

# REHNQUIST'S FOURTH: A PORTRAIT OF THE JUSTICE AS A LAW AND ORDER MAN

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#### INTRODUCTION

My first reaction to participation in this Symposium was negative. I was inclined to forego the opportunity because I thought I knew all there was to know about former Chief Justice Rehnquist's Fourth Amendment views. I knew of an abiding hostility toward and an indiscriminate campaign to demolish the vital civil liberties granted by that provision, and I believed that any honest analysis would be brief and redundant. Many legal scholars had already documented the undisputable nature of Rehnquist's efforts to unravel the Fourth Amendment tapestry.<sup>1</sup> In other words, as an academic who fancies himself a civil libertarian, I reacted with a very closed mind, certain that William Rehnquist had been unfaithful to that guarantee to further his conservative political agenda. My disagreement with his perspectives, and with so many of his Fourth Amendment interpretations, prompted me to question his honesty, to assume

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<sup>1</sup> See *infra* note 215 (citing a number of scholarly articles documenting William Rehnquist's approach and attitude toward Fourth Amendment interpretation).

that with bad faith he had attempted to take away what our forefathers had provided.

Fortunately, I took time to reflect on the invitation, which, from the outset, encouraged prospective participants to avoid Rehnquist-bashing and to exploit the opportunity for temperate consideration and impartial analysis. Criticism was neither forbidden nor discouraged, but authors were urged not to succumb to the trap of railing against a Justice because of our differences. I am most grateful for that exhortation, because it is one of the reasons I was persuaded to participate.

My initial reluctance was also rooted in a sense that the topic was neither important nor interesting enough to warrant extensive consideration. William Rehnquist was an extremist whose position at the far end of the spectrum had precluded much influence on Fourth Amendment law. There is no denying the major erosion of Warren Court precedents during Rehnquist's tenure, but surely that was primarily due to more moderate Justices who shared his general inclinations, but did not harbor his excessive antipathy toward Fourth Amendment rights. Moreover, although he authored sixty-eight Fourth Amendment opinions while on the Court—a little more than two per year spanning the entire thirty-three year period—I could think of very few that qualified as landmarks in the evolution of Fourth Amendment doctrine.<sup>2</sup>

Fortunately, I had incentives to resist these misleading perspectives. First, I have long believed that there are few more important topics than our guarantee against “unreasonable searches and seizures.”<sup>3</sup> My specialization in criminal procedure

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<sup>2</sup> The two opinions that leapt to mind initially were *Illinois v. Gates*, 462 U.S. 213 (1983) and *Rakas v. Illinois*, 439 U.S. 128 (1978). Upon further reflection, I would add *Wilson v. Layne*, 526 U.S. 603 (1999), *Michigan Dep't of State Police v. Sitz*, 496 U.S. 444 (1990), and *United States v. Robinson*, 414 U.S. 218 (1973). My views about what constitute landmarks, I suspect, are colored by my preference for decisions protective of civil liberties. Nonetheless, I still find a relative dearth of landmark Fourth Amendment opinions in the Rehnquist catalogue. As will become apparent, he accomplished his goals by means of many small steps in the directions he wished to go. See *infra* Part II.E.

<sup>3</sup> See *Brinegar v. United States*, 338 U.S. 160, 180 (1949) (Jackson, J., dissenting) (declaring that the Fourth Amendment rights “are not mere second-class rights,” that they “belong in the catalog of indispensable freedoms,” that deprivations of those rights is most “effective in cowering a population, crushing the spirit of the individual and

has biased me in favor of the provision. Still, I believe there are objective reasons for according the Fourth Amendment predominant status among the civil liberties found in our Bill of Rights. First, the values and interests it preserves and protects were of abiding significance to our ancestors. Resentment of unreasonable searches and seizures by the British was a potent cause of our struggle for independence.<sup>4</sup> In my view, our forebears considered protection against unreasonable searches and seizures central to a free society not only because privacy has intrinsic value, but also because it is instrumental for the full enjoyment of many other liberties.<sup>5</sup> In addition, preliminary research persuaded me that my unfounded impression about Rehnquist's lack of influence could be mistaken, and further reading convinced me that it was a serious misperception. This Symposium revolves around a topic of exceptional importance, because the Fourth Amendment is a critical component of our national charter and William Rehnquist played—and continues to play—a major role in shaping that provision's resolution of the tension between freedom and order.<sup>6</sup>

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putting terror in every heart," and that "[u]ncontrolled search and seizure is one of the first and most effective weapons in the arsenal of every arbitrary government").

<sup>4</sup> See NELSON LASSON, *THE HISTORY AND DEVELOPMENT OF THE FOURTH AMENDMENT TO THE UNITED STATES CONSTITUTION* 58-59 (1937) (citing John Adams's belief that James Otis's objections to the colonial writs of assistance "breathed into this nation the breath of life," and gave birth to "the child Independence"); *Warden v. Hayden*, 387 U.S. 294, 312 (1967) (Fortas, J., concurring) (asserting that the conduct of general searches "were one of the matters over which the American Revolution was fought"); *Harris v. United States*, 331 U.S. 145, 159 (1947) (Frankfurter, J., dissenting) (opining that the Fourth Amendment "sought to guard against an abuse that more than any one single factor gave rise to American independence").

<sup>5</sup> See James J. Tomkovicz, *Beyond Secrecy for Secrecy's Sake: Toward an Expanded Vision of the Fourth Amendment Privacy Province*, 36 *HASTINGS L.J.* 645, 667-77 (1985).

<sup>6</sup> See Thomas K. Clancy, *The Irrelevancy of the Fourth Amendment in the Roberts Court*, 85 *CHI.-KENT L. REV.* 191, 192-93 (2010) (stating that in light of his "astonishing number of majority opinions on the Fourth Amendment" in "many of the most important cases" during the time he served as Chief Justice, "Rehnquist's impact on Fourth Amendment analysis—and his legacy—is substantial"); see also Louis D. Bilonis, *Conservative Reformation, Popularization, and the Lessons of Reading Criminal Justice as Constitutional Law*, 52 *UCLA L. REV.* 979, 991-92 (2005) (contending that "no one doubts" that Rehnquist "was [the] most influential" Justice in bringing about a "conservative reformation of criminal justice" and that "as voice of critique, promoter of basic vision, source of energy, and maker of doctrine to reformist ends," he "had no equal" on the Court).

Symposium participants were allowed to be as broad or narrow in focus as they wished. We could illuminate Rehnquist's Fourth Amendment by painstaking analysis of one or two opinions or by a wider-lens effort to assess the entire corpus of the Chief Justice's work. Such freedom can be both a blessing and a curse. With few external constraints, I vacillated between the two extremes, entertaining a variety of options, and unable to settle on an approach. Ultimately, I let William Rehnquist be my muse. I collected all of his opinions and embarked upon a chronological journey through each of them, having faith that inspiration would arrive along the way.<sup>7</sup>

A lightning bolt of the sort I anticipated never struck. A previously undiscerned, unique, and novel perspective on the Chief Justice's relationship to the Fourth Amendment never blossomed. I concluded that only a somewhat more global approach would permit me to convey the lessons I learned. My hope is that the array of discrete insights that follow will be interesting, perhaps even enlightening, and that they will contribute to a fuller appreciation of both the Fourth Amendment and William Rehnquist's immeasurable impacts.

I begin with a brief overview of the Fourth Amendment and an effort to summarize the substance of Rehnquist's conception of that provision. I then offer both quantitative and qualitative support for my descriptions of the Chief Justice's views. The quantitative assessment uses various numbers to confirm the accuracy of my description. The qualitative assessment furnishes additional support and tells a story spanning more than three decades—a tale of the reasoning, principles, doctrine, strategies, and tactics that Justice, then Chief Justice, Rehnquist employed to implement his vision. It consists of “negatives”—of Fourth Amendment principles Rehnquist opposed and premises he found unpersuasive. It also describes “positives”—the affirmative principles and premises that guided his interpretations. A few reflections on his style and methodology are also included. Finally, I endeavor to evaluate the extent of Rehnquist's influence during his time on the Court and since he departed. I also assess how he

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<sup>7</sup> I supplemented this with a review of more than thirty law review articles that had something to say about Rehnquist and the Fourth Amendment.

would react to the Fourth Amendment decisions of the Roberts Court.

I have tried to be apolitical and impartial in my descriptions and analyses, to set aside biases and disagreements with Rehnquist's Fourth Amendment positions. For purposes of these discussions, I reject the notions that he engaged in a bad-faith crusade to deprive citizens of constitutional rights and that his views were disingenuous covers for constitutional distortion to serve political ends. Instead, I assume that the Chief Justice's opinions reflect sincere, principled efforts to discern the true content of that pivotal guarantee.<sup>8</sup>

## I. WILLIAM REHNQUIST'S FOURTH AMENDMENT

### *A. The Fourth Amendment's Balance*

The Fourth Amendment strikes a marvelous balance. It neither allows the government unlimited power to search and seize, nor forbids all searches and seizures. It grants a right against "unreasonable searches and seizures," permitting those that are "reasonable."<sup>9</sup> It aims to guarantee "the people" adequate protection for privacy, property, and liberty while affording society adequate authority to combat crime, preserve order, and ensure public safety.<sup>10</sup>

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<sup>8</sup> See Andrew Jay McClurg, *Logical Fallacies and the Supreme Court: A Critical Examination of Justice Rehnquist's Decisions in Criminal Procedure Cases*, 59 U. COLO. L. REV. 741, 838 (1988) (maintaining that Rehnquist's "views regarding the place the Bill of Rights occupies in the criminal justice system [were] no doubt deeply and honestly felt" and that "he strongly believe[d] in" those views); see also HERMAN J. OBERMAYER, *REHNQUIST: A PERSONAL PORTRAIT OF THE DISTINGUISHED CHIEF JUSTICE OF THE U.S.* 215, 244 (2009) (opining that Rehnquist "was not a devious man," that "[h]e said what he believed," and that he was "of high character" and "honest").

<sup>9</sup> U.S. CONST. amend. IV. ("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.").

<sup>10</sup> See Gerald G. Ashdown, *The Fourth Amendment and the "Legitimate Expectation of Privacy,"* 34 VAND. L. REV. 1289, 1289 (1981) (observing that "[j]udicial supervision of police practices has always necessitated a rather delicate balance," that the promotion of "crime control values" may require the "compromise[]" of "privacy and individual rights," and that "[t]he dilemma . . . created is one of providing the

Various facets of the provision play roles in resolving the tension between these competing interests. First, the terms of the provision explicitly constrain only “searches and seizures.”<sup>11</sup> Other sorts of government activities are not regulated because they do not threaten the interests the Fourth Amendment is designed to safeguard. The authorities are entirely free—as far as the Fourth Amendment is concerned—to promote the public interest by conduct that qualifies as neither a search nor a seizure. Consequently, ascertaining the distinctions between searches and non-searches and between seizures and non-seizures is integral to defining the constitutional balance.

The more pervasive component of the Fourth Amendment balance is the explicit dichotomy between reasonable and unreasonable searches and seizures. Even though they deprive us of privacy, property, or liberty, the former are allowed to enable effective law enforcement. Even though they may impede efforts to protect the public, the latter are forbidden to preserve privacy, property, and liberty. Prescribing the content and meaning of the term “unreasonable”—specifying when searches and seizures are reasonable and when they are not—is integral to implementing the delicate Fourth Amendment balance.<sup>12</sup>

Finally, the Fourth Amendment commands that “the right of the people to be secure against unreasonable searches and seizures shall not be violated,” but does not specify a consequence for violations.<sup>13</sup> Its terms do not address whether the government must repair constitutional damage, whether officials must compensate injured victims, or, most significantly, whether prosecutors may introduce unconstitutionally obtained evidence to meet their heavy burden of proof in criminal cases. The admissibility of illegally acquired evidence—whether suppression is constitutionally required and, if so, how extensive the bar to probative evidence is—is another critical aspect of the

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maximum possible accommodation to one interest without unduly infringing upon the other”).

<sup>11</sup> U.S. CONST. amend. IV.

<sup>12</sup> A limited amount of the substance of the general right “to be secure . . . against unreasonable searches and seizures” is specified in the second clause of the Fourth Amendment, which prescribes the requisites for a valid warrant to search or seize. *See* U.S. CONST. amend. IV.

<sup>13</sup> *Id.*

constitutional effort to reconcile law enforcement efficacy with freedom. The sanction question is difficult, controversial, and inseparable from the effort to identify the appropriate constitutional balance.

*B. Rehnquist's Perspectives on the Fourth Amendment Balance:  
A Broad Brush Portrait*

William Rehnquist understood that the Fourth Amendment was an effort to preserve privacy, property, and liberty while affording law enforcement sufficient opportunities to control crime, preserve order, and protect public safety.<sup>14</sup> His conception of the constitutional balance tilted decidedly more in favor of the government's efforts to enforce the laws than the one that had evolved primarily, although not at all exclusively, during the decade preceding his arrival.<sup>15</sup> Moreover, his conception of the Fourth Amendment was much less restrictive of law enforcement and correspondingly less generous with privacy, property, and liberty than that of any Justice with whom he served.<sup>16</sup>

In his view, the Court had mistakenly interpreted the Fourth Amendment in an array of ways that distorted the accommodation intended by the Framers. The prevailing precedents favored freedom and restricted the authorities efforts to preserve order

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<sup>14</sup> According to Justice Rehnquist, in construing the Fourth Amendment, the Court's "task [was] to 'hold the balance true.'" *Illinois v. Gates*, 462 U.S. 213, 241 (1983). Rehnquist described the constitutional balance as one involving competing public interests. See *United States v. James Daniel Good Real Prop.*, 510 U.S. 43, 67 (1993) (Rehnquist, C.J., dissenting) ("The Fourth Amendment strikes a balance between the people's security in their persons, houses, papers, and effects and the public interest in effecting searches and seizures for law enforcement purposes.").

<sup>15</sup> See Thomas Y. Davies, *The Supreme Court Giveth and the Supreme Court Taketh Away: The Century of Fourth Amendment "Search and Seizure" Doctrine*, 100 J. CRIM. L. & CRIMINOLOGY 933, 993 (2010) (noting that Nixon sought out Rehnquist because of his "opposition to the Warren Court's criminal procedure rulings"); JOHN W. DEAN, *THE REHNQUIST CHOICE* 268-69 (2001) (observing that before his appointment Rehnquist had argued that the Supreme Court's criminal procedure rulings had "hindered the enforcement of the criminal law").

<sup>16</sup> See Mark C. Rahdert, *William Rehnquist's Judicial Craft: A Case Study*, 60 TEMP. L. Q. 841, 847 (1987) (declaring that Rehnquist's "position on the fourth amendment no doubt marked one end of a continuum of views on the Court," although "other Justices shared" that position, "at least in part").

considerably more than was justified.<sup>17</sup> As will be seen, Rehnquist sought to “right”<sup>18</sup> the balance by implementing narrow conceptions of the terms “search” and “seizure.” He worked to recalibrate the scales by eliminating or weakening onerous norms of “reasonableness” that had been promulgated and by replacing them with less demanding, more malleable criteria. Finally, believing that the exclusion sanction was not a part of the Framers’ effort to reconcile freedom with order, he advocated its abolition and strove at every turn to minimize its negative impacts on the government’s abilities to successfully prosecute criminals.<sup>19</sup>

Earlier, I suggested that Fourth Amendment freedoms are an essential substrate for the enjoyment of other civil liberties. William Rehnquist believed that an orderly society—maintained through efficient and effective law enforcement—was vital to the preservation of liberties. His vision of the Fourth Amendment balance as less restrictive of official authority grew out of a belief that control over the forces of disorder is a critical predicate for the preservation of a genuinely free society.<sup>20</sup>

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<sup>17</sup> See *Robbins v. California*, 453 U.S. 420, 438 (1981) (Rehnquist, J., dissenting) (charging that the Court had “failed to appreciate the impact of its decisions, not mandated by the Fourth Amendment, on law enforcement” and had indulged the “casual assumption that police are not substantially frustrated in their efforts to apprehend” criminals or “gather evidence . . . by the judicially created preference for a warrant”); see also Craig M. Bradley, *Criminal Procedure in the Rehnquist Court: Has the Rehnquisition Begun?*, 62 IND. L. J. 273, 291 (1987) (observing that Rehnquist’s “fourth amendment jurisprudence [was] informed by the view that the Warren Court went too far in [one] direction, according the criminal defendant too many rights and allowing the crime problem to threaten the civil liberty of the people”).

<sup>18</sup> The double entendre is quite deliberate. I mean to suggest that Rehnquist was determined to “correct” the erroneous balancing of the constitutional scales by placing more weight on the government’s side, a position consistent with the “conservative” end of the political spectrum.

<sup>19</sup> See SUE DAVIS, *JUSTICE REHNQUIST AND THE CONSTITUTION* 44-45 (1989) (contending that in general, Rehnquist aimed to “strengthen the ‘peace forces’ against the ‘criminal forces’” and to “swing the pendulum away from the protection of the rights of the accused and toward the power of government”).

<sup>20</sup> See Bradley, *Criminal Procedure in the Rehnquist Court*, *supra* note 17, at 292 (quoting a Rehnquist speech in which he observed that “the claim of fair and efficient administration of the law may be idealized in terms of the *sine qua non* of a self-governing society” and asserted “that a society that is unable to enforce the laws it has enacted” is not one “in which civil liberties and privacy are secure”).

*C. Painting by the Numbers: A Quantitative Sketch of William Rehnquist's Votes and Opinions in Fourth Amendment Cases*

Before exploring the substance of Rehnquist's Fourth Amendment views in detail—that is, the principles, reasoning, premises, and doctrines that informed his efforts to implement a more law enforcement-friendly regime—a quantitative sketch of his thirty-three-year record of opinions and votes seems fitting. Viewed from various angles, this numerical account resoundingly confirms the perspective just described.<sup>21</sup>

William Rehnquist assumed his place on the Supreme Court on January 7, 1972, and served until his death on September 3, 2005, a period just a few days short of thirty-three years and eight months.<sup>22</sup> He was an Associate Justice from his appointment until September 26, 1986, when he assumed the mantle of Chief Justice.<sup>23</sup> He served in that post for nearly nineteen years.<sup>24</sup> Only six Justices have served on the Court for longer spans, and only three have been Chief longer than he was.<sup>25</sup> The Supreme Court resolved 207 cases involving Fourth Amendment issues during the Rehnquist years, and he cast votes in 205.<sup>26</sup> Rehnquist authored sixty-eight majority, concurring, and dissenting opinions in cases involving Fourth Amendment issues.<sup>27</sup> His first Fourth

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<sup>21</sup> To support my numerical claims, I have created a table of the decisions as an Appendix to this article. James J. Tomkovicz, *Fourth Amendment Decisions During the Rehnquist Years (1972-2005)*, 82 MISS. L.J. 443 (2013) (hereinafter cited as Appendix).

<sup>22</sup> See Madhavi M. McCall & Michael A. McCall, *Chief Justice William Rehnquist: His Law-and-Order Legacy and Impact on Criminal Justice*, 39 AKRON L. REV. 323, 372 n.21 (2006); see also *William H. Rehnquist*, The Oyez Project at IIT Chicago-Kent College of Law, [http://oyez.org/justices/william\\_h\\_rehnquist](http://oyez.org/justices/william_h_rehnquist) (last visited January 18, 2013).

<sup>23</sup> *William Hubb Rehnquist (1924-2005)*, Cornell Information Institute: Supreme Court Collection, <http://www.law.cornell.edu/supct/justices/rehnquist.bio.html> (last visited January 18, 2013).

<sup>24</sup> McCall & McCall, *supra* note 22, at 323.

<sup>25</sup> *Id.* at 332.

<sup>26</sup> The Appendix lists all of the Court's Fourth Amendment decisions during Rehnquist's tenure. I believe the list compiled is comprehensive. If I have overlooked any Fourth Amendment decisions during the Rehnquist years, I apologize for the oversight. The Court averaged more than six Fourth Amendment decisions per year between 1972 and 2005. Rehnquist did not participate in *Devenpeck v. Alford*, 543 U.S. 146 (2004) or *Illinois v. Caballes*, 543 U.S. 405 (2005).

<sup>27</sup> This means that Rehnquist averaged just over two Fourth Amendment opinions per year and one opinion for every three Fourth Amendment cases before the Court. I am indebted to Professor Thomas Clancy, organizer of this Symposium, for assembling

Amendment opinion was in *Adams v. Williams*,<sup>28</sup> a case decided on June 12, 1972, a little more than five months after Rehnquist's arrival. His final Fourth Amendment opinion was in *Muehler v. Mena*,<sup>29</sup> handed down on March 22, 2005, nearly six months before his departure.

Of the 205 Fourth Amendment cases in which Rehnquist cast an identifiable vote, he favored the pro-law enforcement position 164 times, he endorsed a pro-Fourth Amendment stance 28 times, he supported a “split” position (partly pro-law enforcement and partly pro-Fourth Amendment rights) on four occasions, and, in my view, nine of his votes were “neutral.”<sup>30</sup> Excluding the “neutral” positions and dividing up the split votes, he favored law enforcement in 166 of 196 cases, roughly 85 percent of the time, and agreed that the Fourth Amendment claim had merit in 30 cases, approximately 15 percent of the time.

During the Rehnquist years, I identify 190 Supreme Court decisions as clearly favoring or disfavoring Fourth Amendment protection.<sup>31</sup> Majorities ruled in favor of Fourth Amendment protection 55 times, or nearly 29 percent of the time. Rehnquist disagreed with the majority in 27 of those cases and agreed with

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and organizing a list of Rehnquist's Fourth Amendment opinions. See Thomas K. Clancy, *Foreword: William Rehnquist's Fourth Amendment: 2012 Fourth Amendment Symposium*, 82 MISS. L.J. i (2013). The Appendix includes a column noting whether Rehnquist authored an opinion and the type of opinion he authored. See Appendix, *supra* note 21.

<sup>28</sup> 407 U.S. 143 (1972). *Adams* was a majority opinion in which the Court rejected a Fourth Amendment claim by a 6-3 vote. *Id.* It was just the second Fourth Amendment case in which he voted and the only Fourth Amendment opinion Rehnquist authored during his initial year. Tomkovicz, *supra* note 21, at 444.

<sup>29</sup> 544 U.S. 93 (2005). In *Mena*, the vote against the Fourth Amendment claims was unanimous, but Rehnquist's majority opinion was joined by a bare majority of five Justices, and one of the five, Justice Kennedy, qualified his position by expressing concern about the need to ensure that a police practice at issue—handcuffing detainees in homes during searches—did not become “excessive.” See *id.* at 102 (Kennedy, J., concurring). *Mena* was the sole Rehnquist Fourth Amendment opinion during his final year and the last Fourth Amendment case in which he participated. Tomkovicz, *supra* note 21, at 486.

<sup>30</sup> One of the columns in the table includes classifications of Rehnquist's positions in the cases. See Appendix, *supra* note 21.

<sup>31</sup> Of the 205 cases in which Rehnquist voted, I classify ten of the Court's outcomes as “neutral” Fourth Amendment rulings and five of the Justices' rulings as “split decisions.”

the majority in 28—a roughly 50-50 split.<sup>32</sup> The Supreme Court rejected Fourth Amendment protection on 135 occasions or approximately 71 percent of the time. Rehnquist agreed with the majority in every one of those decisions. Not once did he take a position more solicitous of constitutional rights than the Court majority.

Thirty-eight of the Fourth Amendment cases were decided by a single vote. Thirty of those bare majority rulings rejected Fourth Amendment claims, and Rehnquist was in the majority, providing a critical vote in every one of them.<sup>33</sup> The Court sustained Fourth Amendment claims in seven cases that were decided by 5-4 votes,<sup>34</sup> and not once was William Rehnquist one of the five Justices in the majority.<sup>35</sup> In fact, in over three decades, William Rehnquist had an almost flawless record of not being more indulgent of Fourth Amendment claims than any of his colleagues. Of the 205 Fourth Amendment cases he was involved in deciding during his tenure, *Bond v. United States*<sup>36</sup> was the sole blemish, the lone outlier in which Rehnquist took a more “civil libertarian” position than another member of the Court.<sup>37</sup>

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<sup>32</sup> All but one of the twenty-eight decisions favoring Fourth Amendment protection were unanimous. The sole exception was *Bond v. United States*. See *infra* note 37 and accompanying text. Thus, when Rehnquist took a stance against law enforcement, it was virtually always in a case where the merits tipped decidedly in favor of Fourth Amendment shelter. Of the twenty-seven pro-Fourth Amendment decisions with which Rehnquist disagreed, he was alone in dissent only four times.

<sup>33</sup> All but one of these cases was decided by a 5-4 vote. In *Murray v. United States*, 487 U.S. 533 (1988), two Justices did not participate and the vote was 4-3.

<sup>34</sup> I count *United States v. James Daniel Good Real Property*, a 5-4 decision in which Rehnquist authored a dissent, as “neutral” regarding the Fourth Amendment. 510 U.S. 43 (1993).

<sup>35</sup> See McCall & McCall, *supra* note 22, at 335-36, 343 (asserting that in criminal justice rulings in general and Fourth Amendment decisions in particular, Rehnquist was the only “conservative” Justice not to provide the critical vote in a bare majority decision favoring civil liberties).

<sup>36</sup> 529 U.S. 334 (2000). Moreover, it took Rehnquist nearly three decades to break his streak. *Bond* was decided during his twenty-ninth year on the Court. Chief Justice Rehnquist authored the majority opinion upholding the Fourth Amendment claim. Two Justices, Breyer and Scalia, would have rejected the claim. See *id.* at 339 (Breyer, J., dissenting).

<sup>37</sup> I am most grateful to another participant in this Symposium for first bringing this fact to my attention a number of years ago. See Craig M. Bradley, *The Fourth Amendment: Be Reasonable*, in THE REHNQUIST LEGACY 86-87 (Craig M. Bradley ed., 2006). There are at least a couple of decisions in which Rehnquist’s *vote* was not more pro-Fourth Amendment than another Justice, but his *opinion* evinces a more favorable

Of the sixty-eight cases in which Rehnquist authored opinions, forty-eight were majority opinions, six were concurring opinions, and fourteen were dissenting opinions. Thirty-nine of the majority opinions were pro-law enforcement, rejecting Fourth Amendment protection, four of his majority opinions favored Fourth Amendment claims, and five were neutral. Four of the concurring opinions joined majorities that favored Fourth Amendment claims, while two agreed with decisions favorable to law enforcement. Thirteen of his fourteen dissents expressed anti-Fourth Amendment positions and one was neutral. Overall, excluding the six neutral decisions, Rehnquist voted against Fourth Amendment claims in fifty-four of sixty-two cases, eighty-seven percent of the time, while he voted in favor of constitutional shelter in only eight of them. His votes favoring the pro-law enforcement position were in the majority forty-one times and in the minority thirteen times. All eight of his votes in favor of Fourth Amendment claims were majority positions.<sup>38</sup>

The numbers paint a bold and vivid picture of a Justice who typically believed that the Fourth Amendment balance tipped toward law enforcement in cases meriting Supreme Court scrutiny. Moreover, the numbers understate the pro-law enforcement tilt of Rehnquist's positions on Fourth Amendment issues. A closer look at the eight Rehnquist opinions that are ostensibly pro-Fourth Amendment reveals that he was even less generous in his interpretations of Fourth Amendment protection than the numbers indicate.

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inclination toward the rights guaranteed by that provision than one or more of his colleagues. See *Minnesota v. Carter*, 525 U.S. 83 (1998) (endorsing a position regarding the capacity of guests in homes to claim exclusion that is more generous than the concurring position taken by Justices Scalia and Thomas); *Donovan v. Dewey*, 452 U.S. 594, 608-09 (1981) (Rehnquist, J., concurring in the judgment) (disagreeing with the majority reasoning supporting a warrantless search because, in his view, the Court's precedents did not justify the suspension of warrant protection for business premises based on pervasive regulation alone). In addition, in *Groh v. Ramirez*, 540 U.S. 551 (2004), Chief Justice Rehnquist did not write an opinion but voted with the dissenters solely on qualified immunity grounds. See *id.* at 566 (Kennedy, J., dissenting); *id.* at 578 (Thomas, J., dissenting). Unlike Justices Thomas and Scalia, Rehnquist did not disagree with the Court's conclusion that the Fourth Amendment had been violated. See *id.* at 571-77 (Thomas, J., dissenting).

<sup>38</sup> In seven of the eight cases, the Court was unanimously in favor of the Fourth Amendment claim. *Bond*, of course, was the one decision that was not unanimous. 529 U.S. 334. See *supra* note 37 and accompanying text.

William Rehnquist had been an Associate Justice for three years when he authored his first opinion supportive of a Fourth Amendment claim. In *United States v. Brignoni-Ponce*,<sup>39</sup> a unanimous Court held that roving border patrol stops could not be based on apparent ancestry alone, but required a reasonable suspicion of criminal activity. While Rehnquist joined this opinion, the motivation for his concurrence was to highlight the narrowness of the Court's ruling. He expressed his approval of random stops of "motorists using highways in order to determine whether they . . . met the qualifications . . . for such use" and pointed out that the Court's decision did not render "agricultural inspections and highway roadblocks to apprehend known fugitives . . . in any way constitutionally suspect."<sup>40</sup> Consequently, while he *voted* in favor of the constitutional claim, his *opinion* was not supportive of Fourth Amendment protection.

That same day, Justice Rehnquist also authored a concurrence in *United States v. Ortiz*,<sup>41</sup> another unanimous opinion holding that nonconsensual *searches* of vehicles at fixed checkpoints at locations removed from the border required probable cause.<sup>42</sup> In fact, Rehnquist *disagreed* with the Court's protective interpretation of the Fourth Amendment, describing the majority's holding as "an extension of the *unsound rule* announced in" *Almeida-Sanchez*.<sup>43</sup> He decided, nonetheless, to "join the" Court's opinion only "because a majority . . . still adhere[d] to" that *unsound rule* and he agreed that there was inadequate reason to treat fixed checkpoints differently from the roving patrol searches condemned in *Almeida-Sanchez*.<sup>44</sup> Moreover, he "stress[ed]" the limits of the ruling in *Ortiz*, pointing out that only "full searches" were at issue and asserting that stops at checkpoints to "inquir[e] about citizenship" were "modest intrusion[s]" that "effectively serve the important national interest in controlling illegal

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<sup>39</sup> 422 U.S. 873, 885-87 (1975).

<sup>40</sup> *Id.* at 887-88 (Rehnquist, J., concurring).

<sup>41</sup> 422 U.S. 891 (1975).

<sup>42</sup> *Id.* at 896-97.

<sup>43</sup> *Id.* at 898 (Rehnquist, J., concurring). Two years before *Ortiz*, the Justices ruled that *searches* of vehicles by roving patrols had to be based on probable cause. *See Almeida-Sanchez v. United States*, 413 U.S. 266 (1973). In that case, Rehnquist joined the dissent. *See id.* at 285 (White, J., dissenting).

<sup>44</sup> *Ortiz*, 422 U.S. at 898 (Rehnquist, J., concurring).

entry.”<sup>45</sup> Once again, despite his *vote* to sustain a Fourth Amendment claim, Justice Rehnquist’s *opinion* was anything but favorable toward constitutional shelter.

Three years later, Rehnquist again supported a unanimous decision in favor of a Fourth Amendment claim. In *Mincey v. Arizona*, the Justices refused to adopt a “murder scene exception” to the search warrant rule and found a four-day-long warrantless search unreasonable.<sup>46</sup> After confirming his agreement with his colleagues, Rehnquist “emphasize[d] that” the majority opinion had not decided “what, if any, evidence” had been “seized” as a result of the illegal search<sup>47</sup> and highlighted the grounds on which the state courts might find the evidence at stake admissible.<sup>48</sup> In addition, he floated a pro-law enforcement trial balloon, sketching a doctrine under which valid initial home entries by officers in response to a shooting might justify subsequent warrantless entries pursuant to “exigencies that in tamer circumstances might not permit a search.”<sup>49</sup> In other words, Justice Rehnquist used his concurrence to instruct a state court how to avoid suppression and to propose an expanded variety of exigency exception to the warrant rule. Again, he lined up on the Fourth Amendment’s side, but his opinion was designed to detract from that guarantee’s protection.

Rehnquist did not author a majority opinion sustaining a Fourth Amendment claim until nearly two decades after his appointment, four years after his elevation to Chief Justice. In *Florida v. Wells*,<sup>50</sup> a unanimous Court held that a warrantless search did not satisfy the “standardized criteria” or “established routine” requirement<sup>51</sup> for the “inventory search” exception to the search warrant rule because the police “had no policy whatever with respect to the opening of closed containers” in vehicles.<sup>52</sup>

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<sup>45</sup> *Id.* at 898-99 (Rehnquist, J., concurring).

<sup>46</sup> 437 U.S. 385, 395 (1978).

<sup>47</sup> *Id.* at 406 (Rehnquist, J., concurring in part and dissenting in part). Justice Rehnquist was also the sole dissenter from the Court’s further holding that the defendant’s confession was involuntary and inadmissible as a matter of due process. *See id.* at 407-10 (Rehnquist, J., concurring in part and dissenting in part).

<sup>48</sup> *Id.* at 406.

<sup>49</sup> *Id.* at 406-07.

<sup>50</sup> 495 U.S. 1 (1990).

<sup>51</sup> *Id.* at 4.

<sup>52</sup> *Id.* at 4-5.

Most of Rehnquist's terse majority opinion, however, was devoted to explaining that the Florida Supreme Court had erred by relying on the principle that inventory search policies must mandate that either all or none of the containers in a vehicle be searched.<sup>53</sup> According to the Chief Justice, the Fourth Amendment was not so demanding. Although it forbids "uncanalized discretion" of the sort allowed by the Florida Highway Patrol, it permits officers to exercise some judgment in deciding which containers to inventory.<sup>54</sup>

The Florida Supreme Court's contrary conclusion was hardly a lark. Just three years earlier, five Justices had indicated that warrantless inventories were permissible *only* when departments eliminated all discretion regarding the scope of the search officers could conduct.<sup>55</sup> Consequently, while Rehnquist favored the Fourth Amendment claimant in *Wells* and authored the first of his four majority opinions sustaining unreasonable search contentions, he managed to attract slim majority support for an expansion of the inventory search exception to the search warrant rule that loosened the constraints on officers' explorations of the contents of private repositories discovered in impounded vehicles.<sup>56</sup> Despite the announcement that totally unconstrained

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<sup>53</sup> *Id.* at 4.

<sup>54</sup> *Id.* at 4.

<sup>55</sup> See *Colorado v. Bertine*, 479 U.S. 367, 376 (1990) (Blackmun, J., concurring); *id.* at 377 (Marshall, J., dissenting).

<sup>56</sup> The "standard" announced in *Wells* regarding the scope of permissible discretion is so ambiguous that it is difficult to tell the breadth of the judgment that officers may exercise consistent with the Constitution. Rehnquist declared that officers may have the "latitude" to decide whether to open a container "in light of the nature of the search and characteristics of the container." *Wells*, 495 U.S. at 4. He sanctioned policies allowing officers to open "containers whose contents officers determine they are unable to ascertain from examining . . . exteriors" and declared that "[t]he allowance of the exercise of judgment based on concerns related to the purposes of an inventory search" was constitutional. *Id.* These amorphous descriptions seem intended to endorse most inventory policies that do not authorize *entirely* unfettered discretion.

Although the vote to strike down the search in *Wells* was unanimous, only five Justices joined Rehnquist's opinion. Because the Chief Justice had exploited the opportunity to write his first pro-Fourth Amendment majority opinion to expand law enforcement authority and erode privacy protection, four Justices concurred in the judgment, expressing disapproval of the announcement that officers could exercise discretion in searching vehicle contents. See *id.* at 9-10 (Brennan, J., concurring in the judgment); *id.* at 11 (Blackmun, J., concurring in the judgment); *id.* at 12 (Stevens, J., concurring in the judgment).

inventory discretion is impermissible, *Wells* is anything but an unqualifiedly pro-Fourth Amendment opinion. Thus, as of 1990, William Rehnquist had still not written an opinion that was devoid of efforts to enhance law enforcement authority by diminishing the protection against unreasonable searches and seizures.

The Chief Justice's 1996 opinion in *Ornelas v. United States*<sup>57</sup> is difficult to classify. For an eight-Justice majority, he concluded that appellate review of probable cause and reasonable suspicion determinations must be *de novo*, not deferential.<sup>58</sup> Rehnquist voted for the Fourth Amendment claim in *Ornelas*. The majority vacated an appellate ruling that had been inappropriately deferential in affirming a trial judge's probable cause and reasonable suspicion findings.<sup>59</sup> Under *de novo* scrutiny, the accused in that case had a better chance of prevailing on appeal. Nonetheless, it is quite uncertain whether the substance of Rehnquist's opinion and ruling are generally protective of Fourth Amendment rights. In cases where trial judges find no probable cause or reasonable suspicion, *de novo* review improves the *government's* odds of ultimate success. Although Rehnquist supported the defendant's Fourth Amendment position, his opinion addressed standards of appellate review, not the breadth of constitutional protection against unreasonable searches and seizures.<sup>60</sup> Thus, at best, *Ornelas* is "neutral" regarding Fourth Amendment rights.

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Rehnquist had already written an opinion recognizing that the *impoundment* decision that is a predicate for inventory search authority could also be discretionary "so long as that discretion is exercised according to standard criteria," and he sustained a policy according officers generous authority to choose whether to impound vehicles. See *Bertine*, 479 U.S. at 375-76.

<sup>57</sup> 517 U.S. 690 (1996).

<sup>58</sup> *Id.* at 691, 698-99.

<sup>59</sup> *Id.* at 700.

<sup>60</sup> Between *Wells* and *Ornelas*, the Chief authored an opinion in *Minnesota v. Dickerson*, 508 U.S. 366, 383 (1993) (Rehnquist, J., concurring in part and dissenting in part). The majority sustained the Minnesota Supreme Court's conclusion that an officer exceeded the bounds of a *Terry* frisk by manually manipulating the contents of a suspect's pocket. *Id.* at 379. The legal content of Rehnquist's opinion was unquestionably pro-Fourth Amendment. He agreed that frisk authority must be confined to what is necessary to look for weapons and that *Terry* does not allow "evidentiary" searches on less than probable cause. *Id.* at 383. He made no effort to expand officers' authority to search suspects for contraband. Nonetheless, he disagreed

Decisions in 1998, 1999, and 2000 produced Rehnquist's three most capacious Fourth Amendment opinions. *Knowles v. Iowa*<sup>61</sup> resolved a question he had left unsettled in *United States v. Robinson*.<sup>62</sup> Chief Justice Rehnquist wrote the opinion for a unanimous Court, concluding that an officer lacks authority to search a motorist merely cited for speeding even though the officer *could have* arrested the motorist.<sup>63</sup> A custodial arrest was necessary to trigger the search incident to arrest exception.<sup>64</sup> In *Knowles*, Rehnquist not only cast his vote in favor of an unreasonable search claim, his opinion neither shrunk constitutional protection nor expanded law enforcement search authority. It was his most pro-Fourth Amendment opinion to-date.

Nevertheless, he crafted the rejection of authority to search incident to traffic citations as narrowly as possible. The Chief Justice first pointed out that the validity of the Iowa statute authorizing searches incident to citations was not at issue, and that the sole question was the constitutionality of "the search at issue."<sup>65</sup> In addition, his reasoning—that the threat to officer safety was less serious in citation situations and that there was no possibility of finding "evidence of excessive speed" on the arrestee or in his vehicle<sup>66</sup>—left room for argument that a warrantless, causeless search incident to a citation might be permissible if the citation was for an offense which might involve evidence. Moreover, Rehnquist opined that officers could ensure their safety

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with the majority's disposition of Dickerson's claim. *Id.* He did not believe that the Minnesota courts had actually determined whether the officer had gained probable cause while conducting a proper *Terry* frisk. *Id.* Consequently, he advocated vacating the Minnesota Supreme Court's ruling in the defendant's favor and remanding the case for a clear determination of that issue, a determination that could have sustained the constitutionality of the search that exceeded *Terry* frisk bounds. *Id.* Rehnquist's position was protective of Fourth Amendment rights, but his opinion was motivated by a desire to uphold the constitutionality of the officer's search and the admissibility of the contraband discovered. *Id.*

<sup>61</sup> 525 U.S. 113 (1998).

<sup>62</sup> 414 U.S. 218, 236 n.6 (1973). Rehnquist wrote the majority opinion in *Robinson* during his second year on the Court. The opinion was a very generous interpretation of law enforcement authority to conduct thorough warrantless, causeless searches of persons arrested for relatively minor offenses.

<sup>63</sup> *Knowles*, 525 U.S. at 118-119.

<sup>64</sup> *Id.* at 116-17, 119.

<sup>65</sup> *Id.* at 116.

<sup>66</sup> *Id.* at 118.

by ordering all occupants of a vehicle to get out and patting them down based on “reasonable suspicion that they may be armed and dangerous.”<sup>67</sup> In fact, the Court had not yet addressed officers’ authority to search passengers not suspected of any involvement in criminal activity.<sup>68</sup> Finally, Rehnquist responded to the claim that authority was needed to prevent a suspect from destroying “evidence related to his identity” by instructing officers that they might arrest a driver who does not furnish adequate identification, then conduct a full search incident to that arrest.<sup>69</sup> In sum, in *Knowles*, the Chief Justice made efforts to ensure that law enforcement officers had ample authority to protect themselves, and, perhaps, happen upon some evidence along the way.<sup>70</sup>

*Wilson v. Layne*<sup>71</sup> is my nominee for the most generous Fourth Amendment opinion authored by William Rehnquist. For a unanimous Court, he wrote an opinion holding that officers acted unreasonably when they brought media representatives into a home they were authorized to search.<sup>72</sup> His reasoning placed heavy emphasis on the special constitutional protection afforded home privacy.<sup>73</sup> Moreover, he pointedly rejected each of the government’s putatively “legitimate law enforcement purposes” as inadequate to justify an invasion of the “important right” to home privacy which is “guaranteed by th[e Fourth] Amendment’s text.”<sup>74</sup> *Layne* bars the police from bringing gratuitous others into dwellings; it allows officers to bring only those third parties whose “presence” directly aids the performance of their law enforcement functions.<sup>75</sup>

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<sup>67</sup> *Id.*

<sup>68</sup> Years later, after Rehnquist’s departure, the Court would approve the authority to frisk passengers for weapons in the situations contemplated by the Chief Justice. See *Arizona v. Johnson*, 555 U.S. 323 (2009).

<sup>69</sup> *Knowles*, 525 U.S. at 118.

<sup>70</sup> It is conceivable, though by no means certain, that Rehnquist voted against his natural inclination in *Knowles* in order to write an opinion that was as minimally restrictive of law enforcement as necessary.

<sup>71</sup> 526 U.S. 603 (1999).

<sup>72</sup> *Id.* at 605, 614.

<sup>73</sup> *Id.* at 612-13.

<sup>74</sup> *Id.* at 605, 614.

<sup>75</sup> *Id.* at 611, 614.

It is noteworthy that Rehnquist shielded the officers in *Layne* from civil liability, concluding that they were entitled to qualified immunity because the law was not clear at the time of their unconstitutional actions.<sup>76</sup> Further, he made it clear that evidence found by officers during a home search rendered unconstitutional by unnecessary third parties would not be suppressed from a criminal trial unless the third parties contributed to the discovery of the evidence.<sup>77</sup> He even intimated that evidence acquired only because the third parties were improperly present might not be subject to suppression.<sup>78</sup>

*Layne* was a logical vehicle for the Chief Justice's most pro-Fourth Amendment opinion. Forbidding privacy invasions by gratuitous third parties did not impede officers' abilities to conduct legitimate home searches. Moreover, if officers transgressed the *Layne* restriction—and there was surely little risk they would accidentally do so—there was virtually no chance that it would interfere with the government's ability to secure a conviction. The most serious consequence would be civil liability—and the clarity of the ruling made it easy for officers to avoid that consequence.

The final opinion Rehnquist wrote in favor of a Fourth Amendment claim and restrictive of law enforcement authority has already been mentioned. In *Bond v. United States*,<sup>79</sup> he authored a majority opinion holding unconstitutional an officer's "physical manipulation" of a soft-sided bag in an overhead compartment on a bus. The case turned on whether the officer's actions constituted a "search" at all. The Chief Justice concluded that the officer's conduct had triggered Fourth Amendment regulation by violating a reasonable expectation of privacy.<sup>80</sup> In

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<sup>76</sup> *Id.* at 605-06, 618. The Justices affirmed the lower court's recognition of qualified immunity. Consequently, Rehnquist ultimately voted against the Fourth Amendment claimants in *Layne*—although not on the merits. In this sense, *Layne* was a mirror image of *Ornelas*.

<sup>77</sup> *Id.* at 614 n.2 (asserting that when officers are "lawfully present" it is only the "presence of the media and not the presence of the police" that violates the Fourth Amendment, and indicating, therefore, that suppression would be required, at most, for "evidence discovered or developed by the media representatives").

<sup>78</sup> *Id.* (refraining from deciding "whether the exclusionary rule would apply to any evidence discovered or developed by the media representatives").

<sup>79</sup> 529 U.S. 334 (2000).

<sup>80</sup> *Id.* at 338-39.

response to the government's claim that "by exposing his bag to the public," the defendant had "lost a reasonable expectation" of privacy in the bag,<sup>81</sup> Rehnquist asserted that a bus passenger expects the public to handle a bag placed in an overhead compartment but "does not expect that other passengers or bus employees will . . . feel the bag in an exploratory manner," as "the agent did" in *Bond*.<sup>82</sup> The upshot is that if officers manipulate a bag no more than one can expect of the public, there is no cognizable privacy invasion. They are constrained by the Fourth Amendment reasonableness demand *only* if they exceed the public intrusions that can be anticipated.

Rehnquist's positions in *Bond* were unarguably protective of Fourth Amendment privacy interests in personal belongings. He restrained officers' investigative authority in an opinion that contains nothing overtly promotive of law enforcement interests. The Chief Justice might not have considered the restriction imposed to be a severe impediment to effective investigations. Officers are unlikely to detect much contraband or evidence through tactile contact with soft-sided bags. Moreover, they remain free to handle bags in a non-exploratory manner without any objective justifications. In addition, it seems entirely possible that Rehnquist's vote in favor of the defendant might have been strategic. As Chief Justice and a member of the majority, he could claim the opinion as his own and could minimize its interference with law enforcement authority.<sup>83</sup>

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<sup>81</sup> *Id.* at 337.

<sup>82</sup> *Id.* at 338-39.

<sup>83</sup> Justices Breyer and Scalia would have ruled that physical manipulation was never a search. *See id.* at 339 (Breyer, J., dissenting). If Chief Justice Rehnquist had sided with the dissenters, as very well might have been his inclination, Justice Stevens would have been entitled to write or assign the majority opinion. The opinion could have imposed tighter restrictions on officers' authority to handle belongings. There are powerful reasons to believe that the same year as *Bond* Rehnquist cast his vote against the conclusion he preferred in another case with much greater law enforcement significance. *Dickerson v. United States*, 530 U.S. 428 (2000), involved a direct challenge to the legitimacy of the *Miranda* doctrine. *Id.* at 431-32. Rehnquist, who had made no secret of his hostility toward *Miranda*, voted to sustain the landmark ruling, then drafted an artful opinion that accorded the *Miranda* doctrine no greater force than was necessary and, most important, preserved the prophylactic rationale that had been the basis for its dramatic erosion. *Id.* at 442-44. Had he not cast his lot with *Miranda*'s proponents, Justice Stevens, or his designee, might have breathed new life into the tenuous icon.

My trek through the Rehnquist Fourth Amendment catalogue produced not a single surprise. Every vote in favor of a Fourth Amendment claim and every opinion written in one of the cases where he cast such a vote is easily reconciled with his “conservative” conception of the nature of that guarantee’s constraints upon law enforcement. By my count, eight of his sixty-eight opinions were in cases where his position favored Fourth Amendment protection. A number of those opinions, however, evinced his signature pro-law enforcement bent. In some, he expanded or sought to expand search and seizure powers. In most that involved no efforts to increase investigative authority, he grabbed the reins and penned opinions that avoided severe damage to officers’ crime-fighting abilities. Rehnquist’s voting pattern in the 205 Fourth Amendment disputes in which he participated and in the sixty-eight in which he authored opinions provide overwhelming evidence of his disinclination to expand privacy, property, or liberty protection at the expense of law enforcement authority. Close examination of his opinions in the cases involving stances favoring constitutional rights serves only to confirm the accuracy of the portrait painted by the numbers.<sup>84</sup>

*D. William Rehnquist’s Fourth Amendment Premises: A Qualitative Portrait*

This part examines the content of Rehnquist’s Fourth Amendment jurisprudence—the principles, premises, reasoning, and doctrinal standards he employed to express and implement his understanding of the Framers’ search and seizure balance. As noted earlier,<sup>85</sup> three main elements of the Fourth Amendment’s resolution of the tension between liberty and order are the identification of conduct it regulates, the definition of the term “unreasonable,” and the prescription of consequences for

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<sup>84</sup> A temporal perspective also yields an interesting picture. If *United States v. Brignoni-Ponce*, 422 U.S. 873 (1975), *United States v. Ortiz*, 422 U.S. 891 (1975), and *Mincey v. Arizona*, 437 U.S. 385 (1978)—the opinions with the palpable purpose of restricting the impact of a majority opinion’s interference with law enforcement—are excluded, the remaining opinions appeared between 1990 and 2000. It is no stretch to contend that William Rehnquist authored no genuinely pro-Fourth Amendment opinions during the first seventeen and the last five years he sat on the Court.

<sup>85</sup> See *supra* Part II.A.

violations. More specifically, the constitutional balance involves defining what constitutes a search and what amounts to a seizure, specifying what renders a search or a seizure unreasonable, and deciding whether and when relevant, probative evidence must be excluded from trials. The Warren Court revolutionized the definition of “searches” in *Katz v. United States*,<sup>86</sup> the landmark expansion of Fourth Amendment scope. In addition, that Court endorsed and adhered to basic norms of reasonableness—the general demands for probable cause and a warrant.<sup>87</sup> Finally, during the 1960s, the Justices presumed that illegally obtained evidence would be suppressed; its admission was exceptional.<sup>88</sup>

### 1. The Negatives: Rehnquist’s Hostility Toward the Governing Norms

William Rehnquist sought to correct the imbalances he perceived in prior interpretations of the Fourth Amendment by challenging the validity of some prevailing norms and by construing others narrowly. He sought to tear down some parts of the constitutional edifice and to remodel others.

#### *a. Rehnquist’s Approach to the “Search” and “Seizure” Thresholds: Shrinking the Fourth Amendment’s Purview*

The Chief Justice’s contributions to defining what constitutes a search or seizure were relatively modest. He authored only two opinions addressing the search threshold.<sup>89</sup> In *United States v.*

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<sup>86</sup> 389 U.S. 347 (1967).

<sup>87</sup> See *Wong Sun v. United States*, 371 U.S. 471, 478-80 (1963) (affirming a probable cause norm for warrantless searches and seizures) and *Katz*, 389 U.S. at 356-57 (explaining the search warrant demand).

<sup>88</sup> When the Warren era ended, the only two exceptions to the exclusionary rule were the “independent source” doctrine, which had roots in a 1920 opinion, see *Silverthorne Lumber Co. v. United States*, 251 U.S. 385, 392 (1920), and the attenuation exception, which was traceable to a 1939 opinion. See *Nardone v. United States*, 308 U.S. 338, 341 (1939). In addition, in 1954, the pre-Warren Court identified very limited circumstances in which the government could use illegally-acquired evidence to impeach a defendant’s trial testimony. See *Walder v. United States*, 347 U.S. 62, 65 (1954).

<sup>89</sup> Rehnquist did write four other opinions addressing whether a search had occurred in cases where the threshold question was not central. All four were hostile to Fourth Amendment coverage. See *Texas v. Brown*, 460 U.S. 730, 740 (1983) (asserting that use of a flashlight to illuminate the interior of a vehicle “simply does not constitute

*Knotts*,<sup>90</sup> his majority opinion denied Fourth Amendment protection against technology-aided surveillance, while in *Bond v. United States*,<sup>91</sup> his majority opinion affirmed constitutional regulation of exploratory manual manipulation. Rehnquist did not oppose the *Katz* doctrine's "reasonable expectation of privacy" criterion for determining whether a search has occurred.<sup>92</sup> In fact, he found it a quite accommodating vehicle for ensuring ample law enforcement authority.

Despite the even split in the outcomes of Rehnquist's two majority threshold opinions, it is clear that he held a narrow understanding of the search category. In *Knotts*, he exploited the malleability and ambiguity of the *Katz* doctrine to deny constitutional privacy interests in publicly exposed movements.<sup>93</sup> The result was to free officials of Fourth Amendment constraints when they used a technological device to gain information that, as a practical matter, they might well have been unable to acquire by relying on ordinary human capabilities.<sup>94</sup> Moreover, in other

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a search"); *Donovan v. Dewey*, 452 U.S. 594, 608-09 (1981) (Rehnquist, J., concurring in the judgment) (opining that the Fourth Amendment did not govern the entry of a stone quarry because it was "largely visible to the naked eye without" entering the property); *Robbins v. California*, 453 U.S. 420, 442 (1981) (Rehnquist, J., dissenting) (suggesting that there was "no reasonable expectation of privacy in the contents of . . . garbage bags" because their "contents . . . could be inferred from their outward appearance"); *United States v. Santana*, 427 U.S. 38 (1976) (concluding that officers were authorized to arrest a suspect in the threshold of her home without a warrant because she lacked a reasonable expectation of privacy).

Although, thanks to Justice Rehnquist, the reasonable expectation of privacy doctrine that dictates threshold analysis also governs "standing" determinations, see *Rakas v. Illinois*, 439 U.S. 128 (1978). I have not included the "standing" cases here. I treat them as exclusionary rule decisions because they center around whether an official search has infringed upon the privacy interests of a particular individual, *not* whether the government has engaged in any Fourth Amendment activity.

<sup>90</sup> 460 U.S. 276 (1983).

<sup>91</sup> 529 U.S. 334 (2000).

<sup>92</sup> This contrasts with Justice Scalia, who has criticized the *Katz* threshold standard as a "self-indulgent test" with "no plausible foundation in the text of the Fourth Amendment." *Minnesota v. Carter*, 525 U.S. 83, 97 (1998) (Scalia, J., concurring).

<sup>93</sup> *Knotts*, 460 U.S. at 281-82, 285.

<sup>94</sup> Rehnquist asserted that officers were free to track people's public movements by electronic means because naked, unaided eyes can acquire the same information. *Id.* at 282, 285. He ignored the fact that electronic methods of tracking enable officials to gain a comprehensive picture of public travels that fallible human trackers might well be unable to obtain without technological assistance. See James J. Tomkovicz, *Technology*

threshold cases,<sup>95</sup> Rehnquist routinely rejected claims that law enforcement had searched, joining opinions that applied *Katz* constrictively. In only a few cases did Rehnquist agree with contentions that searches had occurred.<sup>96</sup> Although he wrote few opinions on this subject, he consistently joined those advocating a limited and limiting understanding of the Fourth Amendment's regulatory ambit.<sup>97</sup>

Similarly, Rehnquist authored only a handful of opinions concerning when an encounter between officers and an individual constitutes a "seizure." In *Dunaway v. New York* and *Reid v. Georgia*, he penned dissents disagreeing with majority decisions that seizures had occurred.<sup>98</sup> In *I.N.S. v. Delgado*, he authored a majority opinion rejecting workers' seizure claims.<sup>99</sup> All three

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*and the Threshold of the Fourth Amendment: A Tale of Two Futures*, 72 MISS. L.J. 317, 363-65 (2002); see also Tracey Maclin, Katz, Kyllo, and Technology: Virtual Fourth Amendment Protection in the Twenty-First Century, 72 MISS. L.J. 51, 84 (2002) (concluding that the "logic" of Rehnquist's opinion in *Knotts* "proceeded as if the Court had never heard of *Katz*" and that his statement concerning the permissibility of technological sense enhancement "contradicts *Katz* itself").

<sup>95</sup> See, e.g., *Kyllo v. United States*, 533 U.S. 27, 41-51 (2001) (Stevens, J., dissenting); *California v. Ciraolo*, 476 U.S. 207 (1986) (majority opinion); *Smith v. Maryland*, 442 U.S. 735 (1979) (majority opinion).

<sup>96</sup> I identified two cases other than *Bond*. In *United States v. Karo*, 468 U.S. 705 (1984), Rehnquist joined the Court's conclusion that officers do not conduct a search by transferring to a person an object that contains an electronic tracking device, but also agreed that officers do conduct a search when they monitor a signal from an electronic tracking device attached to a container that has entered a private dwelling. See *id.* at 712, 714-16. He joined a concurrence that would have narrowed the category of those who could claim violations of privacy in such situations. See *id.* at 721-28 (O'Connor, J., concurring in part and concurring in the judgment). In *New York v. Class*, 475 U.S. 106 (1986), Rehnquist agreed that reaching into a car to move papers obstructing a VIN was a search, see *id.* at 115, while also joining the majority's conclusion that motorists lack protected privacy interests in the VIN itself. See *id.* at 114.

<sup>97</sup> I count at least fifteen such opinions, thirteen of which are majority opinions. See *Kyllo*, 533 U.S. at 41-51 (Stevens, J., dissenting); *Florida v. Riley*, 488 U.S. 445 (1989); *California v. Greenwood*, 486 U.S. 35 (1988); *Dow Chem. Co. v. United States*, 476 U.S. 227 (1986); *Ciraolo*, 476 U.S. 207; *Hudson v. Palmer*, 468 U.S. 517 (1984); *Oliver v. United States*, 466 U.S. 170 (1984); *United States v. Jacobsen*, 466 U.S. 109 (1984); *Illinois v. Andreas*, 463 U.S. 765 (1983); *United States v. Place*, 462 U.S. 696 (1983); *Walter v. United States*, 447 U.S. 649, 662-65 (Blackmun, J., dissenting); *Smith*, 442 U.S. 735; *United States v. Miller*, 425 U.S. 435 (1976); *United States v. Mara*, 410 U.S. 19 (1973); *United States v. Dionisio*, 410 U.S. 1 (1973).

<sup>98</sup> See *Dunaway v. New York*, 442 U.S. 200, 221-25 (1981) (Rehnquist, J., dissenting); *Reid v. Georgia*, 448 U.S. 438, 442 (1980) (Rehnquist, J., dissenting).

<sup>99</sup> 466 U.S. 210 (1984).

opinions endorsed a notably narrow understanding of the liberty interest shielded by the Constitution's regulation of seizures of persons. Rehnquist was inclined to allow officers generous room to investigate their unfounded suspicions by means of interactions that did not have to be reasonable.<sup>100</sup> I identified seven additional "seizure" cases in which he did not write an opinion. In five, Rehnquist joined opinions construing the seizure category very restrictively,<sup>101</sup> while in two he joined unanimous holdings that suspects had been seized.<sup>102</sup>

Because of the relative dearth of Rehnquist opinions confronting threshold search and seizure issues, it was important to consult cases in which he did not write to ascertain and document his views. The cases show a belief that both "search" and "seizure" categories should be defined stingily by denying the reasonableness of privacy expectations and by concluding that in the absence of discernible and affirmative coercion reasonable people would typically feel free to leave encounters with police officers.<sup>103</sup> Rehnquist's conceptions of the threshold aspects of the constitutional balance left law enforcement free to engage in a variety of investigative activities without Fourth Amendment control.

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<sup>100</sup> In *Delgado*, the sole opportunity he had to actually influence the direction of "seizure" law, Rehnquist's reasoning recognized enormous space for interactions that qualify as unregulated "consensual encounters." *See id.* at 218-21.

<sup>101</sup> *See* *United States v. Drayton*, 536 U.S. 194 (2002); *Florida v. Bostick*, 501 U.S. 429 (1991); *California v. Hodari D.*, 499 U.S. 621 (1991); *Florida v. Rodriguez*, 469 U.S. 1 (1984); *United States v. Mendenhall*, 446 U.S. 544 (1980). All of these decisions were disputed and controversial, involving situations in which it was arguable that cognizable liberty infringements had occurred. In *Michigan v. Chesternut*, he agreed with a unanimous Court that officers did not seize a suspect by merely following him. 486 U.S. 567, 572, 574-76 (1988)

<sup>102</sup> *See* *Brower v. County of Inyo*, 489 U.S. 593 (1989); *Brown v. Texas*, 443 U.S. 47 (1979). Both of these cases involved seizures effected by means of physical interference with liberty. Neither involved the more difficult and delicate question of whether a seizure by means of a show of authority has occurred.

<sup>103</sup> *See* Yale Kamisar, *Confessions, Search and Seizure, and the Rehnquist Court*, in *THE REHNQUIST COURT: A RETROSPECTIVE* 99 (Martin H. Belsky ed., 2002) (asserting that Rehnquist took "a cramped view of what constitutes a 'search'" and narrowly defined the conduct that amounts to a "seizure" of an individual); *see also* Davies, *supra* note 15, at 1017 ("[T]he Rehnquist majority . . . enlarged the room for proactive police conduct by narrowing the definition of whether a person was 'seized.'").

*b. Rehnquist's Attitude Toward the Probable Cause Norm:  
Diluting Its Force and Limiting Its Domain*

The Fourth Amendment's text requires probable cause for valid warrants to search or seize.<sup>104</sup> Prior to William Rehnquist's arrival, the Court had declared that probable cause is a norm for warrantless searches and seizures as well—that is, that searches and seizures without advance judicial approval are ordinarily unreasonable unless supported by that same showing.<sup>105</sup> It is certainly plausible to conclude that the Framers' explicit prescription of probable cause for warrants reflected a belief that searches and seizures are generally objectionable in its absence because law enforcement interests are insufficient to outweigh privacy, property, or liberty invasions. Rehnquist never overtly contested that fundamental premise about the constitutional balance. His opinions do, however, provide powerful indications of a belief that the prevailing views on the nature and importance of probable cause distorted the Fourth Amendment's meaning in ways that illegitimately harm crime control interests. He acknowledged the probable cause requirement on only rare occasions,<sup>106</sup> and he strove to diminish the burdens it placed on law enforcement.

First, Rehnquist diluted the *content* of the probable cause requirement. *Illinois v. Gates*<sup>107</sup>—one of his most important Fourth Amendment opinions and one of very few Burger-Rehnquist Court rulings to actually overturn a Warren Court criminal procedure precedent—eliminated restrictions upon hearsay-based probable cause showings.<sup>108</sup> The *Aguilar-Spinelli* test had identified two independent types of information that officers had to furnish in hearsay situations, instructing judges to follow a three-stage analysis in evaluating probable cause.<sup>109</sup> In

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<sup>104</sup> See U.S. CONST. amend. IV (“no warrants shall issue, but upon probable cause”).

<sup>105</sup> See *Wong Sun v. United States*, 371 U.S. 471, 478-80 (1963).

<sup>106</sup> See, e.g., *Maryland v. Pringle*, 540 U.S. 366, 370 (2003) (referring to “[t]he long-prevailing standard of probable cause”); *United States v. Knights*, 534 U.S. 112, 121 (2001) (acknowledging that “the Fourth Amendment ordinarily requires the degree of probability embodied in the term ‘probable cause,’” before finding that norm inapplicable).

<sup>107</sup> 462 U.S. 213 (1983).

<sup>108</sup> *Id.* at 238.

<sup>109</sup> See *Spinelli v. United States*, 393 U.S. 410, 415-19 (1969).

*Gates*, a Rehnquist-led five-Justice majority “abandon[ed]” that scheme and replaced it with a “totality-of-the-circumstances analysis.”<sup>110</sup> The two previously controlling and independent criteria—basis of knowledge and veracity—were demoted to “highly relevant,” non-independent variables.<sup>111</sup> Justice Rehnquist took great pains to declare that probable cause could not be accurately determined by the Warren Court’s “labyrinthine body of judicial refinement”<sup>112</sup> or by any other “[r]igid legal rules.”<sup>113</sup> Only a flexible approach that assessed the entirety of relevant facts could produce results faithful to the Constitution. The *Aguilar-Spinelli* approach had to be eliminated because it impeded probable cause findings in cases where the information was adequate—thereby interfering with effective law enforcement in ways the Framers did not intend.<sup>114</sup> Rehnquist’s liberation of judges from the shackles of the two-pronged test was clearly designed to enable and encourage more findings that searches and seizures were reasonable. The decision expanded constitutional authority to investigate crime.

The abolition of the *Aguilar-Spinelli* hurdles was not the only way in which *Gates* diluted the probable cause demand. For the first time, the Court specified the degree of probability necessary to satisfy the constitutional standard. According to Justice Rehnquist, officers did not need to establish that it was more probable than not that a search or seizure would bear fruit.<sup>115</sup> A “fair probability” or “substantial chance” was sufficient.<sup>116</sup> By fixing the requisite likelihood of success at this level, Rehnquist further empowered law enforcers. The lower the probability needed, the greater the number of searches and seizures that would satisfy the Constitution—and the broader the legitimate authority to investigate.

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<sup>110</sup> *Gates*, 462 U.S. at 238.

<sup>111</sup> *Id.* at 230, 233.

<sup>112</sup> *Id.* at 240.

<sup>113</sup> *Id.* at 232.

<sup>114</sup> *Id.* at 237 n.10 (refusing “to accept the premise that the accurate assessment of probable cause [is] furthered by the ‘two-pronged test’”); *id.* at 237 (asserting that the *Aguilar-Spinelli* approach interferes with government’s ability to preserve societal security and “seriously imped[es] the task of law enforcement”).

<sup>115</sup> *See id.* at 235 (asserting that the “preponderance of the evidence” standard has “no place” in probable cause determinations).

<sup>116</sup> *Id.* at 238, 243 n.13.

Rehnquist also instructed judges reviewing warrants that they should affirm probable cause findings and sustain the warrants as long as there was a “substantial basis” for magistrates’ decisions.<sup>117</sup> This highly deferential review standard was designed to add weight on the law enforcement side of the scales by decreasing the chances that a warranted search would be declared invalid. In sum, *Gates* diluted the strength of the probable cause norm in multiple ways, making it considerably easier to satisfy in hearsay cases and less onerous in general.

Rehnquist also sought to counter the law-enforcement restrictive effects of the probable cause norm by increasing the exceptions—that is, by specifying additional situations in which a lesser showing would suffice. In *Terry v. Ohio*,<sup>118</sup> the Warren Court carved out an exceedingly important exception to the norm. Eight Justices concluded that the probable cause norm could be suspended for stops and frisks.<sup>119</sup> According to Chief Justice Warren, the same balancing analysis that ordinarily dictated probable cause for searches and seizures led to a less demanding standard in light of the lesser privacy and liberty intrusions involved in detentions and patdowns and the significant law enforcement interests furthered.<sup>120</sup> The majority opinion suggested an intent that *Terry* be narrowly construed. There was no indication that the interest-balancing analysis employed—and the consequent suspension of the probable cause demand—should become the new norm for evaluating reasonableness.<sup>121</sup>

In *Adams v. Williams*,<sup>122</sup> however, his inaugural Fourth Amendment opinion, recently-appointed Justice Rehnquist read *Terry* expansively. Moreover, he continued to do so in subsequent opinions, recognizing, advocating, and joining in the approval of ever-greater search and seizure authority that was not bound by the probable cause constraint. In a variety of cases, Rehnquist

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<sup>117</sup> *Id.* at 236-38 (quoting *Jones v. United States*, 362 U.S. 257, 271 (1960)).

<sup>118</sup> 392 U.S. 1 (1968).

<sup>119</sup> *See id.* at 27.

<sup>120</sup> *See id.* at 20-27.

<sup>121</sup> *See Dunaway v. New York*, 442 U.S. 200, 208-10 (1979) (explaining that the Court’s resort to balancing analysis and suspension of the probable cause norm in *Terry* had been prompted by a “*sui generis* ‘rubric of police conduct’” and had produced a “narrow” ruling that the Court had kept confined).

<sup>122</sup> 407 U.S. 143 (1972).

contended, concluded, or agreed that officers' actions were reasonable without probable cause.<sup>123</sup> Each time this argument prevailed the norm became less normal.

In sum, William Rehnquist's opinions generally did not start from the presumption that probable cause was a critical requisite of reasonableness. He consistently sought to diminish the potency of the probable cause demand by increasing the situations in which officers were free to act on less. This erosion of the probable cause norm was an integral part of his quest to correct the Fourth Amendment imbalance and to ensure adequate authority to preserve law and order.

*c. Rehnquist's View of the Search Warrant Requirement: Overt Hostility and Wholesale Rejection*

The Warren Court proclaimed the centrality of a second, more controversial norm of reasonableness—the search warrant requirement. The need for officers to obtain advance judicial approval of searches had first been recognized long before the 1960s.<sup>124</sup> According to the warrant rule, searches without warrants are “*per se* unreasonable.”<sup>125</sup> Even if officers have ample probable cause, if they fail to secure judicial approval *prior to* searching, the search violates the Fourth Amendment.<sup>126</sup> The rule rests on assumptions that the Fourth Amendment aims to prevent unreasonable searches—those not supported by probable cause—and that judges make more accurate probable cause

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<sup>123</sup> For opinions written by Rehnquist, see *United States v. Arvizu*, 534 U.S. 266 (2002); *United States v. Knights*, 534 U.S. 112 (2001); *Illinois v. Wardlow*, 528 U.S. 119 (2000); *United States v. Sokolow*, 490 U.S. 1 (1989); *United States v. Montoya De Hernandez*, 473 U.S. 531 (1985). For opinions of other Justices which he joined, see *Alabama v. White*, 496 U.S. 325 (1990); *Maryland v. Buie*, 494 U.S. 325 (1990); *Griffin v. Wisconsin*, 483 U.S. 868 (1987); *Arizona v. Hicks*, 480 U.S. 321, 333 (1987) (O'Connor, J., dissenting); *United States v. Sharpe*, 470 U.S. 675 (1985); *United States v. Hensley*, 469 U.S. 221 (1985); *Michigan v. Long*, 463 U.S. 1032 (1983); *United States v. Place*, 462 U.S. 696 (1983).

<sup>124</sup> See *Weeks v. United States*, 232 U.S. 383, 390-91 (1914). Through the years, the Court's commitment to the warrant requirement sometimes waned. See *United States v. Rabinowitz*, 339 U.S. 56, 63-65 (1950). The Warren Court's support, however, was consistent.

<sup>125</sup> See *Katz v. United States*, 389 U.S. 347, 357 (1967). Thus, the warrant requirement finds its roots in the “unreasonableness” clause of the Fourth Amendment, not in the “warrant” clause.

<sup>126</sup> See *id.*; *Johnson v. United States*, 333 U.S. 10, 14 n.4 (1948).

determinations than officers who are understandably influenced by their responsibilities.<sup>127</sup> By requiring police to document their information under oath and obtain judicial sanction beforehand, the warrant demand is thought to prevent unconstitutional searches. First, judges will deny warrants when probable cause showings are deficient, and, when they do grant authority, they will restrict the scope of searches and seizures, permitting only what is justified by officers' showings of cause.<sup>128</sup> Second, officers will not be able to bootstrap unreasonable searches by reliance on facts learned from the search.<sup>129</sup> The Warren Court acknowledged that there were exceptional situations justifying warrantless searches, but declared that they were "few" and "well-delineated."<sup>130</sup>

Because there is no explicit textual basis for the warrant norm, and history shows a concern with general warrants, not warrantless searches,<sup>131</sup> the legitimacy of the warrant demand has long been a subject of dispute.<sup>132</sup> William Rehnquist sided with the opponents.<sup>133</sup> He saw it as a serious misinterpretation of the Fourth Amendment, a judicial creation that needlessly impeded effective law enforcement.<sup>134</sup> Because he did not deem a search unreasonable simply because officers had not secured judicial approval, he would have preferred abrogation of the warrant requirement. A majority, however, never coalesced around this position, and the Court continued to adhere to the basic principle

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<sup>127</sup> See *Johnson*, 333 U.S. at 14 n.3. Thus, the warrant requirement has inextricable ties to the probable cause norm.

<sup>128</sup> See James J. Tomkovicz, *California v. Acevedo: The Walls Close in on the Warrant Requirement*, 29 AM. CRIM. L. REV. 1103, 1144-46 (1992).

<sup>129</sup> See *id.* at 1146-47.

<sup>130</sup> See *Katz*, 389 U.S. at 357.

<sup>131</sup> See Tomkovicz, *The Walls Close in on the Warrant Requirement*, *supra* note 128, at 1125, 1130.

<sup>132</sup> See *id.* at 1104-05, 1116-63 (explaining in detail the various arguments for and against the warrant rule).

<sup>133</sup> See Thomas K. Clancy, *The Role of Individualized Suspicion in Assessing the Reasonableness of Searches and Seizures*, 25 U. MEM. L. REV. 483, 522 (1995) (asserting that Rehnquist "share[d the] view" that the test of constitutionality is reasonableness and search warrants are not required for reasonable searches).

<sup>134</sup> See *Robbins v. California*, 453 U.S. 420, 438-39 (1981) (Rehnquist, J., dissenting); *Payton v. New York*, 445 U.S. 573, 621 (1980) (Rehnquist, J., dissenting); *id.* at 607-11 (White, J., dissenting); see also *Steagald v. United States*, 451 U.S. 204, 223-25 (1981) (Rehnquist, J., dissenting).

that a search warrant was a prerequisite for reasonableness.<sup>135</sup> As a fallback position, Rehnquist sought to erode the force of the rule by advocating, fashioning, and expanding exceptions.<sup>136</sup> In his own opinions and in those he joined, new exceptions emerged and acknowledged exceptions stretched to accommodate an increasing array of warrantless searches.<sup>137</sup> As a result, the search warrant rule was gradually, steadily drained of substance and potency.<sup>138</sup>

Rehnquist resisted this longstanding doctrinal pillar. He believed that it distorted the balance struck by the Fourth Amendment, denying officers investigative authority they were entitled to exercise and impeding their efforts to preserve order and public safety by apprehending criminals and gathering evidence. In no opinion did he acknowledge the primacy of this premise that most of his colleagues and predecessors accepted as fundamental. His criticism of the legitimacy of the warrant demand and his consistent efforts to shrink the territory it

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<sup>135</sup> See *Robbins*, 453 U.S. at 423 (plurality opinion); *Steagald*, 451 U.S. at 212-14; *Payton*, 445 U.S. at 586; *Arkansas v. Sanders*, 442 U.S. 753, 758 (1979); *United States v. Chadwick*, 433 U.S. 1, 8-11 (1977).

<sup>136</sup> He also would have weakened the warrant demand by holding that it was satisfied even if officers obtained judicial approval by means of deliberate falsehoods. See *Franks v. Delaware*, 438 U.S. 154, 181-82 (1978) (Rehnquist, J., dissenting).

<sup>137</sup> For Rehnquist opinions fitting this description, see *Thornton v. United States*, 541 U.S. 615 (2004); *United States v. Knights*, 534 U.S. 112 (2001); *Florida v. Wells*, 495 U.S. 1 (1990); *Colorado v. Bertine*, 479 U.S. 367 (1987); *Robbins*, 453 U.S. at 437 (Rehnquist, J., dissenting); *Michigan v. Clifford*, 464 U.S. 287, 305 (1984) (Rehnquist, J., dissenting); *Steagald*, 451 U.S. at 223 (Rehnquist, J., dissenting); *Payton*, 445 U.S. at 620 (Rehnquist, J., dissenting); *Mincey v. Arizona*, 437 U.S. 385, 405 (1978) (Rehnquist, J., concurring in part and dissenting in part); *Michigan v. Tyler*, 436 U.S. 499, 516 (1978) (Rehnquist, J., dissenting); *Gustafson v. Florida*, 414 U.S. 260 (1973); *United States v. Robinson*, 414 U.S. 218 (1973); *Cady v. Dombrowski*, 413 U.S. 433 (1973). For other Justices' opinions that he joined, see, e.g., *Wyoming v. Houghton*, 526 U.S. 295 (1999); *California v. Acevedo*, 500 U.S. 565 (1991); *Illinois v. Rodriguez*, 497 U.S. 177 (1990); *O'Connor v. Ortega*, 480 U.S. 709 (1987); *California v. Carney*, 471 U.S. 386 (1985); *United States v. Johns*, 469 U.S. 478 (1985); *Welsh v. Wisconsin*, 466 U.S. 740, 756 (1984) (White, J., dissenting); *United States v. Ross*, 456 U.S. 798 (1982); *Washington v. Chrisman*, 455 U.S. 1 (1982); *Arkansas v. Sanders*, 442 U.S. 753, 768 (1979) (Blackmun, J., dissenting); *United States v. Chadwick*, 433 U.S. 1, 17 (1977) (Blackmun, J., dissenting); *South Dakota v. Opperman*, 428 U.S. 364 (1976); *Texas v. White*, 423 U.S. 67 (1975) (per curiam).

<sup>138</sup> See *Acevedo*, 500 U.S. at 582 (Scalia, J., concurring in the judgment) (observing that the warrant requirement's "victory was illusory" because it "had become so riddled with exceptions that it was basically unrecognizable").

governed were further efforts to achieve the constitutional accommodation of interests he perceived.<sup>139</sup>

*d. Rehnquist's Position on the Exclusionary Rule: Utter Contempt and Overt Resistance*

There is no more controversial, emotionally charged component of the Fourth Amendment balance than the “exclusionary rule”—a bar to proving criminal charges by means of evidence acquired in violation of that provision.<sup>140</sup> The longstanding federal court rule—which predates the Warren Court by half a century—was adopted with unanimous support.<sup>141</sup> The state version—which is the Warren Court’s offspring—became law with the barest of majority support.<sup>142</sup> By the end of the Warren era, there was a presumption that unconstitutionally gathered evidence was barred in all but a limited number of exceptional situations.<sup>143</sup>

William Rehnquist was fervently opposed to the exclusionary rule.<sup>144</sup> He found no constitutional support for a doctrine, which,

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<sup>139</sup> In some opinions, Rehnquist relied on the fact that officers had secured a warrant as a predicate for finding investigatory conduct not authorized by the warrant to be reasonable. See *Steagald*, 451 U.S. at 223-26 (Rehnquist, J., dissenting); *Ybarra v. Illinois*, 444 U.S. 85, 104-07 (1979) (Rehnquist, J., dissenting). In other words, he sought to expand warrantless search authority on the ground that officers had obtained judicial permission for a related search or seizure.

<sup>140</sup> Despite the modern Court’s description of the exclusionary rule as a judicial creation, there can be no doubt that it is constitutional in character—not a mere rule of evidence or an exercise of supervisory power. The source of the federal court rule is the Fourth Amendment and the source of the state court rule is the Fourteenth Amendment Due Process Clause. For a thorough discussion of the history, nature, and doctrinal details of the exclusionary rule, see JAMES J. TOMKOVICZ, *CONSTITUTIONAL EXCLUSION: THE RULES, RIGHTS, AND REMEDIES THAT STRIKE THE BALANCE BETWEEN FREEDOM AND ORDER* 1-60 (2011).

<sup>141</sup> See *Weeks v. United States*, 232 U.S. 383, 398 (1914).

<sup>142</sup> See *Mapp v. Ohio*, 367 U.S. 643 (1961). Just five Justices cast their votes for adoption of the state court exclusionary rule in *Mapp*, and one of those Justices was “not persuaded that the Fourth Amendment, standing alone,” could support the rule. *Id.* at 661 (Black, J., concurring). He believed that illegally obtained evidence had to be excluded because of the combined effect of the Fourth and Fifth Amendments. *Id.* at 662.

<sup>143</sup> See *supra*, note 77 and accompanying text.

<sup>144</sup> McClurg, *supra* note 8, at 775 (asserting that Rehnquist “made clear . . . his distaste for the exclusionary rule; Rahdert, *supra* note 16, at 846-47 (contending that Rehnquist “criticized the exclusionary rule and . . . questioned its underpinnings” and “steadfastly adhered to th[e] view” that it was not legitimate).

to his mind, was an illegitimate and indefensible creation of the judiciary. In addition, he objected to the substantial and unjustified impediments it posed to effective law enforcement. He made his perspectives on the suppression doctrine clear prior to his appointment.<sup>145</sup> During his first ten years as a Justice, he confirmed his stance and lobbied for its demolition.

Justice Rehnquist launched his first offensive three years after joining the Court in *United States v. Peltier*.<sup>146</sup> Although he did not immediately call for the overthrow of the rule, he expounded “an entirely new understanding of the exclusionary rule in Fourth Amendment cases,” which, in a dissenting colleague’s view, “forecast[ its] complete demise.”<sup>147</sup> Four years later, in *California v. Minjares*,<sup>148</sup> he thoroughly aired his concerns and the premises that led him to conclude that the rule was a fundamental and grave misinterpretation. In Rehnquist’s opinion, the suppression doctrine had turned the criminal process into “a sport of fox and hound” with “anomalous consequences.”<sup>149</sup> He was “morally certain” that this “unique jurisprudential rule” applied only in the United States.<sup>150</sup> It “impose[d] tremendous costs on the judicial process,” distracting from the very purpose of trial—accurately ascertaining guilt or innocence.<sup>151</sup> It “deflect[ed] the truthfinding process and often free[d] the guilty,” was disproportionate, undermined justice, and could well “generat[e] disrespect for the law and administration of justice.”<sup>152</sup> Rehnquist was certain that the Justices had “made a wrong turn,” that society’s “reaction” would mirror his,<sup>153</sup> and that suppression was

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<sup>145</sup> See Craig M. Bradley, *Rehnquist Scaled Back Rights of the Accused*, 41 TRIAL 56, 56 (2005) (noting that in 1969 Rehnquist “wrote a memorandum” in which he criticized the balance struck by the Warren Court and “specifically complained about . . . the Fourth Amendment’s exclusionary rule”).

<sup>146</sup> 422 U.S. 531 (1975). In *Peltier*, the Court held by a 5-4 vote that the exclusionary rule did not apply retroactively to a case on direct appeal at the time the Court decided, in *Almeida-Sanchez v. United States*, 413 U.S. 266 (1973), that roving border patrol searches violate the Fourth Amendment. *Peltier*, 422 U.S. at 534-35.

<sup>147</sup> *Id.* at 551 (Brennan, J., dissenting).

<sup>148</sup> 443 U.S. 916 (1979) (Rehnquist, J., dissenting from denial of stay).

<sup>149</sup> *Id.* at 916-17.

<sup>150</sup> *Id.* at 919.

<sup>151</sup> *Id.*

<sup>152</sup> *Id.* at 920.

<sup>153</sup> *Id.*

unsupportable on either a judicial integrity or deterrence foundation.<sup>154</sup> Exclusion was not a mandate of the Fourth Amendment, but, instead, was an ill-advised judicial construct. Ultimately, he believed that there were persuasive reasons to reconsider “whether, and to what extent, the so-called ‘exclusionary rule’ . . . should be retained.”<sup>155</sup>

In the years immediately following *Minjares*, Rehnquist expressed his opposition on only a couple of occasions.<sup>156</sup> During his last twenty-four years on the Court, including his entire run as Chief Justice, he did not author an opinion advocating abrogation. There is absolutely no reason to believe that he had changed his mind. The better explanation is that he had recognized the futility of frontal assault and had elected a different strategy.<sup>157</sup> Justice Rehnquist seems to have realized that gradual erosion was an approach more likely to yield tangible dividends. He sought to decrease the occasions when exclusion would be possible in a number of opinions that contained generous doses of anti-exclusionary rule rhetoric and relied on premises that facilitated constriction of the rule’s reach.

*Rakas v. Illinois*<sup>158</sup> was by far his most significant contribution to the unraveling of the exclusionary rule. His bold and dramatic alteration of “standing” doctrine shrank the class of individuals who could claim suppression and provided a prescription for further diminution.<sup>159</sup> Although Rehnquist did not

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<sup>154</sup> *Id.* at 924-26.

<sup>155</sup> *Id.* at 927-28.

<sup>156</sup> See *New York v. Belton*, 453 U.S. 454, 463 (1981) (Rehnquist, J., concurring) (stating that he is joining the majority opinion “[b]ecause it is apparent that a majority of the Court is unwilling to overrule *Mapp v. Ohio*”); *Robbins v. California*, 453 U.S. 420, 437-39, 443 (1981) (asserting that he had “in no way abandoned” his opposition to exclusion and that a solution “short of overruling *Mapp v. Ohio* [was] apt to be illusory”); see also *Payton v. New York*, 445 U.S. 573, 620 (1980) (Rehnquist, J., dissenting).

<sup>157</sup> Alternatively, or in addition, perhaps he believed that his initial attacks had accomplished the objective that was attainable—softening the rule up for a slower, incremental kill.

<sup>158</sup> 439 U.S. 128 (1978).

<sup>159</sup> Based on *Rakas*’s reform of standing law, the Court rejected the premise that a property interest in an item seized provided a basis for objecting to an unreasonable search, see *Rawlings v. Kentucky*, 448 U.S. 98, 105-06 (1980); abolished the “automatic standing” doctrine for possessory offenses, see *United States v. Salvucci*, 448 U.S. 83, 95 (1980); concluded that even deliberate, bad-faith violations of the Fourth

author any opinions recognizing new exclusionary rule exceptions, he happily joined several opinions that created novel holes in the Fourth Amendment's evidentiary bar, and he wrote and subscribed to opinions that expanded extant exceptions.<sup>160</sup>

William Rehnquist's campaign against the exclusionary rule was his top Fourth Amendment priority. It was an integral part of the quest to strike a proper Fourth Amendment balance and restore to law enforcement their entitlement to prosecute effectively. His tactics evolved from a call for eradication to a pragmatic, unrelenting crusade to confine the doctrine's scope and minimize its damaging impacts. He did not achieve his ultimate goal, but his rhetorical and doctrinal assaults weakened the rule's foundations and made it considerably less likely that officers' Fourth Amendment missteps would allow guilty defendants to evade just convictions.

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Amendment could not be the basis for suppression by a claimant who lacked a reasonable expectation of privacy in the place searched, *see* *United States v. Payner*, 447 U.S. 727 (1980); and held that short-term social guests with limited connections to a dwelling could not object to a search of that dwelling, *see* *Minnesota v. Carter*, 525 U.S. 83, 91 (1998). Rehnquist authored the majority opinions in *Rawlings*, *Salvucci*, and *Carter*.

<sup>160</sup> Rehnquist opinions include *Arizona v. Evans*, 514 U.S. 1 (1995), which expanded the good-faith exception, and *United States v. Ceccolini*, 435 U.S. 268, 278 (1978), which liberalized the attenuation exception for "live-witness testimony." For anti-suppression opinions that Rehnquist joined, see *Pa. Bd. of Prob. v. Scott*, 524 U.S. 357 (1998); *New York v. Harris*, 495 U.S. 14 (1990); *Murray v. United States*, 487 U.S. 533 (1988); *Illinois v. Krull*, 480 U.S. 340 (1987); *I.N.S. v. Lopez-Mendoza*, 468 U.S. 1032 (1984); *Massachusetts v. Sheppard*, 468 U.S. 981 (1984); *United States v. Leon*, 468 U.S. 897 (1984); *Payner*, 447 U.S. 727; *United States v. Havens*, 446 U.S. 620 (1980); *United States v. Crews*, 445 U.S. 463 (1980); *Stone v. Powell*, 428 U.S. 465 (1976); *United States v. Janis*, 428 U.S. 433 (1976); *United States v. Calandra*, 414 U.S. 338 (1974).

Rehnquist also took gratuitous swipes at the exclusionary rule and looked for opportunities to argue (or at least suggest) that it was inapplicable in cases where suppression was not at issue. *See, e.g., Payton*, 445 U.S. at 620-21 (Rehnquist, J., dissenting); *Ybarra v. Illinois*, 444 U.S. 85, 108 (1979) (Rehnquist, J., dissenting); *Dunaway v. New York*, 442 U.S. 200, 225-27 (1979); *Franks v. Delaware*, 438 U.S. 154, 186 (1978) (Rehnquist, J., dissenting); *United States v. Santana*, 427 U.S. 38, 41 n.2 (1976).

*e. Rehnquist's Refusal to Accept Pro-Fourth Amendment Premises*

The preceding subsections describe William Rehnquist's antipathy toward established Fourth Amendment norms. This subsection discusses some influential premises that he refused to accept. Rehnquist's resistance is hardly surprising because the premises involved favor Fourth Amendment protection at the expense of law enforcement authority.

i. The "Least Intrusive Alternative" Principle

If officers can accomplish their purposes by conduct that intrudes less on privacy, property, or liberty interests, it is arguably unreasonable for them to use more intrusive options. Consequently, the Fourth Amendment might require officials to employ the least intrusive alternative methods that will accomplish their objectives. The status and force of this premise in the Supreme Court's Fourth Amendment jurisprudence is not entirely clear. In at least one opinion the Court relied on it explicitly,<sup>161</sup> and it has seemed implicit in other decisions protective of Fourth Amendment liberties.<sup>162</sup> What is clear is Rehnquist's hostile attitude toward such reasoning.

In just his second Fourth Amendment opinion, he declared that "[t]he fact that the protection of the public might, in the abstract, have been accomplished by 'less intrusive' means [did]

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<sup>161</sup> See *Delaware v. Prouse*, 440 U.S. 648, 659-60 (1979); see also *Florida v. Royer*, 460 U.S. 491, 500 (1983) (plurality opinion) (declaring that during investigative detentions officers should employ "the least intrusive means reasonably available to verify or dispel [their] suspicion in a short period of time").

<sup>162</sup> I find less intrusive alternative logic implicit in the holding in *Terry v. Ohio*, 392 U.S. 1, 25-26 (1968), that officers may not reach beneath clothing when conducting weapons frisks; in the conclusion in *United States v. Chadwick*, 433 U.S. 1, 13 (1977), that officers must seize containers and apply for search warrants; and in the determination in *United States v. Sharpe*, 470 U.S. 675, 686 (1985), that officers may not detain suspects longer than is necessary for the diligent pursuit of their suspicions. In *Chambers v. Maroney*, 399 U.S. 42 (1970), a majority allowed a warrantless search of a car on probable cause, rather than requiring that it be seized and held pending application for a warrant, because of an inability to decide whether a seizure was less intrusive than a search. See *id.* at 51-52. Justice Harlan dissented *because* he believed that a seizure almost always inflicted less severe constitutional injury than a search. See *id.* at 63-65 (Harlan, J., dissenting).

not, by itself, render the search unreasonable.”<sup>163</sup> Shortly after becoming Chief Justice, he announced that officers need not always pursue alternative investigatory methods that inflict less severe constitutional harm, asserting that “[t]he reasonableness of any particular governmental activity does not necessarily or invariably turn on the existence of alternative “less intrusive” means.”<sup>164</sup> Two years later, he asserted that “the reasonableness of [an] officer’s decision to stop a suspect does not turn on the availability of less intrusive investigatory techniques.”<sup>165</sup> Finally, in finding a drunk driving roadblock constitutional, he stressed that “for purposes of Fourth Amendment analysis, the choice among . . . reasonable alternatives remains with the governmental officials” and that judges should not declare a choice unconstitutional because another “reasonable alternative law enforcement technique[]” might be available “to deal with a serious public danger.”<sup>166</sup>

As noted, it is not clear that Rehnquist was rejecting accepted logic, which was firmly established in precedent. Moreover, on no occasion did he say that judges should *never* deem a search or seizure unreasonable because of the availability of a less intrusive means of accomplishing a law enforcement objective, that the Fourth Amendment *never* requires officers to employ less injurious means to serve their purposes, or that greater intrusions than necessary are *always* reasonable. Nonetheless, his opinions suggest a very limited role, at best, for the less intrusive alternative premise.<sup>167</sup> His message was that judges should be

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<sup>163</sup> *Cady v. Dombrowski*, 413 U.S. 433, 447 (1973).

<sup>164</sup> *Colorado v. Bertine*, 479 U.S. 367, 374 (1987) (quoting *Illinois v. Lafayette*, 462 U.S. 640, 647 (1983)).

<sup>165</sup> *United States v. Sokolow*, 490 U.S. 1, 11 (1989).

<sup>166</sup> *Mich. Dep’t of State Police v. Sitz*, 496 U.S. 444, 453-54 (1990). All of these were majority opinions. Rehnquist also cast aspersions upon the premise in other majority opinions. See *United States v. Montoya De Hernandez*, 473 U.S. 531, 542 (1985); *United States v. Villamonte-Marquez*, 462 U.S. 579, 591 n.5 (1983); *Bell v. Wolfish*, 441 U.S. 520, 559 n.40 (1979).

<sup>167</sup> In fact, his writings lead me to believe that Rehnquist was more hostile to least intrusive alternative logic than his carefully worded statements convey. I believe that if he had been able to express his own preferences, unconstrained by the need to please a majority of his fellow Justices, Rehnquist’s rejection of the principle might have been more categorical.

hesitant, rarely, if ever, substituting their choices for those of officers when it comes to effective law enforcement.<sup>168</sup>

In Rehnquist's view, if there are adequate government interests justifying a particular degree of intrusion, that intrusion is presumptively reasonable. The fact that those interests might also be furthered with less loss of privacy does not mean that the greater intrusion is unjustified. His conception of the Fourth Amendment balance did not require officers to inflict less serious injury even if they could do so consistent with the performance of their duties. Moreover, he believed that forcing officers to identify and pursue less intrusive alternatives would often impede their efficacy by requiring them to make difficult, if not impossible, decisions.<sup>169</sup> For Rehnquist, the less intrusive alternative principle threatened effective law enforcement and did not assist judges' discernment of the correct Fourth Amendment balance. Reasonableness should not depend on a judicial determination that officers could preserve order and public safety by methods that did less damage to privacy, property, or liberty.

## ii. Reverence for Home Privacy

Supreme Court opinions emphasize the Fourth Amendment significance—the almost venerable quality—of *home* privacy, declaring that the provision reflects the belief that “a man's home is his castle.”<sup>170</sup> In one of his few genuinely pro-Fourth

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<sup>168</sup> It is arguable that the Fourth Amendment reasonableness requirement imposes a general duty on judges to demand that officers pursue the least intrusive alternative means that will effectively accomplish their investigative ends. If less intrusive means are readily available, there may well be no constitutional justification for a greater intrusion, nothing that outweighs the additional harm done by that intrusion.

<sup>169</sup> See *Colorado v. Bertine*, 479 U.S. 367, 375 (1987).

<sup>170</sup> For example, see *Georgia v. Randolph*, 547 U.S. 103, 115 (2006), which relied on the “centuries-old principle of respect for the privacy of the home,” *id.* (quoting *Wilson v. Layne*, 526 U.S. 603, 610 (1999)). The Court in *Randolph* also observed that “it is beyond dispute that the home is entitled to special protection,” *id.* (quoting *Minnesota v. Carter*, 525 U.S. 83, 99 (1998)), and declared that “[w]e have . . . lived our whole national history with an understanding of ‘the ancient adage that a man's house is his castle,’” *id.* (quoting *Miller v. United States*, 357 U.S. 301, 307 (1958)). See also *Miller*, 357 U.S. at 307; *Payton v. New York*, 445 U.S. 573, 585 (1980) (noting that “the physical entry of the home is the chief evil against which the . . . Fourth Amendment is directed”); *Silverman v. United States*, 365 U.S. 505, 511 (1961) (asserting that “the

Amendment opinions, Chief Justice Rehnquist relied upon the uniquely high value of home privacy.<sup>171</sup> Nonetheless, there are indications of negativity toward the premise that dwellings deserve extra solicitude in Fourth Amendment analysis. Some opinions suggest that William Rehnquist did not share the majority's special reverence for home privacy, that he was less inclined than others to accord home privacy the added weight that could trump law enforcement interests.

In *Steagald v. United States*, the harm done by entering homes in search of felony suspects led a majority to affirm search warrant protection.<sup>172</sup> Justice Rehnquist dissented, concluding that home privacy did not require the safeguard of prior judicial approval.<sup>173</sup> Moreover, he challenged the Court's "reliance on the adage that 'a man's home is his castle'" as "uncritical," claiming that while it may apply "in civil cases," it should not govern "in criminal cases."<sup>174</sup> In *Michigan v. Clifford*<sup>175</sup>, Rehnquist dissented from the Court's restrictions on home entries following fires. He challenged the majority's reliance on the fact that "the privacy interests in the residence . . . were significantly greater than those in" business premises, observing that "private commercial buildings . . . are as much protected by the Fourth Amendment as are private dwellings."<sup>176</sup> In *Rakas v. Illinois*, Rehnquist's landmark opinion limiting passengers' privacy interests in vehicles, he first noted that privacy interests in automobiles were not identical to those in houses, then went out of his way to declare that the claim made by the defendants in *Rakas* "would fail even in an analogous situation in a dwelling place."<sup>177</sup> He disagreed with the Court's conclusion in *Minnesota v. Olson* that

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right of a man to retreat into his own home and there be free from unreasonable governmental intrusion" lies "[a]t the very core" of the Fourth Amendment).

<sup>171</sup> See *Wilson v. Layne*, 526 U.S. 603, 610 (1999).

<sup>172</sup> See *Steagald*, 451 U.S. 204, 222 (1981).

<sup>173</sup> *Id.* at 223, 227. He also dissented from the Court's earlier holding, in *Payton*, 445 U.S. at 602-03, that an arrest warrant is needed to enter a suspected felon's home to arrest him. See *id.* at 621 (Rehnquist, J., dissenting).

<sup>174</sup> *Steagald*, 451 U.S. at 229-30 (Rehnquist, J., dissenting).

<sup>175</sup> 464 U.S. 287 (1984).

<sup>176</sup> 464 U.S. 287, 307 (1984) (Rehnquist, J., dissenting).

<sup>177</sup> 439 U.S. 128, 148 (1978). He also rejected a prior holding that an individual's legitimate presence in a home was sufficient to give rise to a Fourth Amendment privacy interest in the home. See *id.* at 142-43.

overnight guests have privacy interests in their hosts' homes,<sup>178</sup> and, when the issue of other social guests' privacy interests in dwellings came before the Court in *Minnesota v. Carter*, Rehnquist's majority opinion denied privacy claims.<sup>179</sup> Moreover, he did not subscribe to the majority ruling that "almost all" social guests possess reasonable privacy expectations in their hosts' homes.<sup>180</sup>

In addition, Chief Justice Rehnquist's majority opinion in *United States v. Knights*, concluded that a mere "reasonable suspicion" was sufficient to outweigh the "diminished" home privacy of a probationer.<sup>181</sup> Moreover, he indicated that the home privacy interest of the probationer could have been "so diminished, or completely eliminated . . . that a search . . . without any individualized suspicion" would have been reasonable.<sup>182</sup> Finally, when a bare majority relied on home privacy's special status in holding that thermal imaging is subject to Fourth Amendment regulation,<sup>183</sup> the Chief Justice joined a dissent that deemed the home privacy interests at issue insignificant.<sup>184</sup>

All together, Rehnquist's opinions and votes indicate that he was not as receptive to this fundamental Fourth Amendment premise as his peers and predecessors. To him, home privacy should not impede effective law enforcement more than the other privacies sheltered by that guarantee.<sup>185</sup>

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<sup>178</sup> 495 U.S. 91, 101 (1990) (noting that Chief Justice Rehnquist dissented).

<sup>179</sup> 525 U.S. 83, 91 (1998).

<sup>180</sup> The Chief Justice authored a majority opinion that Justice Kennedy joined. In a separate concurrence, however, Justice Kennedy expressed the view that "almost all social guests" have privacy interests in their hosts' homes. *Id.* at 99. Four other Justices declared that *all* social guests have such privacy interests. *See id.* at 108-09 (Ginsburg, J., dissenting); *id.* at 103 (Breyer, J., concurring in the judgment). Consequently, a majority of Justices concluded that almost all social guests are entitled to Fourth Amendment protection. *See id.* at 109 n.2 (Ginsburg, J., dissenting).

<sup>181</sup> 534 U.S. 112, 120-21 (2001).

<sup>182</sup> *Id.* at 120 n.6.

<sup>183</sup> *Kyllo v. United States*, 533 U.S. 27, 31, 34 (2001).

<sup>184</sup> *Id.* at 45 (Stevens, J., dissenting).

<sup>185</sup> On the other hand, Rehnquist was willing to concede the significance of "the traditional expectation of privacy within a dwelling place" as a basis for contrast with the nonexistent privacy interest in publicly visible movements outside a home. *See United States v. Knotts*, 460 U.S. 276, 282 (1983). In addition, he gladly joined opinions that denied search warrant protection because the privacy interests in vehicles are "significantly less" than those in a "home." *See South Dakota v. Opperman*, 428 U.S. 364, 367 (1976). He did not believe that home privacy should be relied upon to elevate

## iii. Concern for Innocents and Fear of a Police State

Inordinate risks to the privacy or liberty interests of innocent persons can militate in favor of more expansive Fourth Amendment protection.<sup>186</sup> The Justice for whom William Rehnquist clerked, Robert Jackson, eloquently explained the potential Fourth Amendment relevance of jeopardy to innocent individuals.<sup>187</sup> Apparently, Jackson's attitude was not contagious. Justice Rehnquist was not receptive to arguments for broader Fourth Amendment shelter to guard against privacy and liberty threats to innocents. The premise did not inform his reasoning, and he ignored other Justices' contentions that it should influence Fourth Amendment decision making. In a number of cases where potential impacts on innocent citizens influenced—or appeared to influence—majorities, Rehnquist dissented.<sup>188</sup> In other cases, his majority opinions provoked suggestions of insensitivity to the harms that innocents might suffer.<sup>189</sup>

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or enhance the protection afforded dwellings, but he did find the privacy interests in dwellings a useful basis for diminishing the protection afforded other, less worthy locations.

<sup>186</sup> See *Steagald v. United States*, 451 U.S. 204, 222 (1981); *Reid v. Georgia*, 448 U.S. 438, 441 (1980); *Dunaway v. New York*, 442 U.S. 200, 214 (1979); *Almeida-Sanchez v. United States*, 413 U.S. 266, 284 (1973); *Davis v. Mississippi*, 394 U.S. 721, 726 (1969).

<sup>187</sup> See *Brinegar v. United States*, 338 U.S. 160, 182 (1949) (Jackson, J., dissenting).

<sup>188</sup> See *City of Indianapolis v. Edmond*, 531 U.S. 32, 48 (2000) (Rehnquist, J., dissenting); *Chandler v. Miller*, 520 U.S. 305, 323 (1997) (Rehnquist, J., dissenting); *Steagald*, 451 U.S. at 223 (Rehnquist, J., dissenting); *Reid*, 448 U.S. at 442 (Rehnquist, J., dissenting); *Dunaway*, 442 U.S. at 221 (Rehnquist, J., dissenting); *Ybarra v. Illinois*, 444 U.S. 85, 108 (1979) (Rehnquist, J., dissenting); see also *United States v. James Daniel Good Real Prop.*, 510 U.S. 43, 72-73 (Rehnquist, J., dissenting) (1993).

<sup>189</sup> See *Muehler v. Mena*, 544 U.S. 93, 109 (2005) (Stevens, J., concurring in the judgment); *Illinois v. Wardlow*, 528 U.S. 119, 139 (2000) (Stevens, J., concurring in part and dissenting in part); *Minnesota v. Carter*, 525 U.S. 83, 107-08 (1998) (Ginsburg, J., dissenting); *Maryland v. Wilson*, 519 U.S. 408, 422 (1997) (Kennedy, J., dissenting); *Michigan Dep't of State Police v. Sitz*, 496 U.S. 444, 465, 472, 475 (1990) (Stevens, J., dissenting); *United States v. Sokolow*, 490 U.S. 1, 12-13 (1989) (Marshall, J., dissenting); *United States v. Montoya de Hernandez*, 473 U.S. 531, 545 (1985) (Stevens, J., concurring in the judgment); *id.* at 548 (Brennan, J., dissenting). On at least one occasion, Rehnquist relied on the impact of a police practice on innocent citizens as a basis for restricting Fourth Amendment protection. See *Sitz*, 496 U.S. at 452 (observing that what counted was the "fear and surprise engendered in law-abiding motorists," not those who were intoxicated).

A related and potentially influential consideration is that a pro-law enforcement interpretation could be a step down the road to totalitarianism. Fears of “police-state” practices have occasionally prompted Justices to favor more generous search and seizure protection.<sup>190</sup> This theme, which also informed Justice Jackson’s understanding of the Fourth Amendment,<sup>191</sup> found no traction in his former law clerk’s Fourth Amendment opinions. Once again, he was not persuaded by dissenters’ suggestions that his positions on lawful police practices were more consistent with authoritarian regimes.<sup>192</sup>

#### iv. The Perils Posed by Technology

The dangers to privacy engendered by scientific and technological advances can militate in favor of greater Fourth Amendment safeguards. Such perils, however, did not seem to influence William Rehnquist. His majority opinion in *United States v. Knotts* concluded that the use of an electronic tracking device to monitor public movements was beyond the Fourth Amendment’s regulatory sphere.<sup>193</sup> He reasoned that “[n]othing in the Fourth Amendment prohibited the police from augmenting the sensory faculties bestowed upon them at birth with such enhancement as science and technology afforded them in [that] case.”<sup>194</sup> Moreover, the “complaint . . . that scientific devices . . . enabled the police to be more effective in detecting crime . . .

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Rehnquist’s contention that the Fourth Amendment’s balance contemplates that innocent persons will be deprived of the liberty and privacy interests it safeguards was undeniably correct. See *Wardlow*, 528 U.S. at 126; *Baker v. McCollan*, 443 U.S. 137, 145 (1979). The issue here is not whether innocents will be harmed by unreasonable searches and seizures, but whether impacts of police practices on innocents is a salient consideration to be weighed in the Fourth Amendment balance.

<sup>190</sup> In fact, expression of this fear is usually found in dissenting opinions. See *Kentucky v. King*, 131 S. Ct. 1849, 1864 (2011) (Ginsburg, J., dissenting); *United States v. White*, 401 U.S. 745, 760 (1971) (Douglas, J., dissenting); *Rabinowitz v. United States*, 339 U.S. 56, 82 (1950) (Frankfurter, J., dissenting).

<sup>191</sup> See *Brinegar v. United States*, 338 U.S. 160, 180 (1949) (Jackson, J., dissenting); *Johnson v. United States*, 333 U.S. 10, 17 (1948).

<sup>192</sup> See *Montoya de Hernandez*; 473 U.S. at 550, 565 (Brennan, J., dissenting); *Illinois v. Gates*, 462 U.S. 213, 291 (1983) (Brennan, J., dissenting).

<sup>193</sup> 460 U.S. 276, 285 (1983).

<sup>194</sup> *Id.* at 282.

simply ha[d] no constitutional foundation.”<sup>195</sup> Construed narrowly, Rehnquist’s reasoning might be well within the Fourth Amendment mainstream. Some technological developments pose no threat to constitutional values, and the improvement of crime-fighting capacities alone should not necessarily trigger Fourth Amendment concern. Rehnquist’s pronouncements, however, are susceptible to a more expansive interpretation that is dismissive of and arguably insensitive to legitimate fears that scientific and technological progress might erode fundamental rights. They could suggest that officers have nearly unfettered freedom to exploit technology. In part because of his statements about the relationship between technological sense enhancement and the Fourth Amendment, three Justices who agreed that the electronically-assisted tracking in *Knotts* was unobjectionable refused to join Rehnquist’s opinion.<sup>196</sup>

Opinions Rehnquist joined provide additional evidence that he was not particularly troubled by scientific and technological threats to Fourth Amendment values. In *California v. Ciraolo*, he agreed with the conclusion that officers could take advantage of advances in aviation to monitor otherwise private activities in residential curtilage.<sup>197</sup> Chief Justice Burger’s opinion dismissed the dissenting protest that a failure to regulate aerial surveillance was irreconcilable with the spirit and intent of *Katz v. United States*—which revolutionized Fourth Amendment doctrine in response to technological encroachment on constitutional values.<sup>198</sup> *Kyllo v. United States* held that thermal imaging of a

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<sup>195</sup> *Id.* at 284. Rehnquist also stated that “scientific enhancement of th[e] sort [involved in *Knotts*] raise[d] no constitutional issues which visual surveillance would not also raise” because an officer who was “following” in his car “throughout [the] journey could have observed” the movements monitored by electronic means. *Id.* at 285. He refused to entertain the realistic possibility that electronic devices might well enable surveillance of public movements that would be impossible or impractical if officers had to depend on unaided human capabilities.

<sup>196</sup> *Id.* at 288 (Stevens, J., concurring).

<sup>197</sup> 476 U.S. 207 (1986). Because the curtilage receives protection as part of the home, see *Oliver v. United States*, 466 U.S. 170, 180 (1984), the outcome of *Ciraolo* is also arguably inconsistent with the special regard for home privacy found in precedent. See *Ciraolo*, 476 U.S. at 220-21, 224 (Powell, J., dissenting).

<sup>198</sup> See *id.* at 215-16, 218-19 (Powell, J., dissenting). According to Chief Justice Burger, *Katz*’s concern with electronic eavesdropping was inapposite to officers’ use of air travel to gain visual access to curtilage activities. See *id.* at 215.

home is a search in part because technology should not be allowed to shrink Fourth Amendment shelter for home privacy.<sup>199</sup> Rehnquist joined a dissent that deemed the enhancement of human senses afforded by thermal imagers to be no cause for concern.<sup>200</sup>

In sum, the record suggests that William Rehnquist disagreed with some fundamental premises that others have found germane to Fourth Amendment interpretation. He was overly negative about the least intrusive alternative principle, skeptical about special reverence for home privacy, seemingly unconcerned by impacts on the privacy and freedom of innocent persons or creeping authoritarianism, and not troubled by privacy losses resulting from scientific and technological progress. These considerations did not influence his efforts “to ‘hold the [Fourth Amendment] balance true.’”<sup>201</sup>

## 2. The Positives: Rehnquist’s Approach to Fourth Amendment Interpretation

The last section discussed how the Chief Justice rejected some established Fourth Amendment norms and principles and took a limiting view of others. This section describes the Fourth Amendment reasoning he preferred, the lights that guided his understanding of the constitutional balance.

From his earliest time on the Court, Justice Rehnquist focused on a single word as the key to Fourth Amendment construction. His second majority opinion announced the fundamental theme that he would sound over and over through the years—that “the ultimate standard set forth in the Fourth Amendment is reasonableness.”<sup>202</sup> In opinion after opinion, majority, concurring, and dissenting, he repeated this mantra. Because the Framers had been explicit, prohibiting only *unreasonable* searches and seizures, “reasonableness” was the “central requirement,”<sup>203</sup> the “overarching principle,”<sup>204</sup> and “the

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<sup>199</sup> 533 U.S. 27, 34-35 (2001).

<sup>200</sup> *See id.* at 42-44, 49-50 (Stevens, J., dissenting).

<sup>201</sup> *Illinois v. Gates*, 462 U.S. 213, 241 (1983).

<sup>202</sup> *Cady v. Dombrowski*, 413 U.S. 433, 439 (1973).

<sup>203</sup> *Texas v. Brown*, 460 U.S. 730, 739 (1983).

<sup>204</sup> *United States v. Villamonte-Marquez*, 462 U.S. 579, 588 (1983).

touchstone”<sup>205</sup> that must guide every interpretation. “The Fourth Amendment commands” but one elementary thing—“that searches and seizures be reasonable.”<sup>206</sup> The task of the judiciary is simple—to determine whether any particular search or seizure complies with the textual command.<sup>207</sup>

As already discussed, Rehnquist rejected the notion that search warrants were a norm of reasonableness,<sup>208</sup> and his opinions did not treat probable cause as a point of departure, that is, a presumptive dictate of reasonableness.<sup>209</sup> He did not approach reasonableness determinations with assumptions that the most demanding standards applied and that the government must justify their suspension. Reasonableness was “not capable of precise definition or mechanical application,” but, rather, always “require[d] a balancing of the need for the particular search [or seizure] against the invasion of personal rights that the search [or seizure] entails.”<sup>210</sup> The only way to determine compliance with the central, overarching Fourth Amendment touchstone was “the familiar balancing” process that weighs the individual’s interests against the government’s.<sup>211</sup> Evaluations of reasonableness called

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<sup>205</sup> *Florida v. Jimeno*, 500 U.S. 248, 250 (1991).

<sup>206</sup> *United States v. Montoya de Hernandez*, 473 U.S. 531, 537 (1985).

<sup>207</sup> *See also* *Chandler v. Miller*, 520 U.S. 305, 325 (1997) (Rehnquist, J., dissenting); *Maryland v. Wilson*, 519 U.S. 408, 411 (1997); *Florida v. Royer*, 460 U.S. 491, 520 (1983) (Rehnquist, J., dissenting); *Steagald v. United States*, 451 U.S. 204, 224 (1981) (Rehnquist, J., dissenting); *Michigan v. Tyler*, 436 U.S. 499, 516 (1978) (Rehnquist, J., dissenting).

<sup>208</sup> *See supra* text accompanying notes 104-123

<sup>209</sup> *See supra* text accompanying notes 124-39. Of course, he did not dispute the textual requirement of probable cause to support warrants. Nor did he reject the idea that arrests or fully intrusive searches for investigatory purposes might well demand probable cause. In fact, he joined opinions acknowledging the need for probable cause to arrest and to search. *See, e.g.,* *California v. Carney*, 471 U.S. 386, 394-95 (1985) (recognizing the need for probable cause to search a vehicle under the automobile exception); *Payton v. New York*, 445 U.S. 573, 620 (1980) (White, J., dissenting) (conceding that probable cause to arrest and probable cause to believe that a felon is in a home are both necessary for a home entry to effect an arrest); *United States v. Watson*, 423 U.S. 411, 421-23 (1976) (acknowledging that probable cause is necessary for a public arrest). Nonetheless, he was quite receptive to contentions that a particular search or seizure could be reasonable without the fullest measure of constitutional justification.

<sup>210</sup> *Bell v. Wolfish*, 441 U.S. 520, 559 (1979).

<sup>211</sup> *Chandler*, 520 U.S. at 325 (Rehnquist, J., dissenting); *see also* *United States v. Knights*, 534 U.S. 112, 118-19 (2001); *Maryland v. Wilson*, 519 U.S. 408, 411 (1997); *Graham v. Connor*, 490 U.S. 386, 396 (1989).

for “objective” inquiries that pay “careful attention to the facts and circumstances of each particular case.”<sup>212</sup>

William Rehnquist did not invent balancing analysis. He borrowed his preferred approach from Warren Court opinions.<sup>213</sup> The Warren Court, however, believed that situations permitting assessments of reasonableness by judicial interest balancing were rare exceptions to the Framers’ norms.<sup>214</sup> For the vast majority of searches and seizures, judges were not at liberty to suspend the constitutionally-prescribed probable cause and warrant demands based on their assessment of the weights in the scales. For William Rehnquist, the central command of reasonableness dictated balancing in every case. It was not an extraordinary mode of analysis, rarely invoked. Instead, it was the general rule, an approach required by the terms and nature of the Fourth Amendment.<sup>215</sup>

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<sup>212</sup> *Graham*, 490 U.S. at 396-97; see also *United States v. Montoya de Hernandez*, 473 U.S. 531, 537 (1985) (declaring that the reasonableness balance “depends upon all of the circumstances surrounding the search or seizure”).

<sup>213</sup> In two major rulings in successive years toward the end of Earl Warren’s service as Chief Justice—*Camara v. Mun. Ct. of San Francisco*, 387 U.S. 523 (1967), and *Terry v. Ohio*, 392 U.S. 1 (1968)—majorities grounded their holdings in a balancing analysis, recognizing that it was the assumption underlying the Fourth Amendment reasonableness requirement. See *Terry*, 392 U.S. at 20-27; *Camara*, 387 U.S. at 536-40. The Warren Court was willing to suspend Fourth Amendment norms and engage in a balancing analysis only because of the unique practices at issue in those cases. It was an extraordinary approach for infrequent, extraordinary search and seizure situations.

<sup>214</sup> The Warren Court ended soon after *Terry* and *Camara*. Two later opinions that capture its attitude toward balancing analysis are *Dunaway v. New York*, 442 U.S. 200, 210-14 (1979) (emphasizing that the balancing analysis was employed in *Terry* because of the substantially less intrusive character of the searches and seizures at issue, suggesting that widespread balancing could lead to the “disappear[ance]” of the Fourth Amendment’s core protections, and affirming the centrality of the Framers’ “probable cause” standard), and *Arizona v. Hicks*, 480 U.S. 321, 327-29 (1987) (holding balancing inappropriate to determine the reasonableness of the search and seizure involved in moving a turntable to inspect its serial number and “adher[ing],” instead, “to the textual and traditional standard of probable cause”).

<sup>215</sup> I am hardly the first to identify Rehnquist’s preferred approach to Fourth Amendment interpretation. It has been thoroughly documented, analyzed, and critiqued by others, who have pointed out that this was his method for correcting a perceived imbalance between law enforcement authority and civil liberties resulting from Warren Court norms. See Bradley, *supra* note 17, at 294; Thomas Y. Davies, *Denying a Right by Disregarding Doctrine: How Illinois v. Rodriguez Demands Consent, Trivializes Fourth Amendment Reasonableness, and Exaggerates the Excusability of Police Error*, 59 TENN. L. REV. 1, 55 (1991); William W. Greenhalgh & Mark J. Yost, *In Defense of the “Per Se” Rule: Justice Stewart’s Struggle to Preserve the Fourth*

Interest balancing led Rehnquist to deem various sorts of searches and seizures reasonable, despite the absence of both a warrant and probable cause. He often found the alternative, lesser showing of a “reasonable suspicion”<sup>216</sup> adequate to justify official intrusions on privacy, property, or liberty.<sup>217</sup> Perhaps even more significant were the several occasions when balancing led him to approve “random” searches or seizures—i.e., those not supported by any individualized showing of suspicion. No Justice was more favorably inclined toward suspicionless searches or seizures.<sup>218</sup>

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*Amendment's Warrant Clause*, 31 AM. CRIM. L. REV. 1013, 1092 (1994); Tracey Maclin, *The Central Meaning of the Fourth Amendment*, 35 WM. & MARY L. REV. 197, 205 (1993); McClurg, *supra* note 8, at 812-13. The open-ended, flexible reasonableness analysis based on assessments of the totality of objective facts was capable of restoring to the custodians of law and order legitimate authority they had been denied. See Davies, *supra*, at 57, 98 (observing that “the government usually wins under” the “generalized reasonableness” approach and it was “highly prized” by the Rehnquist Court because “the possibilities for justifying searches [were] greatly expanded”); Greenhalgh and Yost, *supra* at 1092 (arguing that the “balancing methodology . . . preferred . . . [by] Chief Justice Rehnquist . . . recognizes society’s interest in apprehending and convicting the criminal but ignores society’s interest in protecting privacy”).

<sup>216</sup> “Reasonable suspicion” is the phrase that has evolved to describe the showing less than probable cause that justifies the less intrusive searches and seizures authorized by *Terry v. Ohio*. According to Chief Justice Rehnquist, it is “considerably less than proof of wrongdoing by a preponderance. . . . [P]robable cause means ‘a fair probability that contraband or evidence of a crime will be found,’ . . . and the level of suspicion required for a *Terry* stop is obviously less demanding than that for probable cause.” *United States v. Sokolow*, 490 U.S. 1, 7 (1989) (quoting *Illinois v. Gates*, 462 U.S. 213, 238 (1983)); see also *Alabama v. White*, 496 U.S. 325, 330-31 (1990) (describing the quantitative and qualitative ways in which reasonable suspicion is a less demanding standard).

<sup>217</sup> For Rehnquist opinions, see *United States v. Arvizu*, 534 U.S. 266 (2002); *United States v. Knights*, 534 U.S. 112 (2001); *Illinois v. Wardlow*, 528 U.S. 119 (2000); *Sokolow*, 490 U.S. 1; *United States v. Montoya de Hernandez*, 473 U.S. 531 (1985); *Florida v. Royer*, 460 U.S. 491, 519 (1983) (Rehnquist, J., dissenting); *Adams v. Williams*, 407 U.S. 143 (1972). For other opinions Rehnquist joined, see *Hiibel v. Sixth Judicial Dist. Ct.*, 542 U.S. 177 (2004); *Alabama v. White*, 496 U.S. 325 (1990); *Maryland v. Buie*, 494 U.S. 325 (1990); *Arizona v. Hicks*, 480 U.S. 321, 333 (1987) (O’Connor, J., dissenting); *United States v. Sharpe*, 470 U.S. 675 (1985); *United States v. Hensley*, 469 U.S. 221 (1985); *New Jersey v. T.L.O.*, 469 U.S. 325 (1985); *Michigan v. Long*, 463 U.S. 1032 (1983); *United States v. Place*, 462 U.S. 696 (1983).

<sup>218</sup> As will be seen, Rehnquist never disagreed with a decision to sustain a random search or seizure, and more than once he dissented from majority decisions holding a suspicionless search or seizure unreasonable. On a couple of occasions, he was alone in dissent. See *Chandler v. Miller*, 520 U.S. 305, 323 (1997) (Rehnquist, J., dissenting); *Delaware v. Prouse*, 440 U.S. 648, 664 (1979) (Rehnquist, J., dissenting).

Rehnquist authored two groundbreaking opinions upholding suspicionless stops—*Michigan Department of State Police v. Sitz*<sup>219</sup> and *United States v. Villamonte-Marquez*<sup>220</sup>—and voted to uphold suspicionless seizures in nearly every other case the Court decided.<sup>221</sup> During the Rehnquist years, the Court sustained some and rejected other suspicionless searches pursuant to random drug testing programs.<sup>222</sup> If Rehnquist's views had prevailed, every program would have been deemed reasonable based on interest balancing.<sup>223</sup> Moreover, he was favorably disposed toward other types of suspicionless searches—i.e., invasions of privacy without any specific indicia of a particular individual's involvement in criminal activity.<sup>224</sup> In Rehnquist's view, judicial interest balancing was justified in the random search context by merely “a proper governmental purpose other than law enforcement.”<sup>225</sup> An “especially ‘important’” objective was not

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<sup>219</sup> 496 U.S. 444 (1990).

<sup>220</sup> 462 U.S. 579 (1983).

<sup>221</sup> See *Illinois v. Lidster*, 540 U.S. 419, 428 (2004); *City of Indianapolis v. Edmond*, 531 U.S. 32, 48-56 (2000) (Rehnquist, J., dissenting); *Prouse*, 440 U.S. at 664 (Rehnquist, J., dissenting); *United States v. Martinez-Fuerte*, 428 U.S. 543 (1976). In *United States v. Brignoni-Ponce*, 422 U.S. 873, 887 (1975) (Rehnquist, J., concurring), Rehnquist concurred with a conclusion that suspicionless seizures of motorists by roving border patrols were unconstitutional.

<sup>222</sup> For opinions sustaining the searches, see *Bd. of Educ. v. Earls*, 536 U.S. 822 (2002); *Vernonia Sch. Dist. 47J v. Acton*, 515 U.S. 646 (1995); *Nat'l. Treasury Emps. Union v. Von Raab*, 489 U.S. 656 (1989); *Skinner v. Ry. Labor Execs.' Ass'n*, 489 U.S. 602 (1989). For opinions holding the searches unconstitutional, see *Ferguson v. City of Charleston*, 532 U.S. 67 (2001); *Chandler v. Miller*, 520 U.S. 305 (1997).

<sup>223</sup> He joined Justice Scalia's dissent in *Ferguson*, 532 U.S. at 91 (Scalia, J., dissenting); and authored his own dissent in *Chandler*, 520 U.S. at 323 (Rehnquist, J., dissenting). See David E. Steinberg, *High School Drug Testing and the Original Understanding of the Fourth Amendment*, 30 HASTINGS CONST. L.Q. 263, 289-90 (2003) (observing that Rehnquist “never has seen a random drug testing program that he didn't like”).

<sup>224</sup> See, e.g., *United States v. Flores-Montano*, 541 U.S. 149, 155-56 (2004) (border search of vehicle); *Hudson v. Palmer*, 468 U.S. 517, 536-37 (1984) (prison cell search); *Ybarra v. Illinois*, 444 U.S. 85, 110 (1979) (Rehnquist, J., dissenting) (patdown of bar patron during search of bar); *Bell v. Wolfish*, 441 U.S. 520 (1979) (visual body cavity searches of inmates); *United States v. Ortiz*, 422 U.S. 891, 898-99 (1975) (Rehnquist, J., concurring) (search at traffic checkpoint); *Almeida-Sanchez v. United States*, 413 U.S. 266, 299 (1973) (White, J., dissenting) (roving border patrol search); see also *United States v. Knights*, 534 U.S. 112, 120 n.6 (2001) (suggesting searches of probationers' homes might be permissible without any suspicion).

<sup>225</sup> *Chandler*, 520 U.S. at 325.

necessary.<sup>226</sup> Furthermore, for suspicionless seizures, he found “balancing analysis” to be “appropriate” even if officials could not demonstrate a “special . . . need ‘beyond the normal need’ for criminal law enforcement.”<sup>227</sup>

In Rehnquist’s hands and with his support, interest balancing proved to be a tool for considerable expansion of the authority to search and seize without any justification particular to the person whose privacy or liberty was infringed upon. For the random searches and seizures that came before the Court during his tenure, Rehnquist’s preferred method of construing the Constitution was a most effective means of ensuring a more law-enforcement-friendly Fourth Amendment.

*E. The Rehnquist Style: The Process, Methods, Tactics, and Strategy Used to Right the Fourth Amendment Ship*

Prior sections have addressed the substance of Rehnquist’s Fourth Amendment—the presumptions, premises, and principles he rejected and the interpretive approach he preferred. This section discusses the methods he employed to implement his views, the distinctive elements of his judicial style.

William Rehnquist could not have known that he would have the luxury of more than three decades to pursue his goals. Retrospectively, however, it seems as if he might have bet on having the time necessary to remedy perceived Fourth Amendment imbalances. Early on, he made efforts to achieve swift and sweeping victories, by challenging the legitimacy and foundations of the warrant requirement and exclusionary rule.<sup>228</sup> He seemed to realize, however, that such revolutionary changes were not likely to happen overnight. Instead of insistently beating those drums, he settled in for a steady war of attrition characterized by consistency and patience.<sup>229</sup> He played the hand

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<sup>226</sup> *Id.*

<sup>227</sup> *Mich. Dep’t of State Police v. Sitz*, 496 U.S. 444, 450 (1990); *see also City of Indianapolis v. Edmond*, 531 U.S. 32, 53-55 (Rehnquist, J., dissenting) (asserting that special needs are not necessary for roadblock seizures to be reasonable).

<sup>228</sup> *See infra* text accompanying notes 133-39 & 144-55 (discussing Rehnquist’s criticisms of the warrant rule and assaults on the exclusionary rule).

<sup>229</sup> I believe that 1981, five years before he became Chief Justice and twenty-four years before he left the Court, was the last year in which Rehnquist challenged the

he was dealt artfully, exploiting opportunities to erode, qualify, or recharacterize Warren Court rulings, thereby confining them within ever-tighter borders that left no room for growth. He sought to modify underlying premises in ways that would afford future opportunities to trim Fourth Amendment excesses. When the votes materialized, he took advantage of malleable doctrines to achieve his ends. He highlighted the limits of rulings with the potential for expansive interpretation, striving to contain any damage. For thirty-three years, William Rehnquist patiently, consistently, and confidently kept the pressure on, never flagging in his quest to restore to the forces of law and order the constitutional authority he saw as their entitlement.

A striking facet of the large catalogue of Rehnquist opinions is how often he sought to lay foundations for future reform. He was a “judicial Johnny Appleseed,” who used majority, concurring, and dissenting opportunities to plant ideas that might later germinate and bear fruit. His very first opinion illustrates the tactic. In *Terry v. Ohio*, Chief Justice Warren had carefully and deliberately refused to resolve the question of whether investigative stops for questioning are permissible on less than probable cause when officers have no grounds to believe that a suspect is armed and dangerous.<sup>230</sup> New Justice Rehnquist’s majority opinion in *Adams v. Williams* contains a foundation for an affirmative answer to that very significant question.<sup>231</sup> He indicated that suspects could be detained for appropriate investigation in the absence of any threat of violence<sup>232</sup>—a position that would later become an accepted expansion of law enforcement authority.<sup>233</sup>

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legitimacy of the warrant requirement and lobbied for the abolition of the exclusionary rule. *See supra* notes 134 & 156.

<sup>230</sup> 392 U.S. 1, 20 n.16 (1968) (specifically reserving the question); *id.* at 30 (characterizing the holding as “merely” that a stop and frisk are allowed when officers “reasonably . . . conclude” that a person is involved in “criminal activity” and is “armed and presently dangerous”).

<sup>231</sup> It bears mention that the issue did not have to be confronted in *Adams*. The officer had a reasonable suspicion that the suspect was involved in criminal activity and was armed and dangerous. *See Adams v. Williams*, 407 U.S. 143, 147-48 (1972).

<sup>232</sup> *See id.* at 146.

<sup>233</sup> *See Illinois v. Wardlow*, 528 U.S. 119, 123, 125 (2000) (asserting that *Terry* held that brief investigative seizures are allowed on reasonable suspicion of criminal

Other examples abound. Rehnquist sowed the seeds for holdings that would allow officers substantial room to interact with suspects without triggering *any* Fourth Amendment regulation. Before a majority held that officers could ask questions and request identification without reasonable suspicion,<sup>234</sup> Rehnquist ventured that view.<sup>235</sup> Moreover, he laid foundations for the Court's position that seizures do not depend on officers' subjective intentions, but only on the objective impact of their actions on a reasonable suspect.<sup>236</sup>

Prior to the holding in *Whren v. United States* that probable cause is determined objectively,<sup>237</sup> Rehnquist more than once rejected inquiries into officers' subjective motivations in resolving most Fourth Amendment issues.<sup>238</sup> His *Florida v. Royer* dissent contains a number of reflections upon the reasonable suspicion criterion. He suggested, for example, that a combination of several "innocent" circumstances could be suspicious in the totality, that even though drug courier profiles do not provide "mathematical formula[s]" for assessing reasonable suspicion the presence of factors in a profile does not diminish their value, and that officer training and experience must be considered.<sup>239</sup> All of these principles would later blossom in a majority opinion he authored.<sup>240</sup>

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activity and concluding that a stop was justified because the officer had such a suspicion).

<sup>234</sup> See *Florida v. Bostick*, 501 U.S. 429, 434-35 (1991) (stating that even with no suspicion officers may ask questions and request identification because no seizure occurs).

<sup>235</sup> See *I.N.S. v. Delgado*, 466 U.S. 210, 216 (1984) (suggesting that neither questioning nor a request for identification constitutes a seizure).

<sup>236</sup> See *Dunaway v. New York*, 442 U.S. 200, 224 (1979) (Rehnquist, J., dissenting) (opining that "unexpressed intentions of police officers . . . have little bearing on . . . whether the police conduct, objectively viewed, restrained [a person's] liberty by show of force or authority"). The Court's position is clear from its formulation of the controlling objective standard. The test is whether "police conduct would 'have communicated to a reasonable person that he was not at liberty to ignore the police presence and go about his business.'" *Bostick*, 501 U.S. at 437 (quoting *Michigan v. Chesternut*, 486 U.S. 567, 569 (1988)).

<sup>237</sup> 517 U.S. 806 (1996).

<sup>238</sup> See *Graham v. Connor*, 490 U.S. 386, 397-99 (1989); *Scott v. United States*, 436 U.S. 128, 137-38 (1978); *United States v. Robinson*, 414 U.S. 218, 236 (1973).

<sup>239</sup> See *Florida v. Royer*, 460 U.S. 491, 525, 525 n.6 (1983) (Rehnquist, J., dissenting).

<sup>240</sup> See *United States v. Sokolow*, 490 U.S. 1, 9-10 (1989).

Rehnquist made similar efforts to undermine and weaken the search warrant requirement. His early majority opinion in *Cady v. Dombrowski*,<sup>241</sup> although very fact specific, would prove foundational for the Court's adoption of a more generic inventory search exception.<sup>242</sup> His dissent in *Robbins v. California*,<sup>243</sup> contained seeds of the later expansions of the automobile exception to include virtually all vehicles and all containers found in vehicles.<sup>244</sup> His majority opinion in *Texas v. Brown*<sup>245</sup> contains a predicate for the Court's ultimate rejection of the inadvertence limitation on the plain view doctrine.<sup>246</sup>

Perhaps his best efforts were devoted to sapping the strength of his chief nemesis—the exclusionary rule. Rehnquist opinions contain seeds of the “good-faith” exceptions that would later garner majority support.<sup>247</sup> Premises relied upon in concluding that the exclusionary rule is not applicable to knock-and-announce violations<sup>248</sup> have roots in his opinions.<sup>249</sup> Most significantly, the

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<sup>241</sup> 413 U.S. 433 (1973).

<sup>242</sup> See *South Dakota v. Opperman*, 428 U.S. 364 (1976).

<sup>243</sup> 453 U.S. 420, 439-43 (1981) (Rehnquist, J., dissenting) (suggesting both that “automobiles” should be treated “as a class” because they are “inherently mobile” and that all containers inside automobiles should be subject to search under the automobile exception).

<sup>244</sup> See *Pennsylvania v. Labron*, 518 U.S. 938, 940 (1996) (confirming that all readily mobile vehicles are subject to warrantless searches under the automobile exception without a specific showing of exigent circumstances); *California v. Acevedo*, 500 U.S. 565, 580 (1991) (holding that all containers in vehicles are subject to warrantless searches based on probable cause under the automobile exception); *California v. Carney*, 471 U.S. 386, 393-94 (1985) (concluding that readily mobile vehicles in use for transportation are within the scope of the automobile exception).

<sup>245</sup> 460 U.S. 730, 743 (1983) (indicating that the inadvertence criterion for the plain view doctrine may not endure).

<sup>246</sup> See *Horton v. California*, 496 U.S. 128, 130 (1990) (abolishing the inadvertence requirement).

<sup>247</sup> See *California v. Minjares*, 443 U.S. 916, 918-19 (1979) (Rehnquist, J., dissenting from denial of stay); *Dunaway v. New York*, 442 U.S. 200, 226-27 (1979) (Rehnquist, J., dissenting); *United States v. Peltier*, 422 U.S. 531, 536-37 (1975).

<sup>248</sup> See *Hudson v. Michigan*, 547 U.S. 586, 601-02 (2006).

<sup>249</sup> See *United States v. Ramirez*, 523 U.S. 65, 72 n.3 (1998) (raising the issue of whether a sufficient causal connection exists between an illegal method of entry and the discovery of evidence in a home); *Minjares*, 443 U.S. at 923-28 (Rehnquist, J., dissenting from denial of stay) (suggesting that changes since *Mapp* justified reassessment and abolition); *Rakas v. Illinois*, 439 U.S. 128, 134 (1978) (observing that civil remedies were available for those who have suffered Fourth Amendment deprivations).

“culpability” threshold for exclusion endorsed in powerful dicta in the Court’s two most recent exclusionary rule opinions<sup>250</sup> can be traced to earlier Rehnquist reflections upon the significance of official blameworthiness.<sup>251</sup>

In sum, an integral part of the Rehnquist strategy was to sketch blueprints for later pro-law enforcement projects. Not every effort was successful, but a number of them yielded the results he desired.<sup>252</sup> The carefully sown seeds produced a bumper crop of authority to preserve law and order.

Among misimpressions that were corrected by this research was my belief that William Rehnquist was a staunch advocate of bright Fourth Amendment lines that furnished officers both clear guidance and overbroad authority to search and seize. I thought he was strongly predisposed toward rulings of that nature. In fact, in his first Fourth Amendment opinion, Rehnquist observed that “[o]ne simple rule” could not suffice to determine whether a stop and frisk based on informant hearsay was reasonable, announcing that constitutionality turned on whether officers had “enough indicia of reliability.”<sup>253</sup> Later, after he became Chief, he rejected a state court’s per se rule that overprotected Fourth Amendment rights, branding it “unrealistic.”<sup>254</sup> According to the Chief Justice, the Court had “consistently eschewed bright-line rules, instead emphasizing the fact-specific nature of the reasonableness inquiry.”<sup>255</sup> When he *could* muster a majority to support a pro-law

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<sup>250</sup> See *Davis v. United States*, 131 S. Ct. 2419, 2427-28 (2011); *Herring v. United States*, 555 U.S. 135, 143-44 (2009).

<sup>251</sup> See *Minjares*, 443 U.S. at 918-19, 925 (Rehnquist, J., dissenting from denial of stay); *Scott v. United States*, 436 U.S. 128, 139 n.13 (1978); *Peltier*, 422 U.S. at 542.

<sup>252</sup> *Thornton v. United States* is an example of an unsuccessful effort. In his majority opinion, Rehnquist strove to prevent foreseeable damage to the expansive authority to search vehicles incident to arrests of recent occupants, suggesting that individualized assessments of access were “unworkable” and describing broad, unqualified power to search passenger compartments as “established constitutional precedent.” See *Thornton v. United States*, 541 U.S. 615, 623 n.3, 624 n.4 (2004). After he left the Court, a majority departed from that established precedent and opted for the unworkable option Rehnquist feared. See *Arizona v. Gant*, 556 U.S. 332 (2009), discussed *infra* text accompanying notes 317-26.

<sup>253</sup> *Adams v. Williams*, 407 U.S. 143, 147 (1972).

<sup>254</sup> See *Ohio v. Robinette*, 519 U.S. 33, 39-40 (1996).

<sup>255</sup> *Id.* at 39. In *Robbins v. California*, 453 U.S. 420, 443 (1981) (Rehnquist, J., dissenting), Justice Rehnquist averred that he favored a bright line but bemoaned the

enforcement bright line, he eagerly endorsed it, citing the vital need for guidance.<sup>256</sup> Nonetheless, Rehnquist opinions favoring bright-line standards are a distinct minority. More typically, his opinions promote amorphous, totality-type standards that provide little clarity for future decisions by officers or judges.

*Rakas v. Illinois*<sup>257</sup> and *Illinois v. Gates*<sup>258</sup>—arguably his two most significant Fourth Amendment opinions—are the antitheses of bright-line decisions. *Rakas* rejected a relatively clear approach to “standing” determinations—an approach that led to more frequent invocation of the exclusionary rule. He supplanted it with a much more indeterminate “legitimate expectation of privacy” standard that hinges on all the facts.<sup>259</sup> *Gates* abandoned a more structured, two-pronged, three-stage doctrine for analyzing hearsay-based probable cause showings, replacing it with a “totality-of-the-circumstances” approach.<sup>260</sup> According to Justice Rehnquist, rigid rules were simply not appropriate for “fluid,”

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fact that the training of the legal profession to “attack ‘bright lines’” is likely to produce “blurry impressionistic pattern[s]” instead.

<sup>256</sup> *United States v. Robinson*, 414 U.S. 218 (1973), is an early and noteworthy example, and probably the reason for my mistaken impression. In *Robinson*, Justice Rehnquist, in just his second year on the Court, emphasized the importance of clear Fourth Amendment guidance and found it reasonable for officers to thoroughly search every arrestee and every belonging on his or her person incident to a lawful arrest. *See id.* at 235-36. Other opinions prescribing bright-line approaches include: *Thornton v. United States*, 541 U.S. 615, 623-24 (2004); *Maryland v. Wilson*, 519 U.S. 408, 413-15, 413 n.1 (1997); *Colorado v. Bertine*, 479 U.S. 367, 375 (1987); and *United States v. Ramsey*, 431 U.S. 606, 619-22 (1977). Rehnquist also stressed the necessity for bright-line guidance in *California v. Minjares*, 443 U.S. 916, 927 (1979) (Rehnquist, J., dissenting from denial of stay) (“There is no question that the police are badly in need of rules that may be relatively easily understood in carrying out their work of apprehending and assisting in convicting those guilty of conduct made criminal by the legislature.”).

<sup>257</sup> 439 U.S. 128 (1978).

<sup>258</sup> 462 U.S. 213 (1983).

<sup>259</sup> *See Rakas*, 439 U.S. at 143, 148-49; *see also* John M. Junker, *The Structure of the Fourth Amendment: The Scope of the Protection*, 79 J. CRIM. L. & CRIMINOLOGY 1105, 1175 (1989) (stating that *Rakas* made “the test for standing . . . far more abstract, and thus more malleable” by adopting “a ‘dim line’ test”). In *Minnesota v. Carter*, the Chief Justice tried to prescribe the same fact-specific, case-by-case approach to “standing” for guests in homes, but Justice Kennedy’s concurring view that almost all social guests have privacy interests in homes thwarted success and resulted in a much brighter line. *See supra* note 180.

<sup>260</sup> *Gates*, 462 U.S. at 238.

“common-sense” probable cause assessments.<sup>261</sup> Other Rehnquist opinions endorsed similar approaches, prescribing standards that demanded case-by-case, fact-intensive assessments and provided minimal guidance for officers’ and judges’ decisions.<sup>262</sup> In some opinions, he took a hybrid approach, prescribing both bright-line rules for some issues and not-so-bright-line approaches for others.<sup>263</sup>

The bottom line is that William Rehnquist’s attitude toward bright-line doctrines is consistent with his substantive understanding of the Fourth Amendment. He favored pro-law enforcement bright lines when they were feasible and struck an appropriate balance. However, sharper Fourth Amendment rules that yielded both clearer guidance and more expansive rights—at the expense of law and order—were unacceptable. Instead, he chose more flexible totality doctrines that interfered less with law enforcement efficacy.<sup>264</sup>

Rehnquist’s opinions had a relatively distinctive flavor. Compared to those of other Justices, they tend to be briefer, more concise and to the point.<sup>265</sup> He ordinarily said little more than he

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<sup>261</sup> *Id.* at 232, 239.

<sup>262</sup> *See, e.g.,* *Muehler v. Mena*, 544 U.S. 93, 99-100 (2005); *Illinois v. Wardlow*, 528 U.S. 119, 123-25 (2000); *Florida v. Jimeno*, 500 U.S. 248, 250-52 (1991); *Florida v. Wells*, 495 U.S. 1, 4 (1990); *United States v. Montoya De Hernandez*, 473 U.S. 531, 542-44 (1985).

<sup>263</sup> *Muehler v. Mena* and *Colorado v. Bertine*, 479 U.S. 367 (1987), fall into this category. *Mena* offers clear guidance for detentions of occupants, *see* 544 U.S. at 98, but also prescribes a case-specific balancing test to determine the use of force that is reasonable during such a detention. *See id.* at 99-100. *Bertine* holds that officers may always search all containers in cars during inventory searches, *see* 479 U.S. at 374-75, but offers only a vague “standard criteria” standard for determining whether discretion to impound a vehicle is appropriate. *See id.* at 375.

<sup>264</sup> *See* George M. Dery III, “When Will This Traffic Stop End?: The United States Supreme Court’s Dodge of Every Detained Motorist’s Central Concern—Ohio v. Robinette,” 25 FLA. ST. U. L. REV. 519, 546 (1998) (stating that Rehnquist “in one term . . . in two opinions . . . took diametrically opposed approaches toward the appropriateness of the use of bright lines in Fourth Amendment litigation”).

<sup>265</sup> *See* Edwin J. Butterfoss & Mary Sue B. Snyder, *Be My Guest: The Hidden Holding of Minnesota v. Carter*, 22 HAMLINE L. REV. 501, 502 (1999) (describing Rehnquist’s “majority opinion” as “short in length and short on analysis” and as “offer[ing] little guidance for future cases”); George M. Dery III, *Sanctioning “Thousands Upon Thousands of Petty Indignities”: The Supreme Court’s Creation of a Constitutional Free Zone for Police Seizures of Innocent Passengers in Maryland v. Wilson*, 54 WASH. & LEE L. REV. 1419, 1447 (1997) (referring to “Rehnquist’s laconic style”). For opinions which illustrate Rehnquist’s tendency to be brief, *see* Thornton v.

needed to say to achieve his objectives.<sup>266</sup> Some efforts are so terse, so unembellished as to be cryptic.<sup>267</sup> His lengthier works tend to be majority opinions for a closely divided Court. The abnormal length is probably attributable to the need to satisfy all members of a fragile majority.<sup>268</sup>

Rehnquist's brevity seems consistent with his frugal nature.<sup>269</sup> There was no reason to waste time or effort with more words than were needed to resolve an issue—except when he found an opportunity to plant seeds for future developments. There might have been other, more strategic reasons. The less said by way of reasoning or justification, the smaller the target for critics. Moreover, Rehnquist surely understood how precedents might be manipulated by future Justices to achieve objectives inconsistent with his views. After all, he had put two 1960s landmarks—*Katz* and *Terry*—to very good service in his effort to right Warren Court imbalances.<sup>270</sup> He may have wanted to minimize the potential ammunition for successors who held different visions. Finally, the less said in support of a decision, the greater the maneuver room in future opinions. As in evidence law, prior statements can produce problematic contradictions down the road. Justice William Rehnquist may well have recognized that he could not know what questions might land on the Court's doorstep. Briefer opinions kept more options open and could avoid the need to find a way out of a logical tangle of his own creation.

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United States, 541 U.S. 615 (2004); *Bond v. United States*, 529 U.S. 334 (2000); *Knowles v. Iowa*, 525 U.S. 113 (1998); *Jimeno*, 500 U.S. 248; Mich. Dept. of State Police v. Sitz, 496 U.S. 444 (1990); and *Adams v. Williams*, 407 U.S. 143 (1972).

<sup>266</sup> Although he would write more than was necessary when he thought it was appropriate to venture some pro-law enforcement position that he saw as suitable for future adoption by the Court. See *supra* text accompanying notes 222-52.

<sup>267</sup> See, e.g., *Illinois v. Wardlow*, 528 U.S. 119, 124-25 (2000) (generating unclarity about what constitutes unprovoked flight and whether unprovoked flight in a high crime area always constitutes reasonable suspicion of criminal activity); *Wells*, 495 U.S. at 4 (announcing a somewhat indecipherable standard for the types and degree of discretion officers may exercise under a constitutionally valid inventory policy).

<sup>268</sup> See, e.g., *Illinois v. Gates*, 462 U.S. 213 (1983); *Rakas v. Illinois*, 439 U.S. 128 (1978).

<sup>269</sup> OBERMAYER, *supra* note 8, at 137 (calling frugality “one of his most basic character traits”).

<sup>270</sup> See *supra* text accompanying notes 93-97, 213-15.

*F. A Brief Assessment of William Rehnquist's Influence on  
Fourth Amendment Law*

This final section is a less than comprehensive effort to assess the Chief Justice's influence on the contours of Fourth Amendment law. One cannot be certain about the full extent of a particular Justice's impacts. Much of the Court's work happens out of the public eye and some effects are untraceable. This evaluation is based on whether (and how much) the Court's approaches to and outcomes on Fourth Amendment issues moved in the direction of William Rehnquist's views during his service, and on the extent to which post-2005 rulings comport with his attitudes and understanding of that guarantee.

1. Fourth Amendment Trends from 1972-2005: Steady  
Rehnquistian Movement

During Rehnquist's more than three decades as a Justice, the "reasonable expectation of privacy" doctrine came to control the threshold "search" question.<sup>271</sup> Only rarely did that standard lead to a conclusion that contested conduct *did* constitute a search.<sup>272</sup> Majorities generally reached results consistent with Rehnquist's opposition to Fourth Amendment expansion.<sup>273</sup> Regarding the threshold "seizure" question, he was one of only two Justices to explicitly endorse the *Mendenhall* standard—whether a reasonable person would feel free to leave—when it first appeared.<sup>274</sup> Before long, a majority adopted that doctrine<sup>275</sup> and

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<sup>271</sup> See *Smith v. Maryland*, 442 U.S. 735, 739 (1979) (declaring that the *Katz* reasonable expectation of privacy standard had become the Justices' "lodestar" for determining whether a search had occurred).

<sup>272</sup> I count five such opinions during Rehnquist's tenure: *Kyllo v. United States*, 533 U.S. 27, 40 (2001); *Bond v. United States*, 529 U.S. 334, 338-39 (2000); *Arizona v. Hicks*, 480 U.S. 321, 324-25 (1987); *United States v. Karo*, 468 U.S. 705, 714-16 (1984); and *Walter v. United States*, 447 U.S. 649, 657-59 (1980). Rehnquist authored *Bond* and agreed with the search conclusion in *Karo*, but dissented in *Kyllo*, *Hicks*, and *Walter*.

<sup>273</sup> The thirteen majority opinions in footnote 97, *supra*, all concluded that the government activities at issue were not searches.

<sup>274</sup> See *United States v. Mendenhall*, 446 U.S. 544, 554 (1980) (only Justice Rehnquist and the author, Justice Stewart, joined this part of the opinion).

<sup>275</sup> See *California v. Hodari D.*, 499 U.S. 621, 627-28 (1991) (asserting that a Court majority had adopted the test in Justice Rehnquist's 1984 opinion in *I.N.S. v. Delgado*, 466 U.S. 210, 215 (1984)).

then proceeded to interpret and apply it stingily, freeing an array of encounters from Fourth Amendment control.<sup>276</sup> The Justices gravitated more and more toward the Rehnquist view that officers ought to have considerable room for preliminary investigatory interactions with individuals without having to justify their conduct. In both threshold domains, the balances struck favored law enforcement the vast majority of the time.

With strong pushes from Rehnquist opinions, the probable cause norm became less demanding, easier to satisfy.<sup>277</sup> Moreover, the standard became less “normal” as more and more official searches and seizures became justifiable on a less demanding showing. The varieties of conduct that could be reasonable on merely a reasonable suspicion increased,<sup>278</sup> and the content of the reasonable suspicion standard proved relatively insubstantial.<sup>279</sup> Moreover, although his colleagues were unwilling to accept as many suspicionless searches and seizures as Rehnquist would have liked, it was during his tenure that the Court first approved several random drug testing programs<sup>280</sup> and two types of suspicionless roadblocks.<sup>281</sup>

The Court did not abandon the search warrant requirement, as Rehnquist would have preferred. In fact, a majority never questioned the status of the warrant requirement or suggested that exceptions were anything but few and well delineated. The reality, however, is that exceptions to the warrant demand increased significantly during Rehnquist’s tenure—both in number<sup>282</sup> and in scope.<sup>283</sup> While ostensibly adhering to the search

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<sup>276</sup> The five post-*Mendenhall* opinions in which the Court interpreted or applied the seizure standard narrowly are: *United States v. Drayton*, 536 U.S. 194, 203-06 (2002); *Florida v. Bostick*, 501 U.S. 429, 435-36, 439-40 (1991); *Hodari D.*, 499 U.S. at 626-28; *Florida v. Rodriguez*, 469 U.S. 1, 5-6 (1984); and *Delgado*, 466 U.S. at 215-21.

<sup>277</sup> See *Maryland v. Pringle*, 540 U.S. 366, 372-73 (2003); *Whren v. United States*, 517 U.S. 806, 818-19 (1996); *Illinois v. Gates*, 462 U.S. 213, 245-46 (1983).

<sup>278</sup> See *supra* note 217 for a list of majority opinions.

<sup>279</sup> See *Alabama v. White*, 496 U.S. 325, 330-32 (1990); *United States v. Sokolow*, 490 U.S. 1, 9-10 (1989).

<sup>280</sup> See *supra* note 222 and accompanying text.

<sup>281</sup> The Court sustained a checkpoint for drunk drivers in *Michigan Department of State Police v. Sitz*, 496 U.S. 444, 455 (1990) and upheld a checkpoint seeking witnesses to a hit-and-run accident in *Illinois v. Lidster*, 540 U.S. 419, 428 (2004).

<sup>282</sup> New exceptions include: (1) inventories of vehicles, see *South Dakota v. Opperman*, 428 U.S. 364 (1976); (2) inventories of arrestees, see *Illinois v. Lafayette*, 462 U.S. 640 (1983); (3) reasonable belief in consent authority, see *Illinois v. Rodriguez*,

warrant rule, the Court deprived it of force, moving far down the path toward Rehnquist's view—that warrants are not essential for reasonableness.

The Justices failed to grant the Chief Justice's fondest wish—outright abandonment of the exclusionary rule. As with the warrant rule, however, they demolished considerable parts of the edifice. The situations in which illegally obtained evidence could be introduced multiplied dramatically due to constriction of the “standing” requisite<sup>284</sup> and growth in the number<sup>285</sup> and breadth of the exceptions.<sup>286</sup> The Court again followed Rehnquist quite a ways down the road he sought to travel, rendering suppression an ever-weaker impediment to criminal law enforcement.

William Rehnquist did not single-handedly move the Court in his direction in each of these Fourth Amendment arenas. Without colleagues favorably inclined toward the balances he preferred, these developments would not have been possible.<sup>287</sup> It seems

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497 U.S. 177 (1990); (4) monitoring of arrestees, *see* *Washington v. Chrisman*, 455 U.S. 1 (1982); (5) weapons searches of vehicles, *see* *Michigan v. Long*, 463 U.S. 1032 (1983); (6) protective sweeps of homes, *see* *Maryland v. Buie*, 494 U.S. 325 (1990); and (7) school searches, *see* *New Jersey, v. T.L.O.*, 469 U.S. 325 (1985). The drug testing searches approved by the Court also qualify as exceptions to the warrant rule. *See, e.g.*, *Vernonia Sch. Dist. 47J v. Acton*, 515 U.S. 646 (1995).

<sup>283</sup> The already established exceptions whose scope increased significantly were: (1) the search incident to arrest exception, *see* *Thornton v. United States*, 541 U.S. 615 (2004); *New York v. Belton*, 453 U.S. 454 (1981); *United States v. Robinson*, 414 U.S. 218 (1973); and (2) the “automobile exception,” *see* *Wyoming v. Houghton*, 526 U.S. 295 (1999); *California v. Acevedo*, 500 U.S. 565 (1991); *California v. Carney*, 471 U.S. 386 (1985); *Texas v. White*, 423 U.S. 67 (1975).

<sup>284</sup> *See supra* text accompanying notes 158-60.

<sup>285</sup> Additional exceptions recognized during the Rehnquist years include: (1) three varieties of the “good-faith exception,” *see* *Arizona v. Evans*, 514 U.S. 1 (1995); *Illinois v. Krull*, 480 U.S. 340 (1987); *United States v. Leon*, 468 U.S. 897 (1984); (2) the inevitable discovery exception, *see* *Nix v. Williams*, 467 U.S. 431 (1984) (holding the exception valid in Sixth Amendment cases, but using deterrent logic that makes it clearly applicable to Fourth Amendment suppression claims); and (3) the bars to raising exclusionary rule claims in various sorts of proceedings, *see* *Pa. Bd. of Prob. v. Scott*, 524 U.S. 357 (1998); *Stone v. Powell*, 428 U.S. 465 (1976) (habeas corpus proceedings); *United States v. Janis*, 428 U.S. 433 (1976); *United States v. Calandra*, 414 U.S. 338 (1974) (grand jury proceedings).

<sup>286</sup> The following exceptions were expanded: (1) independent source, *see* *Murray v. United States*, 487 U.S. 533 (1988); (2) attenuation, *see* *United States v. Ceccolini*, 435 U.S. 268 (1978); and (3) impeachment use, *see* *United States v. Havens*, 446 U.S. 620 (1980).

<sup>287</sup> While he served, Rehnquist had the good fortune of appointments that maintained a majority that was generally favorably inclined toward his conception of

likely, nonetheless, that his unflinching consistency over a very long time exerted powerful influence on the Fourth Amendment's direction. He lost battles, but ultimately his war of attrition was an enormous success. By its end, the law and order's troops had reclaimed considerable amounts of constitutional turf.

## 2. The Course of Fourth Amendment Jurisprudence Since 2005: WWWRT?<sup>288</sup>

The substantial movement of Fourth Amendment doctrine toward Rehnquistian positions would surely distress Earl Warren. Warren's reactions to the fate of Fourth Amendment law since his 1969 departure could only be displeasure at the empowerment of law enforcement and the losses of civil liberties. He was part of a majority committed to generous protection against unreasonable searches and seizures. The safeguards that developed during his tenure comported with his understanding of that guarantee. Today, forty years after William Rehnquist became an Associate Justice, a return to the Warren Court's Fourth Amendment balance is quite unimaginable. William Rehnquist would not be sanguine about every Fourth Amendment ruling since 2005. In fact, he would be quite dissatisfied with some and not entirely thrilled with others. The totality, however, could not disappoint him. The seven years since his death suggest that his influence is still alive and well and that it will continue to shape the course of search and seizure law. Moreover, although it is possible that he would have used persuasive powers to change an outcome, based purely on the votes of Chief Justice Roberts, not a single result has been different than it would have been if Rehnquist had remained.<sup>289</sup>

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the Fourth Amendment balance. These appointments included Justices O'Connor, Scalia, Kennedy, and Thomas, all of whom were still on the Court at the time of his death.

<sup>288</sup> "What Would William Rehnquist Think."

<sup>289</sup> By my count, the Court averaged more than six Fourth Amendment rulings per year between 1972 and 2005. *See supra* text accompanying note 26 (stating that the Court ruled in 207 Fourth Amendment cases during that span). In the seven terms since John Roberts became Chief Justice, there have been twenty Fourth Amendment decisions, or roughly three per year—less than half the average number during the preceding thirty-three years.

Since 2005, the Court has resolved one significant case concerning the “search” threshold and one involving the “seizure” threshold. In both, the Justices unanimously found that the Fourth Amendment regulated the government’s activity. In *United States v. Jones*,<sup>290</sup> decided during the most recent term, all agreed that installing a GPS device on a vehicle and using it to track publicly visible movements for twenty-eight days was a search.<sup>291</sup> It is unclear whether Chief Justice Rehnquist would have agreed.<sup>292</sup> Read broadly, his opinion in *Knotts* could support a contrary outcome. Therein, he denied reasonable expectations of privacy in public travels voluntarily conveyed to ordinary senses, indicating that the exploitation of technology to accomplish what *could have been* accomplished with naked eyes does not trigger Fourth Amendment scrutiny.<sup>293</sup> Moreover, *Jones* imposes a considerable restriction on law enforcement authority to employ a productive investigative tool. On the other hand, in *Knotts*, Rehnquist did suggest that “dragnet type” technology-aided monitoring of exposed travels might trigger Fourth Amendment scrutiny.<sup>294</sup>

A Rehnquist dissent in *Jones* would have rejected some potentially expansive (and surprising) premises in the majority opinion—specifically, that *Katz* does not provide the exclusive standard for whether a search has occurred and that a minor physical trespass on an effect for the purpose of gathering information followed by *any* information gathering at all constitutes a search.<sup>295</sup> He would have agreed with the concurring Justices that the property invasion involved in installing a GPS device is constitutionally trivial and that *Knotts* governs all short-

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<sup>290</sup> 132 S. Ct. 945 (2012).

<sup>291</sup> See *id.* at 949 (majority opinion); *id.* at 964 (Alito, J., concurring in the judgment).

<sup>292</sup> Although it was not unknown for him to be the odd Justice out in 8-1 Fourth Amendment rulings, that happened a mere four times in thirty-three years and only once after he became Chief. See *Chandler v. Miller*, 520 U.S. 305, 323 (1997) (Rehnquist, J., dissenting); *Reid v. Georgia*, 448 U.S. 438, 442 (1980) (Rehnquist, J., dissenting); *Delaware v. Prouse*, 440 U.S. 648, 664 (1979) (Rehnquist, J., dissenting); *Michigan v. Tyler*, 436 U.S. 499, 516 (1978) (Rehnquist, J., dissenting).

<sup>293</sup> See *supra* notes 193-96 and accompanying text.

<sup>294</sup> *United States v. Knotts*, 460 U.S. 276, 284 (1983).

<sup>295</sup> See *Jones*, 132 S. Ct. at 950-51.

term tracking after installation.<sup>296</sup> On the other hand, a Rehnquist dissent would have also rejected the concurrers' view that long-term monitoring of publicly visible movements—at least for *some* offenses—intrudes on protected privacy interests.<sup>297</sup>

If, like his successor, Rehnquist had decided to go along with the majority ruling in *Jones*, it is uncertain whether he would have cast his lot with the Scalia-led majority, joined the Alito-led concurrence, or blazed his own trail. The majority's refusal to address long-term nontrespassory GPS monitoring would have been appealing to his "conservativism."<sup>298</sup> On the other hand, the concurring Justices' inclination to leave all short-term monitoring unregulated, their conclusions that only long-term surveillance is of constitutional concern, and their suggestion that even long-term tracking may be unconstrained for certain "extraordinary offenses"<sup>299</sup> would have been attractive because they preserved considerable authority to exploit GPS technology without justification. Rehnquist would also have been pleased that the Court did not declare that regulated GPS monitoring requires a search warrant.<sup>300</sup> He definitely would have been displeased with *Jones*'s implications for the future of GPS tracking. Five Justices held that short-term monitoring following a trespass is a search,<sup>301</sup> and a different five indicated that long-term monitoring without trespass is a search.<sup>302</sup> If no Justice changes his or her

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<sup>296</sup> See *id.* at 961, 964.

<sup>297</sup> See *id.* at 964.

<sup>298</sup> *Id.* at 954. Rehnquist would have been pleased by the majority's announcement that even extensive "visual observation" without technological assistance "is constitutionally permissible," *id.* at 953-54, and by its care in conceding only that achievement of "the same result through electronic means" *might* invade privacy. *Id.* at 954.

<sup>299</sup> See *id.* at 964.

<sup>300</sup> It is arguable, of course, that the warrant presumption governs once an activity qualifies as a search. Nonetheless, there is an unavoidable contrast between Justice Scalia's opinion in *Jones*, which declined to address the justification needed to render GPS installation and tracking reasonable, see *id.* at 954, and his opinion in *Kyllo v. United States*, 533 U.S. 27, 40 (2001), which announced that a warrant is "presumptively" required for thermal imaging of homes. One can plausibly argue that there are reasons to suspend the warrant safeguard in the contexts *Jones* addresses.

<sup>301</sup> See *Jones*, 132 S. Ct. at 949 (majority opinion).

<sup>302</sup> See *id.* at 964 (Alito, J., concurring in the judgment); *id.* at 955 (Sotomayor, J., concurring).

mind, only short-term, non-trespassory tracking will be ungoverned by the reasonableness demand.<sup>303</sup>

In *Brendlin v. California*, the Justices unanimously ruled that all passengers in vehicles are seized when officers pull a driver over.<sup>304</sup> Applying well-established doctrine, the Court concluded that reasonable passengers would not feel free to leave when officers have signaled for a vehicle to stop and that passengers “submit” by not leaving.<sup>305</sup> Although it seems less likely, Rehnquist again might have refused to join this ruling. He strongly and consistently favored rulings according law enforcers opportunities for unregulated interaction with people, more than once taking a distinctly minority position that an individual had not been seized.<sup>306</sup> He might have hesitated to deprive officers of fortuitously discovered evidence of passengers’ criminality.<sup>307</sup>

On the other hand, in *Maryland v. Wilson*,<sup>308</sup> Rehnquist’s opinion allowing officers to force passengers to alight from stopped vehicles did rest on the premise that a seizure had already occurred. He reasoned that passengers were “already stopped by virtue of the stop of the vehicle” and focused on the modest additional intrusion involved in removing them from the vehicle.<sup>309</sup> Moreover, the *Brendlin* Court relied on a quite defensible interpretation of the two doctrinal requisites for

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<sup>303</sup> The Roberts Court has decided one other relatively insignificant case involving whether government conduct constituted a search. *See City of Ontario v. Quon*, 130 S. Ct. 2619 (2010). The Court avoided resolution of the threshold question, assuming that a city’s review of text messages sent by a police officer on a city-issued pager did intrude on a reasonable expectation of privacy. *See id.* at 2630. The Justices then concluded that the search was reasonable under any appropriate analysis. *See id.* at 2633. Rehnquist would not have favored the Court’s citation of the search warrant rule. *See id.* at 2630. Although he would have preferred interest balancing to the approach the Court employed, he would have agreed that the government acted reasonably. Moreover, he would have been delighted by the Court’s negativity toward and rejection of a least intrusive alternative argument. *See id.* at 2632.

<sup>304</sup> *See* 551 U.S. 249, 251 (2007).

<sup>305</sup> *Id.* at 257, 262.

<sup>306</sup> *See Reid v. Georgia*, 448 U.S. 438, 442 (1980) (Rehnquist, J., dissenting); *United States v. Mendenhall*, 446 U.S. 544, 554 (1980) (portion of opinion joined only by Stewart, J. & Rehnquist, J.); *Dunaway v. New York*, 442 U.S. 200, 221 (1979) (Rehnquist, J. dissenting).

<sup>307</sup> In addition, Rehnquist evinced a distinct lack of concern for passengers’ Fourth Amendment interests in vehicles in *Rakas v. Illinois*, 439 U.S. 128, 150 (1978).

<sup>308</sup> 519 U.S. 408 (1997).

<sup>309</sup> *Id.* at 414.

seizures by shows of authority endorsed by every Justice. Finally, Rehnquist might have been willing to sign on because of two limits in the majority opinion. First, Justice Souter indicated that a different result *might* follow for passengers traveling by public transportation—taxis or buses—instead of privately-owned vehicles.<sup>310</sup> More important, the majority did not hold that evidence found in an unlawfully stopped car must be suppressed at the request of an unlawfully seized passenger.<sup>311</sup> The Court did not preclude a conclusion that the discovery of evidence in a vehicle may lack a sufficient causal link to the incidental seizure of a passenger and may, therefore, not be the “fruit” of a violation of the passenger’s rights. Rehnquist might have concluded that *Brendlin*’s limited Fourth Amendment protection for passengers’ liberty would have minimal negative impacts on police efficacy.<sup>312</sup>

The Court has decided one significant case addressing the meaning of probable cause—*United States v. Grubbs*.<sup>313</sup> The Justices unanimously held that the probable cause requirement does not render anticipatory warrants categorically unconstitutional because it requires only a fair probability that items subject to seizure will be on premises at the time a search is conducted.<sup>314</sup> Rehnquist’s belief that probable cause should not pose inordinate obstacles to crime control efforts would surely have led him to approve. A conclusion that probable cause demands a showing that the objects sought are presently located in a place would have posed an irrational impediment to searches based on demonstrations that evidence or contraband will

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<sup>310</sup> See *Brendlin*, 551 U.S. at 262 n.6.

<sup>311</sup> See *id.* at 259, 263 (suggesting that passengers can exclude only evidence that is the “fruit” of the infringement upon their liberty and remanding for a state court determination of “whether suppression turns on any other issue”).

<sup>312</sup> In light of the Roberts Court’s exclusionary rule work, see *infra* text accompanying notes 407-26, exclusion is even less likely today than in 2005. The attitude toward exclusion evinced by recent decisions would almost certainly lead to a conclusion that the causal link between an incidental seizure of a passenger and the obtainment of evidence in a vehicle is ordinarily insufficient to justify exclusion. Civil liability remains a possible remedy, but a passenger is unlikely to find a civil suit for an unlawful detention in a vehicle worth the investment of time, money, and effort. The prospect of damages is unlikely to impede law enforcement activities.

<sup>313</sup> 547 U.S. 90 (2006).

<sup>314</sup> See *id.* at 94-96. Rehnquist would have endorsed the additional holding of five Justices that the particularity requirement of the Warrant Clause does not mandate inclusion of a triggering condition in an anticipatory warrant. See *id.* at 98-99.

probably arrive at a particular place and be there when officers enter.

The post-Rehnquist Court has addressed six cases involving three different exceptions to the search warrant rule. Some would delight the former Chief Justice; others would distress him. Rehnquist would have wholeheartedly joined the unanimous conclusion in *Virginia v. Moore* that arrests based on probable cause and searches incident to those arrests are constitutional even though state law forbids arrest for the particular offense.<sup>315</sup> The ruling and opinion were entirely in line with his preference for deference to officers' judgments, his view that "reasonableness" is the Fourth Amendment touchstone and is determined by interest balancing, and, of course, his indulgent attitude toward the breadth of the search incident to arrest doctrine.<sup>316</sup>

The Court's much more significant search incident to arrest ruling would have prompted intense dissent. In *Arizona v. Gant*,<sup>317</sup> a bare majority of five contracted the broad authority to search vehicles incident to the arrest of recent occupants that officers had been exercising for nearly thirty years.<sup>318</sup> The majority ruled that officers may exercise traditional search incident to arrest authority *only* when an arrestee "is unsecured and within reaching distance of the passenger compartment at the time of the search" *and* indicated that officers might be compelled to do what they would rarely be unable to do—eliminate the need to search the vehicle by depriving an arrestee of access.<sup>319</sup> The majority did endorse an alternative variety of search incident authority allowing warrantless passenger compartment searches

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<sup>315</sup> 553 U.S. 164, 176-78 (2008).

<sup>316</sup> See *Thornton v. United States*, 541 U.S. 615, 620-24 (2004); *New York v. Belton*, 453 U.S. 454, 463 (1981) (Rehnquist, J., concurring); *United States v. Robinson*, 414 U.S. 218, 235-36 (1973). The opinion in *Moore* would also have appealed to Rehnquist's hostility toward exclusion. Justice Scalia highlighted the inappropriateness of forcing a state to accept a constitutional evidentiary bar as the price of affording its citizens more protection against arrest than required by the Fourth Amendment. See *Moore*, 553 U.S. at 174.

<sup>317</sup> 556 U.S. 332 (2009).

<sup>318</sup> See *id.* at 359 (Alito, J., dissenting) (observing that "[t]he *Belton* rule ha[d] been taught to police officers for more than a quarter century").

<sup>319</sup> *Id.* at 343, 343 n.4.

“when it is ‘reasonable to believe evidence relevant to the crime of arrest might be found in the vehicle.’”<sup>320</sup>

In *Thornton v. United States*,<sup>321</sup> one of his last Fourth Amendment opinions, Chief Justice Rehnquist did not expressly reject *Gant*'s interpretation of *Belton*, but did intimate that he was not receptive.<sup>322</sup> Moreover, he would have disagreed with the majority's point of departure—reliance on “the basic rule” requiring search warrants.<sup>323</sup> He would have rejected the Court's emphasis on the high value of vehicle privacy<sup>324</sup> and its reliance on the fact that officers had no need for the authority *Gant* took away because they have ample alternative means of legitimately protecting “safety and evidentiary interests.”<sup>325</sup> He would have opposed the majority's rejection of the argument that the interest in clear guidance and many years of officer reliance justified the status quo.<sup>326</sup> Most of all, realizing that the expansive interpretation of *Belton* had been very productive for law enforcers, allowing thorough, contemporaneous searches of car contents in conjunction with all arrests, and that many of these searches might not otherwise be justified, Rehnquist would have strenuously resisted the decision to restore some of the Fourth Amendment protection against warrantless (and causeless) searches enjoyed prior to 1981.<sup>327</sup> *Gant*, the sole Roberts Court decision that has unraveled crime control gains achieved during

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<sup>320</sup> *Id.* at 343 (quoting *Thornton*, 541 U.S. at 632 (Scalia, J., concurring in the judgment)).

<sup>321</sup> 541 U.S. 615 (2004).

<sup>322</sup> *See id.* at 622-23, 623 n.3, 624 n.4 (suggesting that case-by-case determinations of arrestee access to a passenger compartment are “unworkable” and “impracticable” and undermine the “need for a clear rule”—that is, for “the sort of generalization which *Belton* enunciated”—and stating that it would have been “imprudent to overrule” *Belton*, which was “established constitutional precedent”).

<sup>323</sup> *See Gant*, 556 U.S. at 338.

<sup>324</sup> *See id.* at 344-45.

<sup>325</sup> *See id.* at 346-47.

<sup>326</sup> *See id.* at 345-46, 349-50.

<sup>327</sup> Rehnquist would have been pleased, at least, that the Court gave back some of what it took away in *Gant* by recognizing the alternative authority to conduct a search for evidence incident to arrests of recent occupants when the nature of the offense involved indicates that evidence *might* be found. *See supra* text accompanying note 319.

the Rehnquist years, would have troubled his law and order soul.<sup>328</sup>

William Rehnquist would have been extremely pleased with all three post-2005 rulings concerning the “exigent circumstances” exception to the warrant requirement, for each affirmed generous authority for warrantless home entries. The first two opinions—*Brigham City, Utah v. Stuart*<sup>329</sup> and *Michigan v. Fisher*<sup>330</sup> dealt with the need to “enter a home without a warrant to render emergency assistance to an injured occupant or to protect an occupant from imminent injury.”<sup>331</sup> The Court sustained warrantless entries in both cases, initially stressing that the authority hinged upon a reasonable belief that someone inside is “seriously injured or threatened with such injury,”<sup>332</sup> but then seeming to discount the need that an actual or threatened injury must be serious.<sup>333</sup> Rehnquist would have enthusiastically endorsed the conclusions that officers’ subjective motivations are irrelevant and that they “do not need ironclad proof of ‘a likely serious, life-threatening’ injury.”<sup>334</sup> He surely would have been pleased that the Court did not insist that officers have “probable cause” to believe that emergency assistance is needed—but, instead, required only “an objectively reasonable basis for believing” that someone “might need help.”<sup>335</sup>

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<sup>328</sup> It bears mention that the result in *Gant* is not attributable to any change in membership following *Thornton*. The five majority Justices were all Rehnquist colleagues. If the Rehnquist Court had faced the issue, the majority support might have been even larger. In *Thornton*, Justice O’Connor indicated sympathy with Justice Scalia’s challenges to *Belton* authority. See *Thornton v. United States*, 541 U.S. 615, 624-25 (2004) (O’Connor, J., concurring in part). Her replacement, Justice Alito, authored the *Gant* dissent.

<sup>329</sup> 547 U.S. 398 (2006).

<sup>330</sup> 130 S. Ct. 546 (2009).

<sup>331</sup> *Stuart*, 547 U.S. at 403.

<sup>332</sup> *Id.*

<sup>333</sup> In *Fisher*, the Court first quoted the serious injury language, see *Fisher*, 130 S. Ct. at 548, but then ignored that qualification in later passages. The Court stated, for example, that officers must have a reasonable belief “that medical assistance [is] needed, or persons [are] in danger,” *id.* at 549, and held that the entry in the case was constitutional because “it was reasonable to believe that Fisher had hurt himself (albeit nonfatally) and needed treatment . . . or that Fisher was about to hurt, or had already hurt, someone else.” *Id.*

<sup>334</sup> *Id.*

<sup>335</sup> *Stuart*, 547 U.S. at 402, 406. See also *id.* at 400 (“conclud[ing]” that officers “may enter a home without a warrant when they have an objectively reasonable basis for

*Kentucky v. King*<sup>336</sup> is the third exigent circumstances opinion from the Roberts Court. With near unanimity, the Justices rejected various lower court doctrines that would have prevented reliance on exigencies officers generate.<sup>337</sup> According to *King*, officers may not justify a warrantless search based on an exigency of their own creation *only* when the precipitating conduct violates or threatens to violate Fourth Amendment rights.<sup>338</sup> *King* declares that in all but a few cases it is irrelevant that officers have brought about the need to act without judicial approval. The decision allows them to engage in a wide variety of conduct designed to prompt a reaction that will suspend the search warrant requirement and demands no justification for the triggering conduct. The staunchest advocate of expansive law enforcement authority would undoubtedly have applauded this decision. He would have been delighted by Justice Alito's tepid endorsement of the warrant rule,<sup>339</sup> his reliance on "reasonableness" as the Fourth Amendment key that dictated the Court's ultimate conclusion,<sup>340</sup> and his deference to officers' needs to have "clear guidance" for their "quick decisions."<sup>341</sup> Rehnquist's beacons informed *King*, producing indulgence of investigators' choices. The majority refused a plea to strengthen the search warrant requirement—a prime Rehnquist target—by narrowing the exigent circumstances doctrine.

Just six months after the Chief Justice departed, the Justices decided *Georgia v. Randolph*.<sup>342</sup> A five-Justice majority restricted third-party consent authority, holding that a home entry pursuant to the consent of one co-occupant is unreasonable as to another co-

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believing that an occupant is seriously injured or imminently threatened with such injury"). In general, the exigent circumstances exception requires probable cause to search—a "fair probability" that a warrantless search will be productive. *See* *Welsh v. Wisconsin*, 466 U.S. 740, 749 (1984); *see also* *Chimel v. California*, 395 U.S. 752, 773 (1969) (White, J., dissenting). The Roberts Court's emergency assistance opinions do not specify that same level of likelihood of an actual or threatened injury, leaving open the possibility that a lesser probability suffices.

<sup>336</sup> 131 S. Ct. 1849 (2011).

<sup>337</sup> *See id.* at 1858-61.

<sup>338</sup> *See id.* at 1858.

<sup>339</sup> *See id.* at 1856.

<sup>340</sup> *See id.*

<sup>341</sup> *See id.* at 1860-61.

<sup>342</sup> 547 U.S. 103 (2006).

occupant who is “physically present” and refuses to consent.<sup>343</sup> Rehnquist would have been at least as unsettled by the Court’s ruling as his successor.<sup>344</sup> During his long tenure, every ruling regarding consent search authority favored law enforcement.<sup>345</sup> *Randolph* was a surprising break in the consent exception’s steady erosion of the warrant requirement. The Court relied on somewhat novel reasoning<sup>346</sup> to draw an admittedly formalistic line<sup>347</sup> that protects home privacy only when a person who happens to be present at the time consent is sought voices opposition.<sup>348</sup>

William Rehnquist favored the government’s position in every consent case, and would certainly have done so in *Randolph*. He would not have been happy with the majority’s reliance on his *Rakas* reasoning to support its new “widely shared social expectations” criterion,<sup>349</sup> with the citation to his opinion in *Wilson v. Layne* for the proposition that home privacy deserves special solicitude,<sup>350</sup> or with the Court’s bows to the vital protection the search warrant rule affords.<sup>351</sup> Most of all, knowing that consent searches are an incredibly productive law enforcement tool, he would have objected to the restriction on co-occupant authority to allow officers into shared dwellings. However, because *Randolph* did not take away powers recognized in prior rulings and imposed a very small, often avoidable

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<sup>343</sup> *Id.* at 106, 120.

<sup>344</sup> Chief Justice Roberts penned a powerful, lengthy dissent. *See id.* at 127 (Roberts, C.J., dissenting).

<sup>345</sup> *See* *United States v. Drayton*, 536 U.S. 194 (2002); *Ohio v. Robinette*, 519 U.S. 33 (1996); *Florida v. Jimeno*, 500 U.S. 248 (1991); *Illinois v. Rodriguez*, 497 U.S. 177 (1990); *United States v. Watson*, 423 U.S. 411 (1976); *United States v. Matlock*, 415 U.S. 164 (1974); *Schneekloth v. Bustamonte*, 412 U.S. 218 (1973).

<sup>346</sup> *See Randolph*, 547 U.S. at 111 (asserting that a “constant element in assessing . . . reasonableness in the consent cases . . . is the great significance given to widely shared social expectations”); *id.* at 130-31 (Roberts, C.J., dissenting) (observing that, contrary to the Court’s suggestions, prior decisions had not looked to “widely shared social expectations to “decide questions of consent” or to determine whether searches were reasonable).

<sup>347</sup> *See id.* at 121.

<sup>348</sup> *See id.* at 127, 137 (Roberts, C.J., dissenting) (arguing that the majority’s rule provides “random” privacy protection and protects “good luck” more than it protects “privacy”).

<sup>349</sup> *Id.* at 111.

<sup>350</sup> *Id.* at 115.

<sup>351</sup> *Id.* at 109, 117.

limitation on third-party consent authority, Rehnquist would find it much less objectionable than *Gant*. It would rank as his second least favorite Fourth Amendment ruling of the Roberts Court.

*Arizona v. Johnson*,<sup>352</sup> the only post-2005 *Terry* doctrine case, produced a unanimous reversal of a state court decision that a frisk of a vehicle passenger was unreasonable because the initial seizure of the passenger had become a consensual encounter.<sup>353</sup> The Justices could find no basis for a determination that the seizure of the passenger had ended.<sup>354</sup> They concluded that if the officer had a “reasonable suspicion” that he “was armed and dangerous,” the patdown was permissible.<sup>355</sup> Rehnquist would have found much to like in both the result and reasoning.

First, *Johnson* expanded *Terry* authority. Precedent permitted frisks of persons reasonably suspected of criminal activity.<sup>356</sup> In traffic stops of drivers, officers seize passengers incidentally, not on the basis of suspicions about their conduct. The Court announced first that seizures of passengers “remain[] reasonable[] for the duration of the stop” of a driver.<sup>357</sup> The Justices then relied on Rehnquist’s reasoning in *Maryland v. Wilson* to “confirm” his “forecast” in *Knowles v. Iowa* “that officers who conduct ‘routine traffic stop[s]’ may ‘perform a ‘patdown’ of . . . any passengers upon reasonable suspicion that they may be armed and dangerous.’”<sup>358</sup> Seeds the Chief Justice planted in two majority opinions<sup>359</sup> bore pro-law enforcement fruit in *Johnson*—an entitlement to promote safety by disarming potentially dangerous passengers.

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<sup>352</sup> 555 U.S. 323 (2009).

<sup>353</sup> *Id.* at 329.

<sup>354</sup> *Id.* at 333-34.

<sup>355</sup> *Id.* at 332. Because the lower court had merely “assumed” that the officer had such a suspicion, the Justices pointed out that the issue could be considered on remand. *See id.* at 334 n.2. In general, Rehnquist seemed content to trust lower courts with such decisions. *See, e.g.,* *Minnesota v. Dickerson*, 508 U.S. 366, 383 (1993) (Rehnquist, J., concurring in part and dissenting in part) (preferring to allow the lower court to decide whether the officer had gained probable cause to believe contraband was present before he exceeded the scope of *Terry* frisk authority).

<sup>356</sup> *See Terry v. Ohio*, 392 U.S. 1, 24, 30 (1968); *see also Dickerson*, 508 U.S. at 373.

<sup>357</sup> *Johnson*, 555 U.S. at 333.

<sup>358</sup> *Id.* at 332 (quoting *Knowles v. Iowa*, 525 U.S. 113, 117-18 (1998)).

<sup>359</sup> Rehnquist had planted his pro-law enforcement seed in *Knowles* in the course of a unanimous opinion that sustained a claim that a search incident to a traffic citation violated the Fourth Amendment.

*Safford Unified School District #1 v. Redding*<sup>360</sup> interpreted the scope of school officials' authority to search students on reasonable suspicion recognized in *New Jersey v. T.L.O.*<sup>361</sup> A nearly unanimous Court held that a strip search of a student was too intrusive to be constitutional without a "reason[] to suspect" that the over-the-counter drugs she was thought to possess *either* "presented a danger" *or* "were concealed in her underwear."<sup>362</sup> It seems highly likely that Rehnquist would have joined Justice Thomas, the lone dissenter on the merits of the Fourth Amendment claim.<sup>363</sup>

First, Rehnquist voted in favor of a Fourth Amendment claim in a nonunanimous case only one time in thirty-three years.<sup>364</sup> A vote with the *Safford* majority would have been just the second occasion in which another Justice favored broader search authority than the former Chief Justice. Moreover, he would have found Justice Thomas's dissenting analysis attractive. While the majority stressed the probable cause norm,<sup>365</sup> Justice Thomas focused on reasonableness,<sup>366</sup> emphasizing the important interests at stake in schools,<sup>367</sup> the difficult tasks school officials face,<sup>368</sup> and the resulting need to "read the Fourth Amendment to grant [them] considerable leeway" to monitor student conduct.<sup>369</sup> He accused the majority of inappropriately substituting its own judgment about the importance of the institution's rule

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<sup>360</sup> 557 U.S. 364 (2009).

<sup>361</sup> 469 U.S. 325 (1985).

<sup>362</sup> *Safford*, 557 U.S. at 368; *see also id.* at 377 (stating that it was "the combination of these deficiencies [that] was fatal to finding the search reasonable"). The Court did conclude, however, that the principal involved was entitled to "qualified immunity," a decision Rehnquist would surely have supported. *Id.* at 379.

<sup>363</sup> *See id.* at 382 (Thomas, J., concurring in part and dissenting in part).

<sup>364</sup> *See supra* note 37 (pointing out that Rehnquist cast his one pro-Fourth Amendment vote in a non-unanimous decision in *Bond v. United States*).

<sup>365</sup> *See id.* at 370.

<sup>366</sup> *See id.* at 383, 387 (Thomas, J., concurring in the judgment in part and dissenting in part).

<sup>367</sup> *See id.* at 383-84, 393-97.

<sup>368</sup> *See id.* at 383-84, 392-93.

<sup>369</sup> *See id.* at 387. In Justice Thomas's view, a reasonable suspicion that the student possessed forbidden drugs made it "eminently reasonable" to look beneath her clothing once a search of her backpack was unproductive. There was no need for a more specific showing that the drugs would be found there. *See id.* at 389-90.

prohibiting over-the-counter drugs.<sup>370</sup> Thomas's themes—particularly deference to educators' decisions—would have resonated with Rehnquist. As in *Gant* and *Randolph*, the pro-Fourth Amendment ruling in *Safford* would have dismayed him.

The outcome of the Roberts Court's other strip search case—*Florence v. Board of Chosen Freeholders of the Count of Burlington*<sup>371</sup>—would have brightened Rehnquist's spirits. A slim majority concluded that it is reasonable for prison officials routinely to conduct extremely intrusive strip searches of those detained for *any* offense prior to their admission into the general prison population.<sup>372</sup> It rejected the claim that individualized reasonable suspicion is required to strip search a detainee for a minor, nonviolent offense.<sup>373</sup> The Court's conclusion and logic would both have received Rehnquist's imprimatur.

The majority's analytical “starting point” was *Bell v. Wolfish*, an early Rehnquist opinion sustaining strip searches of pretrial detainees after contact visits with outsiders.<sup>374</sup> Rehnquist's theme of “defer[ence] to the judgment of correctional officials”<sup>375</sup> played a prominent part in *Florence*.<sup>376</sup> He would have agreed with Justice Kennedy's recognition of the “undoubted security imperatives involved in jail supervision”<sup>377</sup> and with his conclusion that the

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<sup>370</sup> See *id.* at 390-94.

<sup>371</sup> 132 S. Ct. 1510 (2012).

<sup>372</sup> See *id.* at 1513-14, 1518, 1520. The holding is limited by the important condition that those searched will be admitted into the “general jail population” or at least will have “substantial contact with other detainees.” See *id.* at 1522. In addition, the Court did not rule out the possibility that there could be an exception for some detainees who are arrested for minor offenses, could be held in facilities apart from the general population, and have not received judicial review of their detention. See *id.* at 1523; see also *id.* at 1524-25 (Alito, J., concurring). Moreover, the Court carefully observed that it was ruling only on strip searches that did not involve touching a detainee. See *id.* at 1523.

<sup>373</sup> See *id.* at 1518, 1520.

<sup>374</sup> 441 U.S. 520 (1979). The Court framed “the question [as] whether visual body-cavity inspections . . . can ever be conducted on less than probable cause” and simply “conclude[d] that they can.” *Id.* at 560. Nonetheless, the majority held that the strip searches after every contact visit were “not . . . unreasonable,” and it is clear that the searches were conducted in the absence of *any* particularized suspicion that a detainee was in possession of a weapon or contraband. See *id.* at 558.

<sup>375</sup> *Florence*, 132 S. Ct. at 1516.

<sup>376</sup> See *id.* at 1513-18 (adverting multiple times to the need for deference to the judgments of those who administer and operate correctional institutions).

<sup>377</sup> *Id.* at 1518.

official “response to the situation”—a thorough strip search of every prisoner—was not “exaggerated.”<sup>378</sup> The majority’s reliance on the significant interest in readily administrable rules,<sup>379</sup> declaration that it would be impractical and counterproductive to require corrections officials to distinguish among detainees,<sup>380</sup> and conclusion that the prison’s “search procedures . . . struck a reasonable balance between inmate privacy and the needs of the institutions”<sup>381</sup> reflected recurrent Rehnquistian themes and confirm his continuing influence. As noted, William Rehnquist was favorably disposed toward programs authorizing suspicionless searches and seizures.<sup>382</sup> He would have been confident that the situation in *Florence* was a compelling case for such authority.

Rehnquist would approve the outcome and would have been extremely pleased with the reasoning in *Samson v. California*,<sup>383</sup> the other post-2005 case involving a suspicionless search. Under a California statute, inmates released on parole had to agree to searches or seizures by officers without warrants or cause.<sup>384</sup> An officer found methamphetamine during a suspicionless search of the defendant-parolee, and a conviction for possession had resulted.<sup>385</sup> Six Justices joined a majority opinion declaring that search reasonable.<sup>386</sup>

For multiple reasons, the Court’s analysis would have delighted Rehnquist. Justice Thomas affirmed that the former Chief Justice’s preferred method of resolving Fourth Amendment issues was the Court’s “general Fourth Amendment approach.”<sup>387</sup> That approach required examination of the totality of the circumstances to determine reasonableness, and that

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<sup>378</sup> *Id.*

<sup>379</sup> *Id.* at 1522.

<sup>380</sup> *Id.* at 1521-22.

<sup>381</sup> *Id.* at 1523.

<sup>382</sup> *See supra* notes 216-27 and accompanying text.

<sup>383</sup> 547 U.S. 843 (2006).

<sup>384</sup> *See id.* at 846.

<sup>385</sup> *See id.* at 847.

<sup>386</sup> *See id.* at 857. In *United States v. Knights*, 534 U.S. 112 (2001), which the Court relied upon, Chief Justice Rehnquist had concluded that a search of a probationer based on reasonable suspicion was constitutional, but had highlighted the fact that a suspicionless search might be permissible. *See id.* at 120 n.6.

<sup>387</sup> *Samson*, 547 U.S. at 848 (quoting *United States v. Knights*, 534 U.S. 112, 118 (2001)).

determination hinged upon interest balancing.<sup>388</sup> Moreover, the application of the balancing analysis in *Samson* was positively Rehnquistian. Because of his “status” as a parolee<sup>389</sup> and because of his “acceptance of a clear and unambiguous search condition,” Samson “did not have” a legitimate “expectation of privacy.”<sup>390</sup> On the other side of the balance were “substantial” state interests in “supervising parolees,” and “in reducing recidivism and thereby promoting reintegration and positive citizenship.”<sup>391</sup> An “individualized suspicion” requirement for parolee searches “would [have] undermine[d] the . . . ability” to serve these interests effectively.<sup>392</sup> Consequently, the balance of relevant interests dictated a conclusion “that the Fourth Amendment does not prohibit a police officer from conducting a suspicionless search of a parolee.”<sup>393</sup>

In a significant footnote, Justice Thomas responded to dissenters by disavowing the notion that “individualized suspicion” is a Fourth Amendment “touchstone.”<sup>394</sup> Although the Court had recognized that it was “usually a prerequisite,” and had “only sanctioned suspicionless searches in limited circumstances, namely, programmatic and special needs searches,” the Justices had “never held” these were “the only limited circumstances in which searches absent individualized suspicion could be ‘reasonable.’”<sup>395</sup> Rehnquist’s hostility to rigid Fourth Amendment norms would have led him to applaud both the rejection of the premise that individualized suspicion is a requirement that is not easily suspended and the declaration that

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<sup>388</sup> *See id.*

<sup>389</sup> *Id.* at 852. Parolees were “on the ‘continuum’ of state-imposed punishments” and had even “fewer expectations of privacy than probationers, because parole is more akin to imprisonment than probation is to imprisonment.” *Id.* at 850.

<sup>390</sup> *See id.* at 852. It seems odd that the Court proceeded to analyze whether the search was reasonable after declaring that Samson had *no* legitimate expectation of privacy. Later in the opinion, Justice Thomas confused matters more by referring to “a parolee’s substantially diminished expectation of privacy.” *Id.* at 855.

<sup>391</sup> *Id.* at 853.

<sup>392</sup> *Id.* at 854.

<sup>393</sup> *Id.* at 857. Surely, the breadth of this pro-law enforcement holding would have pleased the former Chief Justice. On its face, it appears to declare *all* suspicionless searches of *all* parolees constitutional.

<sup>394</sup> *See id.* at 855 n.4.

<sup>395</sup> *Id.*

suspicionless searches can be reasonable outside the programmatic and special needs contexts addressed in precedents.

The final substantive Fourth Amendment decision is *Scott v. Harris*.<sup>396</sup> Eight Justices concluded that the manner in which an officer seized a fleeing motorist—by applying “his push bumper to the rear of [the man’s] vehicle,”<sup>397</sup> causing the man to lose control and crash—was “objectively reasonable.”<sup>398</sup> Rehnquist surely would have aligned himself with the majority.

As a dissenter in *Tennessee v. Garner*,<sup>399</sup> the Chief Justice would have been pleased with the decision to confine that case’s demanding, probable cause-based standard for seizures by “deadly force”<sup>400</sup> to the “particular type of force in [the] particular situation” *Garner* involved.<sup>401</sup> The conclusions that the constitutionality of the “deadly force” in *Harris* turned entirely on the “factbound” question of whether the officer’s “actions were reasonable” and that “reasonableness” had to be determined by interest balancing<sup>402</sup> exemplified the Fourth Amendment analysis Rehnquist promoted in opinion after opinion.<sup>403</sup> Hostile as he was to less intrusive alternative reasoning, he would have applauded the Court’s resounding rejection of the claim that officers ought to protect “the innocent public” by “ceas[ing] their pursuit” of fleeing motorists.<sup>404</sup> Finally, William Rehnquist would have enthusiastically embraced *Harris*’s generous-to-law-enforcement,

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<sup>396</sup> 550 U.S. 372 (2007).

<sup>397</sup> *Id.* at 375.

<sup>398</sup> *Id.* at 381.

<sup>399</sup> 471 U.S. 1, 22 (1985) (O’Connor, J., dissenting).

<sup>400</sup> In *Garner*, the Court held that if a “suspect threatens the officer with a weapon or there is probable cause to believe that he has committed a crime involving the infliction or threatened infliction of serious physical harm, deadly force may be used if necessary to prevent escape, and if, where feasible, some warning has been given.” *Id.* at 11-12.

<sup>401</sup> *Harris*, 550 U.S. at 382. The Court stressed that the situation in *Garner*—which involved the use of a firearm to prevent the escape of a fleeing suspect who posed no particular threat—was “vastly different” from the situation in *Harris*—which involved an officer bumping a fleeing car with his vehicle during a chase that posed “extreme danger to human life.” *Id.* at 382-83.

<sup>402</sup> *Id.* at 383.

<sup>403</sup> See *supra* notes 202-27 and accompanying text. Rehnquist would also have agreed that the reasonableness balance must take into account the culpability of a fleeing motorist who endangers lives and the innocence of those endangered. *Harris*, 550 U.S. at 384.

<sup>404</sup> *Id.* at 385.

“sensible rule”—that a “police officer’s attempt to terminate a dangerous high-speed car chase that threatens the lives of innocent bystanders does not violate the Fourth Amendment, even when it places the fleeing motorist at risk of serious injury or death.”<sup>405</sup>

In sum, the former Chief Justice would have agreed with the twelve Roberts Court’s rulings against Fourth Amendment claims.<sup>406</sup> He would have opposed the three pro-Fourth Amendment decisions in which the Justices divided, and most likely would have gone along with the two unanimous rulings favoring protection.

It is impossible to overstate how positive Rehnquist’s reactions would be to the three post-2005 exclusionary rule decisions—*Hudson v. Michigan*,<sup>407</sup> *Herring v. United States*,<sup>408</sup> and *Davis v. United States*.<sup>409</sup> He would surely be ecstatic, perhaps even astounded, at how far his colleagues were willing to

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<sup>405</sup> *Id.* at 386. Two additional Fourth Amendment decisions merit only brief mention. The first is *Ashcroft v. Al-Kidd*, 131 S. Ct. 2074 (2011), which involved the narrow issue of whether pretextual use of a valid material-witness warrant to detain a terrorism suspect—when probable cause for an arrest warrant is lacking—violates the Fourth Amendment. A majority concluded that the *Whren* principle—that reasonableness is judged objectively and that subjective motivations are irrelevant—dictated rejection of the pretext claim. The Justices interpreted *Whren* broadly, suggesting that officers’ subjective intentions can render searches or seizures unreasonable *only* in “special-needs and administrative inspection cases.” *See id.* at 2080-83. Rehnquist would have agreed with the outcome and the message that officers’ actual motivations will rarely defeat efforts to enforce the law.

In the other case, *Los Angeles County v. Rettele*, 550 U.S. 609 (2007), officers who were executing a valid search warrant in a home ordered two unclothed occupants to get out of bed and, for a short time, prevented them from getting dressed. The couple was of a different race than the suspects in the case. In a *per curiam* opinion, the Court held that the officers had not acted in an unreasonable manner, but, instead, had properly exercised the legitimate authority “to protect themselves from harm” recognized in the Court’s precedents. *Id.* at 616. One of those precedents, *Muehler v. Mena*, 544 U.S. 93 (2005), was Chief Justice Rehnquist’s final Fourth Amendment opinion. Based on *Mena* and his concern that officers have the power to carry out their tasks safely and effectively, there can be no doubt that Rehnquist would have agreed that the officers’ “orders . . . to the occupants” in *Rettele* “were permissible, and perhaps necessary, to protect the[ir] safety.” 550 U.S. at 614.

<sup>406</sup> The twelve pro-law enforcement rulings include the nine cases described in the text plus the three discussed briefly in footnotes 288 and 390.

<sup>407</sup> 547 U.S. 586 (2006).

<sup>408</sup> 555 U.S. 135 (2009).

<sup>409</sup> 131 S. Ct. 2419 (2011).

move in his direction in a mere five-year span. His sole regret would be that he had not been able to participate actively in the analytical and doctrinal developments targeting the exclusionary rule for extinction.

Less than a year after Rehnquist's departure, the Court launched its first assault on the *Weeks-Mapp* doctrine. The simple holding of *Hudson v. Michigan* was that exclusion is not available for violations of the knock-and-announce principle.<sup>410</sup> Rehnquist would approve this novel exception, but his delight would be in the three foundations of the Court's holding—each of which provides a springboard for additional erosion of the suppression doctrine. And he would relish the hostile, pejorative barbs Justice Scalia directed toward exclusion.

First, the Court endorsed a limiting conception of the “but-for causation” requirement that allows a search to be divided into constituent elements and demands a causal link between the unconstitutional element and the evidence.<sup>411</sup> Rehnquist, who sought to eliminate suppression entirely, would be pleased by the decision to carve up official conduct into discrete components, thereby increasing the number of situations in which defendants are unable to satisfy the causation predicate.<sup>412</sup>

Independently, *Hudson* created and relied upon a novel version of the attenuation doctrine. By tradition and nature, that exclusionary rule exception had applied only to “derivative” evidence with weakened causal connections.<sup>413</sup> *Hudson's* new,

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<sup>410</sup> See *Hudson*, 547 U.S. at 599. For a thorough exploration and critique of *Hudson*, see James J. Tomkovicz, *Hudson v. Michigan and the Future of Fourth Amendment Exclusion*, 93 IOWA L. REV. 1819 (2008).

<sup>411</sup> See Tomkovicz, *supra* note 410, at 1849-54. In *Hudson*, the Court separated the illegal entry from the legal home search that followed. See *Hudson*, 547 U.S. at 592.

<sup>412</sup> The majority drew support for its analysis from Rehnquist's majority opinion in *United States v. Ramirez*, 523 U.S. 65 (1998). See *Hudson*, 547 U.S. at 602. For a discussion of the potential use of *Hudson's* causation premises to foreclose suppression in other situations, see Tomkovicz, *supra* note 410, at 1854-58.

<sup>413</sup> The traditional attenuation exception applies only when “the connection between . . . lawless conduct of the police and the discovery of . . . evidence has ‘become so attenuated as to dissipate the taint’” of the lawlessness. See *Wong Sun v. United States*, 371 U.S. 471, 487 (1963) (quoting *Nardone v. United States*, 308 U.S. 338, 341 (1939)). Because primary evidence is, by definition, discovered as a direct and immediate result of illegal conduct, it is too closely connected to the illegality to qualify for admission under this exclusionary rule exception. Only evidence that is acquired “by means sufficiently distinguishable to be purged of the primary taint”—derivative

entirely distinct branch of attenuation starts from the premise that suppression is appropriate only if the Fourth Amendment rule violated is designed to shield “potential evidence from the government’s eyes.”<sup>414</sup> Generalized, this premise would dictate the admission of evidence gained by violating *any* Fourth Amendment rule whose purpose is not to shelter information from official scrutiny.<sup>415</sup> Like the Court’s approach to causation, the *Hudson* variation on the attenuation theme furthered Rehnquist’s ultimate objective—the introduction of all probative evidence in criminal proceedings.

Unsatisfied with only two bases for denying suppression, the *Hudson* Court offered yet a third. The majority concluded that the balance always favors the admission of evidence in knock-and-announce contexts because the social costs of suppression always exceed the deterrent benefits.<sup>416</sup> Many of Justice Scalia’s assessments and characterizations of those costs and benefits could dictate similar conclusions for violations of other Fourth Amendment commands. Rehnquist would have embraced this invitation to balance rule-by-rule, coupled with the inflation of costs and deflation of benefits. It poses a serious threat to the operation of the exclusionary rule.<sup>417</sup>

Finally, Rehnquist would have been encouraged by the palpable hostility to the exclusionary rule throughout the majority opinion. Justice Scalia announced, for example, that “[s]uppression . . . ha[d] always been [the Court’s] last resort” in part because it not only freed the guilty, but also “set[] . . . the dangerous at large.”<sup>418</sup> He stressed that the Court had “long since rejected” the Warren Court’s “dicta” which had “suggested wide scope for the exclusionary rule”<sup>419</sup> and indicated that changes in

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evidence—can be introduced under the traditional attenuation exception. *See Wong Sun*, 371 U.S. at 488 (quoting JOHN M. MAGUIRE, EVIDENCE OF GUILT 221 (1959)).

<sup>414</sup> *See Hudson*, 547 U.S. at 593. According to the majority, because that is *not* a purpose of the knock-and-announce rule, the new exception applied. *See id.* at 594.

<sup>415</sup> For a discussion of the new attenuation doctrine’s potential application to other kinds of Fourth Amendment violation, see Tomkovicz, *supra* note 410, at 1865.

<sup>416</sup> *See Hudson*, 547 U.S. at 594-99.

<sup>417</sup> For a discussion of which aspects of Justice Scalia’s balancing process might apply in other than knock-and-announce situations, see Tomkovicz, *supra* note 410, at 1876-80.

<sup>418</sup> *Hudson*, 547 U.S. at 591.

<sup>419</sup> *Id.* at 591.

the legal regime since *Mapp* had rendered it anachronistic.<sup>420</sup> The message was that “the heydays” of the *Weeks-Mapp* doctrine were over and that the time for a new approach had arrived.<sup>421</sup> How could William Rehnquist not have been overjoyed by these echoes of themes he had sounded long before 2006 and by the Court’s disdain for its own creation which had no roots in the Fourth Amendment text?

*Herring* and *Davis* reflect a different, perhaps more effective strategy for decimating evidentiary suppression.<sup>422</sup> In each, a majority adopted an additional variety of “good faith-reasonable reliance” exception. *Herring* held that officers’ objectively reasonable reliance on negligent errors by other police agencies suspends the evidentiary bar.<sup>423</sup> *Davis* concluded that objectively reasonable reliance on binding judicial precedent has the same effect.<sup>424</sup> Rehnquist would have embraced the two additional holes in the *Weeks-Mapp* mandate, but would have found more cause for celebration in his successor’s announcement of a threshold “culpability” predicate essential for application of the suppression sanction. Relying on the deterrent foundations of the exclusionary rule, on the facts of landmark rulings, and on earlier recognitions of the role of official fault, the *Herring* majority announced a dramatic reform. Five Justices declared that evidence should not be barred unless officers’ Fourth Amendment violations are blameworthy *and* that mere isolated negligence is insufficient culpability.<sup>425</sup> Gross negligence, or perhaps a pattern of recurrent ordinary negligence, is the minimum fault necessary for suppression.<sup>426</sup> *Herring*’s revolution, solidified by a six-Justice

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<sup>420</sup> See *id.* at 597. According to Justice Scalia, “the public today” should not be forced to “pay for the sins and inadequacies of a legal regime that existed almost half a century ago.” *Id.*

<sup>421</sup> See *id.* at 597.

<sup>422</sup> For discussions of these two opinions, see Wayne R. LaFave, *The Smell of Herring: A Critique of the Supreme Court’s Latest Assault on the Exclusionary Rule*, 99 J. CRIM. L. & CRIMINOLOGY 757 (2009); Tracey Maclin & Jennifer Rader, *No More Chipping Away: The Roberts Court Uses an Axe to Take Out the Fourth Amendment Exclusionary Rule*, 81 MISS. L.J. 1183 (2012); James J. Tomkovicz, *Davis v. United States: The Exclusion Revolution Continues*, 9 OHIO ST. J. CRIM. L. 381 (2011).

<sup>423</sup> See *Herring v. United States*, 555 U.S. 135, 137, 146 (2009).

<sup>424</sup> See *Davis v. United States*, 131 S. Ct. 2419, 2423-24, 2434 (2011).

<sup>425</sup> See *Herring*, 555 U.S. at 143-44.

<sup>426</sup> See *id.* at 144.

majority in *Davis* as the future of exclusionary rule jurisprudence, means that the quest for truth will no longer be thwarted unless a defendant can demonstrate that officers not only violated the Fourth Amendment, but did so with enough culpability. The territory governed by the exclusionary rule will surely be drastically smaller. With *Herring* and *Davis*, the Court moved a giant step closer to making Rehnquist's dream of outright abolition a reality.

If he was able, the former Chief Justice would surely express deep appreciation for the Roberts Court's retreat from the exclusionary rule. He would have been proud to author *Hudson*, *Herring*, and *Davis*, each of which advanced his longstanding campaign to rectify this particular Fourth Amendment imbalance. Rehnquist might well find the Court's missteps in *Gant* and *Randolph* tolerable after the suppression decisions, which make it considerably less likely that a violation of any Fourth Amendment principle will impede efforts to convict the guilty.

On the whole, the former Chief Justice could hardly be dissatisfied with the Court's labors in the Fourth Amendment fields since his passing. The Court has favored the Government's position seventy-five percent of the time—in fifteen of twenty rulings. William Rehnquist's understanding of the provision continues to modify the balance by restoring more generous search and seizure authority to law enforcers. Moreover, it seems entirely likely that his vision will influence developments for some time to come.

#### CONCLUSION

My portrait of Chief Justice William Rehnquist, as reflected in the Fourth Amendment mirror, requires but a few more brush strokes—some finishing touches. The picture that has emerged is not impressionistic, but realistic. Like his views, it is neither nuanced nor ambiguous. William Rehnquist had no doubt that the Court had misinterpreted this central Bill of Rights provision in fundamental ways, that the Justices had distorted the constitutional balance by unjustifiably favoring civil liberties over law and order. From before his time on the Court, he made his

views known,<sup>427</sup> and while serving as Justice and Chief Justice for more than three decades, he consistently sought to correct the imbalance by impressing his vision upon the law.<sup>428</sup> He was never uncertain, hesitant, or doubtful about the validity of his understanding of the Constitution, but, instead, was utterly confident in its correctness.<sup>429</sup> He challenged basic norms and guiding premises in the Fourth Amendment jurisprudence fashioned by the Warren Court, and he worked to replace them with a more flexible method of interpretation that centered around the textual requirement of reasonableness and called upon the judiciary to balance the totality of relevant facts in each case.<sup>430</sup>

The portrait is one of undeniable and enormous success, both during his time on the Court and since his departure.<sup>431</sup> As a result of narrower search and seizure thresholds, law enforcers are free to engage in many activities without constitutional regulation. The restraining force of the probable cause norm has been weakened, and there are myriad avenues around the

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<sup>427</sup> See Davies, *supra* note 15, at 993 (observing that Rehnquist's "opposition to the Warren Court's criminal procedure rulings" was a reason that President Nixon sought to appoint him); DAVIS, *supra* note 19, at 10 (pointing out that in his confirmation hearing Rehnquist let it be known that he was not averse to overturning Warren Court precedent, "particularly in the area of the rights of the accused").

<sup>428</sup> See Bradley, *supra* note 17, at 278 (stating that "[n]o other Justice approached" Rehnquist "in maintaining such a consistent stance in favor of . . . law enforcement"); Rahdert, *supra* note 16, at 841 (maintaining that Rehnquist's "influence no doubt reflects" his "ability to maintain and press a consistent vision of the Constitution").

<sup>429</sup> In disagreeing with Rehnquist's abandonment of the two-pronged test for assessing hearsay in *Illinois v. Gates* and suggesting that judges were capable of interpreting and applying that test, Justice White admitted, "I may be wrong." See *Illinois v. Gates*, 462 U.S. 213, 274 (1983) (White, J., concurring in the judgment). It is difficult to imagine Chief Justice Rehnquist making a similar concession about his Fourth Amendment views.

<sup>430</sup> Cf. David A. Sklansky, *The Fourth Amendment and Common Law*, 100 COLUM. L. REV. 1739, 1791 (2000) (observing that although Rehnquist did not believe "in a 'living Constitution,'" he did believe that "when the Framers 'spoke in general language' they 'left to succeeding generations the task of applying that language to the unceasingly changing environment,'" and contending that "few parts of the Constitution seem to call more loudly for this kind of interpretation than the . . . Fourth Amendment" guarantee against unreasonable searches and seizures).

<sup>431</sup> See Bilionis, *supra* note 6, at 989-90 (asserting that "criminal justice is no longer a project of conservative law reform" because "[t]he forces . . . of law and order have been satisfied"); Bradley, *supra* note 145, at 58 (maintaining that Rehnquist "was able to, in effect, rewrite the Constitution").

impediment imposed by the warrant requirement. Moreover, the reach of the exclusionary rule has been constricted and its operation curtailed. Finally, although the Court does not always follow the analytical mode prescribed by the former Chief Justice, his exhortation to focus on reasonableness and balance competing interests—and to accord law enforcement its due in the process—has been heard. While he was on the Court, this approach to resolving Fourth Amendment issues came to dominate, and it has continued to influence analysis during the first seven years of the Roberts Court.

The constitutional balance is very different today than it was in 1972. Most of the difference seems attributable to William Rehnquist's influence. He had the good fortune to serve for an extraordinarily long period with several colleagues sympathetic to his views. He had the patience, confidence, persistence, and resolve necessary to reshape doctrine and reasoning in his image. In today's constitutional museum, his portrait hangs prominently on the Fourth Amendment wall.