REASONABLENESS MODELS

Professor Thomas K. Clancy

OBJECTIVES:

After this session you will be able to:

1. Identify the five main tests for reasonableness employed by the Supreme Court; and
2. Describe how the balancing test applies in criminal cases.

REQUIRED READING:

FOURTH AMENDMENT SATISFACTION
REASONABLENESS MODELS ©

Thomas K. Clancy

Fourth Amendment Satisfaction:
"Reasonableness" Models

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Two Dimensions to Fourth Amendment Satisfaction:

1. Reasonableness Clause

2. Warrant Clause

The Warrant Clause sets forth the requirements for a warrant to issue. Those requirements are discussed in another session.
“Reasonableness” has two dimensions: it measures –

1. permissibility of the initial decision to search and seize

2. permissible scope of the intrusion

See, e.g., New Jersey v. T.L.O., 469 U.S. 325, 341 (1985) (“Determining the reasonableness of any search involves a two-fold inquiry: first, one must consider ‘whether the . . . action was justified at its inception’; second, one must determine whether the search as actually conducted ‘was reasonably related in scope to the circumstances which justified the interference in the first place.’”).
WHAT IS "REASONABLE?"

"reasonable"?
Blondie
By Dean Young & Denis Lebren.

NYC begins random searches on subways
"We live in a world where, sadly, these types of security measures are needed."
NY Mayor Michael Bloomberg

http://www.minorityreport.com/
CURRENT SUPREME COURT PRECEDENT UTILIZES FIVE MAIN “MODELS” TO MEASURE REASONABLENESS:

- **WARRANT PREFERENCE MODEL**
- **INDIVIDUALIZED SUSPICION MODEL**
- **TOTALITY OF THE CIRCUMSTANCES TEST**
- **BALANCING TEST**
- **HYBRID MODEL GIVING DISPOSITIVE WEIGHT TO THE COMMON LAW**

These are broad frameworks by which the Court typically approaches the problem of measuring reasonableness. Some cases contain a mix of one or more models\(^1\) and there are also several situations that do not easily fit within any of those models, such as consent. The models are offered here to facilitate understanding of the Court’s cases and give some framework to address similar situations. Unfortunately, because the Court has done little to establish a meaningful hierarchy among the models, the Court in any situation may choose whichever model it sees fit to apply.

\(^1\) *E.g.*, Samson v. California, 547 U.S. 843 (2006) (observing that reasonableness involved examining the totality of the circumstances and then articulating the balancing test as the measure).
Model #1: Warrant Preference Model

Reasonableness is defined by the Warrant Clause: a search or seizure is not “unreasonable,” and therefore not forbidden, when it is carried out with a warrant issued pursuant to the criteria set out in the Warrant Clause.²

<table>
<thead>
<tr>
<th>#1 Warrant Preference</th>
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<tr>
<td>1st clause recognizes pre-existing right against unreasonable s/s and 2d clause defines R---</td>
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<tr>
<td>Reasonableness turns on whether officers have valid warrant, which is issued based on</td>
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<tr>
<td>PROBABLE CAUSE</td>
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<tr>
<td>OATH</td>
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<td>PARTICULAR DESCRIPTION</td>
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<tr>
<td>BURDEN: govt must justify exception by showing strong need</td>
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² E.g., Almeida-Sanchez v. United States, 413 U.S. 266, 277 (1973) (Powell, J., concurring) (“But it is by now axiomatic that the Fourth Amendment’s proscription of ‘unreasonable searches and seizures’ is to be read in conjunction with its command that ‘no Warrants shall issue, but upon probable cause.’”); Wong Sun v. United States, 371 U.S. 471, 479 (1963) (The requirements of the first and second clauses are equivalent and it should be at least as difficult for a police officer to act without a warrant as it is for him to obtain a warrant in the first instance: “[w]hether or not the requirements of reliability and particularity of the information on which an officer may act are more stringent where an arrest warrant is absent, they surely cannot be less stringent than where an arrest warrant is obtained.”).
some observations

VARIATIONS ON THE FORMULATION OF THE PREFERENCE:

[reflecting the strength or lack of strength that view has had on the at any given time]

- all searches and seizures are *per se* unreasonable, subject to enumerated exceptions, in the absence of a warrant

- warrants are required when “practicable” to obtain

- warrants are “preferred”

- searches are “presumptively unreasonable” without a warrant

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3 See, e.g., Minnesota v. Dickerson, 508 U.S. 366, 372 (1993); California v. Acevedo, 500 U.S. 565 (1991) Given that formulation of the preference, the Court has often stated that the government bears a heavy burden of justifying exceptions to the specifications of the Warrant Clause, that is, that the warrant exception must be based on necessity. *See, e.g.*, Chambers v. Maroney, 399 U.S. 42, 61-62 (1970) (Harlan, J., concurring and dissenting).

4 Carroll v. United States 267 U.S. 132, 156 (1925).


JUSTIFICATION FOR MODEL:

• assures citizen intrusion is justified
• pre-intrusion authorization by neutral magistrate
• warrant limits intrusion to predetermined locations, objects, persons
• insulates police from liability

MODERN STATUS:


  “our analysis begins, as it should in every case addressing the reasonableness of a warrantless search, with the basic rule that ‘searches conducted outside the judicial process, without prior approval by judge or magistrate, are per se unreasonable under the Fourth Amendment—subject only to a few specifically established and well-delineated exceptions.”

• 90-99% of all searches and seizures fit within an “exception”
MODEL#2: CASE-BY-CASE MODEL

“THERE IS NO FORMULA FOR THE DETERMINATION OF REASONABLENESS. EACH CASE IS TO BE DECIDED ON ITS OWN FACTS AND CIRCUMSTANCES.”

Go-Bart Importing v. United States, 282 U.S. 344 (1931)

<table>
<thead>
<tr>
<th>#2. Totality of the Circumstances</th>
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<tbody>
<tr>
<td>&quot;Reasonableness&quot;: no intrinsic criteria to measure</td>
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<tr>
<td>&quot;total atmosphere&quot; -- no factors</td>
</tr>
<tr>
<td>case-by-case analysis</td>
</tr>
<tr>
<td>if search otherwise R-, don’t need warrant</td>
</tr>
<tr>
<td>(ex) knock and announce - how long do you have to wait?</td>
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</table>

JUSTIFICATION FOR:

**two clauses are independent:** the first clause requires only that searches and seizures be “reasonable;” the second clause addresses only those searches and seizures conducted under warrants, saying nothing about when a warrant is necessary or about what factors are to be examined to determine reasonableness
COMPETITION BETWEEN THE CASE-BY-CASE AND WARRANT PREFERENCE MODELS

EXAMPLE: Search incident to arrest

when case-by-case analysis applied, scope of search invariably broad


- upheld warrantless search of ENTIRE one-room office as incident to valid arrest

- REASONING:
  - “What is a reasonable search is not to be determined by any fixed formula. The Constitution does not define what are ‘unreasonable’ searches and, regrettably, in our discipline we have no ready litmus paper test. The recurring questions of the reasonableness of searches must find resolution in the facts and circumstances of each case.”
  - “relevant test:” not whether a warrant was procured but “whether the search was reasonable. That criterion in turn depends upon the facts and circumstances—the total atmosphere of the case.”

when warrant preference model applied - search of limited scope, influenced heavily by the Warrant Clause requirement of particularity

RESOLUTION OF THE CONTEST FOR SEARCHES INCIDENT ARREST:

Chimel v. California, 395 U.S. 752 (1969), rejected both the result in Rabinowitz and methodology, LIMITING SCOPE TO “GRASP” AREA:
It is argued in the present case that it is “reasonable” to search a man’s house when he is arrested in it. But that argument is founded on little more than a subjective view regarding the acceptability of certain sorts of police conduct, and not on considerations relevant to Fourth Amendment interests. Under such an unconfined analysis, Fourth Amendment protection in this area would approach the evaporation point. It is not easy to explain why, for instance, it is less subjectively “reasonable” to search a man’s house when he is arrested on his front lawn—or just down the street—than it is when he happens to be in the house at the time of arrest.
MODERN STATUS OF CASE-BY- CASE ANALYSIS

- **Methodology still used:**
  
  - test of reasonableness “is not capable of precise definition or mechanical application”\(^7\)
  
  - must examine the totality of the circumstances of the case\(^8\) to assess the reasonableness of a search or a seizure.

- **Example:** How long do the police have to wait after knocking and announcing their presence when executing a warrant? It’s a case-by-case analysis!


\(^7\) Bell v. Wolfish, 441 U.S. 520, 559 (1979).

MODEL#3: INDIVIDUALIZED SUSPICION

**Reasonableness Requires Individualized Suspicion, That Is, Probable Cause for Arrests and Searches, Articulable Suspicion for Stops and Frisks.**

**Effect Of:**

- limits discretion by employing objective criteria outside government’s control to measure propriety of intrusion
- mandates specific justification for each intrusion
- focus of inquiry is upon circumstances presented by private party or object of the search or seizure; if and only if the individual or object provides a reason for governmental inquiry may the government intrude

**Example: Davis v. Mississippi, 394 U.S. 721 (1969)**

- Police investigating a rape could not permissibly seize two dozen young African-American men and take them to police headquarters for questioning and fingerprinting simply because victim described her assailant as a Negro youth
- Procedure condemned because such “seizures would subject unlimited numbers of innocent persons to the harassment and ignominy incident to involuntary detention. Nothing is more clear than that the Fourth Amendment was meant to prevent wholesale intrusions upon the personal
security of our citizenry.”


tWO DIMENSIONAL USE OF INDIVIDUALIZED SUSPICION

<table>
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<th>#3 Individualized Suspicion</th>
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<tr>
<td>two dimensions</td>
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<tr>
<td>limits:</td>
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<tr>
<td>1. when initial intrusion justified</td>
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<tr>
<td>2. scope of intrusion performed</td>
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• limits circumstances under which government may initiate actions

• limits scope search or seizure by ensuring that intrusion performed is reasonably related to circumstances that justified initial interference

EXAMPLE: if police are looking for an elephant, they do not have any objective basis to believe that it would be found in a dresser drawer and opening that drawer would be outside the scope of a permissible search.9

9 E.g. United States v. Ross, 456 U.S. 798, 824 (1982) (the scope of a search “is defined by the object of the search and the places in which there is probable cause to believe that it may be found”); Davis v. United States, 328 U.S. 582, 592 (1946) (warrantless search of service station for gasoline ration coupons is limited in scope by the “nature of the coupons”)
HISTORICAL BASIS:

- complaints of the colonists against suspicionless searches and seizures
- historical requirement of probable cause to arrest or to search\textsuperscript{10}
- language of the Warrant Clause, which requires probable cause to search or seize pursuant to a warrant

ONLY TWO LEVELS OF INDIVIDUALIZED SUSPICION\textsuperscript{11}

- #1: frisks and stops -- reasonable suspicion needed
- #2: searches and arrests -- probable cause required

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\textsuperscript{10} Dunaway v. New York, 442 U.S. 200, 213 (1979). Accord Henry v. United States, 361 U.S. 98, 100 (1959) (“The requirement of probable cause has roots that are deep in our history.”). The centrality of the role played by individualized suspicion as a prerequisite for an intrusion may find its strongest expression in cases rejecting mere association as a basis for a search or seizure. See United States v. Di Re, 332 U.S. 581, 587 (1948) (“We are not convinced that a person, by mere presence in a suspected car, loses immunities from search of his person to which he would otherwise be entitled.”); Ybarra v. Illinois, 444 U.S. 85, 93 n.5 (1979) (requirement of probable cause particularized to each person “cannot be undercut or avoided by simply pointing to the fact that coincidentally there exists probable cause to search or seize another or to search the premises where the person may happen to be”).

\textsuperscript{11} E.g., United States v. Montoya De Hernandez, 473 U.S. 531, 541 (1985) (rejecting third standard in addition to reasonable suspicion and probable cause because “subtle verbal gradations may obscure rather than elucidate the meaning” of reasonableness).
**MODEL#4: THE BALANCING TEST**

“**UNFORTUNATELY, THERE CAN BE NO READY TEST FOR DETERMINING REASONABLENESS OTHER THAN BY BALANCING THE NEED TO SEARCH AGAINST THE INVASION WHICH THE SEARCH ENTAILS.**”

*Camara v. Municipal Court, 387 U.S. 523 (1967)*

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**MAIN FACTORS: 12 BALANCE GOVERNMENTAL VERSUS INDIVIDUAL INTERESTS**

- **individual’s interests**
  - examine “generality of the cases” --- decisions do not turn on specific individual interests in the case before the Court
  - do not cumulate the interests of all persons who have been searched or seized. instead, on the individual’s side of the scale, the

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12 In the wake of *Camara*, the balancing test appeared to have four distinct factors: the individual’s interests; the government’s interests; the necessity for the intrusion; and the procedures utilized by the authorities in executing the search or seizure. The importance of the latter two factors has significantly eroded; the element of necessity has been completely repudiated and the analysis of the procedures utilized in effectuating the search or seizure has often taken on–at best–a secondary role in the balancing test. *See generally* Thomas K. Clancy, *The Fourth Amendment: Its History and Interpretation* chapter 11 (2008).


15 *See Atwater v. City of Lago Vista*, 532 U.S. 318, 346-47 (2001) (although conceding that if the Court balanced the competing interests based on the facts of the case, petitioner might win, asserting that “a responsible Fourth Amendment balance is not well served by standards requiring sensitive, case-by-case determinations of government need, lest every discretionary judgment in the field be converted into an occasion for constitutional review”).
person stand alone

for searches, focus on the person’s privacy expectations: apply the hierarchy of privacy interests discussed in session on “What The Fourth Amendment Protects” to this analysis

- **governmental interests** are aggregated—it is not the interest involved in the specific case before the Court; instead, it is the totality of the harm to be combated that is placed on the government’s side of the scale

- **Court’s thumb** presses heavily on government’s side of the scale -- the Court has candidly acknowledged that the “practical realities” of the balancing test “militate in favor of the needs of law enforcement, and against a personal-privacy interest that is ordinarily weak”

- **No History here** -- balancing is non-historical in the nature of its analysis -- factors used are contemporary interests

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16 For example, in Sitz, which addressed the permissibility of checkpoints set up to address the pervasive problem of drunk driving, the government’s interests were listed as the 25,000 deaths each year from drunk drivers, the nearly one million injuries, and the more than five billion dollars in property damage. Michigan Dep’t of State Police v. Sitz, 496 U.S. 444, 451 (1990).

17 United States v. Montoya De Hernandez, 473 U.S. 531, 558 (1985) (Brennan, J., dissenting) (criticizing balancing as process “in which the judicial thumb apparently will be planted firmly on the law enforcement side of the scales”).


19 See, e.g., New Jersey v. T.L.O., 469 U.S. 325, 339 (1985) (in applying the balancing test to searches of school children, stating: “Maintaining order in the classroom has never been easy, but in recent years, school disorder has often taken particularly ugly forms: drug use and violent crime in the schools have become major social problems.”).
BALANCING DIFFERS FROM THE CASE-BY-CASE APPROACH

- identifies specific interests to be balanced
- “done on a categorical basis—not in an *ad hoc*, case-by-case fashion”\(^{20}\)

BROAD APPLICATION OF THE BALANCING TEST

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used to justify lots of intrusions ---
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- searches of prison inmates and detainees and their cells
- orders designed to protect police officers during stops\(^{22}\)
- detentions of persons during the execution of search warrants\(^{23}\)
- entries onto property to combat and investigate fires\(^{24}\)
- inventory searches of possessions validly in police custody\(^{25}\)


\(^{22}\) *See* CLANCY, § 6.4.2.8.

\(^{23}\) *See* id. § 6.6.

\(^{24}\) *See* id. § 10.7.

\(^{25}\) *See* id. § 10.8.
• administrative inspections, including private residences,\textsuperscript{26} commercial buildings,\textsuperscript{27} ground and surface mines;\textsuperscript{28} and Occupational Safety and Health Administration inspections of places of employment for safety and regulatory violations\textsuperscript{29}
• highly regulated businesses\textsuperscript{30}
• work-related searches of employee areas of governmental workplaces\textsuperscript{31}
• searches of public school students\textsuperscript{32}
• searches of parolees\textsuperscript{33}
• searches of probationers’ homes\textsuperscript{34}

\textsuperscript{26} Camara v. Municipal Court, 387 U.S. 523 (1967).
\textsuperscript{27} See v. City of Seattle, 387 U.S. 541, 542 (1967).
\textsuperscript{29} Marshall v. Barlow’s, Inc., 436 U.S. 307, 320-21 (1978). These latter inspections extend to “‘any factory, plant, establishment, construction site, or other area, workplace or environment where work is performed by an employee of an employer’” and allow OSHA to inspect “‘any such place of employment and all pertinent conditions, structures, machines, apparatus, devices, equipment, and materials therein, and to question privately any such employer, owner, operator, agent, or employee.’” Id. at 309 n.1 (quoting 29 U.S.C. § 657(a) (1988)).
\textsuperscript{30} E.g., New York v. Burger, 482 U.S. 691, 702 (1987) (An owner or operator of commercial premises in a closely regulated industry has a reduced expectation of privacy, so that both the “warrant and probable-cause requirements, which fulfill the traditional Fourth Amendment standard of reasonableness, . . . have lessened application.”). The Court has employed several rationales in allowing suspicionless and warrantless intrusions of highly regulated industries but seems to have now settled on a balancing test to measure their reasonableness. See generally CLANCY, § 4.4.2.2.
\textsuperscript{31} O’Connor v. Ortega, 480 U.S. 709, 715 (1987) (plurality opinion).
\textsuperscript{34} United States v. Knights, 534 U.S. 112 (2001) (upholding warrantless search, based on reasonable suspicion of criminal activity, of probationer’s home).
• drug testing of various categories of people\(^{35}\)

• Most vehicular checkpoints\(^{36}\) including license-and-vehicle-registration stops\(^{37}\) and sobriety\(^{38}\) and immigration checkpoints\(^{39}\)

• airport screenings of passengers and their effects—and many other types of entranceway intrusions\(^{40}\)

• **SPECIAL NEEDS**

  • Court sometimes asserts that departures from the warrant and individualized suspicion models are justified where the intrusion serves a “special need” that

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\(^{36}\) *See* Illinois v. Lidster, 540 U.S. 419 (2004) (upholding roadblock to seek information about recent crime in area); Delaware v. Prouse, 440 U.S. 648, 663-64 & n.26 (1979) (states not precluded from developing methods for spot checks of licenses and registrations “that [did] not involve the unconstrained exercise of discretion” and asserting that its opinion was not intended to “cast doubt on the permissibility of roadside truck weigh-stations and inspection checkpoints, at which some vehicles may be subject to further detention for safety and regulatory inspection than are others’’); United States v. Brignoni-Ponce, 422 U.S. 873, 888 (1975) (Rehnquist, J., concurring) (“[A]gricultural inspections and highway roadblocks to apprehend known fugitives” are permissible.). *But see* Indianapolis v. Edmond, 531 U.S. 32 (2000) (striking down roadblock to interdict drug trafficking).


\(^{38}\) *See* Michigan Department of State Police v. Sitz, 496 U.S. 444, 445 (1990) (balancing “the State’s interest in preventing drunken driving, the extent to which [the checkpoints] can reasonably be said to advance that interest, and the degree of intrusion upon [stopped] motorists” in upholding the intrusion).

\(^{39}\) *See* CLANCY, § 10.2.

\(^{40}\) *See* CLANCY, § 10.5.
is “divorced from the State’s general interest in law enforcement.”


42 See Samson v. California, 547 U.S. 843, __ nn.3-4, 126 S. Ct. 2193, 2201-02 nn.3-4 (2006) (applying balancing test and declining to determine whether there was a “special need” to search parolees because “general Fourth Amendment principles render[ed] such an examination unnecessary” and observing that “special needs” analysis was not a necessary precondition of valid suspicionless searches).
IMPACT OF REDUCED EXPECTATIONS OF PRIVACY ON REASONABLENESS ANALYSIS: depart from traditional models

Reduced Expectations of Privacy

- automobiles [eliminates warrant requirement]
- commercial property (especially in highly regulated industries: gun dealer, coal mine, liquor business, auto junkyard)
- some employees at work: (ex) train operators, customs
- children at school
- international border
- probationers
- parolees (maybe none)

Expectation of privacy analysis

Reasonable expectations: two prongs –
1) actual EP
2) society recognizes EP as legitimate

Reduced expectations:
apply gov't friendly reasonableness analysis

No REP:
amendment does not apply as to a Search

Hierarchy of privacy analysis example: Vehicles

Reasonable expectations → no one
Reduced expectations → driver/owners
Reasonableness model changes:
no warrant for probable cause based searches
No REP → car thief (Rakas)
Passengers (Rakas → as to glove box, under search)
MODEL#5: COMMON LAW PLUS BALANCING


- **step #1:** was the action “regarded as an unlawful search or seizure under the common law when the Amendment was framed” --- if it yields an answer, the common law at the time the Amendment was framed, which was in 1791, is *dispositive*

- **step #2:** if step #1 “yields no answer,” apply the balancing test
OTHER CURRENT CASES ON ROLE OF HISTORY:

In *Atwater v. City of Lago Vista*, 532 U.S. 318, 346 n.14 (2001), which was a case where the majority believed that probable cause historically justified all arrests, in responding to Justice O’Connor’s dissent that sought to modify that standard, the majority opined:

History . . . is not just “one of the tools” relevant to a Fourth Amendment inquiry[.]. Justice O’Connor herself has observed that courts must be “reluctant . . . to conclude that the Fourth Amendment proscribes a practice that was accepted at the time of adoption of the Bill of Rights and has continued to receive the support of many state legislatures,” *Tennessee v. Garner*, 471 U.S. 1, 26 (1985) (dissenting opinion), as the practice of making warrantless misdemeanor arrests surely was and has. Because here the dissent “claim[s] that [a] practic[e] accepted when the Fourth Amendment was adopted [is] now constitutionally impermissible,” the dissent bears the “heavy burden” of justifying a departure from the historical understanding.
THE COURT’S ATTEMPTS TO HARMONIZE THE MODELS

nothing lasts forever:

- numerous attempts to harmonize cases by announcing the primacy—or demise—of a particular model
- inconsistent opinions on meaning of reasonableness are abundant and within same time period


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**How to choose between models?**


1. s/s “ordinarily unreasonable” absent individualized suspicion of wrongdoing

2. balancing limited to where “primary purpose” of s/s not to detect evidence of “ordinary criminal wrongdoing”


What checkpoints are permissible?

- *Edmond*: drugs?
- Sitz: sobriety?
- *Lidster*: informational (gather info on recent crime)?

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- TEST: search or seizure is “*ordinarily unreasonable* in the absence of individualized suspicion of wrongdoing,” thereby placing that model at the pinnacle of the hierarchical structure of reasonableness
- balancing limited to situations where the “*primary purpose*” of search or seizure is not to detect evidence of “ordinary criminal wrongdoing”

- *Edmond* FACTS
  - highway checkpoint program explicitly designed to discover illegal narcotics

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\(^{43}\) *See also* *Illinois v. Lidster*, 540 U.S. 419 (2004) (finding primary purpose of roadblock was informational and not investigatory and therefore permissible).
hit rate: 1,161 vehicles stopped; 104 motorists arrested: 55 arrest arrests for drug-related crimes, 49 for offenses unrelated to drugs, with an overall “hit rate” of approximately 9 per cent

**EDMOND ON HOW TO MEASURE “PRIMARY PURPOSE”:**

- Previously approved checkpoint programs were “designed primarily to serve purposes closely related to the problems of policing the border or the necessity of ensuring roadway safety.”
- Rejected the view that those checkpoints similar to Indianapolis program because they had the same ultimate purpose of arresting those suspected of committing crimes: “If we were to rest the case at this high level of generality, there would be little check on the ability of the authorities to construct roadblocks for almost any conceivable law enforcement purpose.” Because the *primary purpose* of the Indianapolis checkpoints was “to advance ‘the general interest in crime control,’” the Court declined “to suspend the usual requirement of individualized suspicion.”
- Although subjective intentions play no role in ordinary probable cause analysis, “programmatic purposes may be relevant to the validity of Fourth Amendment intrusions undertaken pursuant to a general scheme without individualized suspicion.” The Court emphasized that the purpose inquiry “is to be conducted only at the programmatic level and is not an invitation to probe the minds of individual officers acting at the scene.”
- Lower courts can “sift[] abusive governmental conduct from that which is lawful” and that “a program driven by an impermissible purpose may be proscribed while a program impelled by licit purposes is permitted, even though the challenged conduct may be outwardly similar.”
MY VIEW:

- Nothing in *Edmond* would prevent Indianapolis from and conducting the same screening for drugs as an incident to permissible checkpoint

- distinction between a criminal law enforcement purpose and other purposes is illusory or at least unwise:

  What matters is the intrusion on the people’s security from governmental interference. Therefore, the right against unreasonable seizures would be no less transgressed if the seizure of the house was undertaken to collect evidence, verify compliance with a housing regulation, effect an eviction by the police, or on a whim, for no reason at all. As we have observed on more than one occasion, it would be “anomalous to say that the individual and his private property are fully protected by the Fourth Amendment only when the individual is suspected of criminal behavior.”

- distinction is ironic in light of search and seizure practices that motivated the Framers: suspicionless intrusions approved of at the “programmatic level,” that is, writs of assistance and general warrants issued by executive officials to find illegally imported goods and authors and publications critical of the government

- *Edmond*’s framework -- just another of many attempts at creating a hierarchy that is ignored in subsequent opinions

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46 E.g., *Samson v. California*, 547 U.S. 843 (2006) (approving suspicionless stop and search of a person simply because the person was known to be on parole; the court explicitly disclaimed reliance on a special need, stating that “our holding under general Fourth Amendment principles renders such an examination unnecessary.” The Court stated that, because the “touchstone of the Fourth Amendment is reasonableness, not individualized suspicion,” and that, although it had “sanctioned suspicionless searches in limited circumstances, namely programmatic and special needs searches, we have never held that these are the only limited circumstances in which searches absent individualized suspicion could be ‘reasonable’ under the Fourth Amendment.”).
The Fourth Amendment's Concept of Reasonableness

Thomas K. Clancy

I. INTRODUCTION

The first clause of the Fourth Amendment to the United States Constitution requires that a search or seizure not be "unreasonable." This is the "fundamental command" of the Amendment and this "imprecise and flexible term" reflects the framers' recognition "that searches and seizures were too valuable to law enforcement to prohibit them entirely" but that "they should be slowed down." Reasonableness is the measure of both the permissibility of the initial decision to search and seize and the permissible scope of those intrusions.

Search and seizure issues permeate law enforcement and other governmental activity. The broad applicability of the Fourth Amendment creates novel and unprecedented challenges to traditional notions of reasonableness. Perhaps no other part of the Constitution is so often implicated—or litigated. Each day, thousands of vehicle stops occur and countless individuals are subjected to airport and other entrance screening. The Fourth Amendment applies broadly to such activities as health and safety inspections of job sites, traditional law enforcement, regulation of immigration, and drug testing of students. It measures the reasonableness of governmental action of grand responses to such terrorist threats as the use of weapons of mass destruction and mundane searches like rummaging through a governmental workplace to find a misplaced file. Advanced technologies now permit the government to obtain information in a host of ways, ranging from

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Director, National Center for Justice and the Rule of Law, and Visiting Professor, University of Mississippi School of Law.

The Fourth Amendment to the United States Constitution provides:

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

U.S. CONST. amend. IV.


See, e.g., T. L. O., 469 U.S. at 341 (noting twofold inquiry to assess reasonableness of search: initial justification for search and subsequent scope of search); Terry v. Ohio, 392 U.S. 1, 20 (1968) (same).

In the face of such challenges, the reasonableness analysis employed by the Supreme Court has repeatedly changed and each new case seems to modify the Court’s view of what constitutes a reasonable search or seizure. The Court chooses from at least five principal models to measure reasonableness: the warrant preference model, the individualized suspicion model, the totality of the circumstances test, the balancing test, and a hybrid model that gives dispositive weight to the common law. Because the Court has done little to establish a meaningful hierarchy among the models, in any situation the Court may choose whichever model it sees fit to apply. Thus, cases decided within weeks of each other have had fundamentally different—and irreconcilable—approaches to measuring the permissibility of an intrusion.

This Article examines those models and several situations that do not easily fit within any of those models. This Article asserts that there is a fundamental need for objective criteria to measure the reasonableness of a search or seizure. It concludes that an examination of the framers’ values, combined with several other tools of interpretation, inform us to the proper models of reasonableness and establish a hierarchy among those models.

II. ORIGINS OF THE CONCEPT OF REASONABLENESS

A. Searches and Seizures in England and in America Through 1791

The events leading to the adoption of the Fourth Amendment provide important insights as to the meaning of the concept of “reasonableness.” Although there are some differences in opinion among observers on some of the details of the historical record, more important differences stem from interpreting that record. As will be discussed, the lessons of history, when properly understood, should have a significant influence in ascertaining the proper meaning of reasonableness.

1. Warrantless Actions

Law enforcement officials in America and in England during the period preceding the American Revolution did not have “broad inherent authority to search and seize”; such actions required authorization, and the “warrant system
was used primarily to confer that authority.\(^6\) Warrantless searches and seizures were virtually nonexistent.\(^7\) Only one type of warrantless seizure may have been common—the seizure of a suspected felon.\(^8\) When arrested, felons were searched as a matter of course.\(^9\) A principle feature of a legal arrest was the high degree of confidence that the person arrested was guilty of the crime.\(^10\)


\(^{7}\) See, e.g., United States v. Chadwick, 433 U.S. 1, 8 (1977) (explaining that colonials did not oppose warrantless searches in places because such searches were not issue at time); James J. Tomkovicz, California v. Acevedo: The Walls Close In on the Warrant Requirement, 29 AM. CRIM. L. REV. 1103, 1133 (1992) ("Warrantless searches—other than searches incident to arrest—were not a fact of colonial life."); cf. Chimel v. California, 395 U.S. 752, 761 (1969) (indicating Fourth Amendment "was in large part a reaction to the general warrants and warrantless searches").

\(^{8}\) Telford Taylor, Two Studies in Constitutional Interpretation 27–28 (1969). See generally 2 Sir Matthew Hale, The History of the Pleas of the Crown 85–104 (1847) (discussing historic constable authority to arrest those suspected of committing felonies). Temporary detentions were not considered arrests and were not regulated by the common law—nor were they considered a form of abuse of authority. See generally Thomas K. Clancy, What Constitutes an "Arrest" Within the Meaning of the Fourth Amendment?, 48 YLL. L. REV. 129, 129–30 (2003) (discussing uneasy distinction between arrest and temporary detention).

\(^{9}\) See Michigan v. DeJillippo, 443 U.S. 31, 35 (1979) ("The fact of a lawful arrest, standing alone, authorizes a search [of the person arrested]."); United States v. Robinson, 414 U.S. 218, 235 (1973) (holding that search incident to arrest was exception to warrant requirement and, given its historical pedigree, "reasonable" within meaning of Fourth Amendment, requiring no "additional justification"); Weeks v. United States, 232 U.S. 383, 392 (1914) (acknowledging that right to search incident to arrest has been "always recognized under English and American law"). See generally Taylor, supra note 8, at 27–28 ("From the earliest times there were both arrest and search of suspected felons, with no thought of a warrant . . . ."); 2 Hale, supra note 8, at 85–104 (describing arrest procedures).

\(^{10}\) There is some dispute whether probable cause sufficed to arrest at the time of the American Revolution or whether that standard developed later. See David A. Sklansky, The Fourth Amendment and the Common Law, 100 COLUM. L. REV. 1739, 1802 (2000). My reading of history leads me to conclude that probable cause was the accepted standard. See, e.g., United States v. Watson, 423 U.S. 411, 418–19 (1976) (discussing "ancient common-law rule" permitting arrests without warrant for misdemeanors and felonies committed in officer's presence and for felonies not in officer's presence for which there were reasonable grounds to arrest); 2 Hale, supra note 8, at 91–92 (noting when constable ascertained that felony had been committed and had "probable grounds" that specific person was perpetrator, constable could arrest suspect without warrant); id. at 103 (observing that arrest based on "hue and cry" was permissible when probable cause to arrest was present); accord Payton, 445 U.S. at 605 (White, J., dissenting) (discussing constable's historic authority to arrest those suspected of committing felonies); James F. Stephen, A History of the Criminal Law of England 193 (1883) (referring to level of suspicion as "reasonable grounds" that person has committed felony); see also Samuel v. Payne, 99 Eng. Rep. 230, 230–31 (K.B. 1780) (recognizing fact that arrest was
Based on the lack of warrantless searches and seizures and the fact that the only persons searched or seized without a warrant usually were suspected felons, those actions were not the cause of public outcry or litigation.  

2. Warrants and Writs of Assistance

Although several forms of warrants existed in England and in the American colonies in the decades preceding the American Revolution, one form was viewed as a model of proper law enforcement practice and another was the subject of contemporary litigation and public resistance. The favored form of practice included the common law warrant to arrest felons and the common law warrant to search for stolen goods. The disfavored form of practice—general warrants and writs of assistance—represented a notorious and systematic exploitation of the warrant process, permitting the government to engage in suspicionless searches and seizures.

The common law search warrant, which "crept into the law by imperceptible practice," was a "hybrid criminal-civil process." The victim of a theft had to state under oath, before a justice of the peace, the basis for his belief that his goods would be found in a specified place. If probable cause was established, "the justice would issue a warrant authorizing the victim to go with a constable to the specified place and, if the goods were found, to return [with] the goods and the suspected felon before the justice, for . . . disposition of the matter."

Based on allegations that plaintiff had stolen goods as defense to false imprisonment claim stemming from constable's arrest of plaintiff).

11TAYLOR, supra note 8, at 39-40; see also Joseph D. Grano, Rethinking the Fourth Amendment Warrant Requirement, 19 AM. CRIM. L. REV. 603, 621 (1982) ("[H]istory indicates that warrantless felony arrests did not cause consternation."); cf. Chadwick, 433 U.S. at 8 ("The absence of a contemporary outcry against warrantless searches in public places was because, aside from searches incident to arrest, such warrantless searches were not a large issue in colonial America.").

12See TAYLOR, supra note 8, at 24 (observing that scholars seeking origin of search and seize warrants have traveled into "foggy land" and that warrant's origin seems to be based on several "fairly distinct forms of English legal practice").

13See generally 2 HALE, supra note 8, at 105-20 (discussing warrants issued for arrest of felons or persons suspected of felony).

14TAYLOR, supra note 8, at 24; see also M. H. SMITH, THE WRITS OF ASSISTANCE CASE 17 (1978) (noting common law courts recognized only searches for stolen goods and searches authorized by Parliament's legislation).

15See, e.g., LANDYNSKI, supra note 3, at 19-41 (discussing history and unfavorable characteristics of general warrants and writs of assistance); NELSON B. LASSON, THE HISTORY AND DEVELOPMENT OF THE FOURTH AMENDMENT TO THE UNITED STATES CONSTITUTION 13-78 (Leonard W. Levy ed., Da Capo Press 1970) (1937) (same); TAYLOR, supra note 8, at 23-50 (same).

16Entick v. Carrington, 19 Howell's St. Tr. 1029, 1067 (K.B. 1765).

17TAYLOR, supra note 8, at 24-25.

18Id. at 25.

19Id. See generally Gerstein v. Pugh, 420 U.S. 103, 116 n.17 (1975) (discussing common
There also existed the common law arrest warrant for felons. An arrest warrant was a command to the sheriff of the county or the marshal of the court to apprehend a felon and bring the felon to court. The court issued this warrant upon a showing similar to that necessary for a search warrant; the court examined the requesting party under oath, considered the party's grounds for suspicion as to whether a felony had been committed, and reduced the examination to writing. The person suspected of the crime had to be named.

The disfavored form of practice—disfavored at least in the eyes of the American colonists—involves statutory authorization for suspicionless searches and seizures. That legislation, through the seventeenth century, was "uniformly characterized by the granting of general and unrestricted powers." Of particular note was legislation enabling customs searches and seizures, which authorized searches without suspicion anywhere the searcher desired to look. Pursuant to the statute, writs of assistance were issued. The writ was a simple directive in the form of a document in the name of the king that "ordered a wide variety of persons to help the customs man make his search." Writs were not issued as a result of any information that contraband was stored at a specified place; instead, customs officials could search wherever they chose. "The discretion delegated to the official was therefore practically

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20 Hale, supra note 8, at 149–52 (same).
21 Hale, supra note 8, at 105–09; accord 4 Edward Coke, Institutes of the Laws of England 177 (1797).
22 Id. at 110.
23 Id. at 112, 114.
24 Landynski, supra note 3, at 31.
25 Lasson, supra note 15, at 23. See generally Cuddihy, supra note 6, at 376–77 ("[A]ll the colonies enacted general searches or seizures.").
26 The legislation did provide some limitations: the searcher had to be an authorized person and accompanied by a law enforcement officer; the search had to be performed during daylight hours; and only in the case of resistance could doors, chests, and other locked areas or containers be broken. Smith, supra note 14, at 25–31.
27 Taylor, supra note 8, at 26. Section 5(2) of the Act of Frauds of 1662 provided:
And it shall be lawful to or for any Person or Persons, authorized by Writ of Assistance under the Seal of his Majesty's Court of Exchequer, to take a Constable... or other publick Officer inhabiting near unto the Place, and in the Day-time to enter... any House... or other Place, and in Case of Resistance to break open Doors, Chests, Trunks and other Package, there to seize, and from thence to bring, any Kind of Goods or Merchandize whatsoever, prohibited and uncustomed, and to put and secure the same in his Majesty's Store-house.

An Act for preventing Frauds, and regulating Abuses in his Majesty's Customs, 1662, 13 & 14 Car. 2, c. 11, § 5(2) (Eng.).
28 Taylor, supra note 8, at 26.
29 Smith, supra note 14, at 29.
30 Lasson, supra note 15, at 54.
absolute and unlimited." The writs were akin to "permanent search warrants placed in the hands of custom officials: they might be used with unlimited discretion and were valid for the duration of the life of the sovereign."

3. Reaction Against Search and Seizure Practices

(a) The Writs of Assistance in America

Smuggling was a widespread practice in the American colonies, and after 1760, writs of assistance became the principal means of combating the practice. Massachusetts bore the brunt of the customs writ use, with the Superior Court of Massachusetts granting writs beginning in the 1750s. In 1761, after new writs of assistance had been requested because the previously issued writs had expired upon the death of the king the preceding year, a group of Boston merchants challenged the proposed writs. The question upon which the case ultimately turned was whether the Superior Court should continue to grant the writs in a "general and open-ended form" or whether it should limit the writs to a single occasion based on particularized information given under oath. Jeremiah Gridley, the Attorney General of the Massachusetts Bay Colony, defended the general writs of assistance as necessary to enforce the customs laws.

James Otis, representing the merchants, attacked the writs as "against the

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31 Id.
32 Writs of assistance usually have been considered as general search warrants, but some have disputed that characterization because the power to search "inhered in the officers by virtue of their commissions," and the writs were merely "judicial orders which empowered the customs officials to summon the sheriff or constable . . . to keep the peace" for the duration of the search. LADYNSKI, supra note 3, at 32 n.53; see also SMITH, supra note 14, at 37–39, 461, 520–21 (citing cases and 1768 opinion of English Attorney General and recognizing that writ of assistance was not search warrant but merely vehicle by which statutory power to search was exercised). But cf. Berger v. New York, 388 U.S. 41, 58 (1967) (equating customs writs of assistance to general warrants).
33 LANDYNSKI, supra note 3, at 31 (citation omitted). The writs expired six months after the death of the sovereign. LASSON, supra note 15, at 57.
34 LANDYNSKI, supra note 3, at 30. See generally LASSON, supra note 15, at 51–78 (discussing use of writs by customs officials for "detection of smuggled goods" and problems arising from this use).
35 LANDYNSKI, supra note 3, at 31.
36 See generally JOSIAH QUINCY, JR., REPORTS OF CASES ARGUED AND ADJUDGED IN THE SUPERIOR COURT OF JUDICATURE OF THE PROVINCE OF MASSACHUSETTS BAY BETWEEN 1761 AND 1772, at 401–11 (Russell & Russell 1969) (1865) (detailing some early granting of writs in Massachusetts). Attempts to obtain the writs in other colonies were generally unsuccessful. See id. at 500–11; LASSON, supra note 15, at 73–76.
37 TAYLOR, supra note 8, at 36.
38 SMITH, supra note 14, at 282–83; accord QUINCY, supra note 36, at 531–32 (articulating that key issue in case concerned scope of writ of assistance).
39 See generally QUINCY, supra note 36, at 476–92 (providing discussion and text of Gridley's arguments in defense of general writs).
fundamental principles of law.” Otis contrasted the customs writ “unfavorably with the common law warrant for stolen goods, pointing out that it was both unlimited geographically and perpetual temporally, so that there was no return of the warrant before the issuing magistrate.” Otis maintained:

Now one of the most essential branches of English liberty, is the freedom of one’s house. A man’s house is his castle; and while he is quiet, he is as well guarded as a prince in his castle. This writ, if it should be declared legal, would totally annihilate this privilege. Custom house officers may enter our houses when they please—we are commanded to permit their entry—their menial servants may enter—may break locks, bars and everything in their way—and whether they break through malice or revenge, no man, no court can inquire—bare suspicion without oath is sufficient. . . . Again, these writs are NOT RETURNED. Writs in their nature are temporary things; when the purposes for which they are issued are answered, they exist no more; but these monsters in law live forever, no one can be called to account. Thus reason and the constitution are both against this writ.

Otis conceded that the “privilege of house” was subject to peremptory violation when there was crime to be dealt with, [but] he stressed how grave and urgent the situation must be before the exception applied: the crime must be ‘flagrant’, the necessity ‘great’ and ‘public.” Further, Otis emphasized that the common law search warrant for stolen goods had to be special and that a particular house must be suspected.

Although Otis lost his case, he gained a place in history. In Otis’s case, “the American tradition of constitutional hostility to general powers of search first found articulate expression.” In the audience was John Adams, who later

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40Taylor, supra note 8, at 36–37 (quoting 2 Legal Papers of John Adams 125 (L. Kimving Wroth & Hillier B. Zobel eds., 1965) (internal quotation marks omitted)). See generally Smith, supra note 14, at 331–79 (articulating extensive analysis of Otis’s argument).

41Taylor, supra note 8, at 37; see also Payton v. New York, 445 U.S. 573, 608–09 (1980) (White, J., dissenting) (recounting Otis’s reliance on common law to support view that general writ was void).

42Taylor, supra note 8, at 37.

43Smith, supra note 14, at 341.

44Id.

45Otis’s arguments in the writs of assistance case have often been cited by the Supreme Court. See, e.g., Frank v. Maryland, 359 U.S. 360, 364 (1959); Boyd v. United States, 116 U.S. 616, 625 (1886) (noting debate over issuance of writs of assistance in Massachusetts in 1761 “was perhaps the most prominent event which inaugurated the resistance of the colonies to the oppressions of the mother country”); see also Taylor, supra note 8, at 38 (“The writs of assistance were anathema in the colonies, and Otis’[s] argument against them was well known among the founding fathers.”).

46Smith, supra note 14, at 7.
recounted that Otis’s oration was so moving that “then and there” the American Revolution was born. Although this was likely an overstatement, the use of the writs of assistance “caused profound resentment” in the colonies, and their use is considered to be “the first in the chain of events which led directly and irresistibly to revolution and independence.” Public reaction in Massachusetts and in other colonies against the writs was widespread and included rescuing seized ships, issuing town meeting promulgations, pamphleteering, publishing accounts of Otis’s arguments in the writs of assistance case, and providing other propaganda decrying the oppressive nature of the writs.

(b) English Cases

In England, shortly before the American Revolution, the abuses associated with searches pursuant to general warrants resulted in a series of cases stemming from publications objectionable to the crown. In 1762, a series of pamphlets, called The North Briton, was published anonymously. The author, John Wilkes, used the pamphlets to deride government ministers and criticize governmental policies. After an especially bitter attack, the

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48 See SMITH, supra note 14, at 377 (documenting litigation and recognizing that Adams’ account was probably embellished); cf. 2 LEGAL PAPERS OF JOHN ADAMS, supra note 40, at 116–17 (emphasizing impact of Otis’s argument in context of “larger political and constitutional developments”).

49 LANDON, supra note 3, at 31; see also Harris v. United States, 331 U.S. 145, 159 (1947) (Frankfurter, J., dissenting) (positing that abuses surrounding searches and seizures “more than any one single factor gave rise to American independence”); Richard M. Leagre, The Fourth Amendment and the Law of Arrest, 54 J. CRIM. L., CRIMINOLOGY & POLICE SCI. 393, 397 (1963) (noting that, based on history of abuses, “chief concern in the colonists’ minds was probably with the issuance of general warrants”).

50 LASSON, supra note 15, at 51 (internal quotation marks and citation omitted); see also Berger v. New York, 388 U.S. 41, 58 (1967) (noting use of general warrants “was a motivating factor behind the Declaration of Independence”); Stanford v. Texas, 379 U.S. 476, 482 (1965) (“[The] Fourth Amendment was most immediately the product of contemporary revulsion against a regime of writs of assistance . . . .”); United States v. Rabinowitz, 339 U.S. 56, 69 (1950) (Frankfurter, J., dissenting) (explaining that Fourth Amendment was “safeguard” against abuses “so deeply felt by the Colonies as to be one of the potent causes of the Revolution”).


52 Several other sources of authority also condemned the general warrant. For example, Chief Justice Halle stated that the general warrant to apprehend all persons suspected of committing a crime was void and was no defense to a claim for false imprisonment. See 1 HALE, supra note 8, at 580 (affirming that general warrant is not defense to false imprisonment claim); 2 id. at 112 (same); LASSON, supra note 15, at 35 (same).

53 LASSON, supra note 15, at 43.

54 Id.
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government decided to apprehend and prosecute for seditious libel the responsible party. The secretary of state issued a warrant "to four messengers, ordering them "to make strict and diligent search for the authors, printers, and publishers of a seditious and treasonable paper, entitled, The North Briton, No. 45, . . . and them, or any of them, having found, to apprehend and seize, together with their papers." This warrant was "general as to the persons to be arrested and the places to be searched and the papers to be seized." It resulted in the arrest of forty-nine persons in three days. Eventually, the messengers located the printers and learned Wilkes's identity. Wilkes and all of his private papers were then seized.

The printers and Wilkes brought separate suits against the messengers for false imprisonment. One of these cases, Wilkes v. Wood, was well known in America and has been considered a driving force behind the adoption of the Fourth Amendment. In that case, Chief Justice Pratt criticized the warrants for failing to specify the offenders' names and for giving the messengers the discretionary power "to search wherever their suspicions may chance to fall." Chief Justice Pratt maintained that if the power to issue such warrants existed, "it certainly [might] affect the person and property of every man in this kingdom, and [would be] totally subversive of the liberty of the subject."

Another contemporary English case, Entick v. Carrington, has been repeatedly cited by the Supreme Court as a "monument of English freedom 'undoubtedly familiar' to 'every American statesman' at the time the Constitution was adopted, and considered to be 'the true and ultimate expression of constitutional law.' Entick stemmed from a warrant issued by the secretary of state to arrest Entick and to seize his books and papers, based on the charge that he was "the author, or the one concerned in writing of

55Id.
56Id.
57Id.
58Id. at 43–44.
61See, e.g., Stanford v. Texas, 379 U.S. 476, 484 (1965) (describing Wilkes opinion as "a wellspring of the rights now protected by the Fourth Amendment").
62Wilkes, 98 Eng. Rep. at 498; see also Leach, 19 Howell's St. Tr. at 1026–27 (upholding damage award for seizure of printer under general warrant that neither named nor described person to be seized); Huckle, 95 Eng. Rep. at 769 ("To enter a man's house by virtue of a nameless warrant, in order to procure evidence, is worse than the Spanish Inquisition; a law under which no Englishman would wish to live an hour; it was a most daring public attack made upon the liberty of the subject.").
several weekly very seditious papers." Entick was arrested and all of his papers were seized from his home. After his release, he sued the messengers; the jury returned a verdict for Entick, and the case was heard by Chief Justice Pratt, who by then was called Lord Camden.

Lord Camden condemned the scope of the warrant, which authorized seizure of all of Entick’s papers, libelous or not. Camden declared that, if such a warrant were legal, then “the secret cabinets and bureaus of every subject in this kingdom will be thrown open to the search and inspection of a messenger, whenever the secretary of state shall think fit to charge, or even suspect, a person to be the author, printer, or publisher of a seditious libel.” In contrast to the warrant before the court, Camden pointed out the judicial safeguards attending the issuance of common law warrants for stolen goods:

Observe too the caution with which the law proceeds [for stolen goods warrants.] —There must be a full charge upon oath of a theft committed.—The owner must swear that the goods are lodged in such a place.—He must attend at the execution of the warrant to shew them to the officer, who must see that they answer the description.—And, lastly, the owner must abide the event at his peril: for if the goods are not found, he is a trespasser; and the officer being an innocent person, will be always a ready and convenient witness against him.

On the contrary, in the case before us nothing is described, nor distinguished: no charge is requisite to prove, that the party has any criminal papers in his custody: no person present to separate or select: no person to prove in the owner’s behalf the officer’s misbehaviour.

Lord Camden went beyond procedural criticisms of the general warrant and indicated that there were substantive restrictions on the ability of the government to search or seize. In doing so, Lord Camden discussed the fundamental role that property rights played in society and outlined a hierarchy of property rights: “The great end, for which men entered into society, was to secure their property. That right is preserved sacred and incommunicable in all instances, where it has not been taken away or abridged by some public law for the good of the whole.” Evidencing the strong support that the common law gave to private property, Lord Camden considered “every invasion of private

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66 Entick, 19 Howell’s St. Tr. at 1031.
67 Id.
68 TAYLOR, supra note 8, at 32.
69 Entick, 19 Howell’s St. Tr. at 1066, 95 Eng. Rep. at 817.
70 Entick, 19 Howell’s St. Tr. at 1053.
71 Id. at 1067.
72 Id. at 1066. The exceptions for the public good included “[d]istresses, executions, forfeitures, and taxes.” Id.
property, be it ever so minute,” to be a trespass.\textsuperscript{73} Accordingly, “[n]o man can set his foot upon my ground without my licence [sic], but he is liable to an action, though the damage be nothing; which is proved by every declaration in trespass, where the defendant is called upon to answer for bruising the grass and even treading upon the soil.”\textsuperscript{74} Camden also said that there was no right to seize or inspect papers, which were considered the owner’s “dearest property.”\textsuperscript{75} Indeed, the court said, to pronounce that practice legal “would be subversive of all the comforts of society.”\textsuperscript{76} Camden distinguished the right to search and seize for stolen goods based on the property rights involved: in the case of stolen goods, the owner is permitted to recapture his own goods; the seizure of private papers, however, involved the government taking the owner’s property.\textsuperscript{77} Camden also rejected the government’s ability to search papers as a means of discovering evidence in either criminal or civil cases.\textsuperscript{78} To emphasize the strength of that substantive restriction on the government’s ability to search, he said: “yet there are some crimes, such for instance, as murder, rape, robbery, and house-breaking, to say nothing of forgery and perjury, that are more atrocious than libeling. But our law has provided no paper-search in these cases to help forward the conviction.”\textsuperscript{79} Camden justified the rule by reference to the right not to incriminate oneself:

\begin{quote}
It is very certain, that the law obligeth no man to accuse himself; because the necessary means of compelling self-accusation, falling upon the innocent as well as the guilty, would be both cruel and unjust; and it would seem, that search for evidence is disallowed upon the same principle. There too, the innocent would be confounded with the guilty.\textsuperscript{80}
\end{quote}

(c) State Constitutions

Many colonial governments at the time of the American Revolution adopted legal protections against unreasonable searches and seizures.\textsuperscript{81} Those

\textsuperscript{73} Id.
\textsuperscript{74} Id. It was the trespasser’s burden to show his actions was justified or excused. Id.
\textsuperscript{75} Id.
\textsuperscript{76} Id.
\textsuperscript{77} Id.
\textsuperscript{78} Id. at 1073.
\textsuperscript{79} Id.
\textsuperscript{80} Id.
\textsuperscript{81} See generally Cuddihy, supra note 6, at 1231–1358 (discussing transformation of American search and seizure law and development of state constitutional protections regarding searches and seizures). Even the Continental Congress succumbed to the lure of the general warrant. On August 28, 1777, in response to information that a large British army had landed at the head of the Chesapeake . . . [Congress] recommended to the Supreme Executive Council of Pennsylvania the arrest of
protections, embodied in the constitutions of the various states after they declared their independence, addressed abuses associated with general warrants. Most, if not all, were not drafted to address searches or seizures occurring without a warrant. However, a common theme of the provisions was the requirement that the search or seizure be based on particularized suspicion. For example, the Pennsylvania Declaration of Rights required warrants to be issued only upon a "sufficient foundation" and prohibited general warrants to search places or to seize "any person or persons, his or their property." Article Fourteen of the Massachusetts Declaration of Rights of 1780, which "served as the model for the Fourth Amendment," was the certain persons, most of them Quakers, who had shown a disposition inimical to the American cause, together with all such papers in their possession as may be of a political nature.

Lasson, supra note 15, at 76 (internal quotation marks omitted); see also Morgan Cloud, Quakers, Slaves, and the Founders: Profiling to Save the Union, 73 Miss. L.J. 369, 370 (2003) (discussing seizures of Quakers without individualized suspicion during Revolution).

States also adopted some statutory limitations. For example, New Jersey passed a statute in 1782 to prevent illegal trade with the enemy. Quincy, supra note 36, at 508–09 n.11. The act provided for the issuance of search and seizure warrants "as in the case of stolen Goods" by judges upon application made if "due and satisfactory Cause of Suspicion shewn [sic]." and made upon written oath or affirmation, that goods are concealed in a house or other building. Id.

See Taylor, supra note 8, at 38 ("[W]arrants and writs were in the forefront of the colonial mind when the libertarian provisions of the early constitutions were drafted."). See generally Lasson, supra note 15, at 79–82 (detailing provisions of eight states addressing search and seizure in their constitutions prior to adoption of Fourth Amendment). Some courts subsequently construed those state constitutional provisions solely as a restriction on legislatures and not on law enforcement officials or judges. See, e.g., Thomas K. Clancy, A Vision of Search and Seizure Protection, 34 Md. B.J. 11, 12 (2001) (tracing interpretation by Maryland courts of Maryland's constitutional search and seizure provision and noting that, as late as 1949, the provision was construed to apply only to legislative acts and not to acts of police officers); Davies, supra note 6, at 669–63 (observing that framers of Fourth Amendment did not equate police officer misconduct with government illegality).

See Taylor, supra note 8, at 41–42. There were a few provisions that at least obliquely addressed more than warranted actions. On September 28, 1776, Pennsylvania adopted its Declaration of Rights. Lasson, supra note 15, at 80–81. Section 10 provided:

That the people have a right to hold themselves, their houses, papers, and possessions free from search and seizure, and therefore warrants without oaths or affirmation first made, affording a sufficient foundation for them, and whereby any officer or messenger may be commanded or required to search in suspected places, or to seize any person or persons, his or their property, are contrary to that right, and ought not to be granted.

Pa. Const. of 1776, cl. 10. The first clause of this provision, while stating the broader principle of freedom from searches and seizures, served only as a premise for condemning general warrants. Lasson, supra note 15, at 81 n.10; see also Sources of Our Liberties 366 (Richard L. Perry & John C. Cooper eds., 1960) (reproducing provision of Vermont Constitution of 1777, which is identical to Pennsylvania provision).

See, e.g., Cuddihy, supra note 6, at 1255 (noting early state constitutions established probable cause and particularity as tangible elements of concept of reasonableness).

See supra note 84 (reproducing text of Pennsylvania's provision).

See Landynski, supra note 3, at 38–39; cf. Harris v. United States, 331 U.S. 145, 158 (1947) (Frankfurter, J., dissenting) (noting that because Fourth Amendment was based on
first provision to assert that each person had the “right to be secure from all unreasonable searches and seizures.”\footnote{88} The Massachusetts article was drafted by John Adams\footnote{89} some nineteen years after he heard Otis’s argument in the writs of assistance case, and the word “unreasonable” appears to have been Adams’s innovation.\footnote{90} Nonetheless, the remainder of Article Fourteen was concerned with the regulation of warrants, making them illegal if “the cause or foundation of them” was not supported by oath or affirmation, and if the warrant was “not accompanied with a special designation of the person or

Massachusetts model, “[t]his is clear proof that Congress meant to give wide, and not limited, scope to [the] protection against police intrusion”).

\footnote{88}Article 14 of the Massachusetts Declaration of Rights of 1780 provided:
Every subject has a right to be secure from all unreasonable searches and seizures of
his person, his house, his papers, and all his possessions. All warrants, therefore, are
contrary to this right, if the cause or foundation of them be not previously supported
by oath or affirmation, and if the order in the warrant to a civil officer, to make
search in suspected places, or to arrest one or more suspected persons, or to seize
their property, be not accompanied with a special designation of the person or
objects of search, arrest, or seizure; and no warrant ought to be issued, but in cases,
and with the formalities prescribed by the laws.

\footnote{89}MASS. CONST. Pt. 1, Art. XIV. New Hampshire duplicated the Massachusetts provision in its Bill of Rights of 1774. LASNON, supra note 15, at 82.

\footnote{90}Davies, supra note 6, at 685.

\footnote{91}Id.; see also id. at 595 ("There is also a dearth of evidence of a broad reasonableness standard in the records of the framing of the American search and seizure provisions."). Professor Davies sets forth a plausible claim that Adams’s use of the term “unreasonable” was inspired by James Otis’s argument in the writs of assistance case. In that case, Otis had asserted that the writs were "contrary to the principles of the common law" and, therefore, "void." id. at 690. Otis, in turn, cited Edward Coke to support his claim; Coke had previously written that acts of Parliament are void if "against common right and reason." id. (emphasis removed) (citations omitted). Davies, while acknowledging that Coke’s “against ... reason” does not appear in Adams’s notes of Otis’s argument, observes that Adams did cite to the passage from Coke in which the phrase appeared. id. at 690–91. From this Davies concludes that, for the framers, the Fourth Amendment’s concept of reasonableness meant that the search or seizure violated the common law. id. at 693. Davies further concludes that the framers “would have understood ‘unreasonable searches and seizures’ as the pejorative label for searches or arrests made under that most illegal pretense of authority—general warrants.” id.; see also id. at 723 (noting that framers were merely banning general warrants and not creating broad reasonableness standard). If that were the case, however, the initial draft of the Fourth Amendment was clearly sufficient to do so, as were its numerous state predecessors regulating only warrants. Moreover, if “reasonableness” was to be equated with the common law standards of the day, there were two aspects of the common law regulation of searches and seizures. First, there was the common law search warrant. Second, there was a series of common law rules that regulated (and limited) warrantless searches and seizures. If the framers were referring to the common law in using the term “unreasonable,” then it is just as likely that the framers were incorporating the common law standards for both warrants and warrantless actions. More importantly, the word “reasonable” had many meanings at the time of the framing, ranging from connoting "logic or consistency" to “denoting unconstitutionality.” id. at 687; see also Sklansky, supra note 10, at 1777–81 (examining various historical meanings of word “reasonable” and observing that term “unreasonable” in late eighteenth century "almost always" meant "what it means today: contrary to sound judgment, inappropriate, or excessive"). It thus remains speculative whether the framers believed it had a fixed meaning.
of search, arrest or seizure."91

(d) Drafting of the Fourth Amendment

The Fourth Amendment was promulgated against this background of abuse of the warrant process—and revulsion against that abuse.92 The amendment embodies the common law standards for the issuance of warrants for stolen goods.93 Beyond that rejection of general warrants,94 nothing in the drafting or ratification process sheds light on the framers’ use of the word “unreasonable” in the Amendment’s first clause.95 Indeed, the initial draft only addressed abuses associated with general warrants; the evolutionary process behind the final version, which contained the independent reasonableness and warrant clauses, is unclear.96

91 MASS. CONST. Pt. I, Art. XIV.
92 The omission of a bill of rights was a main criticism of the Constitution during the debates regarding its approval by the States. See generally Lasson, supra note 15, at 83–100 (discussing states’ demand for inclusion of bill of rights). Typical anti-Federal attacks included the claim that general search warrants would be permitted without a bill of rights. See, e.g., id. at 88 n.36, 93–94 (including similar claim by Patrick Henry). One pamphlet that gained widespread circulation complained that several essential rights were omitted, including “freedom from hasty and unreasonable search warrants, warrants not founded on oath, and not issued with due caution, for searching and seizing men’s papers, property and persons.” Richard Henry Lee, Observations Leading to a Fair Examination of the System of Government Proposed by the Late Convention; And to Several Essential and Necessary Alterations in It. In a Number of Letters from the Federal Farmer to the Republican, reprinted in Letters from the Federal Farmer to the Republican 28 (Walter Hartwell Bennett Ed., Univ. of Al. Press 1978) (1787).
93 See Gerstein v. Pugh, 420 U.S. 103, 116 n.17 (1975) (noting common law warrant for recovery of stolen goods “furnished the model for a ‘reasonable’ search under the Fourth Amendment”).
94 See, e.g., Brower v. County of Inyo, 489 U.S. 593, 596 (1989) (explaining writs of assistance were “principal grievance against which the Fourth Amendment was directed”); Henry v. United States, 361 U.S. 98, 100–01 (1959) (explaining that colonial revulsion against general warrant and writs of assistance is reflected in Fourth Amendment); Olmstead v. United States, 277 U.S. 438, 463 (1928) (noting Fourth Amendment was “directed against general warrants and writs of assistance”); Taylor, supra note 8, at 43 (indicating drafting process of Fourth Amendment “reinforces the conclusion that it was the warrant which was the initial and primary object of the amendment”); Leage, supra note 49, at 397 (“The importance of this history prior to the drafting of the Fourth Amendment lies in its indication that the chief concern in the colonists’ minds was probably with the issuance of general warrants.”); Wasserstrom, supra note 6, at 285 (“[T]he Framers did not build the warrant clause into the Constitution to prevent warrantless searches. Instead, they sought to prohibit the newly formed government from using general warrants—a device they believed jeopardized the liberty of every citizen.”).
95 See generally Clancy, supra note 51, at 514–17 (summarizing drafting and ratification process).
96 Id.
1. The Rise and Fall of Substantive Restrictions on Searches and Seizures

Beginning in 1886 with Boyd v. United States\textsuperscript{97} and extending to the latter third of the twentieth century, the Supreme Court defined the Fourth Amendment largely in terms of property rights.\textsuperscript{98} In Boyd, the Court created a hierarchy of personal property rights. It based the permissibility of a search or seizure on whether the government had a superior interest in the thing to be searched or seized.\textsuperscript{99} Based on that hierarchy, the Court refused to sanction certain intrusions, regardless of the procedures utilized.\textsuperscript{100} In subsequent decisions, the Court developed Boyd's hierarchy of property rights and refused to permit any search or seizure of certain papers, regardless of the procedures utilized, based on the individual's property rights in the object.\textsuperscript{101} On the other hand, the Court readily permitted an intrusion when the government or another party had a superior property interest in the object.\textsuperscript{102} Over time, the list of

\textsuperscript{97}116 U.S. 616 (1886).

\textsuperscript{98}See Thomas K. Clancy, \textit{What Does the Fourth Amendment Protect: Property, Privacy, or Security?}, 33 Wake Forest L. Rev. 307, 309–27 (1998) (examining origins, development, and demise of role of property rights in Fourth Amendment analysis); Morgan Cloud, \textit{The Fourth Amendment During the Lochner Era: Privacy, Property and Liberty in Constitutional Theory}, 48 Stan. L. Rev. 555, 573–98 (1996) (analyzing Boyd and following cases and concluding that Court's property-based rules and concepts "became a fundamental part of Fourth Amendment doctrine and were not abandoned unequivocally by the Supreme Court for eighty years.")

\textsuperscript{99}See Clancy, supra note 98, at 314.

\textsuperscript{100}Id.


\textsuperscript{102}See, e.g., Davis v. United States, 328 U.S. 582, 588–89 (1946) (distinguishing between private papers and public property and permitting seizure of gasoline ration coupons from service station when the coupons "never became the private property of the holder but remained at all times the property of the Government and subject to inspection and recall by it"); see also United States v. Jeffers, 342 U.S. 48, 53–54 (1951) (recognizing that no property rights exist in contraband goods and allowing government agents to seize drugs as contraband when agents are in a position to observe drugs); Harris v. United States, 331 U.S. 145, 154 (1947) (allowing government agents to seize cards because they were "property of the United States" and "the Government was entitled to possession"); Carroll v. United States, 267 U.S. 132, 143 (1925) (permitting warrantless seizure of liquor based on statute providing "no property right shall exist in such liquor").

The Court adopted what came to be known as the "mere evidence rule" to distinguish objects that could be seized from those that could not:

[Search warrants] may not be used as a means of gaining access to a man's house or office and papers solely for the purpose of making search to secure evidence to be used against him in a criminal or penal proceeding, but that they may be resorted to
goods and papers that could be seized continued to grow and the distinctions
between seizable and nonseizable papers blurred.

The property-based theory of substantive restrictions on searches and
seizures finally expired in 1967 in Warden v. Hayden. Hayden asserted that
privacy, not property, was the central principle upon which Fourth Amendment
rights were premised. The Court characterized the government’s need to
assert a property interest in the objects it sought to seize as a fiction, saying it
“obscure[d] the reality that government has an interest in solving crime.”
Construing the Amendment’s protections as procedural, the Court stated that
the requirements of probable cause, particularity, and the intervention of a
magistrate secured “the same protection of privacy whether the search is for
‘mere evidence’ or for fruits, instrumentalities or contraband.” Since
Hayden, the Fourth Amendment usually has been viewed as providing only a
procedural mechanism to insure that the search or seizure is reasonable.

2. Evolution of Procedural Regulation of Searches and Seizures

(a) Model #1: The Warrant Requirement

Virtually all of the Supreme Court’s doctrinal development of the

only when a primary right to such search and seizure may be found in the interest
which the public or the complainant may have in the property to be seized, or in the
right to the possession of it, or when a valid exercise of the police power renders
possession of the property by the accused unlawful and provides that it may be
taken.


Papers received “no special sanctity, as distinguished from other forms of property, to
render them immune from search and seizure” if they fell within one of the categories of seizable
goods. Gouled, 255 U.S. at 309. Thus, records required to be maintained by law could be seized.
See Wilson v. United States, 221 U.S. 361, 380 (1911). Private papers that were
instrumentalities of a crime could also be seized. See Abel v. United States, 362 U.S. 217, 237–
39 (1960) (holding fake identifications were instrumentalities of crime and could be seized);
United States v. Rabinowitz, 339 U.S. 56, 64 (1950) (finding forged stamps to be
instrumentalities of crime and allowing seizure); Harris, 331 U.S. at 154 (finding checks to be
instrumentalities of crime).


Id. at 304.

Id. at 306. But see Daniel B. Yager, Search, Seizure and the Positive Law:
Expectations of Privacy Outside the Fourth Amendment, 84 J. CRIM. L. & CRIMINOLOGY 249,
250–76 (1993) (arguing that property interests make government’s confiscation of property in
another’s possession lawful).

Hayden, 387 U.S. at 306–07.

inquiry provides no substantive limitation on ability of police to arrest for minor offenses that
are based on probable cause); United States v. Martinez-Fuerte, 428 U.S. 543, 575–78 (1976)
(Brennan, J., dissenting) (discussing view that Fourth Amendment is procedural limitation on
governmental action).
The procedural aspects of the concept of reasonableness began in the twentieth century. The Court's initial cases were notable for their reliance on the premise that a warrant that complied with the specifications of the Warrant Clause was required for all searches. The Amendment contains two grammatically independent clauses joined by the conjunction "and." The first clause is called the Reasonableness Clause; it merely specifies, without elaboration, that all searches and seizures must be reasonable. The second clause, commonly called the Warrant Clause, requires that warrants be under oath or affirmation, that the places to be searched and the persons and things to be seized be particularly described, and that the intrusion be supported by probable cause.

The warrant preference model construes the Reasonableness Clause as being defined by the Warrant Clause; that is, a search is not "unreasonable," and therefore not forbidden, when it is carried out under the safeguards specified by the Warrant Clause. This premise was unquestioned and unexamined in the early cases. The Court's only acknowledged exception was for searches incident to arrest, which had a strong historical pedigree.

\[\text{References:}\]

100 See Nathanson v. United States, 290 U.S. 41, 47 (1933) (holding that probable cause, not merely oath of belief, is necessary for issuance of search warrant); Grau v. United States, 287 U.S. 124, 128–29 (1932) (finding affidavit contained insufficient statement of probable cause under Fourth Amendment and therefore search warrant was invalid); Taylor v. United States, 286 U.S. 1, 6 (1932) (holding failure to obtain warrant before searching garage, when there was "abundant opportunity" to do so, necessitated suppression of evidence); Aghello v. United States, 269 U.S. 20, 29 (1925) ("While the question has never been directly decided by this court, it has always been assumed that one's house cannot lawfully be searched without a search warrant . . . ."); Amos v. United States, 255 U.S. 313, 317 (1921) (holding, when under "implied coercion," police cannot search house without warrant); Weeks v. United States, 232 U.S. 383, 393 (1914) ("The United States Marshal could only have invaded the house of the accused when armed with a warrant issued as required by the Constitution . . . .") Ex parte Jackson, 96 U.S. 727, 727 (1878) (asserting that Fourth Amendment warrant applies to search of letter in mail).

101 For a summary of the principal views of the relationship of the two clauses, see Clancy, supra note 51; Ternovska, supra note 7; Silas J. Wasserstrom, The Fourth Amendment's Two Clauses, 26 AM. CRIM. L. REV. 1389 (1989).

102 LANDYSKI, supra note 3, at 43; see also Almeida-Sanchez v. United States, 413 U.S. 266, 277 (1973) (Powell, J., concurring) ("But it is by now axiomatic that the Fourth Amendment's proscription of 'unreasonable searches and seizures' is to be read in conjunction with its command that 'no Warrants shall issue, but upon probable cause.'"); Wong Sun v. United States, 371 U.S. 471, 479 (1963) ("[W]hether or not the requirements of reliability and particularity of the information on which an officer may act are more stringent where an arrest warrant is absent, they surely cannot be less stringent than where an arrest warrant is obtained."); BRADFORD P. WILSON, ENFORCING THE FOURTH AMENDMENT: A JURISPRUDENTIAL HISTORY 12 (1986) ("Although it is not obvious from the language alone, the antecedent history of the Amendment makes clear that the second clause was intended by the framers to provide a standard, though not necessarily an exhaustive one, of what constitutes a reasonable or an unreasonable search or seizure."); Leage, supra note 49, at 401 ("[I]n order for a search to be reasonable within the first clause of the Amendment, it must comply with the requirements of a search conducted pursuant to a warrant insofar as they are applicable.").

103 See sources cited supra note 9; see also Weeks, 232 U.S. at 392 (noting right to search incident to arrest has been "always recognized under English and American law"). Additional
The warrant preference model remains one of the methods the Court uses to measure reasonableness. Over the years, the Court has articulated the requirement of a warrant in many different forms: all searches and seizures are per se unreasonable, subject to enumerated exceptions, in the absence of a warrant, warrants are required when “practicable” to obtain, warrants are “preferred,” or searches are “presumptively unreasonable” without a warrant.

A main disciple of the warrant preference model was Justice Felix Frankfurter, who was perhaps the most articulate proponent of that view:

One cannot wrench “unreasonable searches” from the text and context and historic content of the Fourth Amendment. It was the answer of the Revolutionary statesmen to the evils of searches without warrants and searches with warrants unrestricted in scope. Both were deemed “unreasonable.” Words must be read with the


*Cf. Illinois v. McArthur, 531 U.S. 326, 330 (2001) (asserting that seizures are unreasonable unless pursuant to warrant, though there are exceptions for “special law enforcement needs, diminished expectations of privacy, minimal intrusions, and the like”); Arkansas v. Sanders, 442 U.S. 753, 758 (1979) (“In the ordinary case, ... a search of private property must be both reasonable and pursuant to a properly issued search warrant. The mere reasonableness of a search, assessed in the light of the surrounding circumstances, is not a substitute for the judicial warrant required under the Fourth Amendment.”) (emphasis added)).

*See Minnesota v. Dickerson, 508 U.S. 366, 372 (1993); Acevedo, 500 U.S. at 580; Mincey v. Arizona, 437 U.S. 385, 390 (1978); Coolidge v. New Hampshire, 403 U.S. 443, 454–55 (1971); Katz v. United States, 389 U.S. 347, 357 (1967); see also Sanders, 442 U.S. at 763 (finding warrantless search of luggage taken from automobile trunk unreasonable as not falling within recognized exception). Given that formulation of the preference, the Court has often stated that the government bears a heavy burden of justifying exceptions to the specifications of the Warrant Clause; the warrant exception must be based on necessity. See, e.g., Chambers v. Maroney, 399 U.S. 42, 61–62 (1970) (Harlan, J., concurring and dissenting) (noting that exigencies justify some recognized exceptions to warrant requirement).

*Carroll v. United States, 267 U.S. 132, 156 (1925).


*See, e.g., Groh v. Ramirez, 124 S. Ct. 1284, 1290 (2004) (noting “basic principle” that “searches and seizures inside a home without a warrant are presumptively unreasonable” (internal quotation marks omitted)); Kyllo v. United States, 533 U.S. 27, 40 (2001) (holding that search of home using “device that is not in general public use” revealing details “previously ... unknowable without physical intrusion ... is presumptively unreasonable”).

*See United States v. Rabinowitz, 339 U.S. 56, 70 (1950) (Frankfurter, J., dissenting) (“A search is ‘unreasonable’ unless a warrant authorizes it, barring only exceptions justified by absolute necessity.”); Harris v. United States, 331 U.S. 145, 162 (1947) (Frankfurter, J., dissenting) (“With minor and severely confined exceptions, ... every search and seizure is unreasonable when made without a magistrate’s authority expressed through a validly issued warrant.”); Davis v. United States, 328 U.S. 528, 605 (1946) (Frankfurter, J., dissenting) (explaining Warrant Clause of Fourth Amendment was “the key to what the framers had in mind by prohibiting ‘unreasonable’ searches and seizures,” because “all seizures without judicial authority were deemed ‘unreasonable’”).
gloss of the experience of those who framed them. Because the experience of the framers of the Bill of Rights was so vivid, they assumed that it would be carried down the stream of history and that their words would receive the significance of the experience to which they were addressed—a significance not to be found in the dictionary. When the Fourth Amendment outlawed “unreasonable searches” and then went on to define the very restricted authority that even a search warrant issued by a magistrate could give, the framers said with all the clarity of the gloss of history that a search is “unreasonable” unless a warrant authorizes it, barring only exceptions justified by absolute necessity. Even a warrant cannot authorize it except when it is issued “upon probable cause [. . .] and particularly describing the place to be searched, and the persons or things to be seized.”

(b) Model #2: Individuated Suspicion as a Separate Model

When confronted with new technology, an automobile, the Court in *Carroll v. United States* had to confront for the first time the question of whether a warrant was the sine qua non of reasonableness. The Court held that a warrant was not always required; it differentiated

between a search of a store, dwelling house or other structure in respect of which a proper official warrant readily may be obtained, and a search of a ship, motor boat, wagon, or automobile, for contraband goods, where it is not practicable to secure a warrant because the vehicle can be quickly moved out of the locality or jurisdiction in which the warrant must be sought.

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120 *Rabinowitz*, 339 U.S. at 70 (Frankfurter, J., dissenting).

121 New technology has long been a source of litigation and Supreme Court opinions struggle to reconcile Fourth Amendment protections with advances in technology. None of the Court’s attempts has produced a consensus that the Court has found the correct analytical structure or the proper balance of governmental and individual interests. Moreover, a strong influence has been the often unstated premise that, if a search and seizure were found to have occurred, it would have to be justified as reasonable. Given the tension in the Court’s jurisprudence between the reasonableness models and the inelasticity of some of the other models, the Court has often avoided ruling on reasonableness by simply excluding some governmental actions from the definition of a search or seizure. Cf. *Kyllo*, 533 U.S. at 32–33 (noting no search occurs unless “the government violates a subjective expectation of privacy that society recognizes as reasonable”). For commentary on the problems posed by modern technology, see generally Symposium, The Effect of Technological Change on Fourth Amendment Rights and Analysis, 72 Miss. L.J. 1 (2002) (featuring articles by Professors A. Morgan Cloud, Tracey Maclin, David Sklansky, Christopher Sloboagin, James Tomkovicz, and Kathryn Urbonya, assessing “question of how to reconcile the impact of technological change with Fourth Amendment principles”).


123 Id. at 153.
In *Carroll*, the Court held that a warrant was not required due to the inherent mobility of an automobile; it found other objective criteria to measure the reasonableness of the search: the official had probable cause to believe that the vehicle was carrying contraband.124

This second model, the requirement of a specified level of individualized suspicion,125 operates to limit the government’s discretionary authority to search and seize by employing objective criteria outside the government’s control to measure the propriety of the intrusion. Individualized suspicion, also called particularized suspicion, serves to preclude arbitrary and general searches and seizures and mandates specific justification for each intrusion.126 It places the focus of the inquiry concerning the permissibility of a search or seizure upon the circumstances presented by the private party or object of the search or seizure; if and only if the individual or object provides a reason for governmental inquiry may the government intrude.127 The justification for the government’s actions is not based upon circumstances within the control of the government.

Thus, a person cannot be arrested absent probable cause128 to believe that

124 Id. at 154; see also *Brinegar* v. United States, 338 U.S. 160, 177 (1949) (discussing Court’s finding of probable cause in *Carroll*).

125 See generally Clancy, supra note 51 (discussing history and role of individualized suspicion to measure the propriety of search or seizure).

126 See Anthony G. Amsterdam, *Perspectives on the Fourth Amendment*, 58 MINN. L. REV. 349 (1974) (explaining that suspicionless searches and seizures are unjustified because “every citizen is entitled to security of his person and property unless and until an adequate justification for disturbing that security is shown”; suspicionless searches and seizures are arbitrary because they permit “despotic and capricious exercise of the power to search and seize by executive officials”).

127 The concept of individualized suspicion should not be confused with the concepts of probable cause or articulable suspicion of criminal behavior. While one of the two latter requirements is usually necessary to seize a person, the presence of either alone is not sufficient to justify the seizure. There must also be individualized suspicion. Imagine, for example, that the police arrive at the scene of a crime, observe a crowd, and believe that one of the members of the crowd has committed an obvious crime. However, they do not know which one. There is ample probable cause to believe that a crime has occurred but no individualized suspicion identifying a specific person as a suspect. See, e.g., *Ybarra v. Illinois*, 444 U.S. 85, 88–92 (1979) (finding unconstitutional search of suspect since probable cause was absent at time warrant was issued).

128 The probable cause standard is flexible, albeit seeking a significant standard of justification. See *Hill v. California*, 401 U.S. 797, 803–04 (1971) (holding Fourth Amendment reasonableness standard satisfied when police arrested wrong man but mistaken belief was based on probable cause); see also *Brinegar*, 338 U.S. at 176 (finding probable cause standard allows for mistakes by police but mistakes must be those of reasonable persons). “Probable cause’ to justify an arrest means facts and circumstances within the officer’s knowledge that are sufficient to warrant a prudent person, or one of reasonable caution, in believing, in the circumstances shown, that the suspect has committed, is committing, or is about to commit an offense.” *Michigan v. DeFillippo*, 443 U.S. 31, 37 (1979). Seizures of things require a similar showing. See, e.g., *Kremen v. United States*, 353 U.S. 346, 347 (1957) (condemning seizure of “entire contents” of arrestee’s house).
person is engaged in criminal activity.\textsuperscript{129} Similarly, to justify a search, the officer must have probable cause to believe that the person, place, or thing to be searched has evidence of a crime.\textsuperscript{130} For example, police investigating a rape cannot seize young African American men and take them to police headquarters for questioning and fingerprinting simply because the victim described her assailant as a "Negro youth."\textsuperscript{131} This type of investigatory procedure has been condemned as violating the Fourth Amendment because such "seizures would subject unlimited numbers of innocent persons to the harassment and ignominy incident to involuntary detention. Nothing is more clear than that the Fourth Amendment was meant to prevent wholesale intrusions upon the personal security of our citizenry."\textsuperscript{132} The principle of individualized suspicion limits not only the circumstances under which the government may initiate actions but also the scope and details of the search or seizure. It ensures that the intrusion is reasonably related to the circumstances that justified it.\textsuperscript{133}


\textsuperscript{132} Id. at 726.

\textsuperscript{133} Limitations on the scope of a search or seizure when individualized suspicion is utilized are inherent in the nature of that model. In other words, the police may only look in places where the object sought can be hidden. Thus, for example, if the police are looking for an elephant, they do not have any reasonable suspicion that it would be found in a dresser drawer, and such containers are therefore outside the scope of a permissible search. Accord United States v. Sharpe, 470 U.S. 675, 682 (1985) (discussing dual inquiry of officer's search as justified and "reasonably related in scope to the circumstances"); see United States v. Ross, 456 U.S. 798, 824 (1982) (finding scope of search "is defined by the object of the search and the places in which there is probable cause to believe that it may be found"); Davis v. United States, 328 U.S. 582, 591 (1946) (holding warrantless search of service station for gasoline ration coupons is limited in scope by "nature of the coupons"); see also New Jersey v. T. L. O., 469 U.S. 325, 341 (1985) ("Determining the reasonableness of any search involves a two-fold inquiry: first, one must consider 'whether the... action was justified at its inception'; second, one must determine whether the search as actually conducted 'was reasonably related in scope to the circumstances which justified the interference in the first place.'" (quoting Terry v. Ohio, 392 U.S. 1, 20 (1968) (omission in original))).

49
The individualized suspicion model has a significant historical basis in the complaints of the colonists against suspicionless searches and seizures, in the common law requirement of probable cause to arrest or to search, and in the language of the Warrant Clause, which requires probable cause to search or seize pursuant to a warrant. Indeed, the Court has recognized that the probable cause requirement has "central importance" to the protection the individual is afforded by the Fourth Amendment:134

"The requirement of probable cause has roots that are deep in our history." Hostility to seizures based on mere suspicion was a prime motivation for the adoption of the Fourth Amendment, and decisions immediately after its adoption affirmed that "common rumor or report, suspicion, or even 'strong reason to suspect' was not adequate to support a warrant for arrest." The familiar threshold standard of probable cause for Fourth Amendment seizures reflects the benefit of extensive experience accommodating the factors relevant to the "reasonableness" requirement of the Fourth Amendment, and provides the relative simplicity and clarity necessary to the implementation of a workable rule.135

Thus, the individualized suspicion model has a legal pedigree and existence independent of the Warrant Clause preference, although the two models often act in tandem to limit the ability of the government to search or seize.136 The models, however, are distinct.137

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134 Dunaway v. New York, 442 U.S. 200, 213 (1979); accord Henry v. United States, 361 U.S. 98, 100 (1959) ("The requirement of probable cause has roots that are deep in our history."); see also Pennsylvania v. Minita, 434 U.S. 106, 121 (1977) (Stevens, J., dissenting) (stating previous general rule that seizures of persons usually require individualized suspicion); Terry, 392 U.S. at 21 n.18 ("This demand for specificity... upon which police action is predicated is the central teaching of this Court's Fourth Amendment jurisprudence."). The centrality of the role played by individualized suspicion as a prerequisite for an intrusion may find its strongest expression in cases rejecting mere association as a basis for a search or seizure. See Ybarra v. Illinois, 444 U.S. 85, 91 (1979) (stating requirement of probable cause particularized to each person "cannot be undercut or avoided by simply pointing to the fact that coincidentally there exists probable cause to search or seize another or to search the premises where the person may happen to be"); United States v. Di Re, 332 U.S. 581, 587 (1948) ("We are not convinced that a person, by mere presence in a suspected car, loses immunities from search of his person to which he would otherwise be entitled."); cf. Maryland v. Pringle, 124 S. Ct. 795, 801–02 (2003) (finding probable cause to arrest all occupants of vehicle for suspected drug activity after drugs found in consensual search of vehicle).

135 Dunaway, 442 U.S. at 213 (citations omitted).


137 See, e.g., Ybarra, 444 U.S. at 107 (Rehnquist, J., dissenting) (arguing that individualized suspicion to search persons on premises not necessary when police search pursuant to valid warrant); Cemara v. Mun. Ct., 387 U.S. 523, 540 (1967) (holding inspection warrants issued without individualized suspicion permissible).
(c) Model #3: The Rise of the Case-by-Case Model

The seeds of a third model, in which questions of reasonableness turn on the facts and circumstances of each case, comes from Go-Bart Importing Co. v. United States,\textsuperscript{138} a 1931 Supreme Court opinion that stated: "There is no formula for the determination of reasonableness. Each case is to be decided on its own facts and circumstances."\textsuperscript{139} That language was unnecessary to the Court's opinion; indeed, the Court applied the rule that a warrant is needed to search premises and invalidated a warrantless search accordingly.\textsuperscript{140} Nonetheless, the Court later used that language to develop a model of reasonableness that competes with the warrant preference and individualized suspicion models.\textsuperscript{141}

According to this third view, the Fourth Amendment's two clauses are distinct: the first clause requires only that searches and seizures be "reasonable"; the second clause addresses only those searches and seizures conducted under warrants, saying nothing about when a warrant is necessary or which factors must be examined to determine reasonableness.\textsuperscript{142} Telford Taylor has been a main proponent of this view. He asserts that the warrant preference rule "stood the Amendment on its head":\textsuperscript{143} the Amendment was designed primarily as a limitation on the issuance of warrants and the framers took for granted the existence of warrantless searches because experience had given them no cause to be concerned about such searches.\textsuperscript{144} Taylor opines that neither the legislative history of the First Amendment nor any other history "sheds much light on the purpose of the first clause. Quite possibly it was to cover shortcomings in warrants other than those specified in the second clause; quite possibly it was to cover other unforeseeable contingencies."\textsuperscript{145} Taylor

\textsuperscript{138} 282 U.S. 344 (1931).
\textsuperscript{139} Id. at 357.
\textsuperscript{140} Id. at 357–58.
\textsuperscript{141} See Harris v. United States, 331 U.S. 145, 150–51 (1947) (upholding warrantless search of entire apartment as incident to arrest when illegally possessed draft cards found, and citing Go-Bart as relevant test).
\textsuperscript{142} See, e.g., Groh v. Ramirez, 124 S. Ct. 1284, 1298 (2004) (Thomas, J., dissenting) (noting unclear relationship between two clauses and that neither "explicitly requires a warrant"); California v. Acevedo, 500 U.S. 565, 562 (1991) (Scalia, J., concurring) (asserting that warrant may be "implicit within the requirement of reasonableness" even though there is no explicit warrant requirement in Fourth Amendment); Ybarra, 444 U.S. at 101 (Rehnquist, J., dissenting) (discussing "the relationship between the reasonableness requirement and the warrant requirement"); see also Grano, supra note 11, at 604 ("[B]y its express language, the fourth amendment [sic] does not require warrants; rather, it merely specifies the conditions that warrants must satisfy to be valid.").
\textsuperscript{143} TAYLOR, supra note 8, at 46–47.
\textsuperscript{144} Id. at 43; see also Payton v. New York, 445 U.S. 573, 611 (1980) (White, J., dissenting) (asserting purpose of Fourth Amendment "was to restrict the abuses" associated with warrants; it "preserved common-law rules of arrest").
\textsuperscript{145} TAYLOR, supra note 8, at 43; see also Payton, 445 U.S. at 621 (Rehnquist, J.,
maintains that the Amendment was designed to authorize warrants, not to safeguard against oppressive searches. Therefore, in Taylor’s view, the Amendment was not designed to make most searches subject to the warrant requirement.

Perhaps the most notable case espousing this model—resting on the independence of the two clauses—is United States v. Rabinowitz. There, the Supreme Court upheld the warrantless search of a one-room office as a search incident to a valid arrest. The Court repeated Go-Bart’s language, stating:

What is a reasonable search is not to be determined by any fixed formula. The Constitution does not define what are “unreasonable” searches and, regretfully, in our discipline we have no ready litmus-paper test. The recurring questions of the reasonableness of searches must find resolution in the facts and circumstances of each case.

The Court added that the “relevant test” was not whether a warrant was procured but “whether the search was reasonable. That criterion in turn depends upon the facts and circumstances—the total atmosphere of the case.” Thus, according to this view, it does not matter whether or not it is “practicable” for the police to get a warrant. Rather, the “failure to obtain a warrant is, at most, one factor in the evaluation of ‘general reasonableness.’”

(d) The Competition Between the Case-by-Case and Warrant Preference Models

A principal battleground for much of the Fourth Amendment litigation in the late 1940s through the 1960s was between the warrant preference model and the case-by-case model, and involved the proper scope of the ancient rule

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\[\text{dissenting} \] (arguing Court has “misread the history of the Fourth Amendment in connection with searches, elevating the warrant requirement over the necessity for probable cause”).

Taylor, supra note 8, at 46–47; cf. Grano, supra note 11, at 616 (analyzing Taylor’s essay and arguing that Taylor’s central point was limited to searches incident to arrest).

Taylor, supra note 8, at 46–47.


Id. at 63.

Id. at 66.

Id. at 65.

Wasserstrom, supra note 6, at 281.

The litigation that stemmed from government needs during World War II produced several government-oriented opinions that significantly degraded the primacy of the warrant preference model. See, e.g., Harris v. United States, 331 U.S. 145, 155 (1947) (upholding warrantless search of entire apartment as incident to arrest upheld when illegally possessed draft cards found); Zap v. United States, 328 U.S. 624, 630 (1946) (upholding warrantless search of government contractor’s business); Davis v. United States, 328 U.S. 582, 593–94 (1946) (upholding warrantless search for gasoline ration coupons in service station).
that permitted the police to search incident to arrest. Indeed, the debate over the scope of a search incident to arrest capsulizes the core problem of measuring reasonableness:

If upon arrest you may search beyond the immediate person and the very restricted area that may fairly be deemed part of the person, what rational line can be drawn short of searching as many rooms as arresting officers may deem appropriate for finding "the fruits of the crime"? Is search to be restricted to the room in which the person is arrested but not to another open room into which it leads? Or, take a house or an apartment consisting largely of one big room serving as dining room, living room and bedroom. May search be made in a small room but not in such a large room? If you may search the bedroom part of a large room, why not a bedroom separated from the dining room by a partition? These are not silly hard cases. They put the principle to a test.

When the Court applied the warrant preference model, search incident to arrest was of limited scope, influenced heavily by the Warrant Clause requirement of particularity. When it applied the case-by-case analysis, with its lack of any objective criteria, the scope of the search was invariably broader. Illustrative of the latter view is Harris v. United States, where the Court reasoned that the scope of the search incident to arrest could extend to all of the rooms of Harris’s four-room apartment because he was in "exclusive possession" of the apartment and the evidence sought could have been concealed anywhere in the apartment.

In the 1969 case of Chimel v. California, the warrant preference model seemed to emerge as the clear winner, with the Court rejecting both the results in Rabinowitz and Harris and the methodology used in those cases:

It is argued in the present case that it is "reasonable" to search a man’s house when he is arrested in it. But that argument is founded on little more than a subjective view regarding the acceptability of

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154 Searches incident to arrest are viewed as necessary to protect the safety of the officer by disarming the suspect, to prevent frustration of the arrest, and to prevent concealment or destruction of evidence. United States v. Robinson, 414 U.S. 218, 234–35 (1973); Chimel v. California, 395 U.S. 752, 762–63 (1969).

155 Rabinowitz, 335 U.S. at 79 (Frankfurter, J., dissenting).


157 Id.


159 Id. at 152.

certain sorts of police conduct, and not on considerations relevant to Fourth Amendment interests. Under such an unconfined analysis, Fourth Amendment protection in this area would approach the evaporation point. It is not easy to explain why, for instance, it is less subjectively "reasonable" to search a man’s house when he is arrested on his front lawn—or just down the street—than it is when he happens to be in the house at the time of arrest.161

Despite the Chimel Court’s explicit disavowal of Rabinowitz and Harris and the now-settled scope of the search-incident-to-arrest rule,162 the third methodology of measuring reasonableness continues to resurface. The Court has stated that the test of reasonableness "is not capable of precise definition or mechanical application."163 Rather, in defining the contours of the right to be free from unreasonable searches and seizures, "the specific content and incidents of this right must be shaped by the context in which it is asserted."164 Accordingly, the Court has often said that it must examine the totality of the circumstances of the case— which is no more precise than the "total atmosphere of the case"—to assess the reasonableness of a search or a seizure.165

161Id. at 764–65.
162See, e.g., New York v. Belton, 453 U.S. 454, 460 (1981) (holding incident to arrest of automobile occupant, police may search entire passenger compartment of car); Mincey v. Arizona, 437 U.S. 385, 391–92 (1978) (rejecting exception to warrant requirement for extensive search of entire residence after entering house to arrest accused based on premise that, while person arrested has lessened expectation of privacy in his person, he did not have lessened expectation of privacy in entire house); Vale v. Louisiana, 399 U.S. 30, 33–34 (1970) (holding officers cannot move arrestee into house and from room to room to justify warrantless search of house).
163Bell v. Wolfish, 441 U.S. 520, 559 (1979); see also Scott v. United States, 436 U.S. 128, 139 (1978) ("Because of the necessity ad hoc nature of any determination of reasonableness, there can be no inflexible rule of law which will decide every case." (emphasis added)); Cady v. Dombrowski, 413 U.S. 433, 448 (1973) (stating that "very little that we might say here can usefully refine the language of the Amendment itself in order to evolve some detailed formula" for measuring reasonableness); Coolidge v. New Hampshire, 403 U.S. 443, 509–10 (1971) (Black, J., concurring and dissenting) ("The test of reasonableness cannot be fixed by per se rules; each case must be decided on its own facts.").
164Wyma v. James, 400 U.S. 309, 318 (1971) (quoting Terry v. Ohio, 392 U.S. 1, 9 (1968); see also New Jersey v. T.L.O., 469 U.S. 325, 337 (1985) ("[W]hat is reasonable depends on the context within which a search takes place.").
166See Akhil Reed Amar, Fourth Amendment First Principles, 107 Harv. L. Rev. 757,
On numerous occasions in the latter part of the twentieth century, the Court rejected a "categorical warrant requirement" and looked to "reasonableness alone" or to the balancing test to measure the validity of the government's activities. Indeed, although the warrant preference rule has prevailed for search-incident-to-arrest principles and for building searches, the reasonableness alone view has prevailed—after a long struggle—in the context of container searches associated with vehicles. Battles remain when containers are not associated with houses or vehicles. For example, can the police search luggage in transit for which they have probable cause but no warrant? Regardless of whether the warrant preference rule won the rhetorical debate, the use of warrants to search or seize is infrequent, and a vast majority of intrusions are performed without a warrant.

(e) Model #4: Genesis of the Balancing Test

In the twentieth century, the Court periodically confronted the problem of the applicability of the Fourth Amendment to intrusions by local and state government authorities. Those cases usually concerned regulation of police investigations; the Court, until the middle of the century, rejected the view that

805, 818 (1994) (arguing that reasonableness is "largely a matter of common sense" and that "[c]ommon sense tells us to look beyond probability to the importance of finding what the government is looking for, the intrusiveness of the search, the identity of the search target, the availability of other means of achieving the purpose of the search, and so on"). 167 See, e.g., California v. Acevedo, 500 U.S. 565, 582 (1991) (Scalia, J., concurring) (characterizing cases as "turf[ing] back and forth" between two views); Texas v. Brown, 460 U.S. 730, 745–46 (1983) (Powell, J., concurring) (recognizing inconsistency of Court's emphasis on Warrant Clause); United States v. Watson, 423 U.S. 411, 417 (1976) (ignoring warrant preference rule in recognizing legality of warrantless arrest in public place based on probable cause); Cady v. Dombrowski, 413 U.S. 433, 448 (1973) (stating that "very little that we might say here can usefully refine the language of the Amendment itself in order to evolve some detailed formula for measuring reasonableness"). See generally H. Richard Uviller, Reasonability and the Fourth Amendment: A (Belated) Farewell to Justice Potter Stewart, 25 CRIM. L. BULL. 29, 29 (1989) (discussing Supreme Court approaches to Fourth Amendment, including categorical and reasonableness approaches).

168 See supra Section II.B.2(a) (discussing warrant requirement).

169 See, e.g., Acevedo, 500 U.S. at 580 (permitting search of closed container in trunk of vehicle without warrant); Robbins v. California, 453 U.S. 420, 433–34 (1981) (Powell, J., concurring) ("The aggregate burden of procuring warrants whenever an officer has probable cause to search the most trivial container may be heavy and will not be compensated by the advancement of important Fourth Amendment values.").

170 For now, the warrant preference rule has prevailed. See, e.g., United States v. Place, 462 U.S. 696, 701 (1983) (holding that, absent exigent circumstance, warrant is needed to search or seize container). But I am not so sure that it will continue to reign. See Acevedo, 500 U.S. at 583–84 (Scalia, J., concurring) (arguing law enforcement should not need warrant to search containers outside of private buildings if probable cause present). Nor, for the reasons discussed in this Article, am I convinced that it should. Cf. United States v. Ross, 456 U.S. 798, 809 (1982) ("The rationale justifying a warrantless search of an automobile that is believed to be transporting contraband arguably applies with equal force to any movable container that is believed to be carrying an illicit substance.").
the Fourth Amendment applied to anyone other than federal officials. The beginnings of change occurred in *Wolf v. Colorado*, which established that, although the specific protections of the Fourth Amendment were inapplicable to the states, the Due Process Clause of the Fourteenth Amendment did apply, and that the "security of one's privacy against arbitrary intrusion by the police" was included within due process protections. The relevant inquiry under the Due Process Clause involved neither "formal nor fixed nor narrow requirements" but was instead an assessment of whether the right asserted was "basic to our free society." The Court viewed due process as an evolving standard and it set no guidelines by which to measure that standard.

The increasing pressure for change based on state and local intrusions can be seen in *Frank v. Maryland*. In *Frank*, the Court was confronted with the constitutionality of a statute that authorized city health inspectors to demand entry into buildings where there was probable cause to believe that a nuisance existed; if the occupant refused entry, that refusal was a criminal violation punishable by fine. The case was decided on due process grounds, which, the Court asserted, required an assessment of "the nature of the demand being made upon individual freedom in a particular context and the justification of social need on which the demand rests." The Court upheld the inspection scheme, in part reasoning that a warrant was not required when there had been a long history of warrantless regulatory inspections for the general welfare of the community, the growth of cities, crowding, and increased need for regulation. Given that the Fourth Amendment was not the relevant inquiry, the *Frank* Court's reasoning was not necessarily indicative of how the Court would view the proper framework under the Fourth Amendment. Nonetheless, the balancing test was insinuated in a search and seizure case.

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172 Id. at 27. The Court, however, rejected application of the exclusionary rule to violations of that right. Id. at 33.
173 Id. at 27.
174 See id. at 27–28; cf. William J. Stuntz, *The Substantive Origins of Criminal Procedure*, 105 YALE L.J. 393, 435–39 (1995) (discussing Court's development of due process and observing that, by late 1950s and early 1960s, Court's jurisprudence had come under attack as "impossibly vague, so much so as to be almost without content").
175 359 U.S. 360 (1959); see also Rochin v. California, 342 U.S. 165, 172–73 (1952) (deciding, on due process grounds, that it shocks conscience to permit police to employ doctor to give emetic solution to induce vomiting to obtain evidence accused had swallowed); cf. Carol S. Steiker, *Second Thoughts About First Principles*, 107 HARV. L. REV. 820, 838 (1994) (arguing that twentieth century judges attempted to "forge new connections . . . between 'reasonableness' and warrants to address the larger problem of racial injustice"); Stuntz, *supra* note 174, at 438–40 (arguing pressure for change stemmed from Court's desire to address police misconduct against black suspects).
176 359 U.S. at 362–63.
177 Id.
178 Id. at 367–72.
179 The balancing test arguably first appeared in *Breithaupt v. Abram*, 352 U.S. 432, 439–40 (1957), a search and seizure case two years before *Frank*. The *Breithaupt* Court upheld the
(i) The Dramatic Restructuring of Fourth Amendment Analysis in the 1960s and the Rise of Balancing

Several cases in the 1960s combined to undermine dramatically the previously existing framework of Fourth Amendment applicability and justification. First, in 1961, the protection of the Fourth Amendment was incorporated into the Fourteenth Amendment, making it fully applicable to the states.\textsuperscript{110} Fourth Amendment protections thus applied for the first time to everyday criminal law enforcement and other activities of state and local governments. Thereafter, case after case challenged the efficacy of the Court's reasonableness analysis.

Second, in 1967, the Supreme Court rejected its property-based analysis of the Fourth Amendment and substituted a privacy analysis.\textsuperscript{111} To support this inquiry, the Court in subsequent cases created a hierarchy of privacy interests: \textsuperscript{112} "reasonable expectation[s] of privacy that society is 'prepared to recognize as legitimate'\textsuperscript{113} have—at least in theory—the greatest protection; diminished expectations of privacy are more easily invaded;\textsuperscript{114} and subjective expectations of privacy that society is not prepared to recognize as legitimate have no protection.\textsuperscript{115} The Court has, at times, utilized this hierarchy to involuntarily extraction of blood at a hospital following an automotive collision. \textit{id.} at 439. The Court asserted that due process analysis was measured by the whole community's "sense of 'decency and fairness' that has been woven by common experience into the fabric of acceptable conduct." \textit{id.} at 436. But in analyzing the facts of the case, the Court viewed the inquiry as involving the balancing of the government's and the individual's interests. \textit{id.} at 439-40.

\textsuperscript{110}Mapp v. Ohio, 367 U.S. 643, 655 (1961); see also Dunaway v. New York, 442 U.S. 200, 207 (1979) (recognizing Mapp holding that Fourth Amendment is "applicable to the states through the Fourteenth Amendment").

\textsuperscript{111}See supra notes 105-09 and accompanying text; Katz v. United States, 389 U.S. 347, 353 (1967). Justice Brennan, who was the primary intellectual force behind the Court's revolution in Fourth Amendment analysis in the 1960s, later came to resist much of the broader implications of that analysis. See, e.g., New Jersey v. T. L. O., 469 U.S. 325, 369 (1985) (Brennan, J., dissenting) (critiquing majority's application of "balancing" approach to search inquiry and rejecting search as illegal); Michigan v. Long, 463 U.S. 1032, 1063 (1983) (Brennan, J., dissenting) (rejecting majority "balancing" approach and insisting that seizures must be based on probable cause); United States v. Martinez-Fuerte, 428 U.S. 543, 569 (1976) (Brennan, J., dissenting) (asserting objective standard must be applied to justify search).

\textsuperscript{112}See generally Clancy, supra note 98, at 330-39 (detailing Court's creation of hierarchy of privacy interests).

\textsuperscript{113}T. L. O., 469 U.S. at 338 (quoting Hudson v. Palmer, 468 U.S. 517, 526 (1984)).

\textsuperscript{114}Id. at 340 n.8 ("Exceptions to the requirement of individualized suspicion are generally appropriate only where the privacy interests implicated by a search are minimal..."); accord Skinner v. Ry. Labor Executives' Ass'n, 489 U.S. 602, 624-25 (1989) ("[W]e have usually required 'some quantum of individualized suspicion' before concluding that a search is reasonable." (citations omitted)).

determine which reasonableness model to choose. Thus, for example, a warrant is not required to search a vehicle because individuals have a reduced expectation of privacy in a vehicle. 186

Third, in Camara v. Municipal Court 187 and Terry v. Ohio, 188 the Court adopted the same balancing test that was used in Frank to measure reasonableness within the meaning of the Fourth Amendment. 189 In Camara, the Court used balancing to undermine the traditional warrant preference model; 190 in Terry, balancing undermined the individualized suspicion model. 191 The Court utilized balancing in response to the inelasticity of the individualized suspicion and warrant preference models when these models were applied outside of the typical probable cause to arrest or search situations that had characterized previous Fourth Amendment analysis. The rise of balancing and the identification of expectations of privacy as the primary object protected by the Amendment brought forth a significant list of permissible warrantless and suspicionless invasions in the latter portion of the twentieth century. Along with them came increasingly intrusive governmental actions.

In addition to identifying specific interests to be utilized, balancing differs from the case-by-case approach in that it is "'done on a categorical basis—not on an ad hoc, case-by-case fashion."

192 It is also decidedly nonhistorical in the nature of its analysis; the factors used in the balancing test are primarily contemporary interests. 193

In Camara, the Supreme Court validated the issuance of search warrants to inspect residences for health, fire, and housing code violations on an areawide basis, rejecting any requirement of individualized basis for believing that

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188 392 U.S. 1 (1968).
190 387 U.S. at 534–39.
193 See, e.g., New Jersey v. T. L. O., 469 U.S. 325, 339 (1985) (stating, regarding searches of school children, "[n]othing short of the use of search forces in the classroom has ever been easy, but in recent years, school disorder has often taken particularly ugly forms: drug use and violent crime in the schools have become major social problems").
violations existed at a particular building. The Court, while rejecting Frank's result, adopted Frank's test for measuring the propriety of a search: "Unfortunately, there can be no ready test for determining reasonableness other than by balancing the need to search against the invasion which the search entails." Although acknowledging that the intrusion was "significant," the Court distinguished the governmental interest in inspections from the governmental interest involved in criminal investigations:

"In a criminal investigation, the police may undertake to recover specific stolen or contraband goods. But that public interest would hardly justify a sweeping search of an entire city conducted in the hope that these goods might be found. Consequently, a search for these goods, even with a warrant, is "reasonable" only when there is "probable cause" to believe that they will be uncovered in a particular dwelling.

Unlike the search pursuant to a criminal investigation, the inspection programs at issue here are aimed at securing city-wide compliance with minimum physical standards for private property. The primary governmental interest at stake is to prevent even the unintentional development of conditions which are hazardous to public health and safety. Because fires and epidemics may ravage large urban areas, because unsightly conditions adversely affect the economic values of neighboring structures, numerous courts have upheld the police power of municipalities to impose and enforce such minimum standards even upon existing structures.

The Court further found that "the only effective way to seek universal compliance with the minimum standards required by municipal codes is through routine periodic inspections of all structures." To justify such inspections, the Court created a nonindividualized concept of probable cause. Probable cause to issue a warrant to inspect does not depend upon specific knowledge of the condition of the building; instead, it exists "if reasonable legislative or administrative standards for conducting an area inspection are satisfied with respect to a particular dwelling." These standards, the Court

194 Camara, 387 U.S. at 537–38.
195 Id. at 536–37. There is more than a little irony in Camara's use of the balancing test, given that the due process advocates on the Court had been concerned that, by applying the Fourth Amendment to the states, the states would be put into a "constitutional straitjacket." See Ker v. California, 374 U.S. 23, 45–46 (1963) (Harlan, J., concurring in result) (advocating "fundamental fairness" approach of due process to review of state search and seizure cases rather than constitutional standards that apply to federal systems).
196 Camara, 387 U.S. at 534.
197 Id. at 534–35.
198 Id. at 535–36.
199 Id. at 538.
observed, may be based upon such considerations as the “passage of time, the nature of the building . . . , or the condition of the entire area.”

This formulation was certainly not the traditionally accepted meaning of the probable cause standard. To justify a search, probable cause had always required that the target of the search or seizure manifest to those seeking to intrude sufficient reason—probable cause—peculiar to the target. Camara thus represented the first significant departure from individualized suspicion requirement outside of searches incident to arrest. The reach of Camara, which involved a private residence, has been extended by the Supreme Court in subsequent cases to commercial buildings, ground and surface mines, and inspections by the Occupational Safety and Health Administration for safety and regulatory violations.

In later cases, the Court sometimes required a warrant in inspection cases; however, after balancing the competing interests, the Court did not require probable cause for issuance of the warrant. More generally, the balancing test does not assign weight to the warrant preference rule but instead views a warrant as a mere procedure that may be dispensed with when the balance favors the government. Further, the fact that the probable cause standard appears in the Warrant Clause sometimes serves as a rationale to dispense with a warrant once the Court determines that probable cause is not needed.

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200See Almeida-Sanchez v. United States, 413 U.S. 266, 282–84 (1973) (Powell, J., concurring) (arguing that Camara-style probable cause standard could provide basis for area warrants to detect illegal aliens).


203Marshall v. Barlow’s, Inc., 436 U.S. 307, 320–21 (1978). The latter inspections extend to “any factory, plant, establishment, construction site, or other area, workplace or environment where work is performed by an employee of an employer” and allows OSHA to inspect “any such place of employment and all pertinent conditions, structures, machines, apparatus, devices, equipment, and materials therein, and to question privately any such employer, owner, operator, agent, or employee.” Id. at 309 n.1 (quoting 29 U.S.C. § 657(a) (1988)); see also 4 WAYNE R. LAFAVE, SEARCH AND SEIZURE § 10.2, at 401–02 (3d ed. 1996) (listing types of industries subject to scrutiny by various governmental authorities).

204The Court has asserted that even if no probable cause is needed, a warrant from a neutral officer still assures that the inspection is reasonable, authorized by statute, or pursuant to an administrative plan containing specific neutral criteria; it also advises the owner of the scope and objects of the search. See Barlow’s, 436 U.S. at 323.


206See, e.g., Vernon School District v. Acton, 515 U.S. 646, 653 (1995) (dispensing with warrant requirement for suspicionless drug testing of students where requiring probable cause is impracticable due to faculty’s need to provide swift and informal discipline); Opperman, 428 U.S. at 370 n.5 (noting that, due to ncriminal context of inventory searches of vehicles,
In *Terry*, decided one year after *Camara*, the Court found that the Fourth Amendment applied to situations less intrusive than a full search or arrest.\(^{209}\) It recognized that the Fourth Amendment applied to stops and frisks—brief detentions of suspicious persons to investigate those suspicions and patdowns of the outer clothing of the person to determine if the person is armed.\(^{210}\) The *Terry* Court, applying a balancing test,\(^{211}\) bisected the concept of individualized suspicion. It required the traditional probable cause showing for full searches and arrests, but reduced to "reasonable" the necessary level of suspicion to permit stops and frisks, which it considered to be much less intrusive investigative techniques than arrests and searches.\(^{212}\) As a general rule, the lesser standard of individualized suspicion continues to be employed to justify stops\(^{213}\) and frisks. For a stop, the police must have articulable suspicion that the person is engaged in criminal activity.\(^{214}\) A frisk, which is designed to protect an officer's safety during an encounter with an individual, is justified by specific and articulable facts that, taken together with rational inferences from those facts, lead a reasonable person to believe that the person is armed and dangerous.\(^{215}\)

Outside of the traditional criminal law enforcement activities involved in *Terry*, however, the role of individualized suspicion, when utilizing the balancing test, has become increasingly rejected as the proper model.\(^{216}\)

\(^{209}\) *Terry* v. Ohio, 392 U.S. 1, 16–17 (1968); see also *Dunaway v. New York*, 442 U.S. 200, 207–10 (1979) (discussing fact that, prior to 1968, Court analyzed Fourth Amendment’s guarantee in terms of arrest, probable cause to arrest, and warrants based on probable cause, but in *Terry*, Court recognized that Fourth Amendment also applied to stops predicated on reasonable suspicion).

\(^{210}\) *Terry*, 392 U.S. at 30.

\(^{211}\) *Id.* at 20–21.

\(^{212}\) *Id.* at 20, 27–30.

\(^{213}\) See *City of Indianapolis v. Edmond*, 531 U.S. 32, 41 (2000) (noting "general rule that a seizure must be accompanied by some measure of individualized suspicion" even though some exceptions occur in checkpoint cases).

\(^{214}\) *Florida v. Royer*, 460 U.S. 491, 498–99 (1983); see also *United States v. Sokolow*, 490 U.S. 1, 9–11 (1989) (finding stop of person at airport was justified by articulable suspicion that person was drug courier); *United States v. Hensley*, 469 U.S. 221, 227–29 (1985) (holding stop was justified based upon "wanted" flyer issued upon reasonable suspicion that person stopped had committed crime); *Florida v. Rodriguez*, 469 U.S. 1, 5 (1984) (per curiam) (finding stop of person at airport was justified by articulable suspicion that person was drug courier); *Reid v. Georgia*, 448 U.S. 438, 440 (1980) (per curiam) (holding stop in airport was not reasonable because government officials had no articulable suspicion that person was drug courier).

\(^{215}\) *Adams v. Williams*, 407 U.S. 143, 146 (1972) (stating that informant’s tip provided articulable suspicion to believe that person was armed and dangerous, justifying limited protective search for weapons); *Sibron v. New York*, 392 U.S. 40, 64 (1968) (asserting police officer may pat down suspicious individual where reasonable suspicion exists that individual is armed and dangerous); *Terry*, 392 U.S. at 27.

\(^{216}\) See *Nat'l Treasury Employees Union v. Von Raab*, 489 U.S. 656, 665 (1989) (rejecting idea that "any measure of individualized suspicion] is an indispensable component of
Individualized suspicion frequently has been viewed as a mere procedural device that may be dispensed with if the government interest outweighs the individual's interest. For example, in permitting suspicionless intrusions, the Court has frequently distinguished between searches for evidence of a crime and regulatory inspections.

(ii) Devolution of the Elements of the Balancing Test

_Camara_ was the fountainhead of many factors subsequently relied on by


217 See, e.g., _Von Raab_, 489 U.S. at 665–66 (dispensing with requirement for individualized suspicion when government can show it is impracticable to obtain); _New Jersey v. T. L. O._, 469 U.S. 325, 341 (1985) (‘‘Where a careful balancing of governmental and private interests suggests that the public interest is best served by a Fourth Amendment standard of reasonableness that stops short of probable cause, [the Court has] not hesitated to adopt such a standard.’’); _Martinez-Fuerte_, 428 U.S. at 557, (dispensing with requirement for individualized suspicion when stopping carts at border because flow of traffic is too heavy to allow particularized study of any one vehicle); _cf. United States v. Knights_, 534 U.S. 112, 119–21 (2001) (utilizing balancing test to determine that lesser quantity of individualized suspicion, that is, articulable suspicion, justified search of probationer’s home).

218 See, e.g., _Von Raab_, 489 U.S. at 667–68 (rejecting any requirement of individualized suspicion for drug testing of specified Customs Service officials because probable cause standard “is peculiarly related to criminal investigations” and that probable cause standard “may be unhelpful in analyzing the reasonableness of routine administrative functions” (quoting _Colorado v. Bertine_, 479 U.S. 367, 371 (1987))); _O’Connor v. Ortega_, 480 U.S. 709, 723 (1987) (plurality opinion) (noting that, as to noninvestigatory, work-related intrusions of government workplaces, given governmental interest in “the efficient and proper operation of the workplace,” “work of public agencies “would suffer if employers were required to have probable cause before they entered an employee’s desk for the purpose of finding a file or piece of office correspondence,”) and, “it is difficult to give the concept of probable cause, rooted as it is in the criminal investigatory context,” meaning for such searches); _Michigan v. Clifford_, 464 U.S. 287, 294 (1984) (plurality opinion) (requiring administrative warrant if “primary object” of search is “to determine the origin and cause of a recent fire” but requiring a “criminal search warrant” based on “a showing of probable cause” if “primary object of the search is to gather evidence of criminal activity”); _Donovan v. Dewey_, 452 U.S. 594, 598 n.6 (1981) (discussing requirement for consent, exigent circumstances, or warrant when searching private residence or commercial property for evidence of crime or to effect arrest); _Marshall v. Barlow’s, Inc._, 436 U.S. 307, 320–321 (1977) (distinguishing probable cause for issuance of warrant to search for administrative purpose from probable cause required for warrant to investigate criminal matters); _Camara_, 387 U.S. at 537 (same); _cf. Skinner_, 489 U.S. at 620–21 n.5 (noting that alcohol and drug tests are not prescribed to assist “in the prosecution of employees, but rather to prevent accidents and casualties in railroad operations”; however, because there is no prohibition against turning over results to prosecutors, Court has left open question whether routine use in criminal prosecutions of evidence obtained pursuant to administrative scheme “would give rise to an inference of pretext, or otherwise impugn the administrative nature” of program (internal quotation marks and citation omitted)).
the Court to justify use of the balancing test. Those considerations initially included the noncriminal purpose of the governmental intrusion at issue, the existence of neutral criteria to guide the executing official’s actions, the historical acceptance of the activities, the necessity for the suspicionless nature of the actions, the preventive nature of the governmental activities, and the intrusiveness of the invasion. Most of those factors have now eroded, however, and the balancing test has devolved into an assessment of the relative strength of the governmental and individual interests, with the Court’s thumb pressing heavily on the government’s side of the scale. Indeed, the Court has candidly acknowledged that the “practical realities” of the balancing test “militate in favor of the needs of law enforcement, and against a personal-privacy interest that is ordinarily weak.”

(iii) The Broad Application of the Balancing Test

In the latter third of the twentieth century, the Court utilized the balancing

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219 The malleability and unprincipled nature of the balancing test can be seen by examining the results in Frank v. Maryland, 359 U.S. 360 (1959), and Camara. In Frank, the Court upheld a warrantless inspection scheme using a balancing test where there was probable cause to believe that a housing code violation had occurred. In Camara, a warranted scheme was required but individualized suspicion was not. Although the same factors were “balanced,” the results differed. See See v. City of Seattle, 387 U.S. 441, 554 (1967) (Clark, J., dissenting) (stating factors relied on in Camara and Frank are “identical”).

220 Cf. T. L. O., 469 U.S. at 369–70 (Brennan, J., concurring in part and dissenting in part) (“All of these ‘balancing tests’ amount to brief nods by the Court in the direction of a neutral utilitarian calculus while the Court in fact engages in an unanalyzed exercise of judicial will. Perhaps this doctrinally destructive nihilism is merely a convenient umbrella under which a majority that cannot agree on a genuine rationale can conceal its differences.”); Christopher Slobogin, Let’s Not Bury Terry: A Call for Rejuvenation of the Proportionality Principle, 72 St. John’s L. Rev. 1053, 1073–85 (1998) (seeking to create hierarchy of invasiveness of intrusions, using various constitutional rights to add weight to individual’s interest, and creating four tiers of justification); Kathryn R. Urbonya, Rhetorically Reasonable Police Practices: Viewing the Supreme Court’s Multiple Discourse Paths, 40 Am. Crim. L. Rev. 1387, 1396 (2003) (observing that Court’s reasonableness paradigm eventually led to “Fourth Amendment doctrines that [did] not require officials to have any suspicion of wrongdoing”). See generally Clancy, supra note 51, at 584–624 (discussing evolution of factors in balancing test, including each factor, legitimate components of each factor, and how, over time, any principle animating any of factors has dissipated, and concluding that factors have become mere shells, manipulated to justify what majority of Court concludes is reasonable).

221 See, e.g., Knights, 534 U.S. at 118–19 (“The touchstone of the Fourth Amendment is reasonableness, and the reasonableness of a search is determined by assessing, on the one hand, the degree to which it intrudes upon an individual’s privacy and, on the other, the degree to which it is needed for the promotion of legitimate governmental interests.” (internal quotation marks omitted)).

222 United States v. Montoya De Hernandez, 473 U.S. 531, 558 (1985) (Brennan, J., dissenting) (criticizing balancing as process “in which the judicial thumb apparently will be planted firmly on the law enforcement side of the scales” (internal quotation marks and citation omitted)).

test to justify a vast array of intrusions by the government. Pursuant to that
test, permissible intrusions include searches of prison inmates and detainees, and their cells, orders designed to protect police officers during stops, detentions of persons during the execution of search warrants, entries onto property to arrest persons, entries onto property to combat and investigate fires, and inventory searches of possessions validly in police custody. One broad category is administrative inspections, which encompass safety

224 Indeed, the Court has even reinterpreted prior decisions that were premised on other models of reasonableness to involve balancing. Compare Gerstein v. Pugh, 420 U.S. 103, 113-16 (1975) (holding that reasonableness clause required that detainee be given prompt judicial hearing to establish probable cause for pretrial detention premised in part on requirement that neutral magistrate evaluate whether probable cause justified intrusion), with County of Riverside v. McLaughlin, 500 U.S. 44, 56 (1991) (establishing that judicial determinations of probable cause for warrantless arrests within forty-eight hours of arrest will generally be considered reasonable and interpreting Gerstein as premised on balancing competing government and individual interests).


226 Id. at 556–57 (suggesting that “a person confined in a detention facility” may not have any “reasonable expectation of privacy with respect to his [or her] room” and had, at best, “a diminished expectation of privacy”).

227 See Maryland v. Wilson, 519 U.S. 408, 414–15 (1997) (permitting police officers to order all passengers to exit vehicle incident to stop of that vehicle); Pennsylvania v. Mimms, 434 U.S. 106, 111 (1977) (per curiam) (police officer may order driver out of car, even when officer has no reason to suspect driver of foul play).


229 Payton v. New York, 445 U.S. 573, 602–03 (1980) (noting that arrest warrant “implicitly carries with it the limited authority to enter a dwelling in which the suspect lives when there is reason to believe the suspect is within”).


227 Colorado v. Bertine, 479 U.S. 367, 376 (1987) (holding police may search canister inside pouch contained in backpack inside locked vehicle either at roadside or at impoundment lot); Illinois v. Lafayette, 462 U.S. 640, 648 (1983) (holding police may search arrestee’s bag and containers therein, rather than sealing bag for storage pending owner’s release); South Dakota v. Opperman, 428 U.S. 364, 375–76 (1976) (holding inventory search of vehicle may include all containers in vehicle if search is conducted according to department policy). The search must be pursuant to a routine administrative policy and not part of an investigation. Bertine, 479 U.S. at 376–77 (Blackman, J., concurring); Lafayette, 462 U.S. at 648; cf. Michigan v. Thomas, 458 U.S. 259, 261–62 (1982) (per curiam) (holding search of remainder of vehicle was permissible based on probable cause to believe it contained additional contraband when officer found contraband during inventory search). The function of an inventory search is to protect the owner’s property, to protect the police against false claims for stolen or lost property, and to protect the police and others from potential danger. Lafayette, 462 U.S. at 646–47; Opperman, 428 U.S. at 369. Although the Court “purports to require standardized criteria to guide the officer’s discretion,” the Court actually permits officers conducting inventory searches a great deal of discretion. Arnold H. Loevy, Cops, Cars, and Citizens: Fixing the Broken Balance, 76 ST. JOHN’S L. REV. 535, 543 (2002).

inspections of buildings and workplaces, administrative searches of persons and their possessions, and searches of highly regulated businesses. Permissible searches have included work-related searches of employee areas of governmental workplaces, searches of public school students, searches of probationers' homes, and drug testing of various categories of people. The Court has permitted warrantless searches, in the absence of particularized suspicion, in industries subject to close governmental supervision and inspection. Vehicular checkpoints have withstood challenges including license and vehicle registration stops, and sobriety and immigration checkpoints.

236Earls, 536 U.S. at 825 (upholding student drug testing); Acton, 515 U.S. at 664-65 (same); Nat'l Treasury Employees Union v. Von Raab, 489 U.S. 656, 679 (1989) (upholding drug testing of United States Customs Service employees seeking transfer or promotions to positions engaged directly in drug interdiction or who were required to carry firearms); Skinner v. Ry. Labor Executives' Ass'n, 489 U.S. 602, 619 (1989) (upholding drug tests of railway employees involved in certain train accidents or who violate certain safety rules).  
237 See, e.g., New York v. Burger, 482 U.S. 691, 702 (1987) (stating that owing or operator of commercial premises in closely regulated industry has reduced expectation of privacy, so that both "warrant and probable-cause requirements, which fulfill the traditional Fourth Amendment standard of reasonableness . . . have lessened application"). The Court has employed several rationales in allowing suspicionless and warrantless intrusions of highly regulated industries but seems now to have settled on a balancing test to measure reasonableness. See Clancy, supra note 51, at 563-68 (discussing Court's treatment of closely regulated industries).  
238 See Illinois v. Lidster, 124 S. Ct. 885, 888 (2004) (upholding roadblock to seek information about recent crime in area); Delaware v. Prouse, 440 U.S. 648, 663-64 & n.26 (1979) (holding that states were not precluded from developing methods for spot checks of licences and registrations "that [did] not involve the unconstrained exercise of discretion" and asserting that its opinion was not intended to "cast doubt on the permissibility of roadside truck weigh-stations and inspection checkpoints, at which some vehicles may be subject to further detention for safety and regulatory inspection than are others"); United States v. Brignoni-Ponce, 422 U.S. 873, 888 (1975) (Rehnquist, J., concurring) (stating that "agricultural inspections and highway roadblocks to apprehend known fugitives" are permissible). But see City of Indianapolis v. Edmond, 531 U.S. 32, 48 (2000) (striking down roadblock to interdict drug trafficking).  
240 See Mich. Dep't of State Police v. Sitz, 496 U.S. 444, 455 (1990) (balancing "the State's interest in preventing drunken driving, the extent to which [the checkpoints] can reasonably be said to advance that interest, and the degree of intrusion upon [individual] motorists" in upholding intrusion).  
241 See infra note 252.
(f) Model #5: Common Law Plus Balancing

As the twentieth century neared its close, a fifth test emerged in *Wyoming v. Houghton* where the Court created a two-step model for measuring reasonableness. First, the Court inquired "whether the action was regarded as an unlawful search or seizure under the common law when the Amendment was framed." Second, if "that inquiry yields no answer," the search or seizure is evaluated "under traditional standards of reasonableness by assessing, on the one hand, the degree to which it intrudes upon an individual's privacy and, on the other, the degree to which it is needed for the promotion of legitimate governmental interests." Putting aside the Court's remarkable assertion that the balancing model was the "traditional" standard, the *Houghton* test is an odd combination. If it yields an answer, the common law at the time the Amendment was framed—1791—is dispositive; if not, the balancing test is used to evaluate the relative weights of contemporary governmental needs and individual interests.

In prior cases, the Supreme Court had often relied on the common law as

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243 *Houghton*, 526 U.S. at 299–300.
244 Id.
245 Id. In *Houghton*, the Court was confronted with the question of "whether police officers violate the Fourth Amendment when they search a passenger's personal belongings inside an automobile that they have probable cause to believe contains contraband." *Id.* at 297. In answering that question, the Court first turned to the common law inquiry mandated by its new test. Based on founding era authorities, the Court concluded that "the historical evidence showed that the Framers would have regarded as reasonable (if there was probable cause) the warrantless search of containers within an automobile." *Id.* at 300. The Court went on to apply the balancing test as an alternative means of reaching the same result. *Id.* at 303–07. Four Justices, one in concurrence and three in dissent, rejected the majority's model of reasonableness. *See id.* at 307 (Breyer, J., concurring) ("I join the Court's opinion with the understanding that history is meant to inform, but not automatically to determine, the answer to a Fourth Amendment question."); *id.* at 311 n.3 (Stevens, J., dissenting) ("To my knowledge, we have never restricted ourselves to a two-step Fourth Amendment approach wherein the privacy and governmental interests at stake must be considered only if 18th-century common law 'yields no answer.'").
246 The first part of *Houghton* implements Justice Scalia's strongly held view that bases Fourth Amendment interpretation on the common law. See California v. Acevedo, 500 U.S. 565, 583–84 (1991) (Scalia, J., concurring) (proposing that "the 'reasonableness' requirement of the Fourth Amendment affords the protection that the common law afforded" but adding "that changes in the surrounding legal rules (for example, elimination of the common law rule that reasonable, good-faith belief was no defense to absolute liability to trespass), may make a warrant indispensable to reasonableness where it once was not" (citations omitted)); County of Riverside v. McLaughlin, 500 U.S. 44, 60 (1991) (Scalia, J., dissenting) (arguing that balancing test applies to "novel questions of search and seizure" but not to "resolving those questions on which a clear answer already existed in 1791 and has been generally adhered to by the traditions of our society ever since"). *See generally* Sklansky, *supra* note 10, at 1746–74 (commenting on Justice Scalia's views).
a guide to ascertain the meaning of Fourth Amendment principles. Exactly
how that tool has been used, as with other interpretative techniques, varied
with the author of the Court's opinion. However, Houghton's dispositive
reliance on the common law as defining reasonableness where it yields an
answer had never been used before in a Fourth Amendment case. Also,
contrary to Houghton, the historical abuses that prompted the Amendment
were more important to the framers than the common law search and seizure
requirements, with the only notable exception being the common law search
warrant, which served as the model for the Warrant Clause. Moreover, using
the common law as the measure of reasonableness is distinct from using the
common law as the measure of the framers' intent. As to the former, the
common law rules as of 1791 defines what is reasonable. As to the latter, the
common law is consulted to ascertain the framers' intent, which is in turn used
to justify reliance on some conception of reasonableness. To date, the
Houghton test has not been repeated in other opinions. It remains to be seen
whether it will have significant precedential value.

(g) Situations that Do Not Fit Any of the Five Models

There are several situations where the reasonableness analysis does not fit
within any of the five models just described. Consent is one such

247 See, e.g., Arwater v. City of Lago Vista, 532 U.S. 318, 326 (2001) (explaining Court is
"guided" by common law in ascertaining meaning of reasonableness); Oliver v. United States,
466 U.S. 170, 183-84 (1984) (noting that while "[the common law may guide consideration of
what areas are protected by the Fourth Amendment," common law rights are not coincident with
the Fourth Amendment); Payton v. New York, 445 U.S. 573, 591 (1980) (utilizing common law
view to shed light on framers' intent); Gerstein v. Pugh, 420 U.S. 103, 114 (1975) (explaining
common law acts guide to interpret Fourth Amendment); see also Urbanya, supra note 220, at
220 (observing that Court's use of "history" is one type of rhetorical argument that Court has
selectively used in its decisions).

balancing test would apply "at least in a case such as this, where there was no clear practice,
either approving or disapproving the type of search at issue, at the time the constitutional
 provision was enacted"); Miller v. United States, 357 U.S. 301, 306-08 (1958) (utilizing
supervisory powers over federal courts and reversing conviction based on police's failure to
 comply with common law requirement to announce their purpose for demanding admission).

249 E.g., Acton, 515 U.S. at 668-71 (discussing exception).

250 The Court has declined to address the reasonableness of some intrusions based on the
assertion that the intrusions were de minimis. Some cases have turned on the Court's view that
the individual interest invaded is so attenuated that there has been no search or seizure within
the meaning of the Amendment. See Cardwell v. Lewis, 417 U.S. 583, 591-92 (1974) (plurality
opinion) (finding that removing paint samples from exterior of automobile was abstract and
theoretical invasion of privacy). There are other cases where the Court has indicated that the
intrusion may be so minimal that it would summarily reject claims of unreasonableness. See
McLaughlin, 500 U.S. at 66 (Scalia, J. dissenting) (characterizing brief period of time to
accomplish administrative steps incident to arrest before presenting arrestee to magistrate to
determine probable cause arguably justified as de minimis delay); Bell v. Wolfish, 441 U.S. 520,
539 n.21 (1979) ("There is, of course, a de minimis level of imposition with which the
situation.\textsuperscript{251} Border searches and seizures are another.\textsuperscript{252} Those two situations

Constitution is not concerned." (quoting Ingraham v. Wright, 430 U.S. 651, 674 (1977))); cf. Graham v. Connor, 490 U.S. 386, 396 (1989) (noting that "not every push or shove" would support a claim for unreasonable use of force (internal quotation marks and citation omitted)); Pennsylvania v. Mimms, 434 U.S. 106, 111 (1977) (per curiam) (explaining that, in balancing competing interests, intrusion on individual liberty of police order to driver to exit validity stopped vehicle is de minimis). \textit{But see} Connolly v. Georgia, 429 U.S. 245, 251 (1977) (per curiam) (holding fee collected to issue search warrant not de minimis). This latter group of cases fit, in my view, under the Court's "totality of the circumstances" model of reasonableness.

\textsuperscript{251}See, \textit{e.g.}, United States v. White, 401 U.S. 745, 752 (1971) (refusing to recognize Fourth Amendment protection for recording of voluntary communications of wrongdoing when party to conversation is consenting police informant); Alderman v. United States, 394 U.S. 165, 179 n.11 (1969) (same); Hoffa v. United States, 385 U.S. 293, 302–03 (1966) (same). There is some debate whether the analysis is a question of reasonableness or whether the Amendment is applicable, given the voluntary exposure of information. See, \textit{e.g.}, Katz v. United States, 389 U.S. 347, 351 (1967) ("What a person knowingly exposes to the public, even in his own home or office, is not a subject of Fourth Amendment protection."). In my view, because the informant is a government agent, the Amendment applies as long as the actions involve a search or seizure. However, two conditions make such intrusions reasonable. First, the exposure is consensual. \textit{See, e.g.}, United States v. Jacobsen, 466 U.S. 109, 117 (1984) ("[W]hen an individual reveals private information to another, he assumes the risk that his confidant will reveal that information to the authorities . . . ."); Schneckloth v. Bustamonte, 412 U.S. 218, 219 (1973) (viewing consent as exception to warrant and probable cause requirements). This raises the question of the voluntariness and the informed nature of the consent. Voluntariness—meaning the lack of coercion by the government agent—must be established. However, the consent need not be an informed one, which is to say that the person giving the consent need not know that he or she has the right to refuse, which is the essential holding of \textit{Schneckloth}. \textit{id}. at 227. This is unimportant not for the reasons articulated in \textit{Schneckloth}, \textit{id}. at 229–30, but because the Amendment regulates the reasonableness of governmental actors, not the knowledge of private individuals. Hence, it is \textit{reasonable} for a law enforcement officer to rely on the apparent consent of a person who seems authorized and competent to consent, regardless of whether or not the person is in fact authorized, competent, or otherwise making an informed choice. \textit{See} Illinois v. Rodriguez, 497 U.S. 177, 186–87 (1990) (stating that consent by person whom police reasonably believe to have common authority over premises validated search); United States v. Matlock, 415 U.S. 164, 171 (1974) (noting that third party may consent to search if party has common authority or other sufficient relationship to the premises or effect). Second, a government agent is not required to divert his eyes or avoid the use of his other senses when an individual discloses evidence. This is to say that, so long as the government agent has not violated the constitution in arriving at the place where he makes use of his senses, his use of the senses is reasonable. This is the essential rationale behind the plain view and plain sense cases. \textit{See}, \textit{e.g.}, Minnesota v. Dickerson, 508 U.S. 366, 374–76 (1993) (upholding seizure of contraband discovered through sense of touch during valid Terry frisk).

\textsuperscript{252}Travelers and goods crossing the international border seeking entry into the United States may be searched without suspicion of illegal activity. \textit{See}, \textit{e.g.}, Almeida-Sanchez v. United States, 413 U.S. 266, 272 (1973) ("Travelers may be so stopped in crossing an international boundary because of national self-protection reasonably requiring one entering the country to identify himself as entitled to come in, and his belongings as effects which may be lawfully brought in." (quoting Carroll v. United States, 267 U.S. 132, 154 (1924))); The Court sometimes uses balancing in such situations. \textit{See, e.g.}, United States v. Montoya de Hernandez, 473 U.S. 531, 538 (1985) ("[T]he Fourth Amendment's balance of reasonableness is qualitatively different at the international border . . . ."). This approach fails to recognize the sui generis nature of border searches; the power to search and seize is grounded on national sovereignty. That is, the federal government has both the right and obligation to protect the
have distinctive features. They are properly viewed as not fitting within the
textbooks the Court has developed, nor do they fit within the structure that this
Article proposes. Also, the Court has continued to treat three individual
interests—the body, speech-related concerns, and the home—differently than
others, often utilizing heightened procedural protections or adding substantive
restrictions.

(i) Bodily Integrity

The Court has often exhibited heightened concern regarding physical
intrusions by governmental agents affecting a person's bodily integrity. In
recognition of those concerns, the Court has created some unusual
reasonableness standards. In one case, upholding the involuntary extraction of
the suspect's blood by a doctor to ascertain his level of intoxication, the Court
departed from the usual rule permitting a search as a matter of course incident
to arrest. The Court reasoned that "the interests in human dignity and
privacy" protected by the Fourth Amendment "forbid any such intrusions"
merely incident to a lawful arrest. Instead, there had to be probable cause to
believe that evidence would be found to justify the search.

The Court later built on that analytical framework in a case involving a
compelled surgical procedure to remove a bullet from a suspect's chest. The
Court viewed the "ordinary requirements" of the Fourth Amendment as
"threshold requirements" for conducting a surgical search and seizure.
"Beyond these standards," the Court considered a number of other factors,
including: whether the procedure threatened the person's health or safety; the
reasonableness of the medical procedures; the extent of the intrusion on
the person's dignitary interests; and the government's need to fairly and accurately

Nation's borders from legally excludable persons and things. See Torres v. Puerto Rico, 442
U.S. 465, 472–73 (1979) ("The authority of the United States to search the baggage of arriving
international travelers is based on its inherent sovereign authority to protect its territorial
integrity"); United States v. Ramsey, 431 U.S. 606, 616 (1977) (stating searches at border are
"reasonable simply by virtue of the fact that they occur at the border"); Carroll, 267 U.S. at 154
(speaking of power of "national self-protection").

253 These concerns were originally grounded in due process analysis. See Breithaupt v.
Abram, 352 U.S. 432, 435–38 (1957) (upholding, on due process grounds, involuntary
extraction of blood at hospital following automotive collision and distinguishing Rochin on basis
of procedures utilized); Rochin v. California, 342 U.S. 165, 172 (1952) (relying on due process
analysis when finding that it shocks conscious to permit police to employ doctor to administer
emetic solution to induce vomiting to obtain evidence accused had swallowed); see also County
of Sacramento v. Lewis, 523 U.S. 833, 849 n.9 (1998) (asserting that Rochin would be treated as
Fourth Amendment case if decided today).
255 Id. at 769–70.
256 Id.
258 Id. at 760.
determine guilt or innocence. The Court observed that, where there is a "heightened privacy interest, a more substantial justification is required to make the search 'reasonable.'" The Court viewed the surgery as an unreasonable search—even though the police had probable cause to believe that it would produce evidence of a crime—because of the "magnitude" of the "expectations of privacy and security" that were implicated. Thus, a heightened standard was created: the Court viewed the existence of probable cause as a precondition for balancing the competing governmental and individual interests.

_Tennessee v. Garner_ should be viewed in the same context. In that case, the police, acting with probable cause to believe that Garner was a fleeing felon, shot and killed him. The actions were consistent with Tennessee law and the common law. The Supreme Court, however, held that the mere existence of probable cause to arrest did not suffice to use deadly force. Probable cause, the Court believed, justified the seizure but said nothing "about how that seizure is made." In addressing that latter inquiry, the Court balanced the competing governmental and individual interests and concluded that a suspect’s interest in his own life outweighed the government’s interest in capturing a felon, absent probable cause to believe the suspect posed a significant threat of death or serious physical injury to the officer or others.

(ii) Free Speech and Private Conversation Concerns

The Court has often treated speech-related interests with heightened protections and it has created "special Fourth Amendment protections" for First Amendment materials. For example, in _Roaden v. Kentucky_, the

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259 Id. at 761–62.
260 Id. at 767 (Berger, J., concurring).
261 Id. at 759.
263 Id. at 4–5.
264 Id. at 12–14.
265 Id. at 7.
266 Id. at 3, 9–11.
Court distinguished between instrumentalties of crime, such as a knife or stolen goods, and “quantities of books and movie films” in measuring the reasonableness of a search or seizure.\footnote{270} Relying on a line of cases that provided heightened protection for books and films, the Court asserted: “The seizure is unreasonable, not simply because it would have been easy to secure a warrant, but rather because prior restraint of the right of expression, whether by books or films, calls for a \textit{higher hurdle} in the evaluation of reasonableness.”\footnote{271} Accordingly, the Court established that the police must obtain a warrant to seize a film instead of relying on their own judgment after observing the film played at a movie theater, even though a similar police observation would permit the police to seize weapons or contraband.\footnote{272} The Court has also opined that search warrants involving First Amendment-protected materials must be crafted “to leave as little as possible to the discretion or whim of the officer in the field.”\footnote{273} To avoid a “prior restraint,” any large scale seizure of books or films must be preceded by an adversarial hearing.\footnote{274}

Private conversations were not a protected interest for much of the twentieth century and the government could electronically intercept such speech without implicating the Fourth Amendment.\footnote{275} By the 1960s, this view had changed and the Court mandated a warrant for such interceptions; however, the Court did not articulate any justification for that shift.\footnote{276} The rationale for that protection finally took form in \textit{Katz v. United States},\footnote{277} when the Court broadly asserted that the Amendment protected “people, not places” and observed that that which a person “seeks to preserve as private, even in an

\footnotesize{\textsuperscript{269}}413 U.S. 496 (1973).
\footnotesize{\textsuperscript{270}}Id. at 502.
\footnotesize{\textsuperscript{271}}Id. at 504 (emphasis added).
\footnotesize{\textsuperscript{272}}Id. at 505-06.
\footnotesize{\textsuperscript{273}}Zurcher, 436 U.S. at 564.
\footnotesize{\textsuperscript{274}}P. J. Video, 475 U.S. at 873; accord \textit{Fort Wayne Books}, 489 U.S. at 63. A single copy of a book or a film may be seized for evidentiary purposes based on a finding of probable cause, but a publication may not be taken out of circulation completely until there has been a determination of obscenity after an adversarial hearing. \textit{Id}.
\footnotesize{\textsuperscript{275}}See \textit{Olmstead} v. United States, 277 U.S. 438, 464 (1928) (noting that private conversations are not protected by Fourth Amendment).
\footnotesize{\textsuperscript{276}}See, e.g., \textit{Desist} v. United States, 394 U.S. 244, 247–48 (1969) (discussing demise of belief that oral conversations could not be object of search or seizure); Berger v. New York, 388 U.S. 41, 52–53 (1967) (same); see also Alderman v. United States, 394 U.S. 165, 171 (1969) (acknowledging that “the Amendment now affords protection against the uninvited ear” and discussing evolution of Court’s treatment of conversations); Wong Sun v. United States, 371 U.S. 471, 485 (1963) (asserting that Fourth Amendment protects against overhearing of verbal statements); Silverman v. United States, 365 U.S. 505, 509–12 (1961) (asserting that conversation could be fruit of physical intrusion of home and therefore suppressed). \textit{But see} Katz v. United States, 389 U.S. 347, 367–68 (1967) (Black, J. dissenting) (arguing that \textit{Olmstead} rightly concluded that oral conversations were not covered by Fourth Amendment and that Court had not retreated from that position until “amorphous holding in \textit{Berger}”); \textit{Berger}, 388 U.S. at 78–81 (Black, J. dissenting) (same).
\footnotesize{\textsuperscript{277}}389 U.S. 347 (1967).
area accessible to the public, may be constitutionally protected. According to Katz, the scope of that privacy interest included tangible and intangible items. Thus, a person who makes efforts to keep his words private is "entitled to assume that the words he utters . . . will not be broadcast to the world." A few years later, the Court more closely tied the protection of private speech with the First Amendment, reasoning that, at least for national security cases, there is often "a convergence of First and Fourth Amendment values not present in cases of 'ordinary' crime." Observing that the historical struggle for freedom of speech was bound up with the scope of search and seizure power, the Court opined that "Fourth Amendment protections become the more necessary when the targets of official surveillance may be those suspected of unorthodoxy in their political beliefs."

(iii) The Home

The Court has been insistent in requiring a warrant as a precondition for a valid search of a home, absent exigent circumstances. Prior to Katz, this was easily explained, given the Court's property-based theory of Fourth Amendment rights. Yet, the home has retained its special status despite the

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278 Id. at 351–52.
279 Id. at 352–53.
280 Id. at 352. The Court's finding that conversations were a protected interest came at the same time that the warrant preference rule had strong influence and, accordingly, the Court struck down surveillance techniques that did not comply with the Warrant Clause's requirements. See, e.g., id. at 357–58 (noting that electronic surveillance does not fit within exceptions to warrant requirement); Berger, 388 U.S. at 54–55 (striking down New York statute that allows issuance of warrant for eavesdropping when based on lesser ground than that guaranteed by Warrant Clause); cf. Osborn v. United States, 385 U.S. 323, 329–31 (1966) (upholding electronic recording of conversation when FBI obtained properly issued warrant). In response to the Court's cases and other developments, Congress enacted statutory protections for voice and electronic communications, which have largely superseded Fourth Amendment analysis of government surveillance that implicates those interests. See, e.g., Bartnicki v. Vopper, 532 U.S. 514, 522–25 (2001) (discussing effect of Title III of Omnibus Crime Control and Safe Streets Act of 1968 on regulation of interception of wire and oral communications).
282 Id. at 313–14.
283 See, e.g., Groh v. Ramirez, 124 S. Ct. 1284, 1290–91 (2004) (emphasizing warrant's importance for searches of homes); Payton v. New York, 445 U.S. 573, 586 (1980) ("It is a basic principle of Fourth Amendment law that searches and seizures inside a home without a warrant are presumptively unreasonable." (internal quotation marks and citation omitted)); Coolidge v. New Hampshire, 403 U.S. 443, 474–75 (1971) (summarizing two principal views of Warrant Clause debate and observing that both views "recognize a distinction between searches and seizures that take place on a man's property—his home or office—and those carried out elsewhere"). But see United States v. Knights, 534 U.S. 112, 121 (2001) (upholding warrantless search, based on reasonable suspicion of criminal activity, of probationer's home); Griffin v. Wisconsin, 483 U.S. 868, 875–76 (1987) (holding that it is permissible to search probationer's home pursuant to regulation allowing warrantless searches based on reasonable suspicion).
284 See, e.g., Weeks v. United States, 232 U.S. 383, 390 (1914) ("Resistance to these practices had established the principle which was enacted into the fundamental law in the Fourth
contention that people, not places, are the protected entities and that privacy, not property, is the protected interest. The home has repeatedly been described as a sanctuary and as receiving “special protection.” Indeed, physical entry into the home has been described as the “chief evil against which the wording of the Fourth Amendment is directed.” Thus, the Court has often contrasted the person’s home or business to other locations.

The Court has created unusual standards of reasonableness for circumstances where the police are entering a dwelling. For example, it has placed an almost insurmountable bar to entering the home without a warrant to arrest an individual for extremely minor offenses, even when arguably exigent circumstances are present. The Court has also established that the common law “knock and announce” requirement is a component of reasonableness, thereby obligating the police, as a general rule, to announce their presence prior to breaking open the doors of a dwelling when executing a search based on a warrant.

Amendment, that a man’s house was his castle and not to be invaded by any general authority to search and seize his goods and papers.”); Omond K. Frasenke, Concerning Searches and Seizures, 34 Harvard Law Review 351, 355 (1921) (noting that it was “apparent” that Fourth Amendment embodied principle in English liberty that found “expression in the maxim ‘every man’s home is his castle’” (citations omitted)).

285See, e.g., Alderman v. United States, 394 U.S. 165, 176–77, 180 (1969) (holding that owner of premises is entitled to have illegally recorded conversations suppressed, even if not present when they occurred and maintaining that Katz “was not intended to withdraw any of the protection which the Amendment extends to the home”). See generally Clancy, supra note 3 at 444–46, 356–61 (discussing heightened protection of home in Fourth Amendment jurisprudence and its relationship to right to be secure).


warrant. It has also prohibited the police from allowing the media to accompany them during the execution of a warrant inside a person’s home.

III. THE COURT’S ATTEMPTS TO HARMONIZE THE VARIOUS MODELS

The Court has, from time to time, attempted to harmonize its analysis by announcing the primacy—or the demise—of a particular model. None of those efforts has been enduring. For example, United States v. Rabinowitz and Chimel v. California represent two cases reaching opposite conclusions regarding the primacy of the warrant preference and case-by-case models. With the rise of balancing, the Court felt obligated to establish that test’s relationship to the other models. At one time, it appeared that a precondition for the balancing test was the existence of a lesser intrusion. At other times, the Court has asserted that departures from the warrant and individualized suspicion models would be justified where the intrusion serves “special needs, beyond the normal need for law enforcement.” But it has also stated that a

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298 Bd. of Educ. v. Earls, 536 U.S. 822, 829 (2002); accord Nat’l Treasury Employees Union v. Von Raab, 489 U.S. 656, 665 (1989). The term "special need" is misleading. The Court is not referring to any “need” in the sense of necessity; rather, it speaks of a special interest. See, e.g., Von Raab, 489 U.S. at 665–71 (noting that drug testing of customs officials not designed “to serve ordinary needs of law enforcement” in that results could not be used in criminal prosecution without employee’s consent and that purpose of testing was to deter drug use and prevent promotion of those who used drugs); see also Ry. Labor Executives’ Ass’n v. Skinner, 489 U.S. 602, 619 (1989) (equating governmental interest in ensuring safety, supervising regulated industries, or operating offices, schools, and prisons with special need). The Court’s special need analysis is formless, and the conclusion that a special need is present is more a facade for policy results than an analytical framework supporting reasoned decision making. See, e.g., New York v. Burger, 482 U.S. 691, 706 (1987) (permitting suspicionless searches of vehicle dismantlers based on state interest in investigating trafficking in stolen auto parts).

Some recent cases have attempted to limit the reach of the special needs analysis by finding that no such need was present. See Ferguson v. City of Charleston, 532 U.S. 67, 81–86 (2001) (distinguishing between ultimate goal and immediate purpose for search and concluding that close examination of purpose of drug testing of pregnant patients is “indistinguishable from the general interest in crime control” and, therefore, is not special need (internal quotation marks and citation omitted)); Chandler v. Miller, 520 U.S. 305, 318 (1997) (holding that no special need justified drug testing of political candidates). There have also been recent attempts to limit special needs analysis to a list of situations. See Ferguson, 532 U.S. at 77 (distinguishing prior drug testing cases on basis that results in Ferguson were turned over to law enforcement); City of Indianapolis v. Edmond, 531 U.S. 32, 37 (2001) (construing Court’s previous roadblock cases as involving special needs related to highway safety or policing nation’s borders); Chandler, 520 U.S. at 314–17, 320–21 (construing previous drug testing cases as related to safety or “unique
departure from the traditional probable cause standard is justified "where the public interest" is sufficient. 299

In the past decade, the number of inconsistent opinions on the meaning of reasonableness has peaked. In 1995, in Vernonia School District 47J v. Acton, 300 the majority utilized balancing and dispensed with individualized suspicion, barely noticing that model, 301 despite the dissent's vigorous assertions that individualized suspicion was fundamental. 302 Only weeks later, in Wilson v. United States, 303 the Court ignored both of those concepts of reasonableness and looked to the common law for guidance. 304 Four years later, in Wyoming v. Houghton, 305 the court elevated the common law to dispositive status; balancing was only to be used as a backup. 306 In 2000, in City of Indianapolis v. Edmond, 307 individualized suspicion was viewed as the general rule, over the dissent's claim that balancing should be applied. 308 A year later, the totality of the circumstances method was viewed as the "general" approach to measuring reasonableness. 309 The following year, balancing was again utilized. 310

Edmond is the most significant recent attempt to articulate a hierarchy among the models. In that case, the Court asserted that a search or seizure is "ordinarily unreasonable in the absence of individualized suspicion of wrongdoing," thereby placing that model at the pinnacle of the hierarchical context of customs officials' duties). However, nothing in these cases prevents the Court from simply labeling an interest a special need merely because a majority so concludes. Cf. Earls, 536 U.S. at 829–30 (holding that "special need" justified drug testing of students who participated in extracurricular activities); United States v. Knights, 534 U.S. 112, 117 (2001) (holding state's "special need" to supervise probationers justified suspicionless and warrantless search of probationer's home); Chandler, 520 U.S. at 325 (Rehnquist, C.J., dissenting) (stating that "if there [is] a proper governmental purpose other than law enforcement, there [is] a "special need" and balancing is then required). Other contemporary cases also construe the scope of the special need doctrine broadly. See Earls, 536 U.S. at 829 (stating that special needs doctrine may excuse warrant and probable cause standards "in the context of safety and administrative regulations").

300Id. 652–53.
301See id. at 678 (O'Connor, J., dissenting) ("The individualized suspicion requirement has a legal pedigree as old as the Fourth Amendment itself . . . .").
303Id. at 931.
305Id. at 299–300.
307Id. at 54–55 (Rehnquist, C.J., dissenting) (stating "special needs" test "serves to both define and limit the permissible scope of searches into home and person's body, and "balancing test serves to define and limit the permissible scope of automobile seizures").
structure of reasonableness.\textsuperscript{311} It viewed balancing as limited to situations where the "primary purpose" of the search or seizure is not to detect evidence of "ordinary criminal wrongdoing."\textsuperscript{312}

The \textit{Edmond} Court was confronted with the constitutionality of a highway checkpoint program designed to discover and interdict illegal narcotics.\textsuperscript{313} The Court maintained that its previously approved checkpoint programs were "designed primarily to serve purposes closely related to the problems of policing the border or the necessity of ensuring roadway safety."\textsuperscript{314} It rejected the view that the approved checkpoint programs were similar to the Indianapolis program because they had the same ultimate purpose of arresting those suspected of committing crimes: "If we were to rest the case at this high level of generality, there would be little check on the ability of the authorities to construct roadblocks for almost any conceivable law enforcement purpose."\textsuperscript{315} Because the primary purpose of the Indianapolis checkpoints was "to advance the general interest in crime control," the Court declined "to suspend the usual requirement of individualized suspicion."\textsuperscript{316} The \textit{Edmond} Court asserted that, although subjective intentions play no role in ordinary probable cause analysis, "programmatic purposes may be relevant to the validity of Fourth Amendment intrusions undertaken pursuant to a general scheme without individualized suspicion."\textsuperscript{317} The Court emphasized that the purpose inquiry "is to be conducted only at the programmatic level and is not an invitation to probe the minds of individual officers acting at the scene."\textsuperscript{318}

Although recognizing "the challenges inherent in a purpose inquiry," the Court maintained that lower courts could "sift[] abusive governmental conduct from that which is lawful" and that "a program driven by an impermissible purpose may be proscribed while a program impelled by licit purposes is permitted, even though the challenged conduct may be outwardly similar."\textsuperscript{319}

Purpose analysis as a means of distinguishing between the reasonableness of like intrusions has frequently surfaced and \textit{Edmond} marks a return to this

\textsuperscript{311} \textit{Edmond}, 531 U.S. at 37.

\textsuperscript{312} \textit{Id.} at 37–38. Justice O'Connor wrote the majority opinion in \textit{Edmond}. She mounted a vigorous defense of the individualized suspicion standard in her dissent in \textit{Acton}. However, in \textit{Acton}, she asserted that departures from individualized suspicion turned on whether "a suspicion-based regime would be ineffectual." \textit{Acton}, 515 U.S. at 667–68 (O'Connor, J., dissenting). There is nothing in \textit{Edmond} to indicate why she abandoned that approach in favor of a "purpose" analysis.

\textsuperscript{313} \textit{Edmond}, 531 U.S. at 34–35. In \textit{Edmond}, the City of Indianapolis used vehicle checkpoints in an effort to interdict unlawful drugs, stopping 1161 vehicles and arresting 104 motorists. \textit{Id.} Fifty-five arrests were for drug-related crimes, while forty-nine were for offenses unrelated to drugs, with an overall program "hit rate" of approximately nine percent. \textit{Id.}

\textsuperscript{314} \textit{Id.} at 41.

\textsuperscript{315} \textit{Id.} at 42.

\textsuperscript{316} \textit{Id.} (internal quotation marks and citation omitted).

\textsuperscript{317} \textit{Id.} at 45–46.

\textsuperscript{318} \textit{Id.} at 48.

\textsuperscript{319} \textit{Id.} at 46–47.
problematic approach.\textsuperscript{220} Nothing in the Court’s analysis would prevent Indianapolis from simply relabeling its program and conducting the same screening for drugs as an incident of an otherwise permissible checkpoint\textsuperscript{221} which is to say that the distinction between a criminal law enforcement purpose and other purposes is illusory.\textsuperscript{322} Even if viable, such a distinction is unwise: “It is surely anomalous to say that the individual and his private property are fully protected by the Fourth Amendment only when the individual is suspected of criminal behavior.”\textsuperscript{323} Government officials may intrude to determine whether a building meets fire safety codes, a motorist is intoxicated, automobile parts are stolen, or a child’s welfare is being maintained\textsuperscript{324} That the intruder may be there for a relatively benign purpose

\textsuperscript{220}On the level of individual encounters of the police and citizens, one of the main principles of Fourth Amendment analysis in the latter part of the twentieth century was the measurement of a police officer’s intent by examining the objective aspects of the encounter and not by inquiring into the officer’s actual, subjective intent. See generally Whren v. United States, 517 U.S. 806, 813–14 (1996) (collecting cases and rejecting Fourth Amendment challenges based on officers’ actual motivations); Brower v. County of Inyo, 489 U.S. 593, 598 (1989) (holding that inquiry into subjective intent is inappropriate); Michigan v. Chesternut, 486 U.S. 567, 575 n.7 (1988) (“[T]he subjective intent of the officer is relevant to an assessment of the Fourth Amendment implications of police conduct only to the extent that intent has been conveyed to the person confronted.”); Maryland v. Macon, 472 U.S. 463, 470–71 (1985) (asserting that Fourth Amendment violation is objective inquiry and does not depend on officer’s state of mind); Scott v. United States, 436 U.S. 128, 138 (1978) (asserting that one must examine officer’s actions and not his state of mind); United States v. Robinson, 414 U.S. 218, 236 (1973) (asserting that, for search incident to arrest, it does not matter that officer did not subjectively fear suspect or believe that suspect might be armed). Nonetheless, in justifying departures from the individualized suspicion or warrant preference models, the Court has often relied on the premise that the governmental intrusion was not made to enforce a criminal law but was for some other purpose. Yet, this noncriminal purpose analysis has been at least blurred in other cases. See Mich. Dep’t State Police v. Sitz, 496 U.S. 444, 447 (1990) (upholding use of roadblocks to enforce criminal law prohibition against drunk driving); New York v. Burger, 482 U.S. 691, 712–13 (1987) (permitting suspicionless search of automobile junkyard pursuant to statute regulating vehicle dismantlers and observing that state may enforce its criminal law goals through regulatory process).

\textsuperscript{221}Edmond, 531 U.S. at 47 n.2 (asserting that Court “need not decide whether the State may establish a checkpoint program with the primary purpose of checking licenses or driver sobriety and a secondary purpose of interdicting narcotics”).

\textsuperscript{222}See Camara v. Mun. Ct., 387 U.S. 523, 531 (1967) (recognizing that most regulatory laws are enforced by criminal process); Stephen J. Schulhofer, On the Fourth Amendment Rights of the Law Abiding Public, 1989 SUL. CT. REV. 87, 89, 114–16 (1989) (rejecting distinction between regulatory enforcement and criminal law enforcement as “chimerical and irrelevant”); Sundby, supra note 189, at 411 (“[T]he penal-regulatory distinction misses [the] point that whatever the inspection’s purpose, the intrusion still invades the individual’s privacy.”); cf. Ferguson v. City of Charleston, 532 U.S. 67, 81–86 (2001) (distinguishing between ultimate goal and immediate purpose for search and concluding that close examination of immediate purpose of drug testing of pregnant patients is “indistinguishable from the general interest in crime control” and not special need (internal quotation marks omitted)).

\textsuperscript{223}Camara, 387 U.S. at 530–31.

\textsuperscript{224}See Soldal v. Cook County, 506 U.S. 56, 69 (1992) (“What matters is the intrusion on the people’s security from governmental interference. Therefore, the right against unreasonable
should carry no weight in assessing the reasonableness of the governmental intrusion. Nor does it matter whether the intent is subjective to the individual officer or whether the purpose inquiry is made at the programmatic level. Indeed, such a distinction is particularly ironic in light of the search and seizure practices that motivated the framers of the Amendment: suspicionless intrusions approved of at the programmatic level, namely, writs of assistance and general warrants issued by executive officials to find illegally imported goods and authors and publications critical of the government.

IV. THE HIERARCHY OF REASONABLENESS

Several twentieth century trends underline the need for objective criteria to measure reasonableness. The case-by-case and balancing tests lack objective criteria as guides and, when the Court has employed those models, it has steadily expanded the permissibility of governmental intrusions and deprecated individual liberty. When the Court used a case-by-case approach to measure the scope of the search incident to arrest rule, the area searched was broad and there were no workable rules to measure what was permissible. In contrast, since 1969, when the Court in California v. Chimel settled the scope of that rule by reference to the warrant preference model, clarity and settled analysis have prevailed. Until the last third of the twentieth century, the principle that individualized suspicion was a fundamental component of reasonableness remained a bedrock view. Since that time, based on dozens of cases departing from that principle and relying instead on the balancing test, there has been an expanding zone of intrusion by the government. There is a stark conclusion: absent objective criteria for measuring reasonableness, progressively intrusive actions have been and will continue to be allowed. This tendency is

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325See, e.g., Wyman v. James, 400 U.S. 309, 340–41 (1971) (Marshall, J., dissenting) ("[T]he logic involved, as a matter of law, the view that the ambit of the Fourth Amendment depends not on the character of the governmental intrusion but on the size of the club that the State wields against a resisting citizen.").

326See Edmond, 531 U.S. at 46 (noting that intrusions at "programmatic level" involve cases lacking individualized suspicion).

327See Acton, 515 U.S. at 670 (discussing framers’ opposition to general searches, including general warrants and writs of assistance).

328See Morgan Cloud, Pragmatism, Positivism, and Principles in Fourth Amendment Theory, 41 UCLA L. REV. 195, 223–27, 280 (1993) (discussing how Court’s pragmatic approach to Fourth Amendment analysis has diminished scope of individual liberty while increasing governmental power).


330See Cloud, supra note 328, at 297 (“Simply put, if liberty is the goal, rules are needed.”); Sundby, supra note 189, at 384–85 (recognizing need to define reasonableness “to reflect the amendment’s underlying values and purposes” and that reasonableness concept without definitional restraints “can allow the range of acceptable government intrusions to
fundamentally inconsistent with the framers' intent to protect individuals from unreasonable governmental intrusions. To avoid undermining that fundamental purpose, government officials need objective criteria to measure reasonableness. Justice Frankfurter was correct when he observed: "To say that the search must be reasonable is to require some criterion of reason. It is no guide at all either for a jury or for district judges or the police to say that an 'unreasonable search' is forbidden—that the search must be reasonable."

The recognition of the need for objective rules does not inform us what the criteria are. To identify the criteria, one must look elsewhere. The case-by-case and balancing approaches to define reasonableness illuminate the dangers of elevating contemporary needs to the level of constitutional principles. The Court's dispositive reliance in Wyoming v. Houghton on the common law to define reasonableness offers surface appeal as the needed objective criteria. However, as has been discussed, the Fourth Amendment was a reaction to contemporary abusers; it was not a codification of the common law, with the exception of the requirements specified in the Warrant Clause for warrants to issue. Moreover, as Professor Sklansky has demonstrated, the common law was not a "unified, systematic body of rules, constant across space and time." Search and seizure rules "varied from colony to colony and from decade to decade" and "in both England and America, theory and practice often diverged." The common law thus fails to provide objective criteria. Finally, the world has changed dramatically since 1791 and it would be foolish to put the reasonableness inquiry into the straightjacket of law enforcement rules that were in place at that time, even if those rules could be ascertained with certainty.

expand and overwhelm the privacy interests at stake"; see also Skinner v. Ry. Labor Executives', Ass'n, 489 U.S. 602, 637 (1989) (Marshall, J., dissenting) (asserting that absent warrant and probable cause standards, concept of reasonableness is "virtually devoid of meaning, subject to whatever content shifting judicial majorities, concerned about the problems of the day, choose to give that supple term")..

331Chimel, 395 U.S. at 765 (quoting United States v. Rabinowitz, 339 U.S. 56, 83 (1950) (Frankfurter, J., dissenting)).
335Sklansky, supra note 10, at 1795.
345Id. at 1795–96.
335Cf. Steiker, supra note 175, at 830–44 (discussing rise of modern police forces and increase in racial divisions as factors influencing concept of reasonableness); Wasserman, supra note 6, at 1394–95 (discussing legal changes affecting law enforcement).
This does not mean that we can learn nothing from history. Historical analysis teaches us that the Amendment was designed to protect individuals from unreasonable governmental intrusion. The framers intended not only to prohibit the specific evils of which they were aware, but also, based on the general terms used, to give the Constitution enduring significance beyond their own lifetimes. Any measure of reasonableness must be premised on those values; otherwise, reasonableness analysis is subject to depreciation by interpretation favoring governmental needs.

This Article proposes a hierarchical structure to the analysis of reasonableness that employs objective criteria, is grounded in the framers’ values, is informed by the course of Supreme Court jurisprudence, and accommodates contemporary needs. At the summit of that hierarchy is individualized suspicion, which is fundamental to principled analysis of reasonableness questions. Next in order is the warrant preference rule. That

Fourth Amendment’s purpose of preserving that degree of privacy that was afforded at time it was adopted).

See, e.g., United States v. Chadwick, 433 U.S. 1, 9 (1977) (“What we do know is that the Framers were men who focused on the wrongs of that day but who intended the Fourth Amendment to safeguard fundamental values which would far outlast the specific abuses which gave it birth.”); Coolidge v. New Hampshire, 403 U.S. 443, 455 (1971) (“When times have changed, reducing everyman’s scope to do as he pleases in an urban and industrial world, the changes have made the values served by the Fourth Amendment more, not less, important.”); United States v. Lefkowitz, 285 U.S. 452, 467 (1932) (rejecting literal construction of words in favor of Amendment’s purpose); Boyd v. United States, 116 U.S. 616, 635 (1886) (stating Fourth Amendment should be interpreted liberally in favor of security of person); Amsterdam, supra note 126, at 353 (“The Bill of Rights in general and the fourth amendment [sic] in particular are profoundly anti-government documents.”); Cloud, supra note 98, at 626–27 (noting that Fourth Amendment is designed to protect individual rights).

See JOHN HART ELY, DEMOCRACY AND DISTRUST: A THEORY OF JUDICIAL REVIEW 1–2 (1980) (“[The Constitution proceeds by briefly indicating certain fundamental principles whose specific implications for each age must be determined in contemporary context . . . That the complete inference will not be found there—because the situation is not likely to have been foreseen—is generally common ground.”); Grao, supra note 11, at 620 (“The underlying grievances are certainly relevant to the interpretative task, but constitutional provisions cannot be properly viewed simply as shorthand statements for the specific grievances that gave rise to them.”); Steiker, supra note 175, at 824 (stating Fourth Amendment “appears to require a fairly high level of abstraction of purpose” given its use of term “unreasonable”); Tomkovicz, supra note 7, at 1137 (“The document was meant to be more than a mere catalogue of forbidden actions and the framers intended . . . that the underlying values would be honored.”).

See T. Alexander Aleinikoff, Constitutional Law in the Age of Balancing, 96 YALE L.J. 943, 990–91 (1987) (comparing balancing analysis with other modes of constitutional adjudication and maintaining that constitutional law, contrary to view of balancers, provides set of peremptory norms that are basic to American notion of limited powers, as well as validating function, which serves as forum for affirmation of background principles and for ratification of changes in those principles); Cloud, supra note 328, at 286 (arguing that there is need for normative-based principles to guide Fourth Amendment analysis and concluding: “The Court’s opinions demonstrate that if the fourth amendment [sic] is to function as a device that protects individual autonomy by limiting government power, its interpretation must rest upon a theory that emphasizes strong rules, yet is sufficiently flexible to cope with the diverse problems arising under the fourth amendment [sic].”)

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rule does not have general applicability; it is, instead, limited to intrusions into buildings, a person’s body, and speech-related concerns. Individualized suspicion and the warrant preference rule are the preferred models of reasonableness. Departures from those models can only be justified if necessary to effectuate a strong governmental interest. In those extraordinary circumstances, neutral and objective criteria must be utilized to regulate the permissibility of governmental intrusions. Finally, because of the wide applicability of the Amendment, there may be unusual situations where those three models do not coherently address the question of reasonableness. Under such circumstances, a case-by-case analysis may have to be used. But to do so, the Court must first demonstrate the inapplicability of the two preferred models and the neutral criteria model.

A. Individualized Suspicion

An aversion to suspicionless searches and seizures was the prime motivation of the framers of the Fourth Amendment. The custom of writs of assistance in America and the Wilkes and Entick cases in England all involved suspicionless searches and seizures pursuant to general warrants. The core complaint of the colonists was not that the searches and seizures were warranted, warrantless, or unauthorized actions; it was the general, suspicionless nature of the searches and seizures. This contrasted unfavorably with the requirement of probable cause to arrest and to issue a common law search warrant. The requirement of individualized suspicion made searches and seizures reasonable. In my view, that is the fundamental lesson of history and that standard embodies the framers’ values.

Others might dispute the historical record and conclude that the framers did not intend to define reasonableness to include the requirement of particularized suspicion. They might also contend that the framers’ intent is not controlling and that modern interpreters can look to other criteria to measure reasonableness. In response, one need only recall the lack of objective criteria in the case-by-case and balancing models and the coincident expansion of the government’s powers to intrude when those models are used. Nor has the Court developed any other model that sets forth objective criteria to measure reasonableness. Individualized suspicion, in contrast, has offered a measurable objective standard against unjustified and arbitrary police actions, limiting the

342 See Amsterdam, supra note 126, at 398–99 (stating that when Fourth Amendment was adopted, searches and seizures at issue involved rummaging of English messengers and colonial customs officials: “It is illusory to suppose that we can know what they thought of anything else. Nothing else was then in controversy.”); Tomkovicz, supra note 7, at 1134 (“The Framers objected to general warrants and writs of assistance because they resulted in arbitrary deprivations . . . . [O]fficers were authorized to search and seize upon bare suspicion . . . . [T]hey were given ‘unlimited discretion’ to choose whom, where, and what to search and seize.”).
government's discretionary authority to search and seize.\textsuperscript{343}

Still, if the Amendment applies to all searches and seizures, however mundane or trivial, then that criterion as a means to measure reasonableness appears to lose much of its value. The need to retrieve a file from someone's office to achieve a work-related purpose has little to do with the historical basis for the Amendment.\textsuperscript{344} How can such actions possibly fit into a structured framework? Note also that "purpose analysis" seems to have entered the discussion: a police officer's search of an office to find a file containing incriminating evidence and a coworker's search of an office to retrieve a file for a work-related purpose may be similar in scope; it is the intent behind the search that seems to differentiate the two intrusions.

Yet, it is not "purpose" analysis that explains—or justifies—such intrusions by office workers and not by the police. Rather, the concept of individualized suspicion needs to be properly understood in light of the Amendment's broad application. In criminal cases, it usually involves probable cause that the person is involved in criminal activity or that the place searched will yield evidence of a crime. Because the Amendment now applies to diverse activities of government unrelated to criminal investigations does not mean that individualized suspicion is per se inapplicable or unworkable. Instead, the standard needs to reflect the situation the governmental agent is facing. If a fireman observes a house on fire, he does not have probable cause to believe that a crime has been committed. He does, however, have probable cause to believe that a house is on fire, and the individualized suspicion standard would permit him to enter the house to fight that fire. A police officer who observes a vehicular accident resulting in injuries to the sole occupant of the vehicle, who is taken from the scene in an ambulance, has probable cause to believe that the vehicle is unattended and may take steps to secure it as part of the police's caretaking functions. An office worker who knows that an absent coworker had been studying a file in his office, and who has a business-related need for

\textsuperscript{343}Cf. Christopher Slobogin, \textit{The World Without a Fourth Amendment}, 39 UCLA L. REV. 1, 38 (1991) (arguing that "certainty requirement," that is, "the level of confidence we must have that a search or seizure will be successful before we allow it to occur," is primary criterion in assessing propriety of such intrusions). The lack of objective criteria in the balancing test negatively affects not only the decision to initiate an intrusion but also the scope of the intrusion. Although the permissible scope of a search pursuant to individualized suspicion is limited by the object sought, when a balancing test is used, no such ready limitations are apparent. Thus, for example, in the school context, the Court has asserted that school officials should consider the degree of the intrusion "in light of the age and sex of the student and the nature of the infraction," New Jersey v. T. L. O., 469 U.S. 325, 342 (1985), which creates "a potentially more open-ended standard for assessing the scope of a reasonable school search than for" a search or seizure based on individualized suspicion. Kathryn R. Urbonya, \textit{Determining Reasonableness Under the Fourth Amendment: Physical Force to Control and Punish Students}, 10 CONNELL J.L. & PUB. POL'y 397, 407 (2001).

\textsuperscript{344}See O'Connor v. Ortega, 480 U.S. 709, 723 (1987) (plurality opinion) ("It is difficult to give the concept of probable cause, rooted as it is in the criminal investigatory context, much meaning when the purpose of the search is to retrieve a file for work-related reasons.").
the file, has probable cause to believe that the file is in that office and can enter
to locate the file. In each situation, the governmental agent has probable cause
to believe that the target of the search has characteristics that justify the
governmental intrusion: put out a fire, protect property, retrieve a file.

Individualized suspicion is thus a broad, workable, and necessary
objective guide to measure reasonableness; it is grounded in history and the
framers’ values. Rather than being a mere procedural device to safeguard other
values protected by the Amendment, individualized suspicion is a core
organizing principle to measure reasonableness. By infusing the
reasonableness command with the requirement of individualized suspicion,
group considerations and broad societal interests will not overwhelm the
individual’s right to be secure. Given its central role in measuring
reasonableness, exceptions to the requirement of individualized suspicion
should only be justified by a showing of necessity.

B. The Role of Warrants

With limited exceptions, there was no authorization for law enforcement
officials to search or seize without a warrant when the Fourth Amendment was
ratified. The drafting process of the Fourth Amendment reflected the framers’
lack of concern with warrantless actions; the earlier draft of the Amendment,
along with its state predecessors, addressed only general warrants. General
warrants were the perceived evil and were the immediate concern of the
framers. Thus, neither the language of the Amendment nor the historical
context say anything about whether there was or should be a constitutional
requirement for a warrant.

The assumption that a warrant was generally required—albeit due to
reasons unrelated to the Fourth Amendment—was carried forward through
time. Early twentieth century Supreme Court cases uncritically turned that
assumption into a constitutional presumption favoring a warrant. Yet, at the
same time, society and its needs were changing. Street encounters and
preventive measures became prevalent as population, crime, and organized
police forces increased strikingly. With the advent of modern transportation,
mobility increased significantly, as did the need for swift and efficient action.
Health, safety, and social regulations, unrelated to criminal law enforcement,
became ubiquitous. The Fourth Amendment was made applicable to the states.
The use of a warrant became infrequent and is now a relatively minor aspect of
governmental intrusion, including criminal law enforcement.

One must look elsewhere to justify a blanket warrant preference rule.
Clearly, if individualized suspicion is the primary model of reasonableness, the
warrant preference rule adds nothing to that model to the extent that it similarly
requires probable cause and particularity. There is, however, one feature of
warrants that is not coincident with the individualized suspicion model:
preauthorization by a magistrate. Consistent with that attribute, it has been asserted that the warrant preference "rule rests upon the desirability of having magistrates rather than police officers determine when searches and seizures are permissible and what limitations should be placed upon such activities." Others more bluntly maintain that the preauthorization process serves to avoid "the inevitable bias injected by hindsight in decision making, [and] the problems of police perjury." Accordingly, a "separation of powers and division of functions" between the branches of government, by which authorization to search by the judicial branch is followed by execution by the executive branch, arguably serves to best preserve individual freedoms.

Presearch review is now technologically feasible in many situations. Conceivably, a magistrate could be on duty to review the propriety of most searches before they occur. Consider a traffic stop monitored by a camera in the officer's car. Should it be mandated that a magistrate observe the events and give authorization to search the vehicle or arrest the driver? Given the thousands of traffic stops that occur daily, the enormous judicial and

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345 The Warrant Clause also requires an oath or affirmation. Given that police officers are required to testify under oath in subsequent court proceedings, it is the requirement of preauthorization that arguably diminishes lying and not the requirement, vel non, of an oath. In the past, the use of a warrant also had the feature of a piece of paper that was objective evidence to the police and to the citizen of that authorization that was often served at the time of the search or arrest. With the advent of oral warrants, that feature is rapidly eroding. Cf. Groh v. Ramirez, 124 S. Ct. 1284, 1292 n.5 (2004) (viewing as open question whether it would be unreasonable for police officer not to supply copy of warrant to occupant at outset of search); David A. Sklansky, Quasi-Affirmative Rights in Constitutional Criminal Procedure, 88 Va. L. Rev. 1229, 1245–59 (2002) (observing that ability of police to obtain oral warrants has not lived up to its promise of less searches without warrant).

346 See, e.g., United States v. Chadwick, 433 U.S. 1, 8–9 (1977) ("The judicial warrant has a significant role to play in that it provides the detached scrutiny of a neutral magistrate . . . ."); Camara v. Mun. Ct., 387 U.S. 523, 532 (1967) (noting that even when warrant is issued without probable cause, it still serves role of assuring citizen that governmental official's acts have been authorized by neutral judge).

347 Trupiano v. United States, 334 U.S. 699, 705 (1948); see also Chadwick, 433 U.S. at 9 (explaining that warrant "provides the detached scrutiny of a neutral magistrate, which is a more reliable safeguard against improper searches than the hurried judgment of a law enforcement officer 'engaged in the often competitive enterprise of ferreting out crime'" (quoting Johnson v. United States, 333 U.S. 10, 14 (1948))).

348 Trupiano, 334 U.S. at 705.

349 Steiker, supra note 175, at 852.

350 Arkansas v. Sanders, 442 U.S. 753, 759 (1979) (internal quotation marks and citations omitted).

technological resources that would be involved weigh heavily against such a mandate. On the other hand, the capability of modern technology to record many encounters and to preserve the actual events for later review somewhat mitigates the argument for preauthorization to the extent that it relies on police bias or misconduct.

If preauthorization is a core component of reasonableness, then the vast majority of contemporary searches and seizures, which are performed without a warrant, are unreasonable. Moreover, nothing in the historical record supports this base as the justification for a blanket warrant requirement: the accepted practice of warrantless arrests and searches incident to arrest belie such a requirement; and the historical abuses were preauthorized, with the searchers bearing pieces of paper giving notice of that authority. Certainly, the police should be encouraged to get a warrant. Yet, good policy is not the same as good constitutional law. One could endlessly speculate about the relative benefits of preauthorization. But all of these arguments rest on one’s view of the perceived benefits that accrue from preauthorization and none, in

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352 Cf. Wasserstrom, supra note 6, at 295–96 (asserting that imposing warrant requirement “seems a sensible way for the courts to enforce the fourth amendment [sic]” and arguing that reasoning in favor of warrant requirement “depends on the empirical, contingent, proposition that in today’s world post-search judicial and administrative remedies will not deter unreasonable searches and seizures as effectively as the warrant requirement will prevent them”). The deferential standard of review of probable cause determinations by a magistrate and the good faith exception to exclusion when the police act pursuant to a warrant also serve to encourage the police to get warrants. See United States v. Leon, 468 U.S. 897, 922–25 (1984) (creating good faith exception to exclusion); Illinois v. Gates, 462 U.S. 213, 236–37 (1983) (adopting substantial basis test to review magistrate’s determination of probable cause in warrant application).

353 Certainly, courts must guard against the police’s abuse of authority. Some of the concerns involved in this complex problem are discriminatory treatment of minorities and false testimony regarding the circumstances of the encounter. However, these abuses cannot be rectified by distorting Fourth Amendment principles, which are ill suited to address such issues. The hampering of all police by crafting limitations on their authority under the Fourth Amendment is not the solution. The source of such problems is bad police officers, not bad principles. Adjusting Fourth Amendment rules to combat lying would simply lead to more creative lying. The solution is to weed out the bad police and to establish internal police procedures and practices to effectuate that goal. If a police officer engages in discriminatory treatment, the proper remedy is the Equal Protection Clause of the Fourteenth Amendment. If there is a concern for false testimony, the courts are obligated to examine the testimony of police officers carefully and properly apply the standards to measure the propriety of each protective search.


354 Cf. Slobogin, supra note 343, at 8–12 (arguing for ex ante review of police actions to avoid unnecessary governmental intrusions); Wasserstrom, supra note 6, at 299–300 (observing that “there is reason to doubt that the warrant process works nearly so well in practice as it does in theory” because of, inter alia, magistrate shopping by police, and noting fact that untrained court functionaries are allowed to issue warrants and rubber stamping by magistrates occurs).

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my view, rest on constitutional reasons for mandating a warrant.

From this I conclude that there is little—if any—historical or modern support for creating a blanket warrant requirement. That, however, does not end the inquiry. Instead, it needs refocusing. A warrant requirement does have strong historical roots in the heightened protections afforded the home, which the Supreme Court has generally maintained throughout the Nation's history. Similarly, although physical intrusions into the body to obtain evidence were unheard of at the time of the framing, there is little doubt that the framers would have found such practices particularly offensive. Moreover, enhanced protections against such intrusions developed as medical science gave the government the ability to intrude. The requirement of a warrant for searches of homes—and by extension other buildings—and intrusions into the body is deeply ingrained in our legal and social fabric. Consistent with the course of history and contemporary expectations, a warrant should be required to search buildings and intrude into a person's body.

There remain two other terms listed in the Amendment—“papers” and “effects”—that must be addressed. As an initial matter, papers and effects inside a house benefit from the warrant requirement set forth above; there would be little meaning to a warrant requirement for the search of a house if the items inside the house could be searched without one. Thus, the issue is whether there should be a warrant requirement for papers and effects not associated with a building, that is, items in transit, such as luggage or packages.

There is no historical support for a warrant requirement specific to effects in transit. Case law analysis has been premised on whether there is a blanket warrant preference rule and has not focused on any unique protections associated with “effects.” Those arguments, as set forth above, turn on the question of preauthorization, which I have argued is not a core concept of

355 See United States v. Watson, 423 U.S. 411, 423–24 (1976) (holding no warrant required for arrest outside of home); Maclin, supra note 242, at 955–56 ("The Framers' constitutional concerns focused on searches and seizures directed at the home. No historical evidence has been unearthed indicating that the Framers' constitutional thinking focused on common law search and seizure rules involving other topics.").

356 See United States v. Chadwick, 433 U.S. 1, 8 (1977) (acknowledging silence of historical record regarding permissibility of warrantless searches outside home); Carroll v. United States, 267 U.S. 132, 149–54 (1925) (reviewing statutory and case law distinction between "goods in the course of transportation" and those in house or other structure and concluding that there is no warrant requirement for former).

357 See, e.g., Chadwick, 433 U.S. at 10–11 (utilizing Warrant Clause analysis, reasonable expectation of privacy, to determine if "effects" were protected against search). In Chadwick, which is the main case applying the blanket warrant preference rule to effects, the Court asserted that the Amendment protects reasonable expectations of privacy and not places, therefore, when a person seeks to maintain privacy, the warrant preference rule is applied. Id. at 7. Contrary to that syllogistic reasoning, once it is determined that a person has a protected interest, it simply means that the government must justify its intrusion as reasonable. That conclusion begins the reasonableness analysis; for Chadwick, it ended the inquiry.
reasonableness. Moreover, preauthorization for goods in transit, similar to vehicles in transit, is often burdensome. As to searches of automobiles, the Court struggled for decades before finally resolving the issue by not requiring a warrant. On the other hand, for other effects in transit, a warrant has been required. Yet, the arguments in favor of an immediate search of items in a vehicle and for other effects in transit are identical. As the Court has observed: "Certainly the privacy interests in a car's trunk or glove compartment may be no less than those in a movable container." Based the Court's treatment of containers in vehicles and the Court's analogous distinction between arrests in public and in the home, I conclude that there should be no warrant requirement for effects.

In contrast, there is strong historical support for the protection of "papers," that is, materials related to free speech: Lord Camden described a man's private papers as his "dearest property"; there was a long era of substantive restrictions on the ability of the government to seize private papers, and there remains to this day heightened scrutiny for searches and seizures that implicate free speech concerns. All strongly support a warrant requirement for "papers" related to free speech. Consistent with this accumulated wisdom, a warrant should be required to search or seize speech-related materials, including private conversations.

Thus, although there should be no universal warrant preference rule, historical precedent and contemporary expectations demonstrate that a warrant should be required for searches of buildings, bodily intrusions, and conversations and materials related to free speech. The warrant requirement for such intrusions is a recognition of the heightened protection that these interests have received. For effects, there is no justification for a warrant requirement. This, of course, does not mean that the police can search packages and luggage at will; such articles are protected by the individualized suspicion model.

358 Cf. Robbins v. California, 453 U.S. 420, 433–34 (1981) (Powell, J., concurring) ("The aggregate burden of procuring warrants whenever an officer has probable cause to search the most trivial container may be heavy and will not be compensated by the advancement of important Fourth Amendment values.").


360 See, e.g., United States v. Place, 462 U.S. 696, 701 (1983) (noting that, absent exigent circumstance, law enforcement needs warrant to search or seize container); Chadwick, 433 U.S. at 11–13 (holding search of movable luggage not associated with vehicle requires warrant).

361 See United States v. Ross, 456 U.S. 798, 809 (1982) ("The rationale justifying a warrantless search of an automobile that is believed to be transporting contraband arguably applies with equal force to any movable container that is believed to be carrying an illicit substance.").

362 Id. at 823.


364 Entick v. Carrington, 19 Howell's St. Tr. 1029, 1066 (1765).
C. Alternative Objective Criteria

A third model provides for the use of alternative objective criteria to measure reasonableness. It seeks to approximate—by employing neutral and fixed criteria—the values of the framers by allowing only justified searches and seizures of limited scope. This model is a concession to the requirements of a modern regulatory state combined with the recognition that the Fourth Amendment applies to the diverse intrusions that modern life generates. The model’s main purpose is to allow flexibility for modern developments but retain limits on governmental authority to search and seize. It differs from a balancing test in significant ways. First, the individual’s interest and the government’s interests are not weighed against each other. Second, the government must use fixed, neutral criteria in initiating and executing the search or seizure. Third, and most important, the government must establish an exceptional circumstance where necessity requires departing from the preferred models to effectuate a strong governmental interest.

1. The Government Interest

Unlike the balancing test, where a mere legitimate interest suffices to initiate the balancing process, the test proposed here requires a showing of a substantial or compelling governmental interest as a precondition of its use. A substantial interest supports lesser intrusions, similar to a stop or a frisk. A substantial governmental interest exists when pursuit of the interest strongly or materially benefits the government. A compelling interest may point to the reasonableness of more intrusive searches and seizures, such as airport searches. "Compelling" connotes an interest so strong that the government is obliged to pursue the interest to ensure the survival of its authority or to prevent mass harm.

2. Necessity

A second precondition to the application of the neutral criteria model is a strong showing of need to depart from the preferred models. The concept of "necessity" has been often misused; claims of necessity are as old as the debate concerning what is a reasonable search or seizure and as current as recent Supreme Court cases.\(^{365}\) Yet, many cases fail to distinguish between the

\(^{365}\) See, e.g., City of Indianapolis v. Edmond, 531 U.S. 32, 43 (2000) (rejecting "severe and intractable nature of the drug problem" as sufficient justification to depart from requirement from individualized suspicion); Torres v. Puerto Rico, 442 U.S. 465, 472–74 (1979) (rejecting suspicionless searches of luggage of persons coming to island from United States, despite recognition that Commonwealth had serious problem with "influx of weapons and narcotics" and stating that "we have not dispensed with the fundamental Fourth Amendment prohibition..."
strength of the government interest involved and the need to dispense with the preferred models to effectuate that interest. "Necessity" means that it must be shown that utilizing the preferred model of reasonableness will not protect the governmental interest. This conception of necessity is reflected in the Court's initial departures from the individualized suspicion model; a similarly strong conception of exigency traditionally permeated the question whether the police could search without a warrant.

The concept of necessity has several interrelated facets, each of which may come to the forefront of consideration depending on the circumstances. First, there must be some showing that the asserted governmental purpose will be served by departing from the preferred models, by showing that the procedure used will be productive. A second component is the absence of

against unreasonable searches and seizures simply because of a generalized urgency of law enforcement); Wasserstrom, supra note 6, at 317 ("The 'general searches' which the framers sought to outlaw when they enacted the fourth amendment [sic] may well have been 'cost-justified,' and were defended on precisely this basis.").

See, e.g., Edmond, 531 U.S. at 44–47 (utilizing programmatic purpose analysis to distinguish between permissible and impermissible suspicionless intrusions); Mich. Dep't of State Police v. Sitz, 496 U.S. 444, 453–54 (1990) (stating that it was up to politically accountable officials to choose among reasonable alternative law enforcement techniques); Skinner v. Ry. Labor Executives' Ass'n, 489 U.S. 602, 631 (1989) (permitting substance abuse testing of all crew members on trains involved in accidents or rule violations because serious train accident scenes frequently are chaotic, making it "unrealistic, and inimical" to rely on individualized suspicion to determine which crew members contributed to accident).

See, e.g., Sitz, 496 U.S. at 459 (Brennan, J., dissenting) ("Without proof that the police cannot develop individualized suspicion that a person is driving while impaired by alcohol, I believe the constitutional balance must be struck in favor of protecting the public against even the 'minimally intrusive' seizures involved in this case."); United States v. Martinez-Fuerte, 428 U.S. 543, 555–76 (1976) (Brennan, J., dissenting) ("There is no principle in the jurisprudence of fundamental rights which permits constitutional limitations to be dispensed with merely because they cannot be conveniently satisfied."); Torres, 442 U.S. at 476 (Brennan, J., dissenting) ("The concept that . . . constitutional protections against arbitrary government are inoperative when they become inconvenient or when expediency dictates otherwise . . . if allowed to flourish would destroy the benefit of a written Constitution and undermine the basis of our government."

(agreeing with Reid v. Covert, 354 U.S. 1, 14 (1957) (plurality opinion)).

See, e.g., Warden v. Hayden, 387 U.S. 294, 299 (1967) (removing requirement for warrant to enter house when police are in hot pursuit of fleeing felon, noting, "[s]peed here was essential"); see also Sloboin, supra note 343, at 29–32 (arguing for conception of exigency that defines concept of "imminence" narrowly to avoid exception swallowing general rule of warrant requirement).

See Tennessee v. Garner, 471 U.S. 1, 10–11 (1985) (rejecting use of deadly force to apprehend nonviolent offender in part because there was no showing that use of deadly force was productive means of accomplishing state goals). Productivity, when the need is to deter, could be established by studies or tests showing the effectiveness of the program. It might also be measured by demonstrating that there was a crisis, but that, after the program was implemented, instances of the behavior sought to be deterred were few. For example, the installation of metal detectors in airports in response to the hijacking of airplanes virtually eliminated that problem. If no demonstrated problem is present, then one should not even reach the productivity question. Cf. Sitz, 496 U.S. at 453–54 (stating that there must be some empirical evidence to justify activity and citing data demonstrating that such sobriety checkpoints resulted
any effective alternatives;\textsuperscript{370} if the government has an alternative means to achieve the end using the preferred models, there is no need to use the neutral criteria model.\textsuperscript{371} In assessing the availability of alternatives, the comparative onerousness of each alternative is a valid consideration.\textsuperscript{372} If the relative cost or effort of utilizing the preferred model is out of proportion to utilizing a less-preferred model, then the preferred method may be said to be unavailable.\textsuperscript{373} For example, while some alternative method of preventing fires from spreading might be imagined in lieu of housing inspections—such as posting fire wardens at every street corner—this alternative, even if adequate, would not be feasible given the costs involved.

Another aspect of necessity is the requirement of a high level of compliance to achieve an "acceptable level" of satisfaction of the governmental interest.\textsuperscript{374} Many of the cases dispensing with warrants or

in arrests of about one percent of the motorists stopped). But see Nat’l Treasury Employees Union v. Von Raab, 489 U.S. 656, 673–75 (1989) (upholding suspicionless drug testing of certain Customs Service agents in absence of showing that testing would achieve government interests).

\textsuperscript{370}Cf. O’Connor v. Ortega, 480 U.S. 709, 744–46 (1987) (Blackmun, J., dissenting) (arguing that before warrant and probable cause standards are dispensed with, it must be established that no alternative is available).

\textsuperscript{371}See, e.g., Delaware v. Prouse, 440 U.S. 648, 659–60 (1979) (concluding that system of suspicionless spot checks of drivers’ licenses and vehicular registrations at discretion of officer in field was not sufficiently productive of state interests to justify intrusion, particularly given alternative mechanisms available); see also Sitz, 496 U.S. at 467 (Stevens, J., dissenting) (maintaining that suspicionless intrusions could only be justified by "the degree to which the seizure advance[d] the public interest," as compared to techniques using particularized suspicion (quoting Brown v. Texas, 443 U.S. 47, 50–51 (1979))).

\textsuperscript{372}This is not an argument for a least intrusive means analysis. There is no support for such an analysis in the language of the Amendment or in the historical regulation of search and seizure powers. See, e.g., United States v. Koyomejian, 970 F.2d 536, 546 (9th Cir. 1992) (Kozinski, J., concurring) (finding no support for least intrusive means requirement in either language of Fourth Amendment or in "two centuries of search and seizure caselaw" interpreting it). The Fourth Amendment requires only that the intrusion be reasonable, which is to say that reasonableness is a more forgiving concept than a least intrusive means analysis allows. See Kathryn R. Urbonta, Dangerous Misperceptions: Protecting Police Officers, Society, and the Fourth Amendment Right to Personal Security, 22 Hastings Const. L. Q. 623, 696 (1995) (arguing scrutiny of means “does not necessarily require identifying the least intrusive practice” but instead “entails consideration of whether the police practice was reasonable in light of available alternatives”); Clancy, supra note 353, at 513–21 (arguing that least intrusive means analysis in context of protective searches should be rejected).

\textsuperscript{373}Cf: New Jersey v. T. L. O., 469 U.S. 325, 363 (1985) (Brennen, J., concurring in part and dissenting in part) (explaining that, when assessing whether departure from probable cause standard is justified, "it is the costs of applying probable cause as opposed to applying some lesser standard that should be weighed on the government’s side").

\textsuperscript{374}See Camara v. Mun. Ct., 387 U.S. 523, 537 (1967) (viewing as reasonable areawide health and safety code enforcement inspections designed to combat dangers fires and epidemics pose to large urban areas because other canvassing techniques would not achieve acceptable results); see also 4 LAFAVE, supra note 205, § 16.2(d), at 648 (noting that Camara Court’s analysis included determination “that ‘acceptable results’ in code enforcement could not be accomplished if it were necessary to establish in advance the probability that a particular
individualized suspicion have found the prevention or detection of activities or conditions that could affect a large number of persons to be important: mass harm from epidemics or from fires sweeping across urban areas, nuclear power plants and intoxicated train operators. These scenarios have in common the potential for a single source affecting large numbers of people at the same time. To combat mass concerns before they become mass disasters, the Court has permitted interference with personal interests in a diverse number of ways: housing and business inspections, intrusions into bodily integrity and privacy, and requiring persons to do such activities as walking through metal detectors as a precondition of boarding an airplane.

However, the potential for mass harm is not sufficient in and of itself; it merely describes the governmental interest. A second basis is also common to the situations where there is the need for a high level of compliance: the inability to identify the source of the problem utilizing particularized suspicion in advance of the harm occurring. In such circumstances, unless the government intervenes before individualized suspicion has arisen, the government interest will be frustrated. One example is fire inspections of buildings in urban areas. Absent an inspection, the dangerous conditions existing in such structures cannot be identified before the dangers have been realized. Another example would be a reliable report that a nuclear device has been placed in a neighborhood but that it is unknown exactly where the terrorists have placed it. The gravity of the harm in such a situation would be so great that a house-to-house warrantless search without suspicion falling on any one house would be reasonable. This contrasts with a reliable report that a man possesses heroin at a specified location and, when the police arrive at that location, a crowd is present. In such circumstances, the potential for mass harm is absent, and the police would not be justified in searching each member of the crowd. In this latter situation, where an individual crime is committed, traditional police investigatory techniques are sufficient to achieve an acceptable level of enforcement.

See, e.g., *Camara*, 387 U.S. at 535 (recognizing that "[b]ecause fires and epidemics may ravage large urban areas" police power should include warrantless searches).


Cf. Ellen M. Alderman, *Note, Dragnet Drug Testing in Public Schools and the Fourth Amendment*, 86 COLUM. L. REV. 852, 872 (1986) ("[T]he nature of the problem generates articulable suspicious behavior, thereby enabling public officials to identify the persons most probably engaged in the activity, it is not reasonable under the fourth amendment [sic] to subject an entire class of people to a search.").
3. Neutral, Fixed Criteria

The amount of discretion left to officials should be a fundamental consideration in assessing the permissibility of warrantless and suspicionless intrusions, as it was at one time. In such circumstances, because neither a warrant nor individualized suspicion is present to provide objective criteria to measure the reasonableness of the intrusion, a plan "embodying explicit, neutral limitations" on discretion must be employed. Legislatively or

consulting the lessons of history, designed our Constitution to place obstacles in the way of a too permeating police surveillance, which they seemed to think was a greater danger to a free people than the escape of some criminals from punishment."; cf. Minney v. Arizona, 437 U.S. 385, 395 (1978) (rejecting argument that murder scenes should be exempt from warrant requirement). But see Mich. Dep't of State Police v. Sitz, 496 U.S. 444, 451 (1990) (aggregating individual cases causing death, injuries, and property damage from drunk driving to justify DWI checkpoints).

See Donovan v. Dewey, 452 U.S. 594, 603–04 (1981) (upholding warrantless searches of mines where discretion of inspectors was sufficiently limited); Delaware v. Prouse, 440 U.S. 648, 661 (1979) (noting "that the discretion of the official in the field [must] be circumscribed, at least to some extent"); Marshall v. Barlow's, Inc., 436 U.S. 307, 320–21 (1978) (dispensing with probable cause requirement for issuance of warrant for administrative searches if reasonable administrative or legislative standards are present). However, the Court has allowed officials in the field an increasing amount of discretion. See, e.g., United States v. Martinez-Fuerte, 428 U.S. 543, 560 (1976) (permitting immigration authorities unlimited discretion to refer any motorist stopped at primary checkpoint to secondary checkpoint for further questioning). Because the Court has focused on the officials "in the field" as those whose discretion needs to be restrained, decisions made by higher officials or more systematic searches or seizures are more likely to be upheld. This view distorts the perceived evil that the Fourth Amendment was designed to combat. Standardless discretion is a by-product of not having individualized suspicion or other objective criteria to determine when a search or seizure could be initiated or limited in scope. The Court's view often clouds this by making limits on discretion the "good" that is to be achieved. However, for the framers, the "good"—the core value—was individualized suspicion, which limited arbitrariness at all levels of government, not just at the lowest level of those executing the search or seizure. To the extent that the Court's opinions rely on the procedures utilized as part of the justification permitting suspicionless intrusions, that analysis is misplaced. See, e.g., Nat'l Treasury Employees Union v. Von Raab, 489 U.S. 656, 672 n.2 (1989) (finding testing procedures significantly minimized intrusiveness by testing only employees tentatively accepted for promotion, by allowing employees to provide urine specimens in stall, and by restricting urinalysis to detection of specified drugs); Skinner, 489 U.S. at 624–25 (discussing how procedures used in obtaining drug and alcohol samples limited intrusion); Martinez-Fuerte, 428 U.S. at 562 (opining that procedures followed at checkpoint stops minimized intrusion on interests of motorists). The procedures are employed to ensure that discretion is limited and the scope of the intrusion is no greater than needed to effectuate the government interest. This occurs after it is decided that a warrantless or suspicionless intrusion is necessary. Thus, in examining the procedures employed, the proper question is whether discretion has been limited to effectuate the governmental interest and to prevent unnecessary intrusion upon individual interests.

Brown v. Texas, 443 U.S. 47, 51 (1979); see also Edmond, 531 U.S. at 49–53 (Rehnquist, C.J., dissenting) (asserting that roadblock seizures are valid if carried out pursuant to neutral plan containing explicit limitations on conduct of executing officers); Barlow's, Inc., 436 U.S. at 321 (discussing neutral criteria for business inspections performed without individualized suspicion). 
administratively mandated standards would establish rules for initiating an intrusion and provide limitations on its scope. For example, a suspicionless regulatory inspection program "must advise the owner of the commercial premises that the search is being made pursuant to the law, and [have] a properly defined scope, and it must limit the discretion of the inspecting officers." Those functions adequately serve as a substitute for a warrant and individualized suspicion because government agents can only look for legislatively or administratively determined objects or conditions. Thus, in Camara v. Municipal Court, the Court permitted suspicionless housing inspections carried out pursuant to legislatively or administratively determined standards that permitted inspectors to examine predetermined objects. In contrast, an inability to formulate and utilize objective standards demonstrates that the preferred models remain necessary.

D. A Residual Role for Case-By-Case Analysis?

Do the three categories of reasonableness just described properly measure reasonableness? Should there be a residual measure that allows for case-by-case analysis? I accept such a category of permissible intrusions with great reluctance. The case-by-case method represents a significant danger to individual rights due to the Court's propensity to use it to expand the types and intrusiveness of invasions. Such unconfined analysis is also inconsistent with a main premise of this Article—that there is a need for objective criteria to measure reasonableness.

Cf. Sklansky, supra note 345, at 1275–79 (observing that Supreme Court has done little to encourage rule making in Fourth Amendment context).

383 New York v. Burger, 482 U.S. 691, 703 (1987) (citation omitted). The Court stated that "the statute must be sufficiently comprehensive and defined that the owner of commercial property cannot help but be aware that his property will be subject to periodic inspections undertaken for specific purposes." Id. at 703 (internal quotation marks and citation omitted). In limiting the discretion of the officers, the statute "must be carefully limited in time, place, and scope." Id. (internal quotation marks and citation omitted). The Court's application of these principles to the facts of Burger is, however, an example of the misuse of such neutral criteria. In that case, the majority upheld the constitutionality of a statute that permitted suspicionless inspections of automobile junkyards that had the "barest of administrative schemes." Id. at 718 (Brennan, J., dissenting). It merely required a vehicle dismantler to "register and pay a fee, display the registration in various circumstances, maintain a police book, and allow inspections." Id. at 720 (Brennan, J., dissenting). The statute did not create a predictable and guided governmental presence because it did "not inform the operator of a vehicle-dismantling business that inspections [would] be made on a regular basis; in fact, there [was] no assurance that any inspections at all [would] occur." Id. at 722 (Brennan, J., dissenting). Nor did the statute provide an "upper [or] a lower limit on the number of searches that [were] conducted at any given operator's establishment in any given time period." Id. (Brennan, J., dissenting). Moreover, "[n]either the statute, ... nor any regulatory body, provide[d] limits or guidance on the selection of vehicle dismantlers for inspection." Id. at 723 (Brennan, J., dissenting).


385 See, e.g., Prouse, 440 U.S. at 662 (finding no standards to support random stops of vehicles to check drivers' licenses and registrations).
This fourth category was removed from earlier drafts of this Article. Yet, a recent case from the Supreme Court convinced me that I should reconsider that deletion. In that case, United States v. Banks, the police possessed a validly issued warrant to search an apartment for cocaine. The question presented was how long the police must wait before making a forcible entry into an apartment after they had knocked on the door and announced their presence. The Court asserted that there was no "template" for reasonableness in such cases and that the "notion of [a] reasonable execution" of a warrant had to be "fleshed out" on a case-by-case basis. It rejected the lower court's attempt to create categories of situations regulating the ability of the police to enter the premises because such a scheme "threatens to distort the 'totality of the circumstances' principle by replacing a stress on revealing facts with resort to pigeonholes." The Court then purportedly did a factual analysis of the case and concluded that a fifteen- to twenty-second wait was reasonable.

It would seem that the Court was on to something here: if reasonableness is so broad in application, rigid tests may distort its true meaning. How could the three measures of reasonableness set forth above have any application to such a situation? The Court, however, did not apply a standardless case-by-case analysis. Instead, it analyzed the facts and concluded that the police had reasonable suspicion that, if they delayed entry, the cocaine would be destroyed. The Court failed to acknowledge that it was applying the individualized suspicion standard because it has always viewed that standard as applying only to individualized suspicion of criminal activity. This view, as I have argued, fails to appreciate the proper role that individualized suspicion should play. In my view, Banks illustrates that the structure proposed in this Article is viable: it should not be an unprincipled analysis that guides the result in Banks; rather, it should be a measured determination that individualized suspicion of possible destruction of evidence made the entry reasonable. Thus, properly understood, the individualized suspicion standard does provide an answer in Banks, which illustrates its broad applicability.

Still, there may remain situations where none of the other three models adequately address the question whether an intrusion is reasonable. In such unusual circumstances, the Court should first demonstrate the inapplicability of

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387 Id. at 523.
388 The knock and announce standard is a good example of the third model of measuring reasonableness: the preferred models were inapplicable and the Court developed neutral, fixed criteria to guide the police in executing warrants, that is, they must knock and announce their presence prior to entering a residence. See Richards v. Wisconsin, 520 U.S. 385, 391 (1997); Wilson v. Arkansas, 514 U.S. 927, 934 (1995).
389 Banks, 124 S. Ct. at 525.
390 Id. at 528.
391 Id. at 526–27.
392 Cf. Ker v. California, 374 U.S. 23, 33 (1963) ("[S]tandards of reasonableness under the Fourth Amendment are not susceptible of Procrustean application . . . .").
393 Banks, 124 S. Ct. at 529.
the two preferred models and the neutral criteria model. In performing a factual analysis of such cases, the Court should seek to implement the framers' values of protecting individuals from unreasonable governmental intrusion in fashioning an objective rule for contemporary society.

V. CONCLUSION

It is easier to criticize than to construct. A critic can focus on an individual case and make broad assertions about how horrible the state of Fourth Amendment jurisprudence has become. To create a workable framework, one must look at the countless instances where the Fourth Amendment has application and ask how reasonableness can have any coherent meaning across that range of intrusions. The methods by which the courts address this challenge will largely determine how much liberty we have and how much the government can intrude.

Courts and commentators could throw up their arms at such a task and decline to look beyond the specifics of each case. But such case-by-case analysis is inimical to individual freedom and fails to develop coherent standards to guide government agents. It must be rejected in all but the most unusual situation. Thus, the task remains. None of the other models that the Court has articulated can have across-the-board application. There is no one-size-fits-all solution. That does not mean that there is no workable framework. It just means that the framework is more complicated.

A reasonableness inquiry is not an unprincipled balancing of competing interests. Rather, it is a weighted inquiry: one starts with a conception of what reasonableness is. It is a search or seizure based on objective criteria. But how does one find such criteria? History demonstrates what the framers valued: limitations on the initiation of—and the scope of—searches and seizures based on individualized suspicion that the object of the intrusion has characteristics that justify the intrusion. Moreover, the course of Fourth Amendment jurisprudence has demonstrated the need to retain such objective standards; the Court's other methods have failed to provide meaningful guidance and to protect individuals from ever expanding governmental intrusions. Thus, individualized intrusion should be the primary model for defining reasonableness.

Warrants were to some extent valued by the framers—if they complied with the requirements of the common law search warrant—but they were also feared when they authorized blanket, suspicionless intrusions. The course of history and Supreme Court interpretation of the Amendment establishes that warrants were necessary for home searches—and by extension other buildings—and for bodily intrusions as those intrusions developed. From Lord Camden to the present, there also have been special limitations on speech-related searches and seizures. The warrant model proposed here retains those lessons.
Neutral criteria searches and seizures can only be justified by a strong showing that a departure from the preferred models is necessary to effectuate a compelling or significant governmental interest. This third model of reasonableness is a concession to the modern regulatory state and the broad applicability of the Amendment. Yet, it seeks to approximate the values of the framers by requiring objective criteria to initiate searches and seizures and limit their scope.

Reasonableness is not a mathematical formula and, perhaps, there are some instances where no ready test exists. In the end, however, the Court's judgment should be informed by the fundamental purpose of the Amendment: protecting individual security from unreasonable governmental intrusion.