering because the Court's reasonableness model encourages subjective and haphazard results. Consequently, criminal procedure scholars often deride the Court's Fourth Amendment doctrine as unnecessarily confusing and disjointed. Viewed objectively, their comments seem accurate. Fourth Amendment law is certainly complex, but over the last two decades...
the trend of the Court's cases has been to expand police power. This expansion of police power tends to provide a unifying theme, as well as guidance to lower court judges and police officers in the field. Of course, steady expansion of police search and seizure power is not the source of the Fourth Amendment's complexity. Fourth Amendment law is confusing and complex because the Court's reasonableness analysis encourages ad hoc, subjective judgments about the need for certain police intrusions and the nature and value of Fourth Amendment liberties.

Recall *Maryland v. Wilson*, which held that police have absolute discretion to order passengers out of a car during a routine traffic

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100 Even in cases where the defendant receives a favorable judgment, the Court's reasoning in a particular case sometimes results in the expansion of police power. See, e.g., *Minnesota v. Dickerson*, 508 U.S. 366 (1993). *Dickerson* involved a seizure of contraband narcotics taken from the defendant's pocket after a police frisk for weapons. The Minnesota Supreme Court rejected the prosecution's claim that the Fourth Amendment permitted the seizure of illegal narcotics under a "plain feel" theory. Although the Court affirmed the judgment of the Minnesota Supreme Court, it explained that plain feel or plain touch seizures were proper under the Fourth Amendment. The Court affirmed the state ruling because the officer's testimony revealed that he did not immediately recognize the contraband in Dickerson's pocket. After *Dickerson*, officers rarely make the same mistake; officers now testify that while frisking a suspect they immediately recognized the feel of contraband drugs. See, e.g., *United States v. Matarolo*, 309 F.3d 1153, 1158 (9th Cir. 2000) (accepting officer's testimony that "little chunks" in defendant's pocket had a "distinctive feel" and were immediately known to be contraband); *United States v. Walker*, 181 F.3d 774 (6th Cir. 1999) (acknowledging officer's testimony that identity of contraband hidden in defendant's pants was immediately apparent prior to and during frisk). *United States v. Proctor*, 148 F.3d 39 (1st Cir. 1998) (accepting officer's testimony that bulge in defendant's jacket pocket was immediately determined to be marijuana upon pat-down); *United States v. Craft*, 30 F.3d 1044 (8th Cir. 1994) (denying plaintiff's motion to dismiss based on officer's testimony that bulges around the ankles were immediately identifiable as controlled substances); *State v. Toth*, 729 A.2d 1069 (N.J. Sup. Ct. App. Div. 1999) (accepting trooper's testimony that cocaine enclosed in paper bag was immediately identified during frisk despite officer's inability to articulate the "tactile sensation" leading to his belief). Tailored testimonies are becoming increasingly problematic. In some cases, even judges are finding officers' testimonies too incredible to accept. See, e.g., *United States v. Mitchell*, 832 F. Supp. 1073 (N.D. Miss. 1993) (rejecting officer's testimony of his ability to immediately identify crack cocaine beneath layers of plastic, fabric, paper, and leather). Courts and scholars have acknowledged the practice of conforming testimony to validate searches. See, e.g., *State v. Wonders*, 992 P.2d 1351, 1364 (Kan. 1998) ("We are not unaware that experienced, knowledgeable law enforcement officers know the 'magic words' to be related when their searches and seizures are challenged."). Kevin A. Lantz, *Casenote, Search and Seizure: "The Princess and the Rock": Minnesota Declines to Extend "Plain View" to "Plain Feel,"* 18 U. DAYTON L. REV. 539, 577 (1993) (finding plain feel standard problematic due to the "fashioning of testimony to make otherwise invalid seizures comply with a more traditional standard."). However, as one scholar notes, the hazards of the plain touch doctrine extend beyond the practice of modifying testimony. Professor Der warns:

Due to the inexact nature of the sense of feel, police may strain to establish a plain touch justification when one is not warranted by the facts. Officers may inappropriately reach for plain touch by one of two ways: police may rush to a conclusion of probable cause before the nebulous sense of touch merits it, or they may be tempted to prolong their patdowns in order to increase their ability to form probable cause on the basis of touch.

George M. Dery, III, *The Uncertain Reach of the Plain Touch Doctrine: An Examination of Minnesota v. Dickerson and Its Impact on Current Fourth Amendment Law and Daily Police Practice*, 21 AM. J. CRIM. L. 385, 408 (1994). Thus, although the defendant in *Dickerson* won his case, the upshot of *Dickerson* has been expanded search and seizure power for the police.
Wilson explained that officer safety justified this intrusion. The Court reasoned that encounters involving several occupants of a vehicle increased the potential threats to officer safety. On the other side of the balance, Wilson recognized that a traffic stop, which gives an officer reason to seize the driver, does not provide objective grounds to detain or stop passengers since they are not responsible for the traffic infraction. Nonetheless, the Court concluded that the interests of passengers were not sufficiently different to justify exempting them from the exit order that can be arbitrarily imposed upon the driver. Logically, seizing the car also meant seizing passengers, and the exit order simply means that passengers "will be outside of, rather than inside of, the stopped car." And once they are out of the car, the Court reasoned:

the passengers will be denied access to any possible weapon that might be concealed in the interior of the passenger compartment. It would seem that the possibility of a violent encounter stems not from the ordinary reaction of a motorist stopped for a speeding violation, but from the fact that evidence of a more serious crime might be uncovered during the stop. And the motivation of a passenger to employ violence to prevent apprehension of such a crime is every bit as great as that of the driver.

In sum, the possibility that "a more serious crime might be uncovered" during a traffic stop justified giving officers unchecked authority to order passengers out of a car. A year later, however, a unanimous Court concluded that this same possibility did not justify searching the passenger compartment during a traffic stop. In Knowles v. Iowa, a police officer stopped Patrick Knowles for speeding. After issuing a citation, the officer searched Knowles and the passenger compartment of his car, discovering narcotics inside the car. Iowa law authorizes an arrest for a traffic violation, but it also allows an officer to issue a traffic citation in lieu of arrest. If an officer follows the latter procedure, Iowa law authorizes a search of the driver and car equivalent in scope to a search incident-to-arrest. Knowles held that a "search incident to citation" violated the Fourth Amendment. Officer safety could not justify this intrusion because the "threat to officer safety from issuing a traffic citation... is a good deal less than in the case of a custodial arrest." This response answers the wrong question. The question in Knowles was not

102 Id. (emphasis added).
104 The Court noted that Knowles did not contend that "the statute could never be lawfully applied." Id. at 116. As noted by one student commentator, Knowles "neither approves of nor rejects the [law authorizing the search]. It simply prohibits a certain interpretation of it." Carolyn J. Zambelli, Note, A Band-Aid for the Fourth Amendment: Knowles v. Iowa and the Supreme Court, 31 CONN. L. REV. 1217, 1243 (1999). Although Knowles left open the possibility that a search under Iowa's statute might be upheld in a different context, it is difficult to imagine what type of search the Court had in mind.
105 Knowles, 525 U.S. at 117.
whether the threat to officer safety inherent in a traffic stop is comparable to the threat surrounding a custodial arrest. Rather, the question in Knowles was whether the threat to officer safety inherent in a traffic stop justifies overriding the privacy interest a driver enjoys in the passenger compartment of his car. The safety interests at stake in Knowles were the same interests the Court had relied upon a year earlier in Wilson, namely, the possibility that "a more serious crime might be uncovered" during the traffic stop and "the motivation of a [motorist] to employ violence to prevent apprehension of such a crime." If these potential threats were sufficient to justify subjecting a motorist to an arbitrary seizure, why were these same threats not sufficient to justify an arbitrary search of Knowles's car?

The Court's reply was predictable. It explained that a concern for officer safety "may justify the 'minimal' additional intrusion of ordering" a motorist out of a car, but cannot justify "the often considerably greater intrusion attending" a search of a car. Moreover, Knowles noted that officers have other means to protect themselves when objective evidence of a safety threat is present. The Court's reasoning illustrates how Fourth Amendment law often turns on subjective evaluations rather than neutral principles. Why, in the context of a routine traffic stop, does officer safety justify an arbitrary seizure, but not an arbitrary search? It is true that Mimms and Wilson involved seizures, while Knowles involved a search, but the Fourth Amendment "speaks equally to both searches and seizures" so the text of the Amendment cannot explain the divergent outcomes.

The Court says a search is a "greater intrusion" than a seizure, but this *ipse dixit* is not a neutral principle of law; it merely reflects the Court's subjective evaluation of the interests at stake. Moreover, in similar contexts, the Court has allowed arbitrary searches of cars, notwithstanding the "greater intrusion" associated with searches. The most notorious example was the search approved in New York v. Belton. Belton held that when an occupant of a car has been arrested, police may, as an incident to arrest and without cause, search the passenger compartment of the car. Belton authorizes arbitrary searches, and is "based on the transparent fiction that a person arrested, usually outside the car, will somehow be able to break away and get back in the car to get a weapon or destroy evidence." The

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106 Wilson, 519 U.S. at 414.
107 Knowles, 525 U.S. at 117.
108 Id. at 118.
112 Under Belton, if a motorist is arrested for speeding, a search of a briefcase or purse is valid, even though there is no cause for the search.
113 Craig M. Bradley, *Supreme Court Review: Protection for Motorists—with a Leash?*, TRIAL, Feb.
holding in *Belton* was wrong for the same reason that the holding in *Knowles* was correct: there was no specific cause to search the car.

Instead of deciding on a case-by-case basis as the Court did in *Knowles* whether an arbitrary search of a car is a "greater intrusion" than some other hypothetical intrusion, why not ban all arbitrary searches of cars? If the point of the Fourth Amendment is controlling discretionary police power, then arbitrary searches and seizures are impermissible. If controlling discretionary intrusions is the central purpose of the Amendment, then comparative judgments regarding whether an arbitrary search of a car is a "greater intrusion" than an arbitrary seizure of a motorist would be unnecessary. If there is no cause for a search, and no evidence of a safety threat, then neither a search nor a seizure should be permitted.\(^\text{114}\) Instead of restraining police discretion, the reasoning of *Knowles* encourages police to arrest motorists selectively, which in turn will allow more arbitrary searches.\(^\text{115}\)

Certainly, the divergent results in *Wilson* and *Knowles* can be rationally explained. A reasonable person might agree that an arbitrary search is a "greater intrusion" than an arbitrary seizure. But for someone who values officer safety as "both legitimate and weighty,"\(^\text{116}\) the results in these cases may be harder to explain. After all, the Court had previously permitted arbitrary searches of automobiles in

1999, at 85, 86.

\(^{114}\) See id. ("[T]he criterion for whether a car can be searched should depend not on the nature of the crime or on the fact of arrest but on whether the police have the requisite level of suspicion that the driver has weapons or evidence in the car."); see also Visser, supra note 17, at 1694 (noting that when the Court's search-incident-to-arrest rule is applied to motorists, "police officers have the equivalent of a general warrant to search a motorist and the interior of his or her car subsequent to any lawful arrest for a traffic offense"); cf. David E. Steinberg, *The Drive Toward Warrantless Auto Searches: Suggestions from a Back Seat Driver*, 80 B.U. L. Rev. 545, 561 (2000) ("Courts should require a warrant prior to any auto search unless police face immediate danger or an imminent loss of evidence.").

\(^{115}\) See Transcript of Oral Argument at 41-42, Knowles v. Iowa, 525 U.S. 113 (1998) (No. 97-7597) (counsel for the State conceding that police could arrest a motorist for a traffic violation in order to effectuate a search); Bradley, supra note 113, at 86 ("Until the Court closes the loophole left open in *Knowles*, the effect of the decision will encourage more arrests and greater intrusions on personal privacy than is currently allowed . . . . The way to stop such shenanigans is to require probable cause to search automobiles and abandon the special category of searches incident to arrest."). Because the result in *Knowles* is easily avoided by arresting the driver, and because a search incident to arrest need not precede the actual arrest, see Rawlings v. Kentucky, 448 U.S. 98, 111 (1980) ("Where the formal arrest followed quickly on the heels of the challenged search of petitioner's person, we do not believe it particularly important that the search preceded the arrest rather than vice versa."); some have called for the Court to limit the authority of the police to arrest drivers for minor traffic offenses. See Oliver, supra note 17, at 1453 ("The unanimous decision in *Knowles* simply would make no sense if probable cause to believe an offender had committed a traffic offense alone justified taking him into custody."). In *Atwater v. City of Lago Vista*, No. 99-1408 (cert. granted, 68 U.S.L.W. 3566 (U.S. June 26, 2000)), the Court will address whether the Fourth Amendment imposes any limitations on the authority of the police to make custodial arrests for a fine-only traffic offense.

contexts where there was no objective threat to officer safety, and justified the results primarily on officer-safety grounds. Also, the Court has repeatedly denigrated the notion that motorists have a heightened expectation of privacy regarding property located inside automobiles. More importantly, a rational person who places a premium on police safety might reasonably find that the potential dangers that officers face when conducting traffic stops not only justify the arbitrary seizures approved in Mimms and Wilson, but also the arbitrary search at issue in Knowles.

The divergent views of police safety in Wilson and Knowles illustrate the subjective nature of the Court's reasoning. In Wilson, a potential threat to officer safety justifies an arbitrary seizure; but in Knowles, that same threat does not justify an arbitrary search. Yet, in Belton, a search greater in scope than the search involved in Knowles is permitted because of the potential threat to officer safety. These cases also demonstrate the haphazard way the Court measures the nature and value of Fourth Amendment interests. The text of the Amendment applies to both searches and seizures equally. Thus, the interest in being free from arbitrary seizures is just as important as the interest in being free from arbitrary searches. Yet, in Wilson, an arbitrary sei-

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117 See, e.g., New York v. Class, 475 U.S. 106 (1986) (upholding a suspicionless search for the vehicle identification number during a routine traffic stop); Belton, 453 U.S. at 454.

118 See, e.g., Houghton, 526 U.S. at 303 ("Passengers, no less than drivers, possess a reduced expectation of privacy with regard to the property that they transport in cars, which 'travel[1] public thoroughfares,' 'seldom serv[e] as . . . the repository of personal effects,' are subjected to police stop and examination to enforce 'pervasive' governmental controls '[a]s an everyday occurrence,' and, finally, are exposed to traffic accidents that may render all their contents open to public scrutiny." (citations omitted)); see also Maryland v. Dyson, 527 U.S. 463, 467 (1999) (per curium) (reiterating that under the "automobile exception" it is unnecessary to make a separate finding of exigency in addition to a finding of probable cause to justify a warrantless automobile search).

119 See Francis X. Clines, Police-Killers Offer Insights into Victims' Fatal Mistakes, N.Y. TIMES, Mar. 9, 1993, at A1 (describing incidents where motorists killed officers who had not paid close attention to the actions and movements of their killers). In a different context, a few lower courts have upheld suspicionless frisks of motorists and their passengers. See, e.g., State v. Barrow, No. 1998CA00299, 1999 Ohio App. LEXIS 2788 (Ohio Ct. App. June 7, 1999) (passenger may be frisked before being detained in a police cruiser); Moore v. Commonwealth, 487 S.E.2d 864 (Va. Ct. App. 1997) (noting that suspicionless frisk may be permissible in context of police-citizen encounter requiring investigation of suspected criminal activity or protection of the public safety); State v. Lombardi, 727 A.2d 670 (R.I. 1999) (holding that officer's frisk of intoxicated passenger prior to driving him home was a minimal intrusion and not prohibited by the Fourth Amendment). But cf. State v. Varnado, 582 N.W.2d 886 (Minn. 1998) (rejecting blanket rule that would allow officers to routinely frisk motorists placed in police cruiser); State v. Lozada, Case No. 98-P-0098, 1999 Ohio App. LEXIS 6135 (Ohio App. Ct. Dec. 17, 1999), appeal docketed, No. 99-2316 (May 17, 2000) (rejecting routine practice of frisking motorists in traffic stops prior to entering patrol car in absence of reasonable and objective grounds that the subject is potentially dangerous).

120 As Justice Scalia noted in Arizona v. Hicks, 480 U.S. 321, 328 (1987), because the Amendment protects against both searches and seizures, "neither the one nor the other is of inferior worth or necessarily requires only lesser protection. We have not elsewhere drawn a categorical distinction between the two insofar as concerns the degree of justification needed to establish the reasonableness of police action . . . ."
zure of a passenger is dismissed as "minimal" and not permitted to trump a potential threat to officer safety. Conversely, Knowles pays lip service to the "concern for officer safety" but concludes that an arbitrary search cannot be permitted even though the intrusion might advance police safety. If controlling police discretion were the guiding principle of Fourth Amendment law, neither intrusion would be permitted, and the reasoning of the Court's cases would make more sense.

II. APPLYING THE NORM OF CONTROLLING POLICE DISCRETION

A. What is a "Search" Under the Reasonableness Model?

A reasonableness model is used not only to decide whether a particular police intrusion violates the Fourth Amendment, but also to decide the threshold question of whether police activity triggers Fourth Amendment scrutiny ab initio. Police activity that is not deemed a "search" under the Amendment need not be exercised in a "reasonable" manner; intrusions falling into the "non-search" category "may be as unreasonable as the police please to make them." In determining whether a police intrusion is a search, the Court decides whether the person challenging the police activity had a "reasonable expectation of privacy" in the targeted area. This formula comes from Justice Harlan's concurring opinion in the landmark case of Katz v. United States. The Katz test consists of a two-part inquiry: first, did the person have a subjective expectation of privacy in the area targeted by the police? Second, was this an expectation that society considers reasonable? The Katz test has been applied in a variety of circumstances. The upshot of the Court's cases has recently been described as follows:

[The police can see and hear only those things that the rest of us can see and hear [without triggering Fourth Amendment protection]. ... The pattern is clear enough: the police can infringe privacy in ways that anyone else might infringe it, but not ... in ways that differ from the sorts of things ordinary people might do. All these results seem designed to take the privacy people have, and use it to define the privacy that the police cannot invade without some good cause.

This description of how the Court defines the Fourth Amendment's boundaries rightly acknowledges that "police can infringe privacy in ways that anyone else might infringe it," but it omits a criti-

\[121\] See Amsterdam, supra note 90, at 356 ("The words 'searches and seizures'... are terms of limitation. Law enforcement practices are not required by the fourth amendment to be reasonable unless they are either 'searches' or 'seizures.'" (footnote omitted)).

\[122\] Id. at 388.


\[124\] Stuntz, Distribution, supra note 17, at 1269.

\[125\] Id.
cal aspect of the Court’s analysis. Like other parts of its Fourth Amendment jurisprudence, the Court’s “expectation of privacy” analysis rests on the ad hoc conclusions of the Justices and ignores the reality of police practices. To put it mildly, “the Supreme Court’s conclusions about the scope of the Fourth Amendment are often not in tune with commonly held attitudes about police investigative techniques.” More importantly, controlling police discretion is not part of the Court’s analysis. To the extent that society is concerned about “the amount of power that it permits its police to use without effective control by law,” omitting this factor is illogical. Restraining police discretion should be the crucial consideration when deciding whether intrusive activities are subject to constitutional scrutiny. If police are permitted to intrude at their leisure, we no longer live in a free society. Thus, the boundaries of the Amendment define the breadth of our freedom.

For example, many Americans would be surprised to learn that the Fourth Amendment, as interpreted by the Court, imposes no restraints on the government’s power to infiltrate our homes, businesses, religious organizations, or social groups with undercover spies. There are many other intrusive activities that the Court leaves solely to the discretion of the police on the grounds that the individual has no “reasonable expectation of privacy” in the place or premises targeted by the police. In some cases, the Court’s conclusion that no “search” has occurred not only defies common sense, but also gives police officials unchecked power to invade our personal security. Consider two examples: inspection of one’s garbage and aerial photography of one’s property. When a police officer sifts through a person’s garbage looking for evidence of illegal drug possession, or flies a helicopter over a home to photograph marijuana plants growing in the backyard, what else is the officer doing, if not “searching” for criminal activities? Moreover, to the average person, the intrusions that the Court has left to the unfettered discretion of police officials are shocking.

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126 Slobogin & Schumacher, supra note 7, at 774.
127 Amsterdam, supra note 90, at 377.
129 See Macin, Informants, supra note 69, at 573-77.
130 “To most lay people, looking for evidence of crime is a ‘search,’ regardless of what that term may mean under the Fourth Amendment.” Slobogin, supra note 69, at 22 n. 63. In California v. Greenwood, 486 U.S. 35 (1988), the Court concluded that police could seize and examine opaque, sealed garbage bags left for collection at the curb of a home without triggering Fourth Amendment protections. In Florida v. Riley, 488 U.S. 445 (1989), the Court ruled that helicopter surveillance four hundred feet above a greenhouse located near a private home was not a search. The result in Riley was supported by the earlier ruling in California v. Carnello, 476 U.S. 207 (1986), which held that police observation of a backyard from an airplane flying in navigable airspace did not constitute a search. For a critique of these rulings, see Tracey Macin, Justice Thurgood Marshall: Taking the Fourth Amendment Seriously, 77 Cornell L. Rev. 723, 744 (1992) (asserting that “the Court’s arguments in Riley and Greenwood defy common sense”).
Indeed, as Professor Amsterdam has noted, “[t]he plain meaning of the English language would surely not be affronted if every police activity that involves seeking out crime or evidence of crime were held to be a search.” If clear thinking and a norm of controlling police discretion were utilized to decide whether police activity designed to disclose criminal behavior constituted a search under the Amendment, then many more police investigative practices would trigger Fourth Amendment review.

Of course, if controlling discretionary police power were the principal consideration when defining the scope of the Fourth Amendment, the police would be greatly inhibited in the types of investigative activities they could undertake without prior justification or judicial approval. But controlling the discretion of law enforcement officers has other benefits in addition to eliminating arbitrary intrusions into our personal security and privacy. If the FBI were required to secure a judicial warrant before infiltrating our homes or businesses with undercover informants, there might be fewer undercover searches. Those searches that are approved, however, will likely be “better quality searches” because FBI agents will be permitted to search only when they have good reason.

But the Court has been unwilling to interpret the Fourth Amendment’s scope in a manner designed to restrict discretionary

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police intrusions. Instead, the Court has turned to the "reasonable expectation of privacy" model of the Katz test. As currently applied, the Katz test not only fails to control discretionary intrusions, it also lacks content and substance. Under the best circumstances, the Katz test is prone to circular reasoning. At its worst, Katz's "reasonable expectation of privacy" framework is a malleable formula. The Court's precedents are not built upon objective legal principles; rather, the Court's rulings simply reflect the current sentiments of a majority of the Justices deciding whether a particular police investigative practice is reasonable under the circumstances. Lately, a few members of the Court themselves have acknowledged the emptiness of the Katz test. Last Term, Justice Scalia, in a concurring opinion that Justice Thomas joined, described the Katz formula as a "notoriously unhelpful" and "self-indulgent" test. In Justice Scalia's view, the Katz test means what a majority of the Court says it means, no more and no less. The Court's two most recent cases in this area, Minnesota v. Carter and Bond v. United States, reveal the accuracy of Justice Scalia's comments and indicate why controlling police discretion is a superior legal norm for measuring the scope of the Fourth Amendment.

Minnesota v. Carter involved the following facts: an anonymous informant told an Eagan, Minnesota, police officer that he saw people "bagging" white powder inside a ground-floor apartment. With only this tip, the officer went to the apartment and stood outside a window. Although the blinds were closed, the officer could see through a gap in the blinds. Inside he observed three persons, two males and a female, placing white powder into plastic bags. Other officers were notified. The two men, Carter and Johns, were subsequently arrested outside of the apartment, and the police eventually obtained a warrant to search the apartment. The female, Thompson, was the leaseholder of the apartment. It was later learned that Carter and Johns, who lived in Chicago, came to the apartment to package cocaine. After they were convicted on narcotics charges, the Minnesota Supreme Court overturned the convictions. That court ruled that the defendants had a legitimate expectation of privacy while inside the home of their host. Thus, their Fourth Amendment rights were violated.

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156 See, e.g., Amsterdam, supra note 90, at 385 ("In the end, the basis of the Katz decision seems to be that the fourth amendment protects those interests that may justifiably claim fourth amendment protection. Of course this begs the question. But I think it begs the question no more or less than any other theory of fourth amendment coverage that the Court has used.").


158 According to Justice Scalia, "the only thing the past three decades have established about the Katz test (which has come to mean the test enunciated by Justice Harlan's separate concurrence in Katz) is that, unsurprisingly, those 'actual (subjective) expectation[s] of privacy' that society is prepared to recognize as "reasonable," bear an uncanny resemblance to those expectations of privacy that this Court considers reasonable." 525 U.S. at 97 (Scalia, J., concurring) (internal citations omitted).

159 120 S. Ct. 1462 (2000).
when the officer observed their conduct inside the apartment through a warrantless search. The Supreme Court granted review in Carter to decide two issues. First, does an invitee into a home enjoy a legitimate privacy interest under the Fourth Amendment when his connection to the premises is to assist the homeowner in criminal conduct? Two, is unaided observation of a home that occurs from a public place outside of the curtilage a search under the Fourth Amendment? The Court left the second issue undecided because it concluded that the defendants could not claim a legitimate expectation of privacy in their host's home.

Writing for a splintered five-Justice majority, Chief Justice Rehnquist first made passing references to the Katz analysis and the text of the Fourth Amendment, which, when juxtaposed, appeared to send contradictory signals about the defendants' constitutional claim. On the one hand, under Katz's expectation of privacy framework, "the extent to which the Fourth Amendment protects people may depend upon where those people are." Since Carter and Johns were invited guests in a private home—a place that receives the most scrupulous protection under the Court's precedents—one might have thought that the Court would rule in their favor because "the sanctity of the home... has been embedded in our traditions since the origins of the Republic." On the other hand, Chief Justice Rehnquist noted that the text of the Fourth Amendment weakened the defendants' claim because it "suggests that its protections extend only to people in 'their' houses." The Chief Justice explained, however, that this textual limitation was not automatically fatal to the defendants' claim because the Court's precedents have "held that in some circumstances a person may have a legitimate expectation of privacy in the house of someone else."

Instead of relying on the text of the Amendment, the Chief Justice returned to Katz's reasonable expectation of privacy analysis. Two cases were particularly relevant. First, although it involved the search of a car rather than a home, Rakas v. Illinois rejected the previously accepted rule that merely being legitimately on the premises entitled a person to Fourth Amendment protection. After Rakas, a person was required to show more than lawful presence to obtain judicial scrutiny of a police search—he must show "a legitimate expectation of privacy in the invaded place." The second case on point was Minnesota v. Olson, which held that an overnight guest had a legiti-
mate expectation of privacy in his host's home. The Chief Justice read these precedents to stand for the proposition that "an overnight guest in a home may claim the protection of the Fourth Amendment, but one who is merely present with the consent of the householder may not."148 According to the Chief Justice, the facts in Carter were "somewhere in between" the rules announced in Olson and Rakas. Ultimately, the Court concluded that the defendants did not have a legitimate expectation of privacy in the home. This conclusion rested on "the purely commercial nature" of their conduct, their "relatively short period of time... on the premises," and the "lack of any previous connection" between the defendants and the host.149

Carter indicates the malleability and emptiness of the "reasonable expectation of privacy" analysis. Recognizing that the defendants were observed in a location that normally receives the highest degree of protection under the Fourth Amendment,150 the Carter majority ignored that heretofore critical fact and instead focused on the purpose of the defendants' activities.151 This reasoning suggests that if instead of packaging cocaine, the defendants and their host had been discussing their educational backgrounds or making plans for an upcoming vacation, the result in Carter would have different. This reasoning also suggests that if the defendants had been in the apartment for an overnight stay or had visited the apartment on several prior occasions, then their claim to constitutional protection would have been stronger. But why should these alterations matter? If Fourth Amendment rights are "personal," as the Court repeatedly emphasizes,152 and if the defendants were observed in a place accorded the maximum degree of protection under the Amendment, why should it matter whether the defendants were "essentially present for a business transaction" rather than a social visit?153 In either case, the defendants were relying, as does anyone who uses a telephone at a friend's house, upon the security and privacy of the host's home to shield their activities from police surveillance. That security was breached when the officer, without a warrant, probable cause, con-

148 Carter, 525 U.S. at 90.
149 Id. at 84.
150 See, e.g., United States v. Karo, 468 U.S. 705, 714 (1984) ("At the risk of belaboring the obvious, private residences are places in which the individual normally expects privacy free of governmental intrusion not authorized by a warrant, and that expectation is plainly one that society is prepared to recognize as justifiable.").
151 See Carter, 525 U.S. at 90 ("While the apartment was a dwelling place for Thompson, it was for these respondents simply a place to do business.").
152 See, e.g., Rakas, 439 U.S. at 133-34 ("Fourth Amendment rights are personal rights which, like some other constitutional rights, may not be vicariously asserted." (citations omitted)).
153 See Lloyd L. Weinreb, Your Place or Mine? Privacy of Presence Under the Fourth Amendment, 1999 SUP. CT. REV. 253, 273 (noting that there is "nothing in the amendment itself to support such a distinction" and that "conventional understandings do not support the view that business activities in general are less private than social activities; the range and variety of both are too great for any such generalization").
sent, or exigent circumstances, observed their activities. The commercial nature of their conduct should not undermine their right to Fourth Amendment protection unless the Court is prepared to say in a future case that a homeowner also lacks an expectation of privacy in her home once she decides to use her residence for commercial purposes. 154 A home does not become any less of a home for Fourth Amendment purposes because the persons inside decide to violate the law. The commercial nature or purpose of the defendants' activities sheds no light on the question that should capture the Court's attention: should police have unfettered discretion to monitor the activities of persons who have been invited into a private home?

Nor should it matter that the Carter defendants' brief stay in the home was insufficiently similar “to the overnight guest relationship in Olson to suggest a degree of acceptance into the household.” 155 Constitutional rights should be assessed in qualitative, not quantitative, terms. 156 When deciding whether a visitor or guest is entitled to be secure against unreasonable intrusions while in the home of their host, the result should not turn on the length of the visit or whether one stays until the next day's dawn. Otherwise, a homeowner's sexual

154 The weight that the Court's analysis in Carter placed on the purpose of the defendants' presence in the home is reminiscent of Justice Brennan's concurrence in Lewis v. United States, 385 U.S. 206 (1966). In Lewis, an undercover officer misrepresented his identity and obtained permission to enter Lewis's home to purchase illegal narcotics. The Lewis Court ruled that while a private home is normally "accorded the full range of Fourth Amendment protections," those protections did not extend to Lewis. Id. at 211.

[Where a home] is converted into a commercial center to which outsiders are invited for purposes of transacting unlawful business, that business is entitled to no greater sanctity than if it were carried on in a store, a garage, a car, or on the street. A government agent, in the same manner as a private person, may accept an invitation to do business and may enter upon the premises for the very purposes contemplated by the occupant. Id. In other words, by conducting a commercial transaction in his home, Lewis had "waived" the Fourth Amendment protection normally given to his home. In his concurrence Justice Brennan made explicit what the Lewis Court implied: "[Lewis's] apartment was not an area protected by the Fourth Amendment as related to the transactions in the present case." Id. at 213 (Brennan, J., concurring). According to Justice Brennan, a homeowner can "waive his right to privacy" and does so "to the extent that he opens his home to the transaction of business and invites anyone willing to enter to come in to trade with him." Id. For a critique of Lewis and the Court's other informant cases, see Maclin, Informants, supra note 69, at 615.

By emphasizing the purpose of the defendants' presence in Carter, perhaps the Carter Court intended to invoke the "waiver theory" espoused by Justice Brennan. More likely, by emphasizing the commercial purpose of the defendants' activity, the Carter Court meant to subtly draw attention to the illegal nature of the defendants' conduct inside the home. The problem with this approach, however, is that the Court's precedents have already rejected the notion that the criminal nature of a defendant's conduct is a relevant criterion in deciding whether he possesses a reasonable expectation of privacy in a home. See Brief Amicus Curiae of the American Civil Liberties Union et al. at 14-15, Minnesota v. Carter, 525 U.S. 83 (1998) (No. 97-1147) ("If [the prosecution's] theory is correct that the criminal nature of a defendant's activity is relevant when measuring one's Fourth Amendment standing, then guilty people would never have standing." (footnote omitted)).

155 Carter, 525 U.S. at 90.

156 Cf. Arizona v. Hicks, 480 U.S. 321, 325 (1987) ("A search is a search, even if it happens to disclose nothing but the bottom of a turntable.").
partner would have no expectation of privacy in the home and no standing to object if the police peered through the closed blinds of a bedroom window, unless that sexual partner spent the night."

While *Carter* ruled that houseguests may not always rely on the security and privacy of their host's home, *Bond v. United States* confronted the Court with a different aspect of privacy. Steven Dewayne Bond was a passenger on a bus that left California heading for Arkansas. At a border patrol checkpoint in Texas, an immigration officer squeezed Bond's canvas bag that was in the overhead compartment. The officer felt a "brick-like" object inside. After opening the bag, the officer found a "brick" of methamphetamine. The issue in *Bond* was whether the officer's physical manipulation of the luggage constituted a search within the meaning of the Fourth Amendment. The Court concluded that it was.

In *Bond*, unlike the fractured opinion in *Carter*, Chief Justice Rehnquist wrote for a majority of seven Justices. The Chief Justice first rejected the government's argument that by exposing his luggage to other passengers, Bond lost a reasonable expectation that his luggage would not be subject to physical manipulation. While acknowledging that the Court has refused to extend Fourth Amendment protection to activities and places exposed to the public, the Chief Justice explained that the officer's manipulation of Bond's luggage was unlike the aerial surveillance that the Court found permissible in *California v. Ciraolo* and *Florida v. Riley*. "Physically invasive inspection is simply more intrusive than purely visual inspection."

After noting that physical inspections are more intrusive than visual inspections, the Chief Justice then moved to the crux of the matter. Bond conceded that by placing his bag in the overhead bin, he understood that it would be exposed to certain types of handling.

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157 See Brief Amicus Curiae of the American Civil Liberties Union et al. at 19, Minnesota v. Carter, 525 U.S. 83 (1998) (No. 97-1147); Weinreb, supra note 153, at 262 ("If a man and a woman meet at a party and leave together, when one of them says, 'Your place or mine?' the answer will determine which of them can count on what happens thereafter remaining beyond the scrutiny of the police—unless, at least, they make a night of it. Those consequences rest on the Court's assertion that none of those persons has a legitimate expectation of privacy in what is said or done in those circumstances."). Interestingly, *Carter* does not consider the two-prong inquiry of the *Katz* test. As noted above, supra notes 123-24 and accompanying text, that test entitles a person to Fourth Amendment protection if he, first, shows a subjective expectation of privacy and, second, convinces the Court that his expectation of privacy is one that society is prepared to consider as reasonable. Applying that test to the facts in *Carter* and to the above sexual partner hypothetical, the defendants' legal positions in both instances appear strong. First, in both cases the defendants sought to preserve their privacy by locating themselves in a private home. Second, society would surely regard the defendants' subjective expectations regarding the privacy they shared with their hosts as reasonable. This is because "[w]e will all be hosts and we will all be guests many times in our lives. From either perspective, we think that society recognizes that a houseguest has a legitimate expectation of privacy in his host's home." Minnesota v. Olson, 495 U.S. 91, 98 (1990). This is even more obvious with respect to the sexual partner hypothetical, given that society traditionally regards sexual behavior as highly private.

158 *Bond*, 120 S. Ct. at 1464.
However, Bond contended that the officer’s handling went beyond the type of casual touching that he expected from other passengers. The government responded that the officer’s touch was similar to the type of contact a passenger might have with the bag. Applying the two-part test of *Katz*, the Chief Justice seemed to conclude that Bond had established the first requirement of a subjective expectation of privacy. The Court opined that Bond "sought to preserve privacy by using an opaque bag and placing that bag directly above his seat." The more difficult question involved the second prong of *Katz*: whether this expectation was one society would find reasonable.

On that question, the Chief Justice reaffirmed that an officer’s subjective intent or purpose behind the intrusion was irrelevant to whether his actions constituted a search. "[T]he issue is not his state of mind, but the objective effect of his actions." Ultimately, the Chief Justice concluded that a search occurred on the grounds that a bus passenger, while he expects that his luggage may be handled, "does not expect that other passengers or bus employees will, as a matter of course, feel the bag in an exploratory manner." In other words, an officer’s motive for touching a bag—to ascertain whether contraband might be inside—is unimportant. However, the "manner" or intensity of his touch is relevant.

The result in *Bond* is perplexing. The core of the Chief Justice’s reasoning rests on a razor-thin distinction that has no nexus to the realities of police work. *Bond* implies that touching luggage in a manner that is the equivalent of what a passenger might do to create more room in the overhead rack is not a search. But a squeeze to explore the contents of the luggage is a search. The practical problem with this distinction is that officers looking for drugs or guns have no reason to perform the former type of touch. The officer who squeezed Bond’s canvas bag was not helping another passenger create more space in the overhead rack. He was feeling (or "squeezing") for contraband. Law enforcement officers do not manipulate luggage to create more room in overhead compartments. Their squeezing will always be done in an exploratory manner; otherwise, they are wasting their time and taxpayers’ money. If read literally, the upshot of *Bond* will either be the elimination of police "squeezes" (which is unlikely) or a new "constitutional jurisprudence of [Fourth Amendment] ‘squeezes’" that endeavors to distinguish permissible from impermissible touches.

Another puzzling point in *Bond* is the emphasis placed on the distinction between visual and tactile inspections. As an abstract matter, the Court is probably correct when it notes that “[p]hysically invasive
inspection is simply more intrusive than purely visual inspection.”¹⁶³ But why should this difference matter when deciding whether the Fourth Amendment covers the officer’s squeeze of Bond’s bag? The Court acknowledged Bond’s concession that “a bus passenger clearly expects that his bag may be handled.”¹⁶⁴ According to the Court, Bond did not argue that he had a reasonable expectation that his bag would not be felt while on the bus. Thus, the dispute was not about whether the officer could touch the bag: absent an objection from Bond, merely touching the bag did not violate any of Bond’s rights.¹⁶⁵ If the officer had touched Bond’s bag in a manner consistent with the touch that a passenger might employ, the officer’s actions would not have triggered constitutional review. Instead, the issue confronting the Court concerned the intensity of his touch. Viewed this way, the distinction between physical and tactile inspections is immaterial to the question of whether the Fourth Amendment covered the officer’s squeeze of Bond’s bag.

There is an additional reason why the distinction between visual and tactile inspection seems unimportant. If, while checking Bond’s immigration status, the officer had coincidentally rested his hand on Bond’s bag and immediately recognized the contour of a gun or a “brick” of methamphetamine, the officer would have been free to seize the gun or contraband. This is so because in *Minnesota v. Dickerson*¹⁶⁶ the Court extended the “plain-view” doctrine to the sense of touch. “The rationale of the plain-view doctrine is that if contraband is left in open view and is observed by a police officer from a lawful vantage point, there has been no invasion of a legitimate expectation of privacy and thus no ‘search’ within the meaning of the Fourth Amendment—or at least no search independent of the initial intrusion that gave the officers their vantage point.”¹⁶⁷ Dickerson explained that the plain-view rule “has an obvious application by analogy to cases in which an officer discovers contraband through the sense of touch during an otherwise lawful search.”¹⁶⁸ Thus, Dickerson permits a search and seizure when an officer’s sense of touch immediately confirms the presence of contraband. In my hypothetical, the officer’s touch of the bag would not have invaded any constitutional interest of Bond. This is because the agent was lawfully positioned to touch the bag as might any other passenger, and his touch revealed “an object whose contour or mass makes its identity immediately appar-

¹⁶³ Id. at 1464.
¹⁶⁴ Id. at 1465.
¹⁶⁵ The issue would be different if instead of putting the bag in the overhead bin, Bond kept his bag in his lap. In the latter case, Bond could plausibly assert that he had a reasonable expectation that his bag would not be felt.
¹⁶⁷ Id. at 375.
¹⁶⁸ Id.
ent...” Although Dickerson recognized that "touch is more intrusive into privacy than is sight," that judgment is irrelevant to the privacy expectations of my hypothetical bus passenger. If the greater intrusiveness inherent in touch has no bearing on whether a search occurred in my hypothetical case, why does it matter in Bond? The Chief Justice’s opinion provides no answer to this question.

In sum, Bond’s distinction between "visual, as opposed to tactile, observation," and its judgment that “[p]hysically invasive inspection is simply more intrusive than purely visual inspection” are beside the point. Dickerson had already established that officers may rely on their sense of touch to make searches and seizures. Further, the Bond Court did not hold that Bond had a reasonable expectation of privacy that his bag would not be touched at all. On the contrary, the Court stated “a bus passenger clearly expects that his bag may be handled.” Thus, the issue in Bond was not whether the bag could be touched—it clearly could be; instead, the fight was about the intensity of the touch. When these factors are added to the mix, one has to wonder whether the ultimate impact of Bond will be that officers will be more careful during suppression hearings in describing how they “squeezed” a passenger’s bag.

The final puzzling point in Bond is the role “purpose” played in the outcome. The Chief Justice confirms that the subjective intent of the agent is irrelevant for determining whether a search occurred: “the issue is not his state of mind, but the objective effect of his actions.” As a matter of doctrine, the Court has virtually eliminated an officer’s subjective intent as a factor in Fourth Amendment analysis generally. More particularly, when determining the scope of the Amendment, the intent or purpose of the officer is a non-issue. Despite this consensus among the Justices, the facts in Bond appeared to raise doubt, at least in some quarters, about the Court’s unwillingness to consider purpose when calculating privacy interests. During oral argument, Justice Souter noted that an officer’s purpose may be

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169 Id.
170 Id. at 377.
171 Id. (“The seizure of an item whose identity is already known occasions no further invasion of privacy.”).
172 The Chief Justice’s opinion does not even cite Dickerson.
173 Bond, 120 S. Ct. at 1464.
174 Id.
175 Id. at 1465.
176 Id. at 1465 n.2.
178 See, e.g., California v. Ciraolo, 476 U.S. 207, 213 n.2 (1986) (stating that an officer’s purpose in focusing on defendant’s marijuana crop from aircraft was irrelevant since the plants were exposed to the public).
highly relevant when measuring a person's legitimate expectation of privacy:

I mean, our purpose inquiry, again, turns at different levels. We say the
very fact that you may have a law enforcement objective, purpose in mind
as opposed to a private one doesn't matter, but it seems to me that at a
lower level of generality the purpose for which you may engage in touch-
ing may very well matter. Take a nonlaw enforcement example. We both
agree that generally speaking we expose ourselves to being looked at, but
we don't expose things that we carry to being touched, so if somebody
comes up to you on the street and starts feeling the package you have in
mind, you'd tell them to get away. On the other hand, if you drop the
package and someone politely comes along and picks it up for you, even
though they're touching it, you'd say thank you. In that sense, at that
level of purpose, purpose matters a very great deal to reasonable expecta-
tion, and that's the suggestion that I'm making about the purpose for
which luggage is touched. It is touched for the purpose of being moved,
not for the purpose of being explored, and I don't see why that is not a
relevant consideration for the law in judging reasonable expectation.179

Justice Souter's comments are not only thoughtful, but they also
help illustrate why purpose may be relevant when measuring Fourth
Amendment interests. Justice Souter's remarks reveal that ordinary
(as opposed to constitutional) privacy interests are variable, and their
existence may depend on context, as well as on the actions of third
parties. The reasonable person who drops a package will not be off-
fended when the bystander picks it up for her, even though the by-
stander will have to touch it. But if the bystander attempts to touch
the package held by a person, then the expectations and reactions of
the reasonable person will be different. Purpose matters here. But
purpose should also matter in Bond, as well as in Carter, when deter-
mining constitutional privacy interests. And this is where Justice
Souter's comments expose the flaw in the Court's refusal to consider
purpose when it decides the scope of the Fourth Amendment.

The bus passenger who watches another passenger push his lug-
gage to make additional space in the overhead bin may not be
pleased by the actions of the fellow passenger, but he understands
the purpose for the touch and realizes such conduct is part of mod-
ern-day travel. Thus, he has no ordinary privacy interest or tort claim
against that type of touch. In contrast, the passenger who watches a
police officer squeeze his bag has different expectations and interests
at stake. His expectations and legal rights are different both because
the person doing the squeezing is not a fellow passenger and because
the purpose for the squeeze is different. As noted earlier, police offi-
cers do not squeeze luggage to create additional space in overhead
compartments. Officers squeeze luggage for the purpose of explor-
ing its contents. Therefore, the existence of a passenger's constitu-

tional expectations and interests are partially linked to both the person conducting the squeeze and the purpose for the squeeze. The Fourth Amendment guarantees the passenger's privacy against government officers, not against private parties. And the officer's purpose is relevant because reasonable bus passengers do not expect that other passengers or police officers "will, as a matter of course, feel the [ir] bag[s] in an exploratory manner."\(^{180}\)

Lastly, although the Court claims that in determining whether a search occurred "the issue is not [the officer's] state of mind, but the objective effect of his actions," one suspects that the officer's purpose also influenced how the Court viewed the "objective effect" of his conduct.\(^ {181}\) After all, as Justice Souter's comments demonstrate, the "objective effect" of an officer's action may depend on the purpose as well as the consequences of the officer's behavior. For example, the objective effect of an officer's touching a person in a crowded elevator or on a jam-packed subway train will no doubt vary depending on the purpose of the touch. If measured solely in terms of force, the objective effect of an officer's grab to prevent a rider from falling as the subway train lurches forward is more intrusive than the effect of an officer's glancing touch to determine whether a rider possesses a gun. Yet from a constitutional perspective, the officer's grab to prevent the rider from falling is less intrusive than his glancing touch because of the different purposes for each touch. Likewise, the Court's ultimate judgment about the "objective effect" of the officer's squeeze of Bond's bag was doubtlessly influenced by the knowledge that the officer's purpose for squeezing was not to create additional space in the luggage bin, but to look for contraband.

In sum, the results in *Carter* and *Bond* do not turn on an objective legal principle. Instead, these results are achieved by the Court's *ad hoc*, subjective balancing of the police officers' conduct against the defendants' Fourth Amendment interests. In *Carter*, if the defendants' contact with their host's home had been longer and more substantial—for instance, if they had regularly visited for several hours, discussed personal matters (as well as their criminal enterprise), and were close friends with the host—the defendants might have prevailed. In *Bond*, if the officer's testimony had been less explicit about

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\(^{180}\) *Bond*, 120 S. Ct. at 1465. *See also* Craig M. Bradley, *The Limits of the Frisk*, TRIAL, Aug. 1, 2000, at 69 ("But where the issue is 'Was there a search at all?' the motive of the police may matter. If a DEA agent on vacation moves a bag in the plane-luggage compartment to make room for his own and, when the bag emits a puff of marijuana-scented air, arrests the bag owner, there was no 'search.' He was simply acting as a private individual. But if, while moving the bag, he squeezes it to see if it contains a 'brick' of metamphetamine or emits the scent of marijuana, his 'investigatory motive' makes this a search, as in *Bond*.").

\(^{181}\) *Bond*, 120 S. Ct. at 1465. *Cf.* Anne Salzman Kurzweg, *A Jurisprudence of "Squeezes": Bond v. U.S. and Tactile Inspections of Luggage*, 27 SEARCH & SEIZURE L. REP. 73, 77 (Nov. 2000) (arguing that *Bond* "suggests that it will be difficult to make appropriate analytical distinctions between law enforcement motive and the objective consequences of challenged official conduct").
the intensity of his squeeze, then the result in that case might have been different as well. Neither case is dictated by a constitutional norm connected to the Fourth Amendment’s purpose. The results in both cases are determined by the Justices’ subjective views of the reasonableness of the police intrusion. But even under a traditional “reasonableness” formula, the results in *Carter* and *Bond* seem disordered: persons invited into a home for a brief visit are subject to arbitrary search, but police are barred from squeezing luggage that is openly exposed in the overhead bin of an interstate bus.

**B. What is a “Search” Under the Model of Controlling Police Discretion?**

If controlling police discretion rather than the reasonableness model were the touchstone of Fourth Amendment analysis, the results in *Carter* and *Bond* might have been different and more sensible. For example, in *Carter*, rather than focusing on the purpose of the defendants’ visit or the length of their stay, the Court might have asked a more basic question: should police be permitted to monitor arbitrarily the activities of a person or to seize someone randomly who has been invited into the home of a third party for a brief visit? The answer to that question should be “no.” When this type of police intrusion is allowed, the rights of the invited guest will not be the only constitutional interests affected by the intrusion." The privacy and security interests of the homeowner will also be jeopardized where the police have unchecked authority to search or seize short-term guests. Whatever the purpose for a guest’s visit, or however short the length of his stay, neither the guest nor the homeowner is enjoying the right “to be secure” within that home if police have unchecked discretion to monitor the guest’s activities while he is inside the home.183

Even if the homeowner’s interest in sharing her privacy and security is removed from the constitutional calculus, the Fourth Amendment interests of a person invited into another’s home should not be measured by an hourglass or by the reason for the visit. The Fourth Amendment gives us a right “to be secure” at certain times and places against governmental searches and seizures that are arbitrary and un-

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182 See Weinreb, * supra* note 153, at 266-69 (arguing that *Carter* diminishes the “privacy of place” and “privacy of presence” that individuals expect while on the private premises of another).

183 See *Carter*, 525 U.S. at 107 (Ginsburg, J., dissenting) (“A homedweller places her own privacy at risk, the Court’s approach indicates, when she opens her home to others, uncertain whether the duration of their stay, their purpose, and their ‘acceptance into the household’ will earn protection.”).

184 See id. at 108 (Ginsburg, J., dissenting) (“As I see it, people are not genuinely ‘secure in their . . . houses . . . against unreasonable searches and seizures,’ U.S. *CONST.* amend. IV, if their invitations to others increase the risk of unwarranted governmental peering and prying into their dwelling places.”).
The purpose of the Amendment, along with the rest of the Bill of Rights, is to limit police power. When defining the scope of the Amendment, the judiciary ought to focus on whether the challenged police conduct should be free of legal control. Consider, for instance, the argument advanced by the American Civil Liberties Union in *Carter*. The ACLU noted that under the Court's precedents, if either defendant in *Carter* had used his host's telephone to discuss a cocaine deal and an illegal wiretap had recorded the conversation, or if an unlawfully installed eavesdropping device in the host's kitchen had captured the defendants' conversations concerning narcotics, the Court's Fourth Amendment precedents would have invalidated these police searches. Should the privacy of *Carter*'s telephone conversation turn on the purpose of his call? Should *Carter*'s and John's right to be free of arbitrary government eavesdropping depend upon the length of their stay in Thompson's kitchen? Wiretapping and electronic eavesdropping are covered by the Fourth Amendment because police officials should not have the authority to decide for themselves whether to monitor an individual's private conversations. The same principle—controlling the discretion of the police to invade our privacy and personal security—that bars arbitrary monitoring of *Carter*'s and John's private conversations while in Thompson's home should also bar arbitrary monitoring of their private conduct while in the same home.

Similarly, if checking police discretion were the controlling norm of Fourth Amendment law, then the result in *Bond* would be the same, but the reasoning behind that decision would be different. Rather than focusing on the intensity of the officer's squeeze or on the difference between visual and tactile inspection of luggage, the Court should be asking whether police should have the discretion to

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186 In *Alderman v. United States*, 394 U.S. 165, 176 (1969), the Court established that a violation of the Fourth Amendment occurs when officials "unlawfully overhear[] conversations of a petitioner himself or conversations occurring on his premises, whether or not he was present or participated in those conversations." In a footnote, *Alderman* explained that "[t]hose who converse and are overheard [by illegal electronic surveillance] when the owner is not present also have a valid objection unless the owner of the premises has consented to the surveillance." *Id.* at 179 n.11. *Alderman*’s ruling on the standing of a defendant to contest illegal wiretapping or eavesdropping that monitors his conversation while in the home or office of another person paralleled the holding in *Silverman v. United States*, 365 U.S. 505 (1961) (ruling that the right to be secure in a home was violated when petitioners' conversations were overheard by a "spike" microphone that invaded the walls of private premises), and it reflected the earlier views of Justices Harlan and White. See *Berger v. New York*, 388 U.S. 41, 103-04 (1967) (Harlan, J., dissenting) ("I would conclude that, under the circumstances here, the recording of a portion of a telephone conversation to which petitioner was party would suffice to give him standing to challenge the validity under the Consti- tution of the [eavesdropping device installed in another person's office]."); *id.* at 107 (White, J., dissenting) ("Since Berger was rightfully in Steinman's office when his conversations were recorded through the Steinman eavesdrop, he is entitled to have those recordings excluded at his trial if they were unconstitutionally obtained."); see also Weinreb, supra note 153, at 262, 267 n.48 (making the same point).
explore randomly the contents of luggage by tactile examination. The answer to this question should be "no" for two simple reasons. First, Bond's bag deserved to be protected from arbitrary intrusions. As the Court recognized, a "traveler's personal luggage is clearly an 'effect' protected by the Amendment." Moreover, it was undisputed that Bond "possessed a privacy interest in his bag." If Bond's bag fell within the scope of the Amendment's coverage and he possessed an undeniable privacy interest in that bag, then the bag deserved protection from a suspicionless police intrusion. No extraordinary governmental interest existed—such as the fear that a bomb might be smuggled aboard—that justified an unwarranted police intrusion. Second, a police squeeze for exploratory purposes is clearly conduct that jeopardizes the constitutional interest Bond held in the bag. If, while passengers boarded the bus, an officer had squeezed the pocket of a coat that Bond was holding, or the purse or knapsack loosely carried by another passenger, that conduct would clearly threaten the privacy of the targeted passengers. If those squeezes undermined privacy, why is the squeeze in Bond different? It isn't.

C. The Court's Car Search Cases Fail to Control Police Discretion

Since 1925, when Carroll v. United States was decided, the Court has decided many cases concerning the Fourth Amendment and automobiles. These decisions have produced a welter of opinions from the Justices about the scope and meaning of the Fourth Amendment. In addition to the views of the Justices, legal academics have written extensively about the application of the Fourth Amendment to automobiles. Despite (or perhaps because of) the countless judicial opinions and diverse commentary on the subject, the Court continues to review cases raising novel search and seizure issues involving automobiles. The Court’s most recent cases dealing with this subject, Wyoming v. Houghton and Florida v. White, illustrate

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197 Bond, 120 S. Ct. at 1464.
198 Id.
new divisions among the Justices and will surely foster additional legal commentary on the Court's apparent "love affair" with car searches.

My goal in this section is straightforward. I hope to show that the Court's automobile search doctrine does not control discretionary police searches; as such, it is inconsistent with the central purpose of the Fourth Amendment. I will not review the entirety of the Court's automobile cases. Nor will I attempt to critique the vast legal commentary that has sprung from the Court's cases. The latter goal would be a Herculean task; my goal is considerably more modest. My thesis that automobile search doctrine conflicts with the central purpose of the Fourth Amendment rests on two premises. First, automobile search law is built upon a faulty historical assumption. *Carroll*, the original car search case, ruled that warrantless automobile searches were constitutionally valid, and based that conclusion, in part, on the premise that the First Congress had enacted legislation authorizing the warrantless searches of ships. Professor Tom Davies argues that *Carroll*'s historical judgment was wrong because the Framers did not intend or anticipate that ship searches would be controlled by the Fourth Amendment. More importantly, Professor Davies's analysis indicates that the Court "effectively rewrote the Fourth Amendment in *Carroll* by imposing a modern, relativistic meaning on the word 'unreasonable.'" *Carroll*'s shift to a reason-

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191 In both *Houghton* and *White*, the concurring opinions expose a division within the majority on the proper scope of the warrantless searches and seizures in question. For example, although Justice Breyer concurred in the Court's judgment in *Houghton*, his comments indicated his discomfort with certain aspects of the majority's opinion. See *Houghton*, 526 U.S. at 307 (Breyer, J., concurring) (noting, without explanation, the rule adopted by the Court "applies only to automobile searches" and suggesting that a different result would be necessary "if a woman's purse, like a man's billfold, were attached to her person"). Similarly, in *Florida v. White*, Justice Souter wanted a narrower ruling: he was unwilling to construe the Court's holding as a license to conduct any seizure simply because the State has arbitrarily designated the item as contraband. See *White*, 526 U.S. at 566-67 (Souter, J., concurring).

192 See Bradley, supra note 113, at 85 ("The Supreme Court, it would seem, is experiencing 'America's love affair with the automobile.' The Court's interest, however, is not in the driving of cars, but in the searching of them."). *Houghton* has already generated commentary that is critical of the Court's result. See, e.g., Magnus Anderson, Note, Wyoming v. Houghton The Supreme Court Moves One Step Closer to Abandoning the Warrant Requirement, 35 GONZ. L. REV. 121 (1999/2000); Dery, supra note 8; Meadows, supra note 9.

193 267 U.S. at 150-51. *Carroll* explained that "[t]he Fourth Amendment is to be construed in the light of what was deemed an unreasonable search and seizure when it was adopted, and in a manner which will conserve public interests as well as the interests and rights of individual citizens." Id. at 149. Professor Sklansky has noted that the history cited by the *Carroll* Court "had little to do with common law." Sklansky, supra note 75, at 1768. Instead, *Carroll* emphasized "legislation shedding light on what searches and seizures Congress thought were reasonable, particularly Founding-era statutes that authorized customs officers to search ships without warrants." Id. (footnote omitted).

194 According to Professor Davies, "[i]n late eighteenth-century thought, ships were neither 'houses, papers, and effects [or possessions]' nor 'places.' They were ships." Davies, supra note 70, at 605-06 (footnote omitted).

195 Davies, supra note 70, at 732 (footnote omitted). Professor Davies is not the first legal
ablleness model for deciding search issues undermined the "Framers' larger purpose of foreclosing officers from exercising discretionary authority." If Professor Davies's analysis is correct, then the historical foundation of the automobile search cases collapses. Second, even if the concerns of the Framers are put aside, the primary underpinnings for the modern view—that warrantless searches of cars and containers found inside cars are *per se* reasonable—rests on a logical framework that defies the notion of restraining discretionary police searches. The Court's judgments in this area do not rest on theories connected to the Fourth Amendment's ultimate purpose, but instead are based on practical concerns of police efficiency and economics.

*Carroll v. United States* is the cornerstone of modern automobile search law. Looking to the actions of the First Congress, which proposed the Fourth Amendment, the Court reasoned:

> [T]he Fourth Amendment has been construed, practically since the beginning of the Government, as recognizing a necessary difference between a search of a store, dwelling house, or other structure in respect of which a proper official warrant readily may be obtained and a search of a ship, motor boat, wagon, or automobile for contraband goods, where it is not practicable to secure a warrant, because the vehicle can be quickly moved out of the locality or jurisdiction in which the warrant must be sought.

Because the First Congress authorized customs officers to conduct warrantless searches of ships, *Carroll* concluded that a warrantless search of an automobile was constitutionally reasonable, provided there was probable cause for the search. Professor Davies contends

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196 Davies, *supra* note 70, at 748 n.572.
197 See The Collection Act of 1789. The Collection Act actually authorized customs officers to use two different types of warrantless searches. First, section 15 of the Act permitted warrantless, suspicionless searches of ships. See *Collection Act of 1789*, ch. 5, § 15, 1 Stat. 44. Second, section 24 of the Act authorized warrantless searches of ships where customs officers "shall have reason to suspect" taxable goods may be on board. See *Collection Act*, § 24, 1 Stat. at 43; see also *Cloud*, *supra* note 71, at 1743 (discussing early congressional legislation authorizing ship searches).
198 *Carroll* is the cornerstone of modern automobile search law. Looking to the actions of the First Congress, which proposed the Fourth Amendment, the Court reasoned:

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199 267 U.S. at 149. The Court explained:

> On reason and authority the true rule is that if the search and seizure without a warrant are made upon probable cause . . . that an automobile or other vehicle contains that which by law is subject to seizure and destruction, the search and seizure are valid. The Fourth Amendment is to be construed in the light of what was deemed an unreasonable and seizure when it was adopted, and in a manner which will conserve public interests as well as the interests and rights of individual citizens.

Id. Of course, *Carroll* did not mention that the warrantless search authority given to customs officers in 1789 was aimed at the smuggling of foreign goods across America's international border, whereas the search in *Carroll* involved an ordinary police operation within the interior of the country. Congress has plenary power: "[t]o lay and collect Taxes, Duties, Imposts and Excises," and "[t]o regulate Commerce with foreign Nations." U.S. CONST. art. I, § 8, cls. 1 & 3. The Constitution, however, does not grant either Congress or Executive Branch officers equiva-
that Carroll's conclusion that the Framers intended the Fourth Amendment to govern searches and seizures of ships is "ahistorical." According to Professor Davies, Carroll's interpreting the Fourth Amendment to cover ship searches is erroneous for several reasons. First, it ignores the text of the Amendment. Second, it ignores "the civil-law character of admiralty law as well as the First Congress's explicit treatment of revenue seizures of ships as admiralty matters." Third, it ignores the fact that the Court's precedents involving ship seizures by federal officers never "mentioned the Fourth Amendment, let alone applied it." Professor Davies concludes that the "Supreme Court had never suggested that the Fourth Amendment applied to vessels prior to its decision in Carroll." 

According to Professor Davies, the Carroll Court committed another interpretative error by ruling that the concept of "reasonableness" provided an alternative ground, independent of the warrant process, for validating a police search. When explaining why a warrant-less search of a car was valid, Carroll stated: "The Fourth Amendment does not denounce all searches or seizures, but only such as are unreasonable." Conditioning the legality of a search on "reasonableness," rather than on the authorization of a judicial search warrant, was a fundamental shift in Fourth Amendment theory.

When [Carroll] suggested that the Fourth Amendment only forbade those police intrusions that were "unreasonable," [it] opened the way for replacing specific standards of police conduct with the open-ended notion of "reasonableness" itself. Thus, Carroll set search and seizure doctrine on a course away from the rules model and toward the generalized-reasonableness construction [that was later embraced by the modern Court].

The motive for this shift seems obvious: providing law enforcement officers efficient means to enforce Prohibition. But whatever
the motive, the shift significantly modified Fourth Amendment theory, and its impact has been enduring.\textsuperscript{297}

Carroll's judgment that warrantless searches of vehicles are constitutionally permissible has been the historical lodestar of automobile search law for seventy-five years. Indeed, the modern Court has viewed the Carroll analogy that cars are the equivalent of ships as the Framers' imputed analysis of automobile searches.\textsuperscript{298} Professor Davies's analysis indicates that Carroll's interpretation of the Framers' intent may have been misplaced.\textsuperscript{299} More importantly, Carroll's shift to a reasonableness model of Fourth Amendment theory was inconsistent with the Framers' efforts to control discretionary police searches.\textsuperscript{300} If Professor Davies is right,\textsuperscript{301} the Court can no longer claim that the

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\item[297] Davies, \textit{supra} note 70, at 733-34 ("Carroll undertook to expand the \textit{ex officio} authority of the police to facilitate social control, and thus marginalized the warrant process . . . . Despite the interlude of the Warren Court, search and seizure doctrine since Carroll has evolved increasingly to favor police power over the security of the citizen. Indeed, the Burger and Rehnquist Courts have rather consistently expanded discretionary police authority under the modern rubric of 'reasonableness.'" (footnote omitted)).
\item[298] See \textit{Florida v. White}, 526 U.S. 559, 564 (1999) ("Carroll's holding was rooted in federal law enforcement practice at the time of the adoption of the Fourth Amendment."); \textit{Wyoming v. Houghton}, 526 U.S. 295, 300 (1999) ("Carroll concluded that the Framers would have regarded [a warrantless search of a car] as reasonable in light of legislation enacted by Congress from 1789 through 1799—as well as subsequent legislation from the Founding era and beyond—that empowered customs officials to search any ship or vessel without a warrant if they had probable cause to believe that it contained goods subject to duty.").
\item[299] Although Professor Davies is critical of Carroll's interpretation of the Framers' thinking regarding searches of ships, William Cuddihy is cautious about deriving the Framers' intent from actions regarding ship searches for a different reason. Cuddihy notes that early congressional legislation on ship searches may not be the best source for deriving the Framers' thinking on the constitutionality of searches of movable vessels and vehicles. See Cuddihy, \textit{supra} note 72, at 1491 n.256 ("The documentation on the Collection Act mentions no debates of its sections concerning search and seizure. In other words, that act does not offer a back-stairs approach to the original meaning of the Fourth Amendment because debates of those sections either never occurred or were not recorded."). Cuddihy also notes that the framing-era thinking regarding the constitutionality of searches of ships or vehicles is inconclusive. \textit{See id.} at 1548-50 (noting that warrantless searches of ships were allowed when the Fourth Amendment was adopted but that the "extent to which other vehicles were [subject to warrantless search] is unknowable, however, for neither case law nor legislation had significantly illuminated the subject" (footnote omitted)).
\item[300] Davies, \textit{supra} note 70, at 748 n.572 (noting "the broad endorsement of discretionary authority implied in [Carroll's reasonableness] standard was inconsistent with the Framers' larger purpose of foreclosing officers from exercising discretionary authority").
\item[301] Professor Davies's analysis of the Framers' views on ship searches is generally consistent with that of Professor Cuddihy, although Professor Cuddihy does not take the categorical position espoused by Professor Davies that ship searches were outside the scope of the Fourth Amendment's protection. Professor Cuddihy cites a 1780 ruling by the McKean Court of Pennsylvania as the "only firm precedent on ship searches in American case law." Cuddihy, \textit{supra} note 72, at 1549 n.387 (citing \textit{Letter from Chief Justice Thomas McKean to Joseph Reed}, who
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genesis of its automobile search law is based on the intent of the Framers.

When deciding the scope of the Fourth Amendment’s protection against car searches, the Court might understandably be unwilling to have framing-era thinking on ship searches dictate the results for modern automobile searches. In fact, despite the efforts of Justices Scalia and Thomas, current automobile search law is not dominated by eighteenth-century legal theory; the foundation of car search doctrine consists of thoroughly modern judgments regarding the practical concerns of the police. While the Court’s reasoning rests on modern judgments, those judgments have no nexus with the central purpose of the Fourth Amendment: controlling police discretion.

Consider, for example, Chambers v. Maroney,13 which sounded the death knell for the warrant requirement as it applied to car searches and, coincidentally, was the Burger Court’s first major car search case. In Chambers, the police stopped and arrested the occupants of a vehicle who were suspected of an armed robbery. Rather than searching the vehicle at the place of arrest, the car was towed to a police station and subsequently searched. Inside a compartment under the dashboard, police found evidence tying the defendants to the armed robbery. Chambers ruled that the warrantless search did not violate the Fourth Amendment.

After conceding that neither Carroll nor its progeny established “that in every conceivable circumstance the search of an automobile even with probable cause may be made without the extra protection for privacy that a warrant affords,”214 Justice White addressed the crux of the issue confronting the Court.

Arguably, because of the preference for a magistrate’s judgment, only the immobilization of the car should be permitted until a search warrant is obtained; arguably, only the “lesser” intrusion is permissible until the magistrate authorizes the “greater.” But which is the “greater” and which the “lesser” intrusion is itself a debatable question and the answer may depend on a variety of circumstances. For constitutional purposes, we see no difference between, on the one hand, seizing and holding a car before presenting the probable cause issue to a magistrate and, on the other hand, carrying out an immediate search without a warrant. Given probable cause to search, either course is reasonable under the Fourth Amendment.
The upshot of Justice White's logic goes beyond the result in *Carroll* by eliminating the warrant requirement for car searches in cases presenting no exigency for an immediate search. But there is more to *Chambers* than simply removing car searches from the warrant process. Police are given the power to search cars, but the justifications for this power are not tied to a principle connected to the Fourth Amendment's *raison d'être*. Police are given the power to search based on *their own* assessment of probable cause because the Court is unable to decide whether a search or temporary seizure is a "lesser" intrusion and cannot see a constitutional distinction between a temporary seizure and an immediate search. These justifications are not connected to controlling police discretion. *Chambers* in fact *expands* police power and discretion. The Court authorizes police to seize a car and search it later or to conduct an immediate search. Either intrusion is permissible according to the Court, and police do not have to justify their choice. Concededly, the mobility of an automobile presents an exigency that justifies a temporary seizure, and there may be circumstances where an immediate search is necessary. But a warrantless search in a context where the occupants have been safely placed under custody, the car is under the control of the police, and there is no threat to police safety, cannot be justified by a norm that is relevant to the Fourth Amendment.

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215 Id. at 51-52.
216 As Justice Harlan's dissent noted, *Chambers* not only authorizes a warrantless search of a car at the scene of the arrest, but "appears to go further and to condone the removal of the car to the police station for a warrantless search there at the convenience of the police. I cannot agree that this result is consistent with our insistence in other areas that departures from the warrant requirement strictly conform to the exigency presented." Id. at 62-63 (Harlan, J., concurring in part and dissenting in part (footnote omitted). See also Katz, supra note 190, at 566 ("[Chambers] extended the warrant requirement waiver to a situation where it was demonstrably unnecessary.").
217 Unable to decide which police power is more constitutionally obnoxious for the citizen, the search or temporary seizure, *Chambers* "authorizes both." *Chambers*, 399 U.S. at 63 n.8 (Harlan, J., concurring in part and dissenting in part). As Christopher Slobogin has noted, the *Chambers* Court's "rationale is specious." See Slobogin, supra note 69, at 21 n.64. If the Court was truly unable to decide which police power was more offensive, it should have allowed the citizen the opportunity to decide for herself which is more intrusive. See *Chambers*, 399 U.S. at 64 (Harlan, J., concurring in part and dissenting in part) observing that a citizen who does not want the car to be detained to await the magistrate's judgment regarding probable cause "always remains free to consent to an immediate search, thus avoiding any delay or detention of the vehicle.
218 See *Chambers*, 399 U.S. at 64 n.9 (Harlan, J., concurring in part and dissenting in part) ("Circumstances might arise in which it would be impracticable to immobilize the car for the time required to obtain a warrant—for example, where a single police officer must take arrested suspects to the station, and has no way of protecting the suspects' car during his absence. In such situations it might be wholly reasonable to perform an on-the-spot search based on probable cause.").
219 In *United States v. Ross*, 456 U.S. 798 (1982), Justice Stevens sought to defend the reasoning of *Chambers* that trivialized the difference between searching a vehicle on the roadway at the time of an initial seizure and searching an impounded vehicle while awaiting the sanction of a
Chambers severed car searches from the warrant process, but it did not address whether closed containers found inside automobiles could also be searched based on an officer’s assessment of probable cause. That significant question would be addressed in the tandem cases of United States v. Ross and California v. Acevedo. In deciding that closed containers could be searched without judicial approval, the practical concerns of the police prevailed over a rule that would restrict discretionary police searches.

Prior to 1982, the Court’s cases distinguished between a general search of a car based on probable cause that evidence was located somewhere in the vehicle, and a situation where police only have probable cause to search a particular container that happened to be located in a car. The former search was permissible, but the latter search was not. What the Court had not decided was whether police, engaged in a lawful search of a car, could search closed containers found inside the vehicle. Ross ruled that police could search closed containers found during a general search of a car. Writing for the Court, Justice Stevens explained that the “scope of a warrantless search based on probable cause is no narrower—and no broader—than the scope of a search authorized by a warrant supported by prob-

warrant. Id. at 807 n.9. In accordance with Chambers, Justice Stevens implied that so long as probable cause supported the search at the time of the initial seizure, a suspended warrantless search of an impounded vehicle would not offend the Fourth Amendment. Id. at 807. Nine years later, the Court once again adhered to the rationale of Chambers in California v. Acevedo, 500 U.S. 565 (1991), and noted that regardless of when an officer chooses to search the vehicle, the existence of probable cause, whether determined by a magistrate or an officer, would support a search under the Fourth Amendment. Id. at 570 (“Following Chambers, if the police have probably cause to justify a warrantless seizure of an automobile on a public roadway, they may conduct either an immediate or a delayed search of the vehicle.”). However, by employing the rationale of both Ross and Acevedo, officers are free to exercise their own discretion in deciding whether the requirement of probable cause has been fulfilled. Instead of pursuing a warrant, officers will increasingly rely on their own determinations of probable cause. See Dery, supra note 8, at 561 (“The very assumption that an officer’s probable cause determination is sufficient, even absent the exigency that exists during a vehicle stop on the road, could undermine the rationale for a warrant requirement itself. If an officer need not obtain a warrant when an arrestee is securely in custody and his or her car is safely immobilized, why require prior judicial approval in any event?”). By abandoning the preference for the warrant in car searches, the inevitable result is an increase in arbitrary police intrusions that conflict with the very protections that the Fourth Amendment sought to preserve. See id. (“Thus, in its first attempt at explicitly defining the scope of the automobile exception, the [Chambers] Court cast a shadow over the fundamental Fourth Amendment protection of the warrant preference.”).

Compare Chambers v. Maroney, 399 U.S. 42 (1970) (ruling permissible the general search of a car), with United States v. Chadwick, 433 U.S. 1 (1977) (ruling impermissible the warrantless search of a 200 pound footlocker that was found in the trunk of a car) and Arkansas v. Sanders, 442 U.S. 753 (1979) (ruling impermissible the warrantless search of a suitcase found in the trunk of taxicab).

See 3 LAFAVE, supra note 90, § 7.2(d), at 492-93 (noting that Robbins v. California, 453 U.S. 420 (1981), had not definitively resolved the issue, while the search-incident-to-arrest rule adopted in New York v. Belton, 453 U.S. 454 (1981), “made the issue important only as to containers located other than in the passenger compartment or in vehicles other than those as to which an occupant was contemporaneously arrested”).
an the scope of a search authorized by a warrant supported by probable cause." In reaching this conclusion, Ross rejected a rationale that had surfaced in some of the Court's earlier rulings related to car searches. Notably, Ross rejected the "unpersuasive assertion" that an individual has a reduced privacy interest in the concealed areas of a car or in a closed container. Ross also conceded that a warrantless search could not be justified by the exigency or difficulty of securing a closed container. If neither a reduced privacy interest nor an exigency justified a search of a closed container, what was the justification for such a search? Ross explained that "practical considerations" justified the search: "Prohibiting police from opening immediately a container in which the object of the search is most likely to be found and instead forcing them first to comb the entire vehicle would actually exacerbate the intrusion on privacy interests." Moreover, because an officer "could never be certain that the contraband was not secreted in a yet undiscovered portion of the vehicle," in many cases "the vehicle would need to be secured while a warrant was obtained." Ross concluded that the latter scenario would be inconsistent with the power and discretion authorized in Carroll and Chambers.

Although Justice Stevens's reasoning in Ross paralleled the logic of Chambers, he left intact a rule developed during the interval between Chambers and Ross: police must obtain a search warrant where probable cause is confined to a particular container located in a car. Nine years later, however, that loophole was closed in California v. Acevedo, over the strong dissent of Justice Stevens. Acevedo reasoned that "it is better to adopt one clear-cut rule to govern automobile searches and eliminate the warrant requirement for closed contain-

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224 Ross, 456 U.S. at 823.
225 Id.
226 See 3 LAFAVE, supra note 90, § 7.2(d), at 497. In Ross the Court explained that, [c]ertainly the privacy interests in a car's trunk or glove compartment may be no less than those in a movable container. An individual undoubtedly has a significant interest that the upholstery of his automobile will not be ripped or a hidden compartment within it opened. These interests must yield to the authority of a search, however . . .
456 U.S. at 823.
227 456 U.S. at 821 n.28 ("Arguably, the entire vehicle itself (including its upholstery) could be searched without a warrant, with all wrapped articles and containers found during that search then taken to a magistrate.").
228 Id.
229 Id.
230 Id.
231 Id. at 824 (noting that although the Court has "rejected some of the reasoning in Sanders, we adhere to our holding in that case.").
ers” entirely. Thus, a search of a closed container found in a car is per se reasonable if “the[] search is supported by probable cause.”

The “clear-cut” rule adopted by *Acevedo* is not surprising in light of *Chambers* and *Ross*. As *Acevedo* explained, the Court’s prior precedents had “drawn a curious line between the search of an automobile that coincidentally turns up a container and the search of a container that coincidentally turns up in an automobile.” *Acevedo* concluded that either search was reasonable because “[t]he protections of the Fourth Amendment must not turn on such coincidences.” The *Acevedo* Court was right to note that the validity of a search should not turn on such uncertainties. Absent a true emergency or consent, a search of a closed container should never be permitted without judicial authorization. This per se rule, and not the per se rule created in *Acevedo*, would control discretionary searches. After all, why should a container, whether found after a general search of a car, or discovered in a car after a limited search for the container, be subject to search based on a police assessment of probable cause?

The modern Court’s answer to this question is that “practical considerations” justify searching containers discovered during a general search of a car. As noted above, if police could not immediately search a container, they would be forced to “comb the entire vehicle” looking for contraband, which would “exacerbate the intrusion on privacy interests.” The Court has also noted that if containers were not subject to immediate search, in some cases, the vehicle itself “would need to be secured while a warrant was obtained.” What the Court labels “practical considerations” are really “police considerations.” The first concern is easily alleviated: if a motorist does not wish to experience the additional intrusion that would be occasioned by “comb[ing] the entire vehicle,” he can consent to a search of the container. But whether a motorist consents to an immediate search or not, in the real world, police will continue to search the entire car. The best way to put an end to such discretionary searches is to overrule *Carroll* and *Chambers*, which provided the historical and logical foundation for *Ross* and *Acevedo*.

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235 *Id.* at 579.
234 *Id.*
233 *Id.* at 580.
232 *Id.*
231 *Ross*, 456 U.S. at 820.
230 *Id.* at 821 n.28.
229 *Id.*
228 *Id.* at 838 (Marshall, J., dissenting) (“[T]he defendant, not the police, should be afforded the choice whether he prefers the immediate opening of his suitcase or other container to the delay incident to seeking a warrant.”).
227 *Id.* (If police “are looking more generally for evidence of a crime, the immediate opening of the container will not protect the defendant’s privacy; whether or not it contains contraband, the police will continue to search for new evidence.”).
226 Cf. 3 *LAFAVE*, supra note 90, § 7.2(d), at 498 (“The conclusion reached here—albeit
Overruling *Carroll* and *Chambers*, however, would entail significant costs for police departments nationwide. Indeed, the avoidance of these costs is the best explanation for the modern Court’s car search doctrine. Discretionary car searches could be restrained by requiring warrants before a search.

[But this mandate] would have imposed a constitutional requirement upon police departments of all sizes around the country to have available the people and equipment necessary to transport impounded automobiles to some central location until warrants could be secured. Moreover, once seized automobiles were taken from the highway the police would be responsible for providing some appropriate location where they could be kept, with due regard to the safety of the vehicles and their contents, until a magistrate ruled on the application for a warrant. Such a constitutional requirement therefore would have imposed severe, even impossible, burdens on many police departments.

This concern—the costs associated with impounding vehicles and their contents—is the only legitimate argument available to counter the Fourth Amendment interests of motorists. The other arguments proffered by the Court over the years—for instance, the inability to decide whether a search of the car is a “greater” intrusion than a temporary seizure of the car,245 the minimal protection of privacy served by a rule that requires a warrant when police have cause only to search a particular container found in a car,246 and the alleged confusion for judges and police officers generated by automobile search law247—have been evasions design to mask the Court’s unwillingness both to impose significant economic burdens on police departments and to restrain discretionary car searches.248 Because controlling discretionary authority is the underlying vision of the Fourth Amendment,249 it should be the ultimate focus of the Court. The way to restrain discretionary automobile searches is to require judicial warrants prior to a search, unless an emergency or a credible threat

somewhat reluctantly—is that *Ross* was correctly decided within the framework of then existing Fourth Amendment law because it is more akin to *Chambers* than to *Chadwick*. This is to say no more, however, than that *Ross* is as solidly grounded as is the earlier *Chambers* decision; both cases together raise fundamental questions about the Fourth Amendment warrant requirement.”).

249 *Cf.* *Acevedo*, 500 U.S. at 583 (Scalia, J., concurring in judgment) (stating that the *Acevedo* holding is not “some momentous departure, but rather [i]s merely the continuation of an inconsistent jurisprudence that has been with us for years.”).


246 *Chambers*, 399 U.S. at 51-52.

247 *Acevedo*, 500 U.S. at 575 (“To the extent that the *Chadwick-Sanders* rule protects privacy, its protection is minimal .... ‘Since the police, by hypothesis, have probable cause to seize the property, we can assume that a warrant will be routinely forthcoming in the overwhelming majority of cases.’” (citation omitted)).

248 Id. at 576.

249 *See* *MacIn*, supra note 130, at 776-86.

248 *See*, e.g., *Davies*, supra note 70, at 736 (“[The Framers] banned general warrants in order to prevent the officer from exercising discretionary authority.”).
to police safety exists.

CONCLUSION

The Supreme Court's vagueness doctrine has traditionally been designed to promote diverse legal interests. One such interest is to protect the freedoms enumerated in the Bill of Rights. Thus, it has been said that vagueness doctrine "has very intimate connections both with the substance of individual freedom from arbitrary and discriminatory governmental action and... with the federal institutional processes established to protect that freedom."250 This article has argued that the Court should once again look to vagueness doctrine to protect a freedom enshrined in the Bill of Rights; namely, the privilege against arbitrary and capricious police intrusion embodied in the Fourth Amendment. Search and seizure law should adopt an essential feature of vagueness law: controlling police discretion. If this constitutional norm were incorporated into the Court's Fourth Amendment cases, the right of all persons "to be secure" against unreasonable searches and seizures would stand on stronger ground.

250 Amsterdam, supra note 25, at 88.