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"POWER, NOT REASON": JUSTICE MARSHALL'S VALEDICTORY AND THE FOURTH AMENDMENT IN THE SUPREME COURT'S 1990 TERM

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In its 1990 Term, the United States Supreme Court heard five cases involving the Fourth Amendment. In this article, Professor Bruce Green analyzes these five search-and-seizure decisions in light of Justice Marshall's criticism that "[p]ower, not reason, is the new currency of this Court's decision-making." He examines the various considerations the Court advances in its Fourth Amendment analysis—interpretive principle, policy, and precedent—and discovers inconsistencies in the importance assigned to each of these considerations in a series of cases decided very close together by virtually the same Justices. Each approach controlled, Professor Green argues, only when it could be said to warrant a restrictive reading of the Fourth Amendment, one that favored the State. He concludes that, as Justice Marshall's observation suggests, the decisions of a majority of the Court in the Fourth Amendment area were dictated by nothing more than a shared set of personal preferences and a feeling of empowerment to enact these preferences into law.

I. INTRODUCTION

With a dissenting opinion filed on the last day of the Supreme Court's 1990 Term,¹ Thurgood Marshall took leave of a Court that had undergone enormous change in the last years of his twenty-four year tenure. For the nation's first African-American justice, the character of the High Court had greatly changed—both personally and jurisprudentially—from the one to which President Lyndon Johnson had appointed him. Most obviously, there was a transformation in its composition: of the eight Warren Court colleagues he had joined almost a quarter century earlier, only Justice Byron White, the only other member of the Court appointed by a Democratic president, remained.² A Court domi-

* Associate Professor of Law, Fordham University; A.B., Princeton University, 1978; J.D., Columbia University, 1981. I dedicate this Article with respect and gratitude to Justice Thurgood Marshall, for whom I had the privilege of serving as a law clerk in the 1982 Term. I am grateful to Don Capra for his comments on an earlier draft.

1. *Payne v. Tennessee*, 111 S. Ct. 2597, 2619-25 (1991) (Marshall, J., dissenting).

2. Justice White was appointed in 1962 by President Kennedy.

nated by septuagenarians a few years earlier had been altered by the retirements, in succession, of Chief Justice Warren Burger, Justice Lewis Powell, and Justice William Brennan,³ and by the appointments of Justices Antonin Scalia, Anthony Kennedy, and David Souter.⁴

More substantively, the Court's metamorphosis was reflected in its view of its own holdings of the recent past. Three times during the 1990 Term the Court flatly overruled recent precedents favorable to criminal defendants.⁵ In the last of those decisions,⁶ the Court identified the jurisprudential thread that bound the recent decisions, an explanation Justice Marshall characterized in dissent as reflecting an "impoverished conception"⁷ of the principle of stare decisis: cases involving procedural rights, as distinguished from property or contractual rights, will be especially susceptible to reconsideration, particularly those decided by narrow margins over "spirited dissents."⁸

Most importantly, however, Justice Marshall identified a change in the Court's approach to deciding cases. In the opening words of his vale-

3. Chief Justice Burger retired in 1986, Justice Powell in 1987, and Justice Brennan in 1990.

4. In *Payne* Justice Marshall identified the change in "this Court's own personnel" as the real explanation for the majority's decision to overrule two prior decisions that were less than four years old. *Payne*, 111 S. Ct. at 2622 (Marshall, J., dissenting).

5. See *id.* at 2611 (overruling *South Carolina v. Gathers*, 490 U.S. 805 (1989), and *Booth v. Maryland*, 482 U.S. 496 (1987)); *Coleman v. Thompson*, 111 S. Ct. 2546, 2565 (1991) (overruling *Fay v. Noia*, 372 U.S. 391 (1963)); *California v. Acevedo*, 111 S. Ct. 1982, 1991 (1991) (overruling *Arkansas v. Sanders*, 422 U.S. 753 (1979), and *United States v. Chadwick*, 433 U.S. 1 (1977)); see also *Harmelin v. Michigan*, 111 S. Ct. 2680, 2696-97 (1991) (opinion of Scalia, J.) (arguing for overruling *Solem v. Helm*, 463 U.S. 277 (1983)); *Arizona v. Fulminante*, 111 S. Ct. 1246, 1264-66 (1991) (rejecting dictum in *Chapman v. California*, 386 U.S. 18 (1967)); cf. *id.* at 1253 (White, J., dissenting in part) ("Today, a majority of the Court, without any justification, overrules this vast body of precedent without a word . . ." (citation omitted)).

6. In *Payne* a six-justice majority overturned two decisions filed within the past four years. The earlier decisions had held that juries and judges considering whether to impose the death penalty may not take account of either the murder victim's personal characteristics, *Gathers*, 490 U.S. at 811, or the impact of the murder on the victim's family, *Booth*, 482 U.S. at 504-05. After *Payne* both are proper considerations in deciding whether to impose the death penalty. *Payne*, 111 S. Ct. at 2608.

7. *Payne*, 111 S. Ct. at 2623 (Marshall, J., dissenting).

8. *Id.* at 2610; *id.* at 2622-23 (Marshall, J. dissenting). In his dissenting opinion, Justice Marshall took issue with the majority's view of stare decisis:

[S]tare decisis is important not merely because individuals rely on precedent to structure their commercial activity but because fidelity to precedent is part and parcel of a conception of "the judiciary as a source of impersonal and reasoned judgments." . . . Indeed, this function of stare decisis is in many respects even *more* critical in adjudication involving constitutional liberties than in adjudication involving commercial entitlements. Because enforcement of the Bill of Rights and the Fourteenth Amendment frequently requires this Court to rein in the forces of democratic politics, this Court can legitimately lay claim to compliance with its directives only if the public

dictory dissent,⁹ Justice Marshall commented: "Power, not reason, is the new currency of this Court's decisionmaking."¹⁰

What did Justice Marshall mean? And, was he right?

What Justice Marshall meant is not hard to fathom. In observing that the Court had abandoned "reason" as a basis for deciding cases, he did not, of course, mean that the majority no longer provided reasons for its particular determinations. As always, the Court filed opinions expressing reasons. Nor did he appear to mean that the reasons given by the majority could not plausibly justify the results it reached. If not convincing from Justice Marshall's own perspective, the Court's reasons in the individual cases were by no means frivolous. Rather, Justice Marshall's point was about the relation between the Court's reasons and its results. In his view, the outcome of the Court's decisions no longer resulted from its analysis of law and facts.¹¹ Instead, the Court moved in reverse, rea-

understands the Court to be implementing "principles . . . founded in the law rather than in the proclivities of individuals." . . .

. . . .

It does not answer this concern to suggest that Justices owe fidelity to the text of the Constitution rather than to the case law of this Court interpreting the Constitution. . . . The text of the Constitution is rarely so plain as to be self-executing; invariably, this Court must develop mediating principles and doctrines in order to bring the text of constitutional provisions to bear on particular facts. Thus, to rebut the charge of personal lawmaking, Justices who would discard the mediating principles embodied in precedent must do more than state that they are following the "text" of the Constitution; they must explain why they are entitled to substitute *their* mediating principles for those that are already settled in the law. And such an explanation will be sufficient to legitimize the departure from precedent only if it measures up to the extraordinary standard necessary to justify overruling one of this Court's precedents.

Id. at 2623-24 & n.3 (Marshall, J., dissenting) (quoting *Vasquez v. Hillery*, 474 U.S. 254, 265 (1986); *Moragne v. States Marine Lines*, 398 U.S. 375, 403 (1970)).

9. On June 27, 1991, when Justice Marshall initially notified the President of his retirement, he made his retirement effective upon the qualification of his successor. On October 1, Justice Marshall wrote a second letter to the President, making his retirement effective immediately. In the interim, while the Court was in recess, Justice Marshall continued to serve on the Court and to participate in its decisions with respect to motions and petitions. Although his dissent in *Payne* was his last opinion in an argued case, Justice Marshall did issue subsequent dissents from the Court's denial of stays of execution and petitions for certiorari, including an opinion in *McCleskey v. Bowers*, 112 S. Ct. 38, 38 (1991) (Marshall, J., dissenting from denial of stay of execution and denial of certiorari).

10. *Payne*, 111 S. Ct. at 2619 (Marshall, J., dissenting). Justice Marshall's observation echoes Alexander Hamilton's famous point that courts lose legitimacy when they "exercise WILL instead of JUDGMENT." THE FEDERALIST No. 78, at 469 (Alexander Hamilton) (Clinton Rossiter ed., 1961).

11. In comments to the press two days after he announced his retirement, Justice Marshall summed up his own approach to deciding cases as follows: "I looked at the facts and the law and put them together and came out with an opinion and then went to work on the next one." Ruth Marcus, *Plain-Spoken Marshall Spars with Reporters*, WASH. POST, June 29, 1991, at A1.

soning backwards from the result it wanted to reach, one almost invariably dictated in criminal cases by a common preference for the state's interests in law enforcement over the procedural interests of criminal defendants.¹² Having exercised its "power," measured by the ability to garner at least five votes for a desired result, the majority then went back to identify reasons and incorporate them in an opinion purporting to explain the outcome of the case.

Whether Justice Marshall is correct that legal analysis has ceased primarily to determine the outcome of the Court's decisions is hard to say. Since no one but the nine justices are privy to the Court's deliberations, outsiders may derive insights about its decisionmaking process only inferentially, on the basis of its published opinions. Moreover, the question cannot easily be answered by analyzing any individual case. In looking at a single opinion, one cannot ascertain with certainty whether the reasons given for a particular result are disingenuous, whether the decisionmaking process described in the opinion is pretextual, or whether the considerations given weight in the opinion were invoked not because they were actually deemed important but because they plausibly justified a desired, predetermined outcome.

Inferences about whether the Court is reasoning backwards from results, however, might be drawn by looking at the Term's decisions side by side. By comparing the majority's rationales in a series of related cases, and particularly by asking whether the Court is consistent in the considerations it invokes and the weight it gives to those considerations, one might begin to get a sense of whether the Court's decisionmaking is the product of reason or power.

This Article addresses the question raised by Justice Marshall's parting observation about the Court's approach to deciding cases. It does so by analyzing the five decisions interpreting the Fourth Amendment¹³ in the 1990 Term: *Florida v. Jimeno*,¹⁴ *California v. Acevedo*,¹⁵ *Florida v. Bostick*,¹⁶ *California v. Hodari D.*,¹⁷ and *County of Riverside v.*

12. See *Payne*, 111 S. Ct. at 2623 (Marshall, J., dissenting) ("[T]he continued vitality of literally scores of decisions must be understood to depend on nothing more than the proclivities of the individuals who now comprise a majority of this Court.").

13. The Fourth Amendment provides:

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

U.S. CONST. amend. IV.

14. 111 S. Ct. 1801 (1991) (decided May 23, 1991).

15. 111 S. Ct. 1882 (1991) (decided May 30, 1991).

16. 111 S. Ct. 2382 (1991) (decided June 20, 1991).

McLaughlin.¹⁸ Each was reviewed at the behest of the State and decided in the State's favor. Two of the decisions, *Jimeno* and *Acevedo*, analyzed in Part I of this Article, consider the proper scope of warrantless searches; the other three, *Bostick*, *Hodari D.*, and *County of Riverside*, analyzed in Part II, involve warrantless seizures of individuals. The Article does not undertake to judge whether the majority or the dissent had the more persuasive argument in each of these cases; undoubtedly, in the coming year, others will comment on these issues individually in far greater detail. Rather, the Article identifies and compares, in broad terms, the considerations given and denied weight in the Court's decisions. By identifying the commonalities and inconsistencies in the Court's proffered rationales, a clearer picture of its underlying jurisprudence begins to emerge.

The Fourth Amendment guarantees that people shall "be secure . . . against unreasonable searches and seizures"; it also delineates the process for obtaining a valid warrant to carry out a search or seizure.¹⁹ In each of the Term's Fourth Amendment cases the majority cited one or more of several jurisprudential considerations as a significant justification for the outcome. The Court employed two distinct principles of interpretation: the principle that "reasonableness" is the standard governing the constitutionality of searches and seizures, and the principle that the common law should determine the scope of Fourth Amendment protection. The Court also purported to rely on the somewhat inconsistent policy in favor of rules that provide clear guidance to police officers. Finally, the Court sometimes said that past precedent dictated a particular result. Each of these considerations, however—interpretive principle, policy, and precedent—was invoked only when it warranted a restrictive reading of the Fourth Amendment. When a consideration appeared to warrant an expansive reading, one favoring the privacy interests of defendants over the interests of law enforcement, that consideration was rejected. The Article thus uncovers vast inconsistencies in the importance assigned to these considerations, even within a small group of decisions, all dealing with the same general subject and issued by virtually the same justices within a period of just two months.

This Article concludes that the contradictory approaches employed in the search-and-seizure decisions of this Term cannot be explained

17. 111 S. Ct. 1547 (1991) (decided Apr. 23, 1991).

18. 111 S. Ct. 1661 (1991) (decided May 13, 1991).

19. For recent commentary on the requirements for obtaining a valid warrant, see Phyllis T. Bookspan, *Reworking the Warrant Requirement: Resuscitating the Fourth Amendment*, 44 VAND. L. REV. 473, 512-29 (1991); Abraham S. Goldstein, *The Search Warrant, the Magistrate, and Judicial Review*, 62 N.Y.U. L. REV. 1173, 1178-89 (1987).

away as simply the product of efforts to forge agreement among justices who employ differing analyses to arrive at a common outcome. Nor can the contradictions be ascribed to shifts in the composition of the justices comprising the majority from case to case. Rather, one must almost inevitably come away convinced that the decisions of a majority of the Court are dictated by nothing so much as a shared set of personal preferences elevating the needs of law enforcement over the privacy interests underlying the Fourth Amendment and a recognition of their unassailable power to enact those preferences into law.

II. WARRANTLESS SEARCHES

A. *Consensual Searches: The Triumph of Principle Over Policy*

In *Florida v. Jimeno*,²⁰ the first of two cases dealing with the scope of warrantless searches, the Court gave short shrift to the policy of drawing bright lines—a policy it would later invoke to explain the outcome of other Fourth Amendment cases.²¹ Instead, it relied on the interpretive principle of “reasonableness” to justify construing broadly the authority of police officers to conduct searches upon consent.²² A close look at the majority’s opinion, however, reveals that in the hands of the Court “reasonableness” has more rhetorical than interpretive weight.

Like most of the year’s Fourth Amendment cases, *Jimeno* involved narcotics.²³ A police officer overheard Jimeno arranging from a public telephone what sounded like a drug transaction. When Jimeno returned to his car and drove away, the officer followed.²⁴ Apparently realizing that he lacked “reasonable suspicion” to justify stopping Jimeno’s car,²⁵ the officer waited until Jimeno committed a traffic infraction,²⁶ and then

20. 111 S. Ct. 1801 (1991).

21. See *infra* text accompanying notes 94-98.

22. *Jimeno*, 111 S. Ct. at 1804.

23. In his dissenting opinion in *California v. Acevedo*, 111 S. Ct. 1882 (1991), Justice Stevens pointed out that in the previous eight years the Court had decided 30 search-and-seizure cases involving narcotics, all but three in favor of the government. *Id.* at 2002 (Stevens, J., dissenting).

24. *Jimeno*, 111 S. Ct. at 1803.

25. Under *Terry v. Ohio*, 392 U.S. 1 (1968), a brief stop of the car for investigative purposes could have been made if the officer had a particularized and objective basis for suspecting Jimeno of a narcotics violation. *Id.* at 21-22; see, e.g., *United States v. Sharpe*, 470 U.S. 675, 688 (1985) (finding 20-minute detention of vehicle based on articulable suspicion permissible under *Terry*); *United States v. Cortez*, 449 U.S. 411, 417-18 (1981) (requiring “particularized and objective basis” for suspicion to warrant a *Terry* stop).

26. *Jimeno*, 111 S. Ct. at 1803. Jimeno made a right turn at a red light without stopping. *Id.*

pulled Jimeno's car over.²⁷ After informing Jimeno that he believed the car contained narcotics, the officer asked for permission to search it. Jimeno consented to the search, saying that he had nothing to hide. The officer then surveyed the interior of the car, lifted a brown paper bag from the floorboard, and opened it to discover cocaine.²⁸

On appeal from the trial court's decision to suppress the cocaine found in the closed bag, both the Florida Court of Appeals and the Florida Supreme Court affirmed.²⁹ Although they found that Jimeno's consent was voluntary,³⁰ the state courts nevertheless ruled that the officer's search went too far. Because general consent to search a car does not imply consent to search closed containers inside the car, the police had to obtain separate permission to search the paper bag; the court held that officers may not conduct so specialized a search premised solely on the suspect's general consent.³¹

In a brief opinion overturning the state supreme court's ruling, Chief Justice Rehnquist first noted that "[t]he touchstone of the Fourth

27. Neither the defendant nor any of the Justices raised the issue whether the pretextual nature of the stop should make it unconstitutional. The question of pretextual stops, arrests, and searches has been approached inconsistently by the lower courts and awaits resolution by the Supreme Court. See generally John M. Burkoff, *The Pretextual Search Doctrine: Now You See It, Now You Don't*, 17 U. MICH. J.L. REF. 523, 525-44 (1984) (arguing that the pretext-searches doctrine is no longer vital); James B. Haddad, *Pretextual Fourth Amendment Activity: Another Viewpoint*, 18 U. MICH. J.L. REF. 639, 681-92 (1985) (discussing whether motive should play a role in pretextual Fourth Amendment analysis); Daniel S. Jonas, *Pretext Searches and the Fourth Amendment: Unconstitutional Abuses of Power*, 137 U. PA. L. REV. 1791, 1816-25 (1989) (comparing pretextual searches to selective prosecution and due process claims and concluding that they are unconstitutional); Alexander E. Eisemann, Note, *Addressing the Pretext Problem: The Role of Subjective Police Motivation in Establishing Fourth Amendment Violations*, 63 B.U. L. REV. 223, 265-77 (1983) (arguing that allowing pretextual searches will undermine the policies underlying the Fourth Amendment unless the ultimate benefits to society strongly outweigh the costs); Robert D. Snook, Note, *Criminal Law—Pretextual Arrests and Alternatives to the Objective Test*, 12 W. NEW ENG. L. REV. 105, 127-32 (1990) (offering a new test to determine whether pretextual arrests are in keeping with the Fourth Amendment).

28. *Jimeno*, 111 S. Ct. at 1803.

29. *Id.*

30. It has long been recognized that, as a general matter, police officers may lawfully conduct a search when a person who has authority to consent to the search voluntarily gives permission. See, e.g., *Schneekloth v. Bustamonte*, 412 U.S. 218, 248 (1973); *Bumper v. North Carolina*, 391 U.S. 543, 548 (1968); *Stoner v. California*, 376 U.S. 483, 489 (1964); *Johnson v. United States*, 333 U.S. 10, 13 (1948). See generally Mary I. Coombs, *Shared Privacy and the Fourth Amendment, or the Rights of Relationships*, 75 CAL. L. REV. 1593, 1650-61 (1987) (proposing a model to determine when the consent of one person allows a search of shared property); Peter Goldberger, *Consent, Expectations of Privacy, and the Meaning of "Searches" in the Fourth Amendment*, 75 J. CRIM. L. & CRIMINOLOGY 319, 344-62 (1984) (arguing that consent transforms a search into reasonable activity).

31. *State v. Jimeno*, 550 So. 2d 1176, 1176 (Fla. Dist. Ct. App. 1989) (per curiam), *aff'd*, 564 So. 2d 1083 (Fla. 1990), *rev'd sub nom.* *Florida v. Jimeno*, 111 S. Ct. 1801 (1991).

Amendment is reasonableness."³² Consensual searches are permissible, he explained, "because it is no doubt reasonable for the police to conduct a search once they have been permitted to do so."³³ Therefore, according to Chief Justice Rehnquist, the question before the Court was not whether Jimeno in fact intended to permit a search of the paper bag, but whether it was objectively reasonable for the officer to believe that Jimeno intended to permit it.³⁴ The Court concluded that it was: since Jimeno knew the officer was looking for contraband, the officer would reasonably have understood that Jimeno was permitting a search of those places, including a paper bag, in which contraband could be concealed.³⁵ In contrast, the Court noted, it "very likely [would be] unreasonable" to construe general consent to search a car as permission to break open a locked briefcase.³⁶

In employing the principle of "reasonableness" to interpret broadly the scope of permissible searches upon consent, the Court declined to subscribe to a policy of drawing bright lines in Fourth Amendment jurisprudence. Although *Jimeno* makes clear that the Court favors a liberal construction of consent to search, the approach it endorses will nevertheless generate uncertainty for police officers and spawn pretrial litigation over whether officers reasonably construed consent in individual cases. The open-ended standard of "reasonableness" invites a multitude of arguments by future defendants that slight factual variations from *Jimeno* should yield a different result.

First, future defendants might attempt to distinguish *Jimeno* on dif-

32. *Jimeno*, 111 S. Ct. at 1803. Prior to the Court's decision in *Illinois v. Rodriguez*, 110 S. Ct. 2793 (1990), the theoretical basis for upholding warrantless searches upon consent was unclear. *Id.* at 2801. The Court's earliest decisions seemed to view consent as a "waiver" of one's Fourth Amendment rights. See, e.g., *Stoner*, 376 U.S. at 489; *Johnson*, 333 U.S. at 13. That view, however, was rejected by the Court in *Schneckloth* which held that to be valid consent must be voluntary but need not be "knowing," as is required for a valid waiver of trial rights. *Schneckloth*, 412 U.S. at 246. A consensual search might also be justified on the theory that an individual who gives permission to search voluntarily relinquishes his expectation of privacy. See *Rodriguez*, 110 S. Ct. at 2802 (Marshall, J., dissenting). In his opinion for the Court in *Rodriguez*, however, Justice Scalia rejected both these theories in favor of the one reasserted in *Jimeno*, namely, that consent makes a search reasonable. *Id.* at 2797.

The *Rodriguez* Court held constitutional a search conducted upon the permission of a person who reasonably appeared to have authority to give consent, even though, as it later turned out, she did not in fact have authority. *Id.* at 2801. Had the propriety of the search depended on whether the person whose property was searched in fact waived the right to privacy or in fact had a reduced expectation of privacy, the search would have been improper. The question that *Rodriguez* begs, however, is *how* to determine whether a search is "reasonable."

33. *Jimeno*, 111 S. Ct. at 1803.

34. *Id.* at 1803-04.

35. *Id.* at 1804.

36. *Id.*

ferences in the way the officer requests consent. For example, if an officer does not inform the suspect that he is looking for narcotics, it is arguably less reasonable for the officer to infer that the suspect's consent includes permission to search all paper bags inside the car.³⁷ Furthermore, *Jimeno* may be distinguished when different types of containers are searched. Indeed, the Court suggested that a search of a locked suitcase would probably exceed the scope of general consent, presumably because of the extent of the intrusion involved in breaking open a lock.³⁸ The Court did not address whether searches of unlocked suitcases, gift-wrapped packages, or the like also might be treated differently from paper bags. Because these containers either evidence a greater expectation of privacy or are less likely to contain narcotics than paper bags, the "reasonableness" of extending searches authorized generally to these particular containers remains ripe for litigation. Similarly, efforts may be made to distinguish *Jimeno* based on the nature of the place searched. General consent to search a house, for example, may warrant a narrower construction of the scope of consent in light of the greater expectation of privacy that people have in their residences as compared to the expectation of privacy they are held to have in their automobiles.³⁹ Finally, a defendant may argue that he consented to an intrusion meaningfully different in kind from the one the officer conducted.⁴⁰

In contrast to the majority's nebulous "reasonableness" standard, the approach rejected by the Court would vastly minimize uncertainty by requiring an officer to seek clarification as to the scope of the search permitted from a suspect at the time of the search. In a dissenting opinion joined by Justice Stevens, Justice Marshall explained that officers, not suspects, should have the burden of clarifying the scope of the search intended⁴¹ since an individual's general consent to search a car is, at the very least, ambiguous with respect to closed containers inside his car.⁴²

37. Cf. *State v. Hyland*, No. 17131, 1991 Mo. App. LEXIS 1544 (Mo. Ct. App. Oct. 9, 1991). The *Hyland* court reasoned as follows:

As emphasized in *Jimeno*, the scope of a search is generally defined by its expressed object. In the instant case, there was no expressed object. . . . We are unpersuaded a reasonable person would have understood appellant's permission to look in a suitcase—manifested by appellant's opening it—carried with it the permission to reach inside and remove anything that felt suspicious.

Id. at *20-*21.

38. *Jimeno*, 111 S. Ct. at 1804.

39. See *infra* note 71 and accompanying text.

40. See, e.g., *Hyland*, 1991 Mo. App. LEXIS 1544, at *21 (holding that permission to look in suitcase did not authorize officer physically to search beneath surface clothing).

41. *Jimeno*, 111 S. Ct. at 1805-06 (Marshall, J., dissenting).

42. *Id.* at 1805 (Marshall, J., dissenting). Justice Marshall relied in part on decisions holding that people have a greater expectation of privacy in closed containers inside an auto-

Under this approach, factual nuances concerning what the officer said, what the suspect replied, and what the officer then did in conducting a consensual search are comparatively unimportant. The officer knows at the time of the search whether he is acting within the scope of authorization, rather than having to interpret an ambiguous, general consent. The trial court in turn is spared having to make a post hoc legal finding about whether the officer reasonably construed the scope of the suspect's consent.

The Court responded to the dissent's argument that police officers should obtain specific permission before opening containers in two ways. First, it exhorted that there is "no basis for adding this sort of superstructure to the Fourth Amendment's basic test of reasonableness,"⁴³ thus suggesting that the Fourth Amendment's overarching principle of reasonableness does not permit a "rigid" rule like the one urged by the dissent. This reasoning is curious, however, given the Court's traditional willingness to derive categorical rules from the general principle of "reasonableness."⁴⁴ Although categorical, the dissent's approach is entirely consistent with the Fourth Amendment's requirement that a search and seizure be "reasonable." The dissenting justices simply considered it unreasonable for an officer to search a container on the basis of a suspect's general consent to search the place in which the container was found.⁴⁵ A requirement of specific consent to search containers would not constitute a constitutional "superstructure" but would logically grow out of this view of what is reasonable.

Second, the Court cited the societal interest in the discovery of "necessary evidence for the solution and prosecution of crime,"⁴⁶ thereby implying that the real failing of the dissent's approach is that it

mobile than in other areas in the automobile. *Id.* (Marshall, J., dissenting) (citing, *inter alia*, *United States v. Chadwick*, 433 U.S. 1 (1977), and *Arkansas v. Sanders*, 442 U.S. 753 (1979)). These decisions were overruled later in the 1990 Term in *California v. Acevedo*, 111 S. Ct. 1982 (1991), discussed *infra* notes 86-88 and accompanying text.

43. *Jimeno*, 111 S. Ct. at 1804. Three weeks after the decision in *Jimeno*, the Court made use of this same metaphor in *McNeil v. Wisconsin*, 111 S. Ct. 2204 (1991). *McNeil* rejected a defendant's claim that, by invoking the Sixth Amendment right to counsel in a judicial proceeding, he implicitly invoked his *Miranda* right to counsel as well. *Id.* at 2208-11. In concluding his decision for the Court, Justice Scalia noted: "This Court is forever adding new stories to the temples of constitutional law, and the temples have a way of collapsing when one story too many is added." We decline to add yet another story to *Miranda*." *Id.* at 2211 (quoting *Douglas v. City of Jeannette*, 319 U.S. 157, 181 (1943) (opinion of Jackson, J.)).

44. See, e.g., *New York v. Belton*, 453 U.S. 454, 460 (1981) (holding that police may search an individual incident to a lawful arrest); *Michigan v. Summers*, 452 U.S. 692, 705 (1981) (holding that police searching residence for contraband pursuant to a warrant may detain individuals residing there).

45. *Jimeno*, 111 S. Ct. at 1806 (Marshall, J., dissenting).

46. *Id.* at 1804 (quoting *Schneekloth v. Bustamonte*, 412 U.S. 218, 243 (1973)).

would limit the number of searches that could be conducted upon consent. By providing the suspect with a chance to clarify his intent, the dissent's approach might preclude some closed container searches that the initial consent might be construed broadly enough to permit.⁴⁷ In contrast, the majority's approach places the burden of clarification on the suspect⁴⁸ and allows officers to take advantage of his failure or inability to do so by relying on a "reasonable," but erroneous, interpretation of the suspect's permission.⁴⁹ Unlike the dissent's approach, which would both provide guidance to police officers and require strict adherence to the actual intentions of those who voluntarily permit officers to search their property, the majority's approach strongly promotes the interest in the discovery of evidence.

Although the Court ostensibly relied not on the concern for promoting criminal investigations but on the supposedly value-neutral principle of "reasonableness,"⁵⁰ the outcome of *Jimeno* cannot fairly be said to have been dictated by the concept of "reasonableness." As employed by the Court, that concept is far too malleable to provide meaningful guidance for determining the constitutionality of warrantless searches. In the view of the *Jimeno* majority, the bedrock principle that searches satisfy the Fourth Amendment if they are "reasonable" led ineluctably to the conclusion that a consensual search was proper in scope if the officer was "reasonable" in believing that the suspect had consented to the search performed.⁵¹ Thus, the Court equated "reasonableness" from a constitutional perspective with "reasonableness" from a police officer's perspective. Nothing in the *Jimeno* opinion, however, and certainly nothing inherent in the open-ended concept of "reasonableness," explains why the Court adopted the officer's perspective as the benchmark for constitutional reasonableness.

Assessing the permissible scope of consensual searches from a reasonable police officer's perspective does not seem to derive from the con-

47. *Id.* at 1806 (Marshall, J., dissenting). In addition, in some cases in which a suspect genuinely intends his general consent to be broad enough to authorize an extensive search, a request for specific consent to search containers might lead the suspect to reconsider and terminate the search, or limit its scope.

48. *Id.* at 1804 ("A suspect may of course delimit as he chooses the scope of the search to which he consents.").

49. *See id.* at 1806 (Marshall, J., dissenting). As Justice Marshall explained:

The only objection that the police could have to such a rule [requiring them to clarify the scope of the suspect's consent] is that it would prevent them from exploiting the ignorance of a citizen who simply did not anticipate that his consent to search the car would be understood to authorize the police to rummage through his packages.

Id. (Marshall, J., dissenting).

50. *Id.* at 1804.

51. *Id.* at 1803-04.

stitutional concept of "reasonableness." To the contrary, the Court's prior decisions make clear that what is reasonable from a constitutional perspective may be quite different from what is reasonable from a police officer's perspective.⁵²

Had the *Jimeno* Court focused on the precise question of whether the officer's conduct was *constitutionally* reasonable, it would have had far greater difficulty justifying the scope of the search. The Court would have had to decide whether it is reasonable for a police officer, having sought and received general consent to search a car, to search closed containers found inside the car without specific permission to do so. The answer might turn on how a reasonable officer would have interpreted the suspect's permission—but only in part. If the search of the paper bag would have seemed unequivocally to be within the scope of the suspect's consent, from an officer's point of view, then the ensuing search might be reasonable as a constitutional matter, since the officer would not then have been on notice of the possible need for further inquiry.⁵³ But if the suspect's permission would have appeared ambiguous, it might not matter that the officer's interpretation of the general consent was a reasonable one. From a constitutional perspective, it may be unreasonable for an officer to act on his own interpretation of concededly unclear authorization rather than seeking clarification.⁵⁴ It could well be argued that

52. For example, the Court recognized the distinction between "reasonableness" for Fourth Amendment purposes and what a law enforcement officer reasonably believes in *United States v. Leon*, 468 U.S. 897 (1984), when it adopted a "good faith" exception to the Fourth Amendment's exclusionary rule. *Id.* at 926. In *Leon* police officers conducted a search based on a warrant not supported by probable cause. *Id.* at 903. The search was objectively reasonable from the officers' perspective, because in performing the search they relied in good faith on the judgment of the magistrate who issued the warrant. *Id.* at 920. Nevertheless, the Court accepted the district court's finding that the search itself was unreasonable from a constitutional perspective, and thus a violation of the Fourth Amendment, because of the absence of probable cause. *Id.* at 904-05. Although the reasonableness of the officers' conduct justified an exception to the exclusionary rule for evidence discovered upon execution of the defective search warrant, it did not make the search itself reasonable, and therefore lawful, under the Fourth Amendment. *Id.* at 922-23. For commentary on the good faith exception, see Craig M. Bradley, *The "Good Faith Exception" Cases: Reasonable Exercises in Futility*, 60 IND. L.J. 287 (1985); Donald Dripps, *Living With Leon*, 95 YALE L.J. 906 (1986); Goldstein, *supra* note 19, at 1173 (1987); Yale Kamisar, Gates, "Probable Cause," "Good Faith," and Beyond, 69 IOWA L. REV. 551 (1984).

53. This was the fact pattern in *Illinois v. Rodriguez*, 110 S. Ct. 2793 (1990). The officers apparently had little reason to believe that the woman who consented to a search of an apartment for which she possessed the keys might have lacked authority to give consent. *Id.* at 2797. Therefore, from a constitutional perspective, further inquiry could not reasonably have been required in this case as distinguished from other cases in which a consensual search is carried out.

54. Many lower courts have taken a comparable approach in connection with a suspect's ambiguous statements that may reflect a desire to assert the *Miranda* right to counsel. When a suspect in custody makes such an equivocal or unclear statement, a police officer is not free to

police officers acting without judicial authorization should be certain of the scope of the permission on which they predicate a search.

Moreover, if the reasonableness of a consensual search must be gauged from someone's perspective, there is no constitutional reason to select that of the police officer. The reasonableness of the search might just as well be assessed from the suspect's point of view.⁵⁵ The Court might have asked what a reasonable person in the suspect's position would have intended to convey when he gave general consent or what a reasonable person would have expected the police to do after general consent was given. The invocation of the police officer's perspective rather than that of the suspect cannot be attributed to anything intrinsic in the concept of "reasonableness." This perspective, however, is more likely to warrant upholding a search. Even if, from the suspect's or the trial court's perspective, the suspect's authorization should have been interpreted narrowly, it may nevertheless have been reasonable from the officer's perspective to construe the suspect's consent differently, and more broadly.

Just as the "reasonableness" standard does not require adopting as the constitutional standard the perspective of a reasonable police officer, the reasonable-officer standard, in turn, did not require upholding the consensual search in *Jimeno*. Although this standard may provide meaningful guidance when the officer who conducts the search is unaware of the circumstances that seem to make a consensual search unreasonable,⁵⁶

ignore the statement based on his own belief, however reasonable it might be, that the defendant did not in fact mean to invoke the right. Rather, before questioning the suspect, the officer must clarify the defendant's intentions and ascertain that the defendant does not want a lawyer. *See, e.g.,* United States v. Fouché, 776 F.2d 1398, 1404-05 (9th Cir. 1985); Nash v. Estelle, 597 F.2d 513, 518 (5th Cir.) (en banc), *cert. denied*, 444 U.S. 981 (1979).

55. The Court has employed the suspect's perspective to determine whether a police officer's encounter with a suspect amounted to a "seizure." *See, e.g.,* United States v. Mendenhall, 446 U.S. 544, 554 (1980) (defining seizure to be when, "in view of all the circumstances surrounding the incident, a reasonable person would have believed that he was not free to leave"). When an individual has been "seized" for purposes of the Fourth Amendment was an issue in two recent decisions—Florida v. Bostick, 111 S. Ct. 2382, 2386 (1991), discussed *infra* notes 111-39 and accompanying text, and California v. Hodari D., 111 S. Ct. 1547, 1550-51 (1991), discussed *infra* notes 140-64 and accompanying text.

56. The Court's approach makes clear that the "reasonableness" of a consensual search must be determined wholly from the officer's perspective, independent of circumstances outside the officer's knowledge. Among other things, the decision portends the Court's elimination of the subjective aspect of voluntary consent that the Court required almost two decades ago in *Schneekloth v. Bustamonte*, 412 U.S. 218, 248-49 (1973). In *Schneekloth* the Court held that to be valid, a consent to search must be "voluntary," and that the voluntariness of consent is governed by the standard previously developed under the Due Process Clause to assess the admissibility of confessions. *Id.* at 223-29. The ad hoc "voluntariness" standard turns not only on whether the police engaged in overreaching conduct, but also on subjective characteristics of the accused, such as the suspect's level of intelligence and emo-

it provides inadequate guidance when, as in *Jimeno*, the question is whether the officer acted reasonably in light of the information he possessed. The concept of "reasonableness" as employed by the Court in *Jimeno* fails because it has no substantive content. It does, of course, dictate what facts courts must consider in assessing whether an officer exceeded the scope of consent: all the circumstances known to the officer relating to the consensual search. The concept of reasonableness determines the style of the court's decision by suggesting that the relevant circumstances must be considered ad hoc, rather than through categorical rules. But, as used in *Jimeno*, the concept does not say *how* the facts should be taken into account. What determines the "reasonableness" of an officer's interpretation of general consent? The judge's own view of what is or is not reasonable based on the judge's own sensibilities and (usually limited) experience? If the benchmark is to be something objective, and not just the personal predilections of individual judges, the majority fails to say so.

Even looking at *Jimeno* independently of the Court's four other 1991 search-and-seizure decisions, therefore, one might question whether the considerations described in the opinion were the ones that actually influenced the Court to reject the defendant's claim. In its opinion, the Court asked whether the officer reasonably construed Jimeno's consent, but did not explain why the constitutional principle of reasonableness required the Court to frame the question that way. The Court then judged the officer's construction of the suspect's general consent to have been reasonable, but never enunciated its standard for measuring the reasonableness of an officer's interpretation of a suspect's permission. One might surmise that the result in *Jimeno* is in reality the product of the majority's belief that the Fourth Amendment should be interpreted narrowly, not of legal analysis, and that the Court invoked "reasonableness" to avoid having to explain its genuine reason for reaching a result that favored the prosecution. Looking at *Jimeno* alone, however, one cannot say for sure. It may be, instead, that the Court's omissions were simply

tional and psychological stability, of which the police would not be aware at the time of their encounter. *Id.* at 226.

A consensual search is not necessarily permissible under *Schneekloth* simply because the police reasonably understand the suspect's consent to be voluntary. *Id.* at 229. If the suspect is peculiarly susceptible to pressure, for reasons entirely beyond the officers' ken, his consent may later be deemed involuntary, and therefore ineffective. *Id.* This approach is, of course, inconsistent with the view in *Jimeno* that the constitutionality of a search turns solely on the objectively reasonable understanding of the officers who conduct it, without regard to the subjective understanding of the person who gives consent. *Jimeno* signals a possible reconsideration of the voluntariness standard for consensual searches and the elimination of the subjective aspect of that standard.

the product of poor drafting, or of the misguided belief that the unstated reasons for its analytic choices were obvious. Only when *Jimeno* is viewed in relation to the Term's other Fourth Amendment decisions can it be said that the Court's reasoning was not simply sparse, but pretextual.

B. The "Automobile Exception": The Triumph of Policy Over Precedent

California v. Acevedo,⁵⁷ the Court's second decision delineating the proper scope of warrantless searches, stands jurisprudentially in marked contrast to *Jimeno*. In *Jimeno* the Court rejected a state court's "*per se* rule"⁵⁸ designed to provide guidance to police officers who conduct consensual searches—the Florida Supreme Court's requirement that an officer clarify the scope of intent before searching containers⁵⁹—in favor of an ad hoc, fact-intensive inquiry into the "reasonableness" of police conduct.⁶⁰ Only one week later, five of the justices who had been in the majority in *Jimeno* issued an opinion in *Acevedo* that considered the need for clarity compelling enough to warrant overruling the Court's own precedent.

Acevedo, coincidentally, also involved the discovery of narcotics in a paper bag in a car. Police officers saw Acevedo enter an apartment into which the officers knew a second suspect had just brought packages of marijuana.⁶¹ A few minutes later, the officers saw Acevedo leaving the apartment with a brown paper bag about the size of one of the marijuana packages.⁶² After Acevedo placed the package in the trunk of his car and began to drive away, the officers pulled him over, searched the trunk, opened the bag, and discovered marijuana.⁶³ The California appellate court held that the marijuana was inadmissible because the police should have obtained a warrant before opening the bag.⁶⁴

The state court's determination was a straightforward application of the Supreme Court's prior Fourth Amendment case law. Over the past four decades, the Supreme Court had consistently espoused the view that, in the absence of a valid warrant, a search or seizure is presump-

57. 111 S. Ct. 1982 (1991).

58. *Florida v. Jimeno*, 111 S. Ct. 1801, 1803 (1991).

59. See *supra* notes 29-31 and accompanying text.

60. *Jimeno*, 111 S. Ct. at 1804.

61. *Acevedo*, 111 S. Ct. at 1984.

62. *Id.*

63. *Id.* at 1984-85.

64. *People v. Acevedo*, 216 Cal. App. 3d 586, 590, 265 Cal. Rptr. 23, 25 (1989), *rev'd sub nom.* *California v. Acevedo*, 111 S. Ct. 1982 (1991).

tively unreasonable.⁶⁵ Before-the-fact determinations of probable cause by neutral and detached judicial officers are thought to provide greater protection against unreasonable invasions of privacy than on-the-spot determinations made by officers "engaged in the often competitive enterprise of ferreting out crime."⁶⁶ The requirement of a warrant is dispensable only in exceptional situations in which some exigency "support[s] the need for an immediate search."⁶⁷ In *Acevedo* the search of the car was justified by a recognized exception, but the search of the paper bag found inside the car was not.

The question before the Court, therefore, was whether to expand the scope of the previously recognized "automobile exception" to permit warrantless searches like the one conducted in *Acevedo*. Under the "automobile exception," a vehicle may be searched without a warrant when probable cause exists to believe the vehicle contains evidence of a crime.⁶⁸ When it first recognized the exception sixty-seven years earlier in *Carroll*

65. As Justice Stewart stated in his opinion for the Court in *Katz v. United States*, 389 U.S. 347 (1967), "searches conducted outside the judicial process, without prior approval by judge or magistrate, are per se unreasonable under the Fourth Amendment—subject only to a few specifically established and well-delineated exceptions." *Id.* at 357 (footnotes omitted). Although the Court has expanded the exceptions to the warrant requirement in both number and scope in the intervening years, it has continued to cite *Katz* for the principle that a warrant is generally required to conduct a search. See, e.g., *Acevedo*, 111 S. Ct. at 1991; *Skinner v. Railway Labor Executives' Ass'n*, 489 U.S. 602, 619-24 (1989). At the same time, however, the presumption has been challenged by some justices and commentators, including, most recently, Justice Scalia in a separate opinion in *Acevedo*. See *Acevedo*, 111 S. Ct. at 1992-93 (Scalia, J., concurring). See generally Silas J. Wasserstrom, *The Court's Turn Toward a General Reasonableness Interpretation of the Fourth Amendment*, 27 AM. CRIM. L. REV. 119, 119 (1989) (arguing that the general warrant requirement is "by no means compelled by the language of the amendment itself").

66. *Johnson v. United States*, 333 U.S. 10, 14 (1948) (footnote omitted).

67. *United States v. Chadwick*, 433 U.S. 1, 16 (1977). As Justice Scalia noted in his concurring opinion in *Acevedo*, however, the exceptions to the warrant requirement are becoming increasingly less exceptional. *Acevedo*, 111 S. Ct. at 1992 (Scalia, J., concurring) (citing Craig M. Bradley, *Two Models of the Fourth Amendment*, 83 MICH. L. REV. 1468, 1473-74 (1985)) (noting that in 1985 a commentator catalogued nearly 20 exceptions to the warrant requirement, and identifying two other exceptions that the Court since has recognized).

68. See *Chambers v. Maroney*, 399 U.S. 42, 47-48 (1970); *Carroll v. United States*, 267 U.S. 132, 149 (1925). See generally Martin R. Gardner, *Searches and Seizures of Automobiles and Their Contents: Fourth Amendment Considerations in a Post-Ross World*, 62 NEB. L. REV. 1, 3 (1983) (assessing the possibility of the Court further narrowing Fourth Amendment warrant requirements); Lewis R. Katz, *United States v. Ross: Evolving Standards for Warrantless Searches*, 74 J. CRIM. L. & CRIMINOLOGY 172, 208 (1983) (suggesting that the Court might extend the automobile exception to a more general public place/probable cause exception).

At the time of the decision in *Carroll*, searches could lawfully be conducted only for contraband or instrumentalities of a crime, and not for mere evidence. See *Gouled v. United States*, 255 U.S. 298, 309 (1921). This was true of searches pursuant to a warrant, as well as warrantless searches. The rule against searches for "mere evidence" was eliminated, however, by the Court in *Warden v. Hayden*, 387 U.S. 294, 300-01 (1967).

v. United States,⁶⁹ the Court justified it by citing the mobility of vehicles, which quickly can be driven out of the jurisdiction while officers leave the scene to obtain a search warrant.⁷⁰ That justification is far less compelling today, since police officers generally can immobilize an automobile and obtain judicial authorization by radio without leaving the scene. In more recent cases, therefore, the Court has identified an additional justification: the diminished expectation of privacy that individuals have in their automobiles, which are operated in public, are extensively regulated, and are rarely used as a "residence or as the repository of personal effects."⁷¹ The automobile exception is categorical, applying even when the underlying justifications are not implicated. Thus, a warrantless search may be conducted when the particular vehicle is immobile,⁷² or when its owner demonstrates some expectation of privacy by using the vehicle as a residence.⁷³

The Court defined and eventually expanded the scope of the automobile exception in a series of decisions leading up to *Acevedo*. In the late 1970s the Court in *United States v. Chadwick*⁷⁴ and *Arkansas v. Sanders*⁷⁵ appeared to define limits of the automobile exception. In each case, the police had probable cause to believe the person they were following was carrying narcotics—in one case, inside a foot locker,⁷⁶ in the other, inside a suitcase.⁷⁷ Had they seized the container before it was placed in a vehicle, the Court held, the police in each case would have needed a warrant to open it lawfully. The warrant requirement remained even though the container was incidentally placed in a vehicle before it was seized. Once seized, the Court reasoned, the container was immobile, so no urgency justified dispensing with judicial authorization.⁷⁸ The

69. 267 U.S. 132 (1925).

70. *Id.* at 151-54.

71. *Cardwell v. Lewis*, 417 U.S. 583, 590-91 (1974) (plurality opinion of Blackmun, J.); accord *California v. Carney*, 471 U.S. 386, 391-93 (1985). For criticisms of this contemporary justification, see Joseph D. Grano, *Rethinking the Fourth Amendment Warrant Requirement*, 19 AM. CRIM. L. REV. 603, 629-38 (1982); Katz, *supra* note 68, at 199.

72. See *Michigan v. Thomas*, 458 U.S. 259, 261 (1982) (*per curiam*); see also *Chambers v. Maroney*, 399 U.S. 42, 50-52 (1970) (finding no difference between "seizing and holding a car before presenting the probable cause issue to a magistrate and . . . carrying out an immediate search without a warrant").

73. See *California v. Carney*, 471 U.S. 386, 391-93 (1985).

74. 433 U.S. 1 (1977).

75. 442 U.S. 753 (1979).

76. *Chadwick*, 433 U.S. at 3.

77. *Sanders*, 442 U.S. at 755.

78. *Id.* at 763-64; *Chadwick*, 433 U.S. at 13. An additional, unstated concern may have been that applying the automobile exception to these cases would have encouraged police officers to evade the warrant requirement: instead of procuring a warrant when they identified a

rule that containers in cars may be seized but not searched reflected a recognition of the heightened expectation of privacy that people enjoy in handbags, suitcases, and similar containers, which, unlike vehicles, are customarily used as repositories of personal effects.⁷⁹

The Court's apparent intention to hold the line on the automobile exception regarding containers and vehicles seemed to continue in a case in which, unlike *Chadwick* and *Sanders*, the police were not tracking containers that happened to be placed in vehicles, but were tracking vehicles in which containers happened to be found. In *Robbins v. California*⁸⁰ the Court set forth a categorical rule based on the heightened expectation of privacy in closed containers: a closed container found in a car has the same constitutional protection as a container found anywhere else.⁸¹ The next year, however, the expansion of the automobile exception began: the Court overruled *Robbins*, although not *Chadwick* and *Sanders*. It held in *United States v. Ross*⁸² that if police had probable cause to believe evidence will be found somewhere in a vehicle, but it is not known precisely where, then the "automobile exception" permits the police to search without a warrant every area in which the evidence is likely to be found, including closed containers discovered inside the vehicle.⁸³

Prior to *Ross*, police knew in any given situation what they could and could not properly do when they had probable cause to believe evidence was contained in a vehicle: they could search the vehicle and they could seize packages, but they could not open them. After *Ross*, critics of that decision argued, proper procedure was illogical.⁸⁴ If, on the one hand, the police had probable cause to believe evidence was somewhere in the car, but they did not know precisely where, they could search the car and all the containers inside it. If, on the other hand, they knew which container the evidence was in, the officers could seize that container but could not search it without a warrant. In other words, the

container they believed to contain evidence, officers could wait until the container was placed in a vehicle and then seize and search it without a warrant.

79. *Sanders*, 442 U.S. at 762; *Chadwick*, 433 U.S. at 13. The Court has recognized that containers are entitled to less protection under the Fourth Amendment when it can be inferred from their outward appearance that they contain evidence of a crime. See, e.g., *Texas v. Brown*, 460 U.S. 730, 750-51 (1983); *Sanders*, 442 U.S. at 764 n.13.

80. 453 U.S. 420 (1981).

81. *Id.* at 425.

82. 456 U.S. 798 (1982).

83. *Id.* at 825.

84. See *California v. Acevedo*, 111 S. Ct. 1982, 1989 (1991) (citing commentary); see also JOSHUA DRESSLER, UNDERSTANDING CRIMINAL PROCEDURE § 79[C][4] (1991) (providing examples).

police were better off with less knowledge than more—an apparent anomaly.⁸⁵ Assuming they could remember and grasp the lines drawn by the Supreme Court's decisions, police officers would have to judge whether they knew enough, but not too much, before conducting a search of containers in a car.

In *Acevedo* the Court overruled *Chadwick* and *Sanders*, finding them to be administratively unworkable, and thus further expanded the scope of the automobile exception. Writing for the Court, Justice Blackmun, who had dissented in *Chadwick*,⁸⁶ criticized prior case law as drawing 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.”⁸⁷ In its place, the Court drew a more inclusive line: when the police have probable cause to believe that evidence is anywhere in a vehicle—whether or not in a particular container—they may search all parts of the vehicle and all containers in which evidence is likely to be discovered.⁸⁸

The Court provided several justifications for its decision. First, it suggested, paradoxically, that its decision would be more protective of privacy than the prior case law, which might have led police officers to conduct unnecessarily broad vehicle searches.⁸⁹ When police had probable cause to believe contraband was somewhere in a vehicle, but they were not sure precisely where, they might search the entire vehicle rather than just containers in which the contraband was most likely to be found. They presumably would do so not out of a desire to be thorough but to dissuade the judge at a suppression hearing from later inferring that the police knew more than they in fact did about the precise location of the contraband. Such conduct, of course, would reflect not only a subtle grasp of the Fourth Amendment case law but also a particular sensitivity to, and concern for, the evidentiary determinations that might eventually

85. In *Acevedo* both the majority and the concurrence viewed this as anomalous, see *Acevedo*, 111 S. Ct. at 1990-91; *id.* at 1993 (Scalia, J., concurring), but the anomaly is more apparent than real. Invariably, when police are authorized to undertake searches or seizures based on incomplete knowledge, more complete information may eliminate the justification for their action. For example, police may carry out a protective search of a house in which an arrest occurs when they have reason to believe someone is inside, but not when they know for certain that the house is empty. See *Maryland v. Buie*, 110 S. Ct. 1093, 1098 (1990). Likewise, in the course of a *Terry* stop, police may pat down a suspect whom they reasonably believe may be armed, but not a suspect whom they know for certain is unarmed. See *Terry v. Ohio*, 392 U.S. 1, 27 (1968). The distinction in the law prior to *Acevedo* was similarly premised on the officer's degree of knowledge.

86. See *United States v. Chadwick*, 433 U.S. 1, 17 (1977) (Blackmun, J., dissenting).

87. *Acevedo*, 111 S. Ct. at 1991.

88. *Id.*

89. *Id.* at 1989.

be made at a suppression hearing. Nevertheless, the Court characterized the possibility of this conduct as "not far fetched."⁹⁰

At the same time, the Court minimized the extent to which *Chadwick* and *Sanders* actually protected privacy. It reasoned that a warrant routinely will be issued in "the overwhelming majority of cases" in which containers are seized pursuant to a valid warrantless search of an automobile;⁹¹ that in many cases the seized containers could be searched without a warrant under another exception to the warrant requirement;⁹² and that the search of closed containers is far less intrusive than the slashing of upholstery permitted in *Carroll*, the earliest case to recognize the "automobile exception."⁹³

The Court's principal justification, however, was rooted in the shared administrative interests of the police and the judiciary. "The *Chadwick-Sanders* rule," according to Justice Blackmun, "confused courts and police officers"⁹⁴ and was thus "the antithesis of a 'clear and unequivocal' guideline."⁹⁵ Despite the assumption underlying its initial point—that officers have so mastered the subtleties of the "automobile exception" that they will conduct overbroad searches in anticipation of suppression hearings—the Court explained that officers who are justified in searching an automobile are often uncertain about the permissible scope of their search. Therefore, "it is better to adopt one clear-cut rule to govern automobile searches."⁹⁶ Indeed, in the Court's view, the interest in clarity was sufficiently compelling to overcome not only the general presumption against the constitutionality of warrantless searches—a presumption that the majority opinion specifically reaffirmed⁹⁷—but also the

90. *Id.* at 1988.

91. *Id.* at 1989.

92. *Id.* The Court pointed out that under *New York v. Belton*, 453 U.S. 454 (1981), containers found within the passenger compartment of an automobile may be searched incident to an arrest of an occupant of the automobile. *Acevedo*, 111 S. Ct. at 1989 (citing *Belton*, 453 U.S. at 460). This exception would not have applied in *Acevedo*, however, because the paper bag in that case was inside the trunk of the car, not the passenger compartment.

93. *Acevedo*, 111 S. Ct. at 1989.

94. *Id.*

95. *Id.* at 1990 (quoting *Minnick v. Mississippi*, 111 S. Ct. 486, 490 (1990)).

96. *Id.* at 1991.

97. *Id.* (quoting *Mincey v. Arizona*, 437 U.S. 385, 390 (1978)). Although he agreed with the Court's result, Justice Scalia took issue with the majority's reaffirmation of the general rule that warrants are required for a constitutional search and seizure and, therefore, declined to join the majority opinion. *Id.* at 1992-93 (Scalia, J., concurring). In his view, the warrant requirement had spawned decades of inconsistent Fourth Amendment jurisprudence. *Id.* at 1992 (Scalia, J., concurring). The rules regarding automobile searches were only several among many anomalous ones. *Id.* (Scalia, J., concurring). Moreover, over time the warrant requirement had been "riddled with exceptions," many announced in decisions that, if paying

"important purposes" underlying the doctrine of stare decisis.⁹⁸

Even if *Acevedo* is viewed in isolation, there are several reasons why one might question the genuineness of the Court's avowed reliance on the need for clarity. The first is provided by Justice Stevens in a dissenting

lip service to the requirement, did not genuinely take it seriously. *Id.* at 1992-93 (Scalia, J., concurring).

To restore doctrinal order to the Fourth Amendment, Justice Scalia advocated judging all searches by the standard of "reasonableness." *Id.* at 1993 (Scalia, J., concurring). A warrant would not generally be necessary to make a search reasonable, except in situations resembling those in which a warrant was required at common law. *Id.* (Scalia, J., concurring). In his view, the search in *Acevedo*'s case was lawful "because the search of a closed container, outside a privately owned building, with probable cause to believe that the container contains contraband, and when it in fact does contain contraband, is not one of those searches whose Fourth Amendment reasonableness depends upon a warrant." *Id.* at 1994 (Scalia, J., concurring). Curiously, under this formulation, the propriety of a search seems to be justified partly on the basis of what the search reveals.

Given Justice Scalia's identification of "reasonableness" as the overarching principle of Fourth Amendment adjudication, one might have expected him to reject the majority's pragmatic concern for administrative expediency. As the *Jimeno* decision illustrates, the Fourth Amendment standard of "reasonableness" seems to require the rejection of categorical rules in favor of ad hoc assessments of police investigative conduct. *Florida v. Jimeno*, 111 S. Ct. 1801, 1803-04 (1991). Justice Scalia, however, did not advocate the rejection of categorical rules. He simply rejected the particular categorical rules adopted over the preceding three decades relating to the warrant requirement. Instead of the majority's modest refusal to adhere to the doctrine of stare decisis with respect to a narrow issue of Fourth Amendment law, he favored a wholesale rejection of the principal doctrinal premise underlying the Court's Fourth Amendment jurisprudence. *Acevedo*, 111 S. Ct. at 1993-94 (Scalia, J., concurring). With it would follow a rejection of virtually the entire body of Fourth Amendment law, presumably to be replaced by new categorical rules that, taken together, would be less confusing, more "reasonable," and, not incidentally, less demanding upon criminal investigators. For example, the particular categorical rule that should have decided the *Acevedo* case, in Justice Scalia's view, was that a warrantless search of a closed container is permissible whenever there is "probable cause to believe that the container contains contraband." *Id.* at 1994 (Scalia, J., concurring). Justice Scalia never explained why that rule was more "reasonable" than the rules developed over the previous decades by shifting majorities of the Court. Nor did he explain how invoking the principle of "reasonableness" would enable the Court to develop a set of rules that are any more clear and less anomalous than those premised on a "warrant requirement."

98. *Acevedo*, 111 S. Ct. at 1991 ("Although we have recognized firmly that the doctrine of stare decisis serves profoundly important purposes in our legal system, this Court has overruled a prior case on the comparatively rare occasion when it has bred confusion or been a derelict or led to anomalous results.").

The doctrine of stare decisis serves three general functions: it relieves courts of the burden of reexamining the merits of relevant precedent, it enhances stability in the law, and it promotes public respect for judicial decisionmaking. On the role and importance of stare decisis, see generally Charles W. Collier, *Precedent and Legal Authority: A Critical History*, 1988 WISC. L. REV. 771 (discussing importance of stare decisis); Charles J. Cooper, *Stare Decisis: Precedent and Principle in Constitutional Adjudication*, 73 CORNELL L. REV. 401 (1988) (same); William O. Douglas, *Stare Decisis*, 49 COLUM. L. REV. 735 (1949) (same); Anthony J. Kronman, *Precedent and Tradition*, 99 YALE L.J. 1029 (1990) (same); Henry Paul Monaghan, *Stare Decisis and Constitutional Adjudication*, 88 COLUM. L. REV. 723 (1988) (same). Cf. Lewis F. Powell, Jr., *Stare Decisis and Judicial Restraint*, 44 REC. ASS'N B. CITY N.Y. 813, 819-21 (1989) (discussing recent threats to stare decisis).

opinion joined by Justice Marshall.⁹⁹ Justice Stevens responded to the majority opinion point by point, but gave particular attention to the "confusion" the Court claimed was created by *Chadwick* and *Sanders*.¹⁰⁰ He explained at some length that no evidence supported the premise that the police were in fact confused by the prior decisions. Although commentators critical of the decision in *Ross* predicted uncertainty for the police, judicial decisions issued by lower courts in the intervening nine years revealed no difficulty in complying with the prior rulings.¹⁰¹

Even accepting *Ross*'s potential for confusion, the rule announced in *Acevedo* provides no remedy. Prior to *Acevedo* a defendant might have argued that a search of a container was excessive under the "automobile exception" because the police had probable cause to believe that evidence was in the container and nowhere else. After *Acevedo* a defendant may challenge a search of areas of the car *other than* the targeted container on precisely the same ground. For example, if the officers in *Acevedo* had searched the glove compartment of the car, or had searched containers in the trunk other than the paper bag, *Acevedo* could have argued that the search was excessive in scope.¹⁰² To resolve this challenge, a court must still ascertain precisely what the officers knew at the time of the search.¹⁰³

Finally, the interest in clarity does not necessarily dictate a rule, like the one announced in *Acevedo*, that is underprotective of individuals' interest in the privacy of their belongings. In striving for clarity, the Court had the option to announce a different rule that was both more clear-cut and more protective of privacy. Instead of holding that closed containers may be searched like any other area of an automobile in which evidence is likely to be discovered, the Court could have resurrected the short-lived rule of *Robbins*. Under *Robbins*, police officers had ample guidance when they stopped a vehicle thought to contain evidence: closed contain-

99. *Acevedo*, 111 S. Ct. at 1994 (Stevens, J., dissenting). Justice White filed a separate, one-sentence dissent. See *id.* (White, J., dissenting) ("Agreeing as I do with most of Justice Stevens' opinion and with the result he reaches, I dissent and would affirm the judgment below.").

100. *Id.* at 1998-2001 (Stevens, J., dissenting).

101. *Id.* at 1999-2000 & n.11 (Stevens, J., dissenting).

102. In *Acevedo*, the Court reaffirmed the principle that "[p]robable cause to believe that a container placed in the trunk of a taxi contains contraband or evidence does not justify a search of the entire cab." *Id.* at 1991 (quoting *United States v. Ross*, 456 U.S. 798, 824 (1982)).

103. See *id.* ("The facts in the record reveal that the police did not have probable cause to believe that contraband was hidden in any other part of the automobile and a search of the entire vehicle would have been without probable cause and unreasonable under the Fourth Amendment.").

ers could never be searched under the "automobile exception."¹⁰⁴

Viewing the *Acevedo* decision alongside the earlier decision in *Jimeno* one has even greater cause to question whether giving clear guidance to the police was anything more than a retrospective justification for a predetermined outcome. In *Jimeno* the need for clarity was undeniable. Police officers assessing the scope of a suspect's general consent under the open-ended standard of "reasonableness" are invariably at risk that their decisions will later be rejected by reviewing courts. A categorical rule requiring officers to clarify a suspect's intentions would have eliminated this risk, while facilitating judicial review of consent searches. At the same time, in *Jimeno* there was no jurisprudential impediment to adopting such a rule. No prior decisions addressed the scope of a suspect's general consent; the Court was writing on a blank slate. Moreover, the Court had not hesitated in the past to give content to the "reasonableness" standard by adopting categorical rules, the warrant requirement and the automobile exception to the warrant requirement being two obvious examples.¹⁰⁵ Nevertheless, in *Jimeno*, as previously noted,¹⁰⁶ the Court dismissed the interest in clarity, declining to add a "superstructure" to a virtually content-free principle of "reasonableness."¹⁰⁷

In contrast, in *Acevedo*, the same Justices professed that the quest for clarity was virtually determinative of the outcome.¹⁰⁸ Yet, in that case, the interest in clarity did not seem particularly compelling, while the interest in stare decisis strongly militated against an expansion of the automobile exception. One would have thought that if the interest in clarity was unworthy of serious consideration in *Jimeno*, then a fortiori it would have been rejected out of hand in *Acevedo*, rather than being invoked to sweep aside precedent.¹⁰⁹

The juxtaposition of these two cases demonstrates that, as employed by the Court, clarity is not a value-neutral administrative consideration given equivalent weight in all search-and-seizure cases. It is, rather, a consideration invoked only when it will justify a narrow constitutional interpretation. The *Acevedo* Court's preference for law enforcement over individual privacy interests dictated not only the choice between two categorical rules, each of which would have eliminated the murkiness of the existing law, but also the very choice of administrative clarity as a con-

104. See *supra* notes 80-83 and accompanying text.

105. See *supra* text accompanying note 44.

106. See *supra* note 43 and accompanying text.

107. *Florida v. Jimeno*, 111 S. Ct. 1801, 1804 (1991).

108. See *supra* text accompanying notes 94-98.

109. *California v. Acevedo*, 111 S. Ct. 1982, 1991 (1991).

sideration in interpreting the scope of a warrantless search. Taken together, *Acevedo* and *Jimeno* demonstrate that the interest in clarity moves the Court in only one direction: in favor of the prosecution.¹¹⁰

III. WARRANTLESS SEIZURES

A. Seizing Bus Passengers: The Triumph of Precedent Over Policy

In *Florida v. Bostick*¹¹¹ the Court found persuasive the precedent and policy considerations it had dismissed in *Acevedo*. While in *Acevedo* the Court deemed the merits of drawing bright-line rules sufficiently compelling to warrant overruling precedent, in *Bostick* the weight of precedent was said to preclude categorical rules. This reordering seems especially unprincipled for two reasons. First, the precedent relied on in *Bostick* was far less relevant to the issue under consideration than that in *Acevedo*, in which the Court overruled prior decisions precisely on point. Second, although the Court chose an ad hoc approach in *Bostick* and a categorical one in *Acevedo*, the need for clear guidance was far greater in the former case than in the latter.¹¹²

In *Bostick* two officers of the Fort Lauderdale County sheriff's department boarded a bus en route from Miami to Atlanta, approached the defendant without any articulable grounds for suspicion,¹¹³ and asked to inspect his ticket and identification.¹¹⁴ *Bostick* agreed, and the inspection turned up nothing unusual.¹¹⁵ The officers then stated that they were looking for illegal drugs and asked *Bostick's* permission to search

110. The Court all but made this point explicitly in *McNeil v. Wisconsin*, 111 S. Ct. 2204 (1991), a confession case decided two weeks after *Acevedo*. The Court in *McNeil* rejected the argument that, as a matter of sound policy, invocations of the Sixth Amendment right to counsel should be construed to invoke the *Miranda* right to counsel as well. *Id.* at 2208-09. In his opinion for the Court, Justice Scalia countered that the proposed rule would undermine legitimate law-enforcement efforts: "Since the ready ability to obtain uncoerced confessions is not an evil but an unmitigated good, society would be the loser." *Id.* at 2210. Moreover, although a bar on police questioning after the Sixth Amendment right attaches would have the virtue of clarity, "the police do not need our assistance to establish such a guideline; they are free, if they wish, to adopt it on their own." *Id.* at 2211. Clear guidelines are appropriate, he explained, "only when they guide sensibly, and in a direction we are authorized to go." *Id.*

111. 111 S. Ct. 2382 (1991).

112. See *infra* text accompanying notes 129-30.

113. The Court gave no reason why the officers decided to talk to *Bostick*. See *Bostick v. State*, 510 So. 2d 321, 322 (Fla. Dist. Ct. App. 1987) (Letts, J., dissenting in part) ("Eyeing the passengers, the officers, admittedly without articulable suspicion, picked out the defendant passenger and asked to inspect his ticket and identification."), *aff'd*, 554 So. 2d 1153, 1154-55 (Fla. 1989), *rev'd sub nom.* *Florida v. Bostick*, 111 S. Ct. 2382 (1991); *quoted in Bostick*, 111 S. Ct. at 2384-85).

114. *Bostick*, 111 S. Ct. at 2385.

115. *Id.*

his luggage. He consented.¹¹⁶ The search of one of Bostick's bags revealed cocaine, which was used to support his conviction for possession.¹¹⁷ The Florida Supreme Court reversed the conviction, finding that Bostick had been illegally seized when he consented to the search.¹¹⁸

The United States Supreme Court remanded the case, holding not that the questioning on the bus was a reasonable seizure but that it was not a seizure at all, and thus not subject to the strictures of the Fourth Amendment.¹¹⁹ In her opinion for the Court, Justice O'Connor interpreted the Florida court's opinion as having adopted a per se rule that questioning passengers at random on a bus is always a "seizure."¹²⁰ That categorical rule was improper.¹²¹ Rather, the proper test was whether, considering "all the circumstances surrounding the encounter . . . the police conduct would have communicated to a reasonable person that the person was not free to decline the officers' requests or otherwise terminate the encounter."¹²²

The Court reasoned that "a seizure does not occur simply because a police officer approaches an individual and asks a few questions."¹²³ Moreover, the mere fact that the questioning occurs in a bus does not mean that the individual has been seized. Although prior case law indicated that a seizure occurs when a reasonable person believes that he is not "free to leave," the Court rejected that standard in favor of "the principle that those words were intended to capture"—namely, seizure depends on "the coercive effect of an encounter."¹²⁴ Since a bus passenger's inevitable lack of mobility is a product of his voluntary decision to travel by bus, not the officers' conduct, it is not an appropriate measure of the coerciveness of the encounter.¹²⁵ The test should focus not on whether the passenger reasonably feels free to leave, but on whether he reasonably feels free to decline the officers' requests—which he ought to "so long as the officers do not convey a message that compliance with their requests is required."¹²⁶ The Court was skeptical that Bostick had

116. *Id.*

117. *Id.*

118. *Bostick v. State*, 554 So. 2d 1153, 1158 (Fla. 1989), *rev'd sub nom. Florida v. Bostick*, 111 S. Ct. 2382 (1991).

119. *Bostick*, 111 S. Ct. at 2389.

120. *Id.*

121. *Id.*

122. *Id.*

123. *Id.* at 2386.

124. *Id.* at 2387.

125. *Id.*

126. *Id.* at 2388.

been seized under this standard,¹²⁷ but rather than resolve the question it remanded the case to the state court for reconsideration.¹²⁸

For police officers, the *Bostick* seizure test provides even less guidance than the *Jimeno* scope-of-consent test. Since *Bostick*'s ad hoc test views the officer's conduct from the perspective of a reasonable person in the suspect's position, whether the suspect had been seized may turn on contextual circumstances known to the passenger alone.¹²⁹ Moreover, the *Bostick* standard for assessing the total circumstances is so vague and subjective that police officers encountering a suspect on a bus cannot confidently predict how their conduct later will be evaluated by a judge in a suppression hearing.¹³⁰

In contrast, the approach urged by Justice Marshall in a dissenting opinion joined by Justices Blackmun and Stevens provided far clearer guidance. Justice Marshall argued that suspicionless police sweeps of buses bear all the elements of coercion and unjustified intrusion of general warrants,¹³¹ and thus violate the core values of the Fourth Amendment.¹³² In his view, a passenger in *Bostick*'s position would not have felt free to terminate the encounter with the officers.¹³³ In light of the officers' intimidating show of authority, a passenger could neither have obstinately remained silent nor left the bus, which was at an intermediate point in a long journey.¹³⁴ At a minimum, Justice Marshall contended, police officers in such a situation should be required to advise passengers "of their right to decline to be questioned, to dispel the aura of coercion and intimidation that pervades such encounters."¹³⁵

127. *Id.* at 2389.

128. *Id.*

129. Suppose, for example, that before the officers reached *Bostick*, a fellow passenger whispered to him that those who refused to cooperate with the authorities would be arrested. Undoubtedly, a reasonable person in *Bostick*'s situation would then have felt unable to resist the officers' subsequent requests, regardless of how benign the officers' conduct might have appeared to be from their own perspective.

130. Police anticipation of suppression hearings was a major concern of the Court in *Acevedo*. See *supra* text accompanying notes 84-85, 90.

131. *Bostick*, 111 S. Ct. at 2389 (Marshall, J., dissenting). For a discussion of "general warrants" and "writs of assistance," the two practices against which the Fourth Amendment historically was designed to protect, see *Payton v. New York*, 445 U.S. 573, 583-85 (1980); *Warden v. Hayden*, 387 U.S. 294, 301 (1967); Anthony G. Amsterdam, *Perspectives on the Fourth Amendment*, 58 MINN. L. REV. 349, 362 (1974).

132. *Bostick*, 111 S. Ct. at 2389 (Marshall, J., dissenting).

133. *Id.* at 2393 (Marshall, J., dissenting).

134. *Id.* (Marshall, J., dissenting).

135. *Id.* at 2394-95 (Marshall, J., dissenting). The categorical rule adopted by the state court and defended by Justice Marshall in dissent was supported by a far stronger administrative interest than the rule embraced in *Acevedo*. This is true because the rule rejected in *Acevedo* was far easier for officers to follow than the rule adopted in *Bostick*. Under the law

The majority's purported reason for eschewing a categorical rule in *Bostick* seems anomalous in light of *Acevedo*. The Court averred that its ad hoc standard was compelled by "a long, unbroken line of decisions dating back more than 20 years."¹³⁶ Indeed, the Court emphasized several times in the opinion that its approach was dictated by the need for fidelity to precedent.¹³⁷ Yet none of the precedents on which the Court relied in *Bostick* was precisely on point. The Court had never previously analyzed encounters between police officers and suspects that took place in such close quarters that suspects would not ordinarily feel free to leave for reasons apart from the officer's conduct—for example, in buses in transit. Moreover, as the majority recognized, the result in *Bostick* was not dictated by the general standard, enunciated in previous cases, for determining whether an encounter with the police amounted to a seizure, but rather by "the principle" that the previous standard was "intended to capture."¹³⁸ If the Court in *Acevedo* was free to overrule precedent to promote clear rules, it is hard to see why the same Court, three weeks later, would consider itself bound by a principle that was, at best, implicit in factually distinguishable cases.

Viewed in juxtaposition to the reasoning in *Acevedo*, the Court's reasoning in *Bostick* cannot seriously be regarded as an accurate reflection of the Court's deliberative process. It is hard to imagine that the Court felt influenced by precedent to reject a clear rule when, three weeks earlier,

prior to *Acevedo*, an officer could search containers in a car if he had probable cause to believe evidence was somewhere in the car, but not if he knew that the evidence he was seeking was in a specific container. The propriety of a search of containers in a vehicle was not difficult to determine in advance because it turned entirely on a straightforward assessment of information known to the officer. The ability of well-trained officers to conform to the law was reflected in the sparsity of published cases in which officers innocently exceeded the scope of a proper search under the "automobile exception."

The rule Justice Marshall urged in *Bostick* also seems to have a firmer foundation both in experience and in theory. As a matter of experience, the rule—that the random questioning of a bus passenger amounts to a seizure—was warranted by the generalization that a passenger in such an encounter will feel coerced, a generalization recognized by many other judges in similar cases. See *id.* at 2390-91 (Marshall, J., dissenting). In contrast, the categorical rule in *Acevedo* is rooted in a 67-year-old generalization about the mobility of automobiles. Yet, in an era when police easily may impound or tow vehicles, that generalization seems far less valid. As a matter of interpretive theory, it would have made more sense to adopt a categorical rule in *Bostick* to define "seizure," a comparatively concrete term, than it did in *Acevedo* to define "reasonable," an open-textured concept.

136. *Id.* at 2388.

137. See *id.* ("[T]oday's decision follows logically from . . . [prior] decisions and breaks no new ground."); *id.* at 2387 ("This formulation follows logically from prior cases and breaks no new ground."); see also *id.* at 2385 (indicating that the Court's purpose in reviewing the case was "to determine whether the Florida Supreme Court's *per se* rule is consistent with our Fourth Amendment jurisprudence").

138. *Id.* at 2387.

the need for clarity purportedly compelled it to overrule well-established precedent. The result is more plausibly explained by a consideration only briefly alluded to in the *Bostick* opinion itself: the Court's preference for the societal interest in having suspects provide "voluntary cooperation" to criminal investigators¹³⁹ over the interest of individuals in being free from coercive encounters with the police.

B. Seizing Fleeing Suspects: The Triumph of Interpretive Principle Over Precedent and Policy

*California v. Hodari D.*¹⁴⁰ also considered when an individual is "seized" within the meaning of the Fourth Amendment. This time, the Court's narrow view of the protections of the Fourth Amendment was explained neither by precedent, which its opinion took pains to distinguish, nor by the policy favoring clear guidance, which its opinion discounted. Instead, the Court invoked an interpretive principle—that the meaning of the constitutional term should be governed by the common law.¹⁴¹

The defendant in *Hodari D.* was one of several young men on a street in a high-crime area of Oakland who fled an approaching unmarked patrol car. One officer chased Hodari, who tossed away a rock of crack cocaine just before he was caught. The cocaine was recovered, and a search of Hodari turned up a pager and \$130 in cash.¹⁴²

California's appellate court held that Hodari had been "seized" by the pursuing officer. Because the State conceded that the officer lacked "reasonable suspicion" to justify a *Terry* stop, the cocaine should have

139. See *id.* at 2389 ("The Fourth Amendment . . . does not proscribe voluntary cooperation."). The Court's recognition of the importance of this interest, which also appears to underlie the decision in *Jimeno*, was addressed at greater length in *McNeil v. Wisconsin*, 111 S. Ct. 2204 (1991). In that case the Court declined to adopt a rule that once the Sixth Amendment right to counsel attaches with respect to pending charges, police officers may not initiate questioning about unrelated charges. The Court explained in part: "Since the ready ability to obtain uncoerced confessions is not an evil but an unmitigated good, society would be the loser." *Id.* at 2210. Likewise, in a dissenting opinion in another confession case, *Minnick v. Mississippi*, 111 S. Ct. 486 (1991), Justice Scalia gave considerable attention to this interest. In his view, a voluntary confession is "inherently desirable" both for society and "for the wrongdoer himself . . . because it advances the goals of both 'justice and rehabilitation.'" *Id.* at 498 (Scalia, J., dissenting) (quoting *United States v. Washington*, 431 U.S. 181, 187 (1977); *Michigan v. Tucker*, 417 U.S. 433, 448 n.23 (1974)) (emphasis added). It was unintended irony, perhaps, that Justice Scalia said that confessions should be encouraged as an aid to a criminal's rehabilitation in a case in which the confession was used to procure a murder conviction and a sentence of death.

140. 111 S. Ct. 1547 (1991).

141. *Id.* at 1549-51, 1550 n.2.

142. *Id.* at 1549.

been suppressed as the fruit of an illegal seizure.¹⁴³ The only issue before the Supreme Court was whether Hodari had been seized.¹⁴⁴

In an opinion joined by six other justices, Justice Scalia held that Hodari's Fourth Amendment right had not been violated because a suspect in flight is never "seized" under the Fourth Amendment in the absence of physical restraint.¹⁴⁵ He distinguished two situations that would constitute a seizure: when officers use physical restraint (even if the suspect struggles free) and when a suspect submits to a verbal assertion of authority.¹⁴⁶ This interpretation was warranted both by the constitutional language, since the term "seizure" implies the taking of physical possession, and by the elements of a common-law arrest, which include the use of physical force or restraint.¹⁴⁷

In determining that Hodari had not been seized, the Court minimized the importance of providing police officers with clear guidance about the constitutionality of their prospective conduct, the very consideration that had been dispositive in *Acevedo*. As Justice Stevens explained in a dissenting opinion joined by Justice Marshall, under the majority's approach the constitutionality of a police officer's conduct turns not only on the officer's conduct in pursuing a suspect, but also on the suspect's subjective reaction, which an officer cannot possibly predict.¹⁴⁸ An officer's efforts may be subject to the Fourth Amendment if the suspect responds but exempt if the suspect ignores the officer. As a consequence, it is impossible for a police officer "to determine in advance whether the conduct contemplated will implicate the Fourth Amendment."¹⁴⁹ In response, the Court simply expressed confidence that police officers will be unaffected by this uncertainty because they will always proceed on the expectation that suspects will respond to their efforts.¹⁵⁰

The majority also declared itself unconstrained by precedent, the same precedent found dispositive in *Bostick*. A line of decisions over the

143. See *id.* (describing unpublished opinion of the California Court of Appeal).

144. *Id.*

145. *Id.* at 1550-51.

146. *Id.*

147. *Id.* at 1549-51.

148. *Id.* at 1560 (Stevens, J., dissenting).

149. *Id.* (Stevens, J., dissenting) (quoting *Michigan v. Chesternut*, 486 U.S. 567, 574 (1988)).

150. *Id.* at 1551. Justice Stevens, quoting Professor LaFave, argued to the contrary that "police would be encouraged to utilize a very threatening but sufficiently slow chase as an evidence-gathering technique whenever they lack even the reasonable suspicion needed for a *Terry* stop." *Id.* at 1559 (Stevens, J., dissenting) (quoting 3 WAYNE R. LAFAYE, SEARCH AND SEIZURE § 9.2, at 61 (2d ed. Supp. 1991)).

prior decade—the same decisions from which Justice O'Connor extracted the unstated principle said to dictate the outcome in *Bostick*—defined the applicable test as whether, “in view of all the circumstances surrounding the incident, a reasonable person would have believed that he was not free to leave.”¹⁵¹ Justice Stevens argued that *Hodari* was “seized” under this test, since “the officer’s show of force—taking the form of a head-on chase—adequately conveyed the message that [he] was not free to leave,” just like “a command to ‘freeze,’ a warning shot, or the sound of sirens accompanied by a patrol car’s flashing lights.”¹⁵² The majority interpreted the “reasonable person” test to establish a necessary, but not sufficient, condition for a seizure¹⁵³—an interpretation that had no support in prior case law but that was, as Justice Stevens put it, “nothing if not creative lawmaking.”¹⁵⁴

The majority based its interpretation on neither the policy in favor of clarity nor precedent to determine whether a fleeing suspect has been “seized” for constitutional purposes, but rather on the common law.¹⁵⁵ Wholly apart from whether the common law is an appropriate tool for interpreting the term “seizure”—and Justice Stevens argued persuasively that it was not¹⁵⁶—the common law is not clear in this case. While, in

151. *United States v. Mendenhall*, 446 U.S. 544, 554 (1980), *quoted with approval in INS v. Delgado*, 466 U.S. 210, 215 (1984); *accord Chestnut*, 486 U.S. at 573; *Florida v. Royer*, 460 U.S. 491, 498 (1983) (plurality opinion of White, J.). See generally Wayne R. LaFave, “Seizures” Typology: *Classifying Detentions of the Person to Resolve Warrant, Grounds, and Search Issues*, 17 U. MICH. J.L. REF. 417, 420-26 (1984) (discussing what constitutes a “seizure” and distinguishing “encounters” with police from “seizures”); Tracey Maclin, *The Decline of the Right of Locomotion: The Fourth Amendment on the Streets*, 75 CORNELL L. REV. 1258, 1272-77 (1990) (discussing reasonableness test and substantial extension of right-to-inquire rule through reasonableness test); Richard A. Williamson, *The Dimensions of Seizure: The Concepts of “Stop” and “Arrest”*, 43 OHIO ST. L.J. 771, 783-91 (1982) (discussing *Mendenhall* and advantages and disadvantages of objective versus subjective test).

152. *Hodari D.*, 111 S. Ct. at 1559 (Stevens, J., dissenting).

153. *Id.* at 1551.

154. *Id.* at 1559 (Stevens, J., dissenting).

155. *Id.* at 1549-51.

156. *Pointing to Katz v. United States*, 389 U.S. 347 (1967), which held that wiretaps were “seizures,” Justice Stevens contended that traditional common-law analysis was not controlling. *Hodari D.*, 111 S. Ct. at 1554-56 (Stevens, J., dissenting). The majority’s response to this argument was essentially that the common law controls those types of situations that were within the contemplation of the Framers:

[W]e do not assert that . . . [common law] defines the limits of the term “seizure”; only that it defines the limits of a *seizure of the person*. What *Katz* stands for is the proposition that items which could not be subject to seizure at common law (e.g., telephone conversations) can be seized under the Fourth Amendment. That is quite different from saying that what constitutes an arrest (a seizure of the person) has changed.

Id. at 1551 n.3.

The Court’s attempt to distinguish *Katz* as a case dealing with “items which could not be

the absence of physical contact, an officer's unauthorized attempt to restrain a suspect would not subject the officer to liability under the common law governing *arrests*, it would subject him to liability under the common law governing *attempted arrests*.¹⁵⁷ Justice Stevens argued that the common-law distinction between arrest and attempted arrest, even if important for common-law pleading purposes, was nevertheless unimportant for interpreting the Fourth Amendment.¹⁵⁸

In response to Justice Stevens' argument that the common law does not dictate any particular outcome in this case, the majority answered that, as applied to individuals rather than objects, the term "seizure" can be read no more broadly than the common-law term "arrest."¹⁵⁹ In its view, an attempted arrest at common law would be equivalent to "an attempted seizure," which is not proscribed by the language of the Fourth Amendment.¹⁶⁰ This response seems more like a post hoc rationalization than a determinative reason. The term "seizure" in the Fourth Amendment is unquestionably more inclusive than a common-law "arrest." For example, unlike the term "arrest," the term "seizure" has always been understood to apply to the taking of one's personal property as well as one's person.¹⁶¹ There is no reason why "seizure" should not be broader than "arrest" in other respects as well and apply to other police conduct, including an attempted arrest, which interferes with an individual's mobility in a manner prohibited at common law. Thus, use of the common law in interpreting "seizure" does not restrict the Court to use of only one common-law doctrine.

Given the uncertainty of the relevant common-law analogue, one might again suspect that the Court's decision was dictated by something other than the principle that common law determines the scope of the term "seizure." The Court's cavalier rejection of both precedent and clarity—considerations deemed dispositive in other Fourth Amendment

subject to seizure at common law" seems less than persuasive. In *Katz* the items "seized" were conversations. Conversations *could* be overheard by a different method—eavesdropping—that was condemned as a nuisance at common law. *Katz*, 389 U.S. at 366 (Black, J. dissenting). Therefore, as Justice Black argued in his dissenting opinion in *Katz*, wiretapping would not be subject to the dictates of the Fourth Amendment if the scope of that provision was restricted by the common law, as Justice Black believed it should be. *Id.* at 364 (Black, J., dissenting). The Court's decision in *Katz* stood for nothing if not a rejection of Justice Black's view—resurrected by Justice Scalia—that the common law governs the meaning of the term "seizure."

157. *Hodari D.*, 111 S. Ct. at 1553 n.7 (Stevens, J., dissenting) (citing Rollin M. Perkins, *The Law of Arrest*, 25 IOWA L. REV. 201, 201 & n.3 (1940)).

158. *Id.* at 1553-54 (Stevens, J., dissenting).

159. *Id.* at 1550-51.

160. *Id.* at 1550-51 n.2.

161. *Id.* at 1549-50.

cases this Term¹⁶²—bolsters that suspicion. A portion of the majority opinion discussing policy considerations suggests that the *Hodari D.* decision was in fact dictated by a preference for promoting law enforcement. Observing that “compliance with police orders to stop should . . . be encouraged,”¹⁶³ the Court sounded a theme heard throughout the Term’s Fourth Amendment decisions: the law should be fashioned to encourage cooperation with law enforcement authorities.¹⁶⁴ This consideration clearly explains the outcome in *Hodari D.*; reliance on common law does not.

C. *Judicial Determinations of Probable Cause: The Triumph of Precedent Over Principle*

In *County of Riverside v. McLaughlin*¹⁶⁵ the Court addressed warrantless arrests in a civil context. Specifically, the Court faced the question whether an individual who has been arrested without a warrant has a Fourth Amendment right to a prompt judicial determination of whether there is probable cause to believe he has committed a crime. In holding that the states could delay a probable cause hearing for up to two days so that it could be combined with arraignment,¹⁶⁶ the Court expressly refused to be governed by the common law in its interpretation of the right to be free from unreasonable seizures,¹⁶⁷ even though three weeks earlier the Court found the more ambiguous common law dispositive in *Hodari D.*¹⁶⁸ The Court also dismissed the concept of reasonableness as too vague to guide its decision,¹⁶⁹ even though ten days later in *Jimeno* reasonableness purportedly guided the Court.¹⁷⁰ Instead, the majority’s decision rested primarily on implicit guidance it found in a prior decision, *Gerstein v. Pugh*.¹⁷¹

The requirement of a prompt probable cause determination for de-

162. See discussions of *Acevedo*, *supra* text accompanying notes 94-98, and *Bostick*, *supra* text accompanying notes 123-26.

163. *Hodari D.*, 111 S. Ct. at 1551.

164. See *supra* note 110 and accompanying text.

165. 111 S. Ct. 1661 (1991).

166. *Id.* at 1670.

167. *Id.* at 1669.

168. See *supra* text accompanying notes 145-47, 155-61.

169. *County of Riverside*, 111 S. Ct. at 1669.

170. See *supra* text accompanying notes 32-36.

171. 420 U.S. 103 (1975). For recent commentary on *Gerstein*, see Wendy L. Brandes, Note, *Post-Arrest Detention and the Fourth Amendment: Refining the Standard of Gerstein v. Pugh*, 22 COLUM. J.L. & SOC. PROBS. 445, 452-57 (1989) (discussing *Gerstein* holding and rationale and definition of “prompt” hearing); Jane H. Settle, Note, *Williams v. Ward: Compromising the Constitutional Right to Prompt Determinations of Probable Cause Upon Arrest*, 74 MINN. L. REV. 196, 206-09 (1989) (reviewing bases, including time required for police admin-

fendants arrested without a warrant was first recognized sixteen years earlier in *Gerstein*.¹⁷² In that case, the Court struck down a state procedure allowing individuals arrested without a warrant to be detained for up to a month or longer without a judicial determination of probable cause.¹⁷³ The requirement of a "prompt" judicial determination of probable cause was premised on the common-law requirement that "an arrested person . . . be brought before a justice of the peace shortly after arrest."¹⁷⁴ This judicial determination accommodated two competing interests: the state's interest in immediately taking custody of suspects and the individual's interest in avoiding prolonged detention based on unfounded suspicions.¹⁷⁵

County of Riverside addressed the issue of defining the reasonable time period within which the Fourth Amendment requires that a probable cause hearing be held. More particularly, the question in *County of Riverside* was whether it was proper to delay a probable cause hearing so that it could be combined with the defendant's arraignment, which requires more preparation. A class of defendants arrested without warrants brought an action challenging the County of Riverside's practice of combining probable cause determinations and arraignments.¹⁷⁶ The combination could cause delays of up to five days or more because, although the statute required arraignment within two days of arrest, holidays and weekends were excluded from the calculation.¹⁷⁷

The Ninth Circuit Court of Appeals found it improper to delay a defendant's probable cause hearing until the latest time permitted by statute for arraignment. Rather, a probable cause determination must be made immediately after completion of booking, fingerprinting, photographing, and similar administrative procedures incident to arrest.¹⁷⁸ The court found that these procedures require no more than thirty-six hours to complete.¹⁷⁹

istrative tasks and reasonableness of any delay, for courts' interpretation of maximum permissible detention time prior to probable cause hearing).

172. *Gerstein*, 420 U.S. at 125.

173. *Id.* at 106.

174. *Id.* at 114 (citations omitted).

175. *Id.* at 113-14. Two years later, in *United States v. Watson*, 423 U.S. 411 (1976), the Court squarely held that a warrantless arrest on felony charges satisfies the Fourth Amendment as long as probable cause to arrest exists at the time of the arrest. *Id.* at 423-24.

176. *County of Riverside*, 111 S. Ct. at 1665. The action sought both injunctive and declaratory relief. *Id.*

177. *Id.*

178. See *McLaughlin v. County of Riverside*, 888 F.2d 1276, 1278 (9th Cir. 1989), *rev'd*, 111 S. Ct. 1661 (1991).

179. *Id.* Since a probable cause determination may be made in an *ex parte* proceeding and may be based upon hearsay, see, e.g., FED. R. CRIM. P. 4, a probable cause determination

The Supreme Court disagreed. In an opinion written by Justice O'Connor, the majority read *Gerstein* to permit a State to delay probable cause determinations for up to two days in order to combine them with arraignments.¹⁸⁰ It relied on language in *Gerstein* allowing states flexibility to craft procedures to ensure prompt probable cause hearings.¹⁸¹ Implicit in this "invitation to States to experiment" with their procedures is the recognition that a hearing was not compelled immediately after a suspect was "booked"; otherwise, there is no room for experimentation.¹⁸² The need for flexibility therefore justifies "a reasonable postponement of a probable cause determination" until arraignment.¹⁸³ The Court did recognize, however, that at some point a delayed probable-cause determination can no longer be considered "prompt" under *Gerstein*.¹⁸⁴ Although "hesita[nt] to announce that the Constitution compels a specific time limit," the Court nevertheless marked forty-eight hours as the point after which delays caused by attempts to combine pre-indictment proceedings violate the Fourth Amendment.¹⁸⁵

alone could generally be obtained in well under 36 hours. Any police officer familiar with the investigation could appear before a judicial officer and recount evidence thought sufficient to establish probable cause.

180. *County of Riverside*, 111 S. Ct. at 1670.

181. Describing the earlier opinion in *Gerstein*, the Court stated:

We recognized that "state systems of criminal procedure vary widely" in the nature and number of pretrial procedures they provide, and we noted that there is no single "preferred" approach. We explained further that "flexibility and experimentation by the States" with respect to integrating probable cause determinations was desirable and that each State should settle upon an approach "to accord with [the] State's pretrial procedure viewed as a whole."

Id. at 1668 (citation omitted) (quoting *Gerstein v. Pugh*, 420 U.S. 103, 123 (1975)).

182. *Id.*

183. *Id.* at 1669.

184. *Id.*

185. *Id.* at 1670. The Court stated that if a jurisdiction complied with the general requirement that hearings take place within 48 hours, it would be exempt from systemic challenges. *Id.* When delay exceeds 48 hours, however, arrested defendants may bring systemic challenges, and the government must "demonstrate the existence of a bona fide emergency or other extraordinary circumstance" that justifies the delay. *Id.* Neither intervening weekends nor the desire to combine the probable cause hearing with arraignment will qualify as an extraordinary circumstance. *Id.*

While allowing for individual, as opposed to systemic, challenges in cases in which probable-cause hearings occur within 48 hours of arrest, the Court held that an arrested defendant has the burden of showing that any delay in such a case was unreasonable. *Id.* Delay caused by combining the probable cause hearing with arraignment would not be improper, as long as the proceeding takes place within the 48-hour period. *Id.* The Court indicated that delay would be improper, however, when it is "for the purpose of gathering additional evidence to justify the arrest, a delay motivated by ill will against the arrested individual, or delay for delay's sake," rather than attributable to paperwork and logistical problems. *Id.* Interestingly, the Court did not address the one question that might affect the admissibility of incriminating evidence in criminal cases: whether police officers may properly delay a probable cause hear-

A comparison of the decision in *County of Riverside* with other Fourth Amendment decisions of the Term once again compels skepticism that the Court engaged in principled decisionmaking and once again suggests that the rationales invoked throughout the Term were nothing more than post hoc explanations for the outcome of those cases.¹⁸⁶ The other decisions also cast doubt on whether the Court in *County of Riverside* truly felt bound by precedent.

First, the decision underscores how un compelling the Court's rationale was in *Hodari D.*—that the common law of arrest requires rejecting a criminal defendant's claim of unreasonable seizure. In *County of Riverside* the Court refused to be bound by common-law doctrine supportive of the arrested defendants' argument that their detention amounted to an unreasonable seizure. As Justice Scalia argued in a lengthy dissenting opinion,¹⁸⁷ a series of prior judicial decisions established that under the common law governing unlawful arrests, "a person arresting a suspect without a warrant [was required to] deliver the arrestee to a magistrate 'as soon as he reasonably can'"; the reasonableness of any delay depended exclusively on the length of time necessary to reach a magistrate.¹⁸⁸ The majority's only response was to dismiss as a "vague admonition" the requirement that an arresting officer arrange a judicial

ing to conduct an interrogation of the defendant that is designed, not to gather evidence to establish probable cause for the defendant's arrest, but to gather additional evidence for trial.

186. *County of Riverside* also stands in somewhat ironic contrast to the decision several weeks later in *Connecticut v. Doe*, 111 S. Ct. 2105 (1991), which held that a prejudgment attachment of real estate violated due process in the absence of prior notice, opportunity for a prior hearing, or some exigency. *Id.* at 2109. If a person is generally entitled to a hearing prior to the seizure of his property, it would seem to follow that he is entitled to a hearing, if not prior to the seizure of his person, then at the earliest available moment at which a post-arrest hearing could be held. Like the Court's dictum in *Payne v. Tennessee*, 111 S. Ct. 2597, 2610 (1991), the decision in *Doe* suggests that the Court has greater concern for property interests than liberty interests. See *supra* note 8 and accompanying text.

187. See *County of Riverside*, 111 S. Ct. at 1671 (Scalia, J., dissenting). Justice Marshall wrote a separate, one-paragraph dissent, joined by Justices Blackmun and Stevens, which agreed with both Justice Scalia's conclusion and the holding of the court of appeals that a probable cause hearing must take place as soon as the administrative steps incident to arrest are completed. *Id.* (Marshall, J., dissenting). Presumably, Justices Marshall, Blackmun, and Stevens were unwilling to concur in Justice Scalia's reasoning at least partly because of his reliance on the common law as a basis for interpreting the right against unreasonable seizures. See *id.* at 1672-73 (Scalia, J., dissenting). Moreover, as published, Justice Scalia's opinion contained an introduction that referred disparagingly to the Court's decision in *Roe v. Wade*, 410 U.S. 113 (1973). See *County of Riverside*, 111 S. Ct. at 1671 (Scalia, J., dissenting) (stating that the *Roe* Court created rights not in the Constitution). If that reference were contained in Justice Scalia's opinion when it was circulated to the Court, the other three dissenting justices undoubtedly would have been unwilling to subscribe to it. It may be, of course, that Justice Scalia added the reference to *Roe* only after it became apparent that none of the other dissenting justices would join his opinion.

188. *County of Riverside*, 111 S. Ct. at 1672 (Scalia, J., dissenting) (citations omitted)

determination of probable cause "as soon as he *reasonably* can."¹⁸⁹ As Justice Scalia noted, the Court did not even acknowledge, much less attempt to distinguish, decisions holding that delay was impermissible under the common law if it exceeded the period within which an arrest warrant could have been obtained.¹⁹⁰ Given the cavalier disregard for common-law decisions that clearly would have dictated a result contrary to government interests in *County of Riverside*, it is hard to imagine that the Court considered itself compelled in *Hodari D.* to accept common-law decisions whose dictates were far from clear.

Second, the Court's rejection of a reasonableness requirement as a "vague admonition" in *County of Riverside* warrants skepticism about whether the result in *Jimeno* was truly dictated, as claimed, by "the Fourth Amendment's basic test of objective reasonableness."¹⁹¹ In *County of Riverside* the Court understandably framed the question before it as "what is 'prompt' under *Gerstein*,"¹⁹² rather than "what is 'reasonable' under the Fourth Amendment."¹⁹³ It is hard to take issue with the Court's view in *County of Riverside* that "reasonableness" would have provided virtually no guidance on whether probable cause hearings may be delayed for combination with arraignments.¹⁹⁴ The concept gives no greater guidance about the scope of consensual searches, yet it was dispositive in *Jimeno*.¹⁹⁵

Third, the Court's adoption of an absolute forty-eight-hour time limit in *County of Riverside* prompts questions about *Bostick's* rejection of a per se rule that randomly questioning passengers on a bus constitutes a "seizure" under the Fourth Amendment. The *Bostick* Court took the view that "seizure" is not susceptible to categorical rules of this nature. Yet, in *County of Riverside*, the term "reasonable," a more open-ended concept, gave rise to a rule that is both categorical and far more arbitrary than the rule proposed in *Bostick*. After *County of Riverside*, if a defendant arrested without a warrant is detained for less than forty-eight hours

(quoting 2 SIR MATTHEW HALE, PLEAS OF THE CROWN 95 n.13 (Philadelphia, Robert H. Small 1847)).

189. *Id.* at 1669.

190. *Id.* at 1673 n.1 (Scalia, J., dissenting).

191. *Florida v. Jimeno*, 111 S. Ct. 1801, 1804 (1991); see *supra* notes 32-36 and accompanying text.

192. *County of Riverside*, 111 S. Ct. at 1669.

193. *Id.*

194. *Id.* See generally Silas J. Wasserstrom, *The Incredible Shrinking Fourth Amendment*, 21 AM. CRIM. L. REV. 257, 271, 309 (1984) (noting that "reasonableness" may be judged by any of several standards, but the Court has never adopted one, with the result that the term is "now little more than readily manipulable cant").

195. See *supra* notes 32-36 and accompanying text.

for the purpose of combining a probable cause determination with arraignment, the detention is "reasonable" under the Fourth Amendment; however, if the detention exceeds forty-eight hours, it ceases to be "reasonable." The Court adopted this absolute rule "to provide some degree of certainty so that States and counties may establish procedures with confidence that they fall within constitutional bounds."¹⁹⁶ But do police officers who routinely sweep through buses questioning passengers and asking permission to search their belongings need less certainty?¹⁹⁷

Just as one might question the rationales underlying the Court's other Fourth Amendment decisions in light of *County of Riverside*, one might similarly question the purported basis of the latter decision. In *County of Riverside*, *Gerstein* purportedly dictated the conclusion that probable cause hearings properly may be combined with arraignments, even when some delay ensues.¹⁹⁸ As Justice Scalia pointed out in his dissent, however, *Gerstein* never said that delay may be attributable "to the administrative convenience of combining the probable-cause determination with other state proceedings."¹⁹⁹ Viewed in context, *Gerstein*'s reference to "the desirability of flexibility and experimentation," on which the majority relied, "refers to the *nature* of the [probable cause] hearing and not to its *timing*."²⁰⁰ At best, the permissibility of the delay caused by the probable cause/arraignment combination can be gleaned by "implication [from] the dictum of *Gerstein*."²⁰¹ Even that precedent was questionable, since *Gerstein* could just as plausibly be read to permit combining those proceedings only when doing so entails no additional delay.²⁰²

It seems unlikely that the majority felt in any way bound by the language in the precedent, particularly when the *County of Riverside* decision is juxtaposed against the decisions in *Acevedo* and *Bostick*. In *Acevedo* the Court overruled two prior decisions that were squarely on point to expand the permissible scope of warrantless searches of vehicles.

196. *County of Riverside*, 111 S. Ct. at 1670.

197. Likewise, the adoption of the categorical rule in *County of Riverside* calls into question the *Jimeno* Court's rejection of a bright-line rule forbidding officers to search a closed container when a suspect gave general consent to search the place in which the container was found. The *Jimeno* Court found "no basis for adding this sort of superstructure to the Fourth Amendment's basic test of objective reasonableness." *Florida v. Jimeno*, 111 S. Ct. 1801, 1804 (1991); see also *supra* notes 43-45 and accompanying text.

198. See *County of Riverside*, 111 S. Ct. at 1671 ("Under *Gerstein*, jurisdictions may choose to combine probable cause determinations with other pretrial proceedings, so long as they do so promptly.").

199. *Id.* at 1674 (Scalia, J., dissenting).

200. *Id.* (Scalia, J., dissenting).

201. *Id.* (Scalia, J., dissenting).

202. *Id.* (Scalia, J., dissenting).

In *Bostick* the Court declined to be bound by the seizure formula used in several prior decisions. If not bound either by holdings of two prior decisions that it overruled or by a formulation central to holdings it continued to endorse, it is hard to imagine that the Court felt obliged to adhere to an idea that was, at best, implicit in the dictum of a single prior opinion.

That the *County of Riverside* decision was in fact dictated not by loyalty to precedent but by the personal proclivities of individual Justices is further indicated by its references to the "balance between competing interests."²⁰³ As Justice Scalia noted, any "'balancing' of the competing demands of the individual and the State" by the majority would have been "entirely value laden."²⁰⁴ The weight assigned to these countervailing considerations can only have been determined by the values of the individual Justices who comprised the majority.

Perhaps the most ominous aspect of the decision in *County of Riverside* is that the majority's implicit balancing involved a societal interest far less significant, and an individual interest far more significant, than typically appears in Fourth Amendment cases. The societal interest in obtaining evidence of criminal wrongdoing was *not* at stake here; the relevant societal interest was purely financial. The Court allowed states forty-eight hours within which to obtain probable cause determinations to spare them the expense of "hir[ing] additional police officers and magistrates."²⁰⁵ At the same time, the individual interest went well beyond the interest in freedom from brief, unwanted intrusions that was at stake in the other search-and-seizure cases of the Term; the relevant individual interest was in freedom from wrongful confinement. If, as the Court apparently concluded, the interest of wrongfully arrested individuals in limiting the period of their confinement is inadequate to outweigh the state interest in saving a few dollars, then in search-and-seizure cases involving the discovery of evidence, only the most exceptional interest in privacy will be sufficiently compelling to outweigh the state interest in promoting criminal investigations.²⁰⁶ Insofar as the current Justices rely on their

203. *Id.* at 1669, 1670 ("Gerstein clearly contemplated a reasonable accommodation between legitimate competing concerns. We do no more than recognize that such accommodation can take place without running afoul of the Fourth Amendment.").

204. *Id.* at 1674 (Scalia, J., dissenting).

205. *Id.* at 1669, 1670 (citing the problems of "an overly burdened criminal justice system").

206. Aside from *County of Riverside*, the Court's search-and-seizure cases this Term dealt with the admissibility of evidence against the accused in a criminal prosecution. Conspicuously absent from the majority opinions in three of those four cases—*Bostick*, *Acevedo*, and *Jimeno*—was any expression of concern for the individual interests protected by the Fourth Amendment. These decisions, giving weight exclusively to the relevant interests of the state,

own personal preferences, the Fourth Amendment will almost invariably be interpreted in favor of the State.

IV. CONCLUSION

It would be an understatement to say that the 1990 Term's search-and-seizure decisions fail to reflect a unified jurisprudential approach to Fourth Amendment interpretation. The Court used and discarded a variety of approaches seemingly at random. In different cases, the Court purported to be guided in its interpretation of the constitutional provision by the general standard of "reasonableness,"²⁰⁷ by the limitations imposed on the police at common law,²⁰⁸ by the need to provide the police with clear rules,²⁰⁹ and by the dictates of precedent.²¹⁰ Yet the Court denied weight to these same considerations in cases in which they seemed equally relevant, if not more so.²¹¹

The contradictory approaches employed in this small body of decisions were not simply the product of shifts in the composition of the majority. At other times, contradictions emerge within a body of related decisions because different Justices comprise the majority in each case; this especially tends to be true when related decisions are rendered over a period of years. In the Fourth Amendment decisions of the Term, however, a core of four Justices—Chief Justice Rehnquist, Justice O'Connor, Justice Kennedy, and Justice Souter—was in the majority in every case. Justices White, Blackmun, and Scalia joined the majority in most of these cases.²¹² Therefore, contradictions cannot be ascribed to efforts to ac-

mirror the Court's recent criminal jurisprudence as a whole. The Court's indifference to individual interests in criminal cases was noted and strongly criticized by Justice Blackmun in another case this Term—*Coleman v. Thompson*, 111 S. Ct. 2546 (1991)—in which the Court further limited the availability of the federal habeas corpus relief. At the outset of his dissent, Justice Blackmun lamented that Justice O'Connor had inventoried the state interests in "[f]ederalism; comity; state sovereignty; preservation of state resources; [and] certainty," but that "[o]ne searches the majority's opinion in vain . . . for any mention of petitioner Coleman's right to a criminal proceeding free from constitutional defect or his interest in finding a forum for his constitutional challenge to his conviction and sentence of death." *Id.* at 2569 (Blackmun, J., dissenting).

207. See *supra* text accompanying notes 32-36.

208. See *supra* text accompanying notes 155, 159-61.

209. See *supra* text accompanying notes 94-98.

210. See *supra* text accompanying notes 136-37, 171.

211. See *supra* text accompanying notes 43 (*Jimeno*: Court rejected use of categorical rules); 86-87, 109 (*Acevedo*: Court rejected precedent); 120-22 (*Bostick*: Court rejected categorical rules); 148, 151 (*Hodari D.*: Court rejected categorical rules and precedent); 166-70, 187-90 (*County of Riverside*: Court rejected common law and reasonableness).

212. Justice White dissented in *Acevedo*; Justice Blackmun joined dissenting opinions in *Bostick* and *County of Riverside*; and Justice Scalia concurred in *Acevedo* and dissented in *County of Riverside*. Given the departure from the majority in one or more Fourth Amend-

commodate different visions of the Fourth Amendment as the composition of the justices comprising the majority shifted from case to case.

Nor were the contradictions attributable to the desire to achieve consensus among different justices who reached the same result but for different reasons. The seven justices who were in the majority in most or all of this Term's Fourth Amendment cases have not made a practice of compromising their views to enable the Court to issue a majority opinion. On the contrary, in two criminal cases of the Term, no majority opinion was produced because the justices who agreed on the outcome of the case would not agree on a single line of reasoning.²¹³

The Court's inconsistency can be understood only by looking at the outcome of its search-and-seizure decisions: the State won every case. Interpretative approaches were invariably rejected when they warranted a result unfavorable to the State. If not dictated by a view about what considerations deserve weight in interpreting the Fourth Amendment, the Justices' votes could have been dictated only by their personal preferences, and, particularly, by the strongly held preference apparently

ment decisions this Term, it cannot be said that these justices are invariably result oriented. On the contrary, two of these justices clearly consider some interpretive principles to be sufficiently important that, if applicable to a given case, they may be adhered to without regard for the result. For example, Justice White's dissents in *Acevedo* and in two other cases of the Term, *Arizona v. Fulminante*, 111 S. Ct. 1246, 1253 (1991) (White, J., dissenting in part), and *Harmelin v. Michigan*, 111 S. Ct. 2680, 2709 (1991) (White J., dissenting), suggest that he is more likely than other justices to adhere to the principle of stare decisis, even when it goes against his natural inclinations. *But see* *Payne v. Tennessee*, 111 S. Ct. 2597, 2611 (1991) (O'Connor, J., concurring) (Justice White joining the majority opinion overruling *South Carolina v. Gathers*, 490 U.S. 805 (1989), and *Booth v. Maryland*, 482 U.S. 496 (1987)). Similarly, Justice Scalia's dissent in *County of Riverside* demonstrates his adherence to the use of common law as a tool of constitutional interpretation. *See also* *Schad v. Arizona*, 111 S. Ct. 2491, 2507 (Scalia, J., concurring) (examining historical and common-law practice concerning felony murder); *California v. Acevedo*, 111 S. Ct. 1982, 1993 (1991) (Scalia, J., concurring in the judgment) (using the common law to construe "reasonableness").

Justice Blackmun, on the other hand, appears to approach the Fourth Amendment cases on an ad hoc basis from a moderate perspective: although generally predisposed to uphold convictions, there sometimes comes a point that police procedures are sufficiently troubling or the justifications for them sufficiently attenuated to overcome his usual predisposition. *Cf.* *United States v. Leon*, 468 U.S. 897, 927-28 (1984) (Blackmun, J., concurring) (concurring in adoption of good-faith exception to exclusionary rule, but noting that the exception should be reconsidered if subsequent experience showed "a material change in police compliance with Fourth Amendment.")).

213. *See* *Schad*, 111 S. Ct. at 2494; *Harmelin*, 111 S. Ct. at 2684 (only one part of Justice Scalia's opinion was joined by four other Justices); *Hernandez v. New York*, 111 S. Ct. 1859, 1863 (1991) (plurality opinion). Moreover, in a number of criminal cases in which there was a majority opinion, justices wrote or joined separate concurrences to express disagreement with the majority's reasoning. *See, e.g.,* *Mu'Min v. Virginia*, 111 S. Ct. 1899, 1908 (1991) (O'Connor, J., concurring); *Yates v. Evatt*, 111 S. Ct. 1884, 1897 (1991) (Scalia, J., concurring, joined in part by Blackmun, J.); *Michigan v. Lucas*, 111 S. Ct. 1743, 1748 (1991) (Blackmun, J., concurring).

shared by a majority of the justices for promoting law enforcement at the expense of personal privacy. It seems fair to infer that the Justices in the majority approached Fourth Amendment cases with the predetermined conclusion that the State should prevail, then looked for reasons to explain this result. The Term's decisions thus reflect the Court's readiness to exercise its power to enact its personal preferences into law whenever plausible after-the-fact rationalizations can later be advanced as the basis of its decisions; with so many possible methods of interpretation, reasons can seemingly always be found.²¹⁴

One implication of the Justices' indifference to legal reasoning is that the individual Justice assigned to write for the Court in any given Fourth Amendment case has virtually free rein to adopt an analysis of his preference,²¹⁵ without regard to whether that analysis is the most persuasive way of reaching the desired result, and without regard to whether the chosen analysis is one that most other Justices in the majority would have preferred. Thus, in writing for the Court in *County of Riverside*, Justice O'Connor emphasized that "proper deference to the demands of federalism" required construing the arrested defendant's Fourth Amendment rights narrowly to accommodate the State's interest in administrative flexibility, thereby sounding a theme—that the principle of federalism calls for narrowly construing criminal defendants' procedural rights—that has recurred throughout her criminal

214. The Court's approach may have implications for legal scholarship. It may well be a fool's errand for academics to undertake doctrinal analysis in the Fourth Amendment area with an eye toward rationalizing prior decisions or suggesting the future direction of the law.

215. Undoubtedly, there are limits beyond which the writer may not go. For example, it is unlikely that Justice Scalia could have commanded a majority for the approach advocated in his concurring opinion in *Acevedo*, which would have rejected the "warrant requirement," a bedrock principle of contemporary Fourth Amendment jurisprudence, and thereby overruled a significant number of prior decisions. *Acevedo*, 111 S. Ct. at 1992-94 (Scalia, J., concurring). An example from the 1990 Term where Justice Scalia apparently did go too far after being assigned to write for the Court in a criminal case is *Harmelin*, 111 S. Ct. 2680. In *Harmelin* the Court considered whether a sentence of life imprisonment without possibility of parole was "cruel and unusual punishment" when imposed on an individual convicted of possessing cocaine. *Id.* at 2684. Justice Scalia argued that a sentence of imprisonment should never be considered "cruel and unusual punishment" and that the Court should therefore overrule *Solem v. Helm*, 463 U.S. 277, 303 (1983), which set aside as disproportionate under the Eighth Amendment a sentence of life imprisonment without possibility of parole imposed on a recidivist who had committed exclusively nonviolent offenses. *Harmelin*, 111 S. Ct. at 2686. Justice Scalia announced the opinion of the Court, but the bulk of his opinion was joined only by the Chief Justice, who apparently had assigned Justice Scalia to write an opinion for the Court. Justice Kennedy filed a concurring opinion, joined by Justices O'Connor and Souter, in which he opined that the Court should adhere to the proportionality principle applied in *Solem* and recognized in other decisions, but that *Harmelin*'s sentence was not unconstitutionally excessive. *Id.* at 2705, 2708 (Kennedy, J., concurring in part and concurring in judgment).

jurisprudence.²¹⁶ Likewise, in his opinion for the Court in *Hodari D.*, Justice Scalia relied principally on the common law to define "seizure" under the Fourth Amendment²¹⁷ in a mode of analysis he has promoted in other criminal cases.²¹⁸

If the Court's approach continues to be marked by "power, not reason," one can expect it to do more in the coming years than simply fill in the interstices in the current law of criminal procedure with rulings favorable to the State. As Justice Marshall warned, the Court's approach to deciding cases opens the way to "a far-reaching assault" on existing precedents that interpret the Constitution to protect individual privacy and autonomy at the expense of majoritarian interests.²¹⁹ His last dissent

216. *County of Riverside v. McLaughlin*, 111 S. Ct. 1661, 1668 (1991). For other examples of Justice O'Connor's approach to procedural rights of the criminally accused, see *Heath v. Alabama*, 474 U.S. 82, 92 (1985) (noting that doctrine that the Double Jeopardy Clause does not bar successive prosecutions for the same offense brought by different sovereigns "finds weighty support in the historical understanding and political realities of the States' role in the federal system"); *Engle v. Isaac*, 456 U.S. 107, 128 (1982) (availability of federal writ of habeas corpus "frustrate[s] . . . the States' sovereign power"). The apotheosis of this theme was reached during the 1990 Term in Justice O'Connor's opinion for the Court in *Coleman v. Thompson*, 111 S. Ct. 2546 (1991), which began: "This is a case about federalism." *Id.* at 2552. The decision further narrowed the availability of federal habeas relief for defendants convicted in state court. *Id.* at 2559, 2565.

217. *California v. Hodari D.*, 111 S. Ct. 1547, 1550 n.2 (1991).

218. See, e.g., *Harmelin*, 111 S. Ct. at 2686-91; *Acevedo*, 111 S. Ct. at 1993 (Scalia, J., concurring); see also *Coy v. Iowa*, 487 U.S. 1012, 1016, 1018 n.2 (1988) (evaluating the use of close circuit television or screens for child witnesses in sexual assault trials under the Sixth Amendment); *Thompson v. Oklahoma*, 487 U.S. 815, 864, 872 (1988) (Scalia, J., dissenting) (evaluating historical practice in considering whether the death penalty for defendants who committed crimes while under the age of 16 violates cruel and unusual punishment prohibition).

219. *Payne v. Tennessee*, 111 S. Ct. 2597, 2625 (1991) (Marshall, J., dissenting). Justice Marshall opined that scores of opinions upholding the constitutional rights of individuals were in jeopardy and identified 10 recent constitutional decisions that he believed to be particularly endangered. *Id.* at 2623 n.2 (Marshall, J., dissenting) (citing *Rutan v. Republican Party of Illinois*, 110 S. Ct. 2729 (1990) ("First Amendment right not to be denied public employment on the basis of party affiliation"); *Peel v. Attorney Registration & Disciplinary Comm'n*, 110 S. Ct. 2281 (1990) ("First Amendment right to advertise legal specialization"); *Zinerman v. Burch*, 494 U.S. 113 (1990) ("due process right to procedural safeguards aimed at assuring voluntariness of decision to commit oneself to mental hospital"); *James v. Illinois*, 493 U.S. 307 (1990) ("Fourth Amendment right to exclusion of illegally obtained evidence introduced for impeachment of defense witnesses"); *Rankin v. McPherson*, 483 U.S. 378 (1987) ("First Amendment right of public employee to express views on matter of public importance"); *Rock v. Arkansas*, 483 U.S. 44 (1987) ("Fifth Amendment and Sixth Amendment right of criminal defendant to provide hypnotically refreshed testimony on his own behalf"); *Gray v. Mississippi*, 481 U.S. 648 (1987) ("rejecting applicability of harmless error analysis to Eighth Amendment right not to be sentenced to death by 'death-qualified' jury"); *Maine v. Moulton*, 474 U.S. 159 (1985) ("Sixth Amendment right to counsel violated by introduction of statements made to government informant-codefendant in course of preparing defense strategy"); *Garcia v. San Antonio Metro. Transit Auth.*, 469 U.S. 528 (1985) ("rejecting theory that Tenth Amendment provides immunity to states from federal regulation"); *Pulliam v. Allen*,

was, thus, a valedictory not only to a transformed Court but also, it may turn out, to many of the constitutional precedents that he had joined in setting over the preceding quarter century. And few precedents are at greater risk than those upholding the Fourth Amendment rights of criminal defendants.

466 U.S. 522 (1984) ("right to obtain injunctive relief from constitutional violations committed by judicial officials").

