WYOMING V. HOUGHTON: WITH SCALIA IN THE DRIVER'S SEAT, IS THE SUPREME COURT ON THE ROAD TO A "PUBLIC PLACE" EXCEPTION?

The Fourth Amendment to the United States Constitution[1] has both the prudence of brevity and the vice of uncertainty in pronouncing the fundamental rights of citizens to be free from unreasonable searches and seizures.[2] To honor the guarantees of the Fourth Amendment, courts must resolve the ambiguities that stem from the divided nature of the provision.[3] The amendment consists of two distinct clauses.[4] The Reasonableness Clause prohibits unreasonable searches and seizures, while the Warrant Clause establishes requirements for the issuance of search warrants.[5] Understanding the relationship between the clauses is essential in determining the overall application of the amendment.[6] The United

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[1] *See* U.S. CONST. amend. IV. The Fourth Amendment to the United States Constitution states:

> 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.

Id.

[2] *See* JACOB W. LANDYNSKI, SEARCH AND SEIZURE AND THE SUPREME COURT: A STUDY IN CONSTITUTIONAL INTERPRETATION 42 (1966) (noting that the purpose of the Fourth Amendment is to safeguard the public's liberty interests from unreasonable governmental intrusion).

[3] *See* JOSHUA DRESSLER, UNDERSTANDING CRIMINAL PROCEDURE § 11.01, at 161 (2d ed. 1997).

[4] *See* Keith Shotzberger, *Overview of the Fourth Amendment*, 85 GEO. L.J. 821, 821 (1997) (noting that "[t]he Amendment contains two separate clauses: a prohibition against unreasonable searches and seizures, and a requirement that probable cause support each warrant").

[5] *See id*; *see also* ARNOLD H. LOEWY & ARTHUR B. LAFRANCE, CRIMINAL PROCEDURE: ARREST AND INVESTIGATION 1 (1996) ("The Fourth Amendment offers two major protections — one substantive, and the other procedural. The primary substantive protection is probable cause. The primary procedural protection is the requirement that a warrant be issued by an independent magistrate prior to the search or seizure.")

[6] *See* LANDYNSKI, *supra* note 2, at 42. Two schools of thought have emerged concerning the relationship between the Reasonableness Clause and the Warrant Clause. *See* DRESSLER, *supra* note 3, § 11.01, at 159-60; *see also* Akhil Reed Amar, *Fourth*

States Supreme Court has labored over the role that the framers intended the search warrant to play in Fourth Amendment jurisprudence.[7] Particularly in the context of automobile searches, the recent trend has been to abandon a rigid warrant requirement in favor of a more fluid reasonableness standard.[8]

The Supreme Court repeatedly has affirmed the principle that warrantless searches are per se unreasonable and subject only to established exceptions.[9] One such exception, commonly known as the automobile exception,[10] arises when the police have probable

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Amendment First Principles, 107 HARV. L. REV. 757, 762 (1994) (explaining the two variants of the Fourth Amendment's warrant requirement). One view holds that the clauses are vitally linked because Fourth Amendment reasonableness turns upon the presence of a warrant for every search and seizure when obtaining a warrant is practical. *See* DRESSLER, *supra* note 3, § 11.01, at 160; *see also* Nadine Strossen, *The Fourth Amendment in the Balance: Accurately Setting the Scales Through the Least Intrusive Alternative Analysis*, 63 N.Y.U. L. REV. 1173, 1174 (1988) (stating that the Court's application of a mere reasonableness test or balancing test has eroded Fourth Amendment rights).

The competing view holds that the clauses are distinct and independent, and that the Warrant Clause states when warrants *may* issue, and not when they *must*. *See* DRESSLER, *supra* note 3, § 11.01, at 160 (emphasis added); *see also* Lewis R. Katz, *The Automobile Exception Transformed: The Rise of a Public Place Exemption to the Warrant Requirement*, 36 CASE W. RES. L. REV. 375, 378 (1986) (stating that the language of the Fourth Amendment does not explicitly require a warrant for every search and seizure). Justice Scalia has taken a similar position, declaring that "[t]he Fourth Amendment does not by its terms require a prior warrant for searches and seizures; it merely prohibits searches and seizures that are 'unreasonable.'" California v. Acevedo, 500 U.S. 565, 581 (1991) (Scalia, J., concurring). For a discussion of *Acevedo*, see *infra* notes 80-89 and accompanying text.

[7] *See Acevedo*, 500 U.S. at 582 (Scalia, J., concurring). Justice Scalia observed that Fourth Amendment law has "lurched back and forth between imposing a categorical warrant requirement and looking to reasonableness alone." *Id.*

[8] *See* DRESSLER, *supra* note 3, § 11.01, at 165.

[9] *See* Mincey v. Arizona, 437 U.S. 385, 390 (1978) (citing Katz v. United States, 389 U.S. 347, 357 (1967)). The *Katz* Court recognized that warrantless criminal searches are per se unreasonable unless the search falls under one of the recognized exceptions to the warrant requirement. *See Katz*, 389 U.S. at 357.

[10] *See generally* Carroll v. United States, 267 U.S. 132 (1925) (establishing the automobile exception to the Fourth Amendment's warrant requirement). For a discussion of *Carroll*, see *infra* notes 47-52 and accompanying text. Commentators have taken a variety of positions regarding the warrant requirement as it applies to automobile searches. *See, e.g.*, Robert Angell, Note, California v. Acevedo *and the Shrinking Fourth Amendment*, 21 CAP. U. L. REV. 707, 733-34 (1992) (stating that the Supreme Court's expansion of the automobile exception has resulted in the erosion of Fourth Amendment protections); Norma J. Briscoe, Comment, *The Right to Be Free from Unreasonable Searches and the Warrantless Searches of Closed Containers in Automobiles*, 36 HOW. L.J. 215, 216 (1993) (arguing that the application of the automobile exception to containers found during the course of an automobile exception search is, as a matter of law, unreasonable); Mary Brandt Jensen, Note, *The Scope of Warrantless Searches Under the Automobile Exception:* United States v. Ross, 43 LA. L. REV. 1561, 1570-71 (1983) (asserting that the Court must provide an adequate substitute

cause to believe that contraband is concealed within an automobile or similarly mobile vehicle.[11] The justification for the automobile exception rests on two primary factors.[12] First, the inherent mobility of an automobile creates such exigency that rigid enforcement of the warrant requirement is not practical.[13] Second, an individual's expectation of privacy is significantly diminished in a motor vehicle due to the pervasive degree of governmental regulation and the vehicle's visibility to all members of the public.[14]

Since its inception in 1925, the automobile exception to the Fourth Amendment's warrant requirement has undergone significant refinement and expansion.[15] As this exception continues to broaden, at least one commentator asserts that it does so at the expense of individual privacy.[16] Moreover, Justice Scalia maintains that the

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for a neutral and detached magistrate's probable cause determination); Peter C. Prynkiewicz, Note, California v. Acevedo: *The Court Establishes One Rule to Govern All Automobile Searches and Opens the Door to Another "Frontal Assault" on the Warrant Requirement*, 67 NOTRE DAME L. REV. 1269, 1286 (1992) (stating that the Supreme Court may have extended the automobile exception too far).

For an analysis of additional exceptions to the warrant requirement, see O'Connor v. Ortega, 480 U.S. 709, 725-26 (1987) (permitting searches of governmental employee offices); California v. Carney, 471 U.S. 386, 393 (1985) (evaluating mobile home searches); United States v. Ramsey, 431 U.S. 606, 619-20 (1977) (analyzing border searches); South Dakota v. Opperman, 428 U.S. 364, 375-76 (1976) (permitting inventory searches); Schneckloth v. Bustamonte, 412 U.S. 218, 248 (1973) (authorizing consent searches); Coolidge v. New Hampshire, 403 U.S. 443, 465 (1971) (recognizing the "plain view" exception); Chimel v. California, 395 U.S. 752, 762-63 (1969) (establishing the "search incident to arrest" exception); Terry v. Ohio, 392 U.S. 1, 30-31 (1968) (creating the "stop and frisk" exception). One commentator has catalogued approximately 20 exceptions to the Fourth Amendment's warrant requirement. *See* Craig M. Bradley, *Two Models of the Fourth Amendment*, 83 MICH. L. REV. 1468, 1473-74 (1985).

[11] *See, e.g., Carroll*, 267 U.S. at 161. In *Carroll*, the Supreme Court established the automobile exception to the Fourth Amendment's warrant requirement. *See id.* at 162.

[12] *See Opperman*, 428 U.S. at 367.

[13] *See id.* (stating that the ready mobility of a vehicle could place it out of the jurisdiction before the police could obtain a warrant).

[14] *See Carney*, 471 U.S. at 392-93 (stating that an individual has a diminished expectation of privacy in a motor home based on its mobility and public nature). The Court has also justified a vehicle inventory search on the basis that an individual has a reduced expectation of privacy in an automobile. *See Opperman*, 428 U.S. at 368.

[15] *See* Robert H. Whorf, *"Coercive Ambiguity" in the Routine Traffic Stop Turned Consent Search*, 30 SUFFOLK U. L. REV. 379, 382 (1997).

[16] *See* Craig M. Bradley, *The Uncertainty Principle in the Supreme Court*, 1986 DUKE L.J. 1, 16 (explaining that the automobile exception has been expanded "because the Court believed clear rules were necessary . . . , even at the expense of the 'reasonable expectation of privacy' that had previously been the (troublesomely flexible) basis of [F]ourth [A]mendment protections").

Fourth Amendment's warrant requirement has become so encumbered with exceptions that it is basically unrecognizable.[17] Absent the safeguards of the traditional warrant requirement, however, it is unclear how much governmental intrusion a mere reasonableness standard will permit.[18]

Recently, in *Wyoming v. Houghton*,[19] the United States Supreme Court expanded the scope of the automobile exception concerning warrantless searches of passengers' containers that are found within an automobile.[20] Justice Scalia announced that when a police officer has probable cause to believe that contraband is concealed within an automobile, the officer may conduct a warrantless search of a passenger's personal effects found inside the vehicle if those personal effects are large enough to conceal the object of the search.[21]

On July 23, 1995, the Wyoming Highway Patrol conducted a routine traffic stop of a driver for speeding and for driving with a defective brake light.[22] While questioning David Young, the vehicle's driver, an officer observed a hypodermic syringe protruding from Young's shirt pocket.[23] The officer ordered Young out of the vehicle and instructed him to place the syringe on the vehicle's hood.[24] In response to police questioning, Young admitted that he used the syringe to inject narcotics.[25]

Two female passengers were in the car as well, one of whom was the respondent, Sandra Houghton.[26] Upon Young's admission regarding his illicit use of the syringe, the police ordered the remaining passengers out of the vehicle and conducted a search for contraband in the vehicle's passenger compartment.[27] During the

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[17] *See* California v. Acevedo, 500 U.S. 565, 582 (1991) (Scalia, J., concurring).

[18] *See* Prynkiewicz, *supra* note 10, at 1269. Prynkiewicz explains that in *Acevedo*, the Court "may have laid the logical groundwork for the eventual elimination of the warrant requirement for searches conducted outside the home." *Id.*

[19] 119 S. Ct. 1297 (1999).

[20] *See id.* at 1304.

[21] *See id.*

[22] *See id.* at 1299.

[23] *See id.*

[24] *See id.*

[25] *See Houghton*, 119 S. Ct. at 1299.

[26] *See id.* All three occupants of the vehicle were seated in the front seat of the car at the time of the traffic stop. *See id.*

[27] *See id.* The police established probable cause to search the automobile for contraband when Young admitted to the police that he used the syringe in his shirt pocket to inject drugs. *See id.* Probable cause often may be established when the police "utilize interrogation as a means to obtain more information about suspicious persons and circumstances, and the suspect's response will sometimes elevate the prior suspicions up to probable cause." WAYNE R. LAFAVE & JEROLD H. ISRAEL,

ensuing search, the police discovered a purse on the back seat of the vehicle.[28] Houghton immediately admitted ownership of the purse.[29] Acting without a warrant, the police searched Houghton's purse and found a syringe containing methamphetamine and other drug paraphernalia.[30] Based on the evidence uncovered during the warrantless search, the police placed Houghton under arrest.[31]

Pursuant to a Wyoming statute,[32] the State charged Houghton with felony possession of a controlled substance.[33] Houghton moved to suppress all of the evidence found in her purse, claiming that the search violated her rights under the Fourth and Fourteenth Amendments.[34] The trial court denied Houghton's motion to suppress, ruling that when the police have probable cause to search an automobile for contraband, they may also search any container capable of holding such contraband.[35] Subsequently, the jury

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CRIMINAL PROCEDURE § 3.3(f), at 152 (2d ed. 1992).

[28] *See Houghton*, 119 S. Ct. at 1299. Before discovering Houghton's license in her purse, the police asked Houghton for identification. *See id.* Initially, Houghton told the police that she did not have identification, but claimed that her name was "Sandra James." *See id.* Upon a subsequent search of the defendant's purse, the police properly identified her as Sandra K. Houghton. *See id.* In response to police questioning, Houghton told the police that she provided the false name "[i]n case things went bad." *Id.*

[29] *See id.*

[30] *See id.* The drug paraphernalia and the syringe, found in a brown pouch inside of Houghton's purse, contained 60 ccs of methamphetamine. *See id.* Houghton, however, claimed the brown pouch did not belong to her. *See id.* Furthermore, Houghton avowed that she had no knowledge of how the brown pouch came to be in her purse. *See id.* In addition, the police also observed fresh needle-track marks on Houghton's arms. *See id.*

[31] *See id.*

[32] *See* WYO. STAT. ANN. § 35-7-1031(c) (Michie 1996). The statute specifically provides:

> It is unlawful for any person knowingly or intentionally to possess a controlled substance unless the substance was obtained directly from, or pursuant to a valid prescription or order of a practitioner while acting in the course of his professional practice, or except as otherwise authorized by this act. Any person who violates this subsection . . . [a]nd has in his possession any other controlled substance classified in Schedule I, II or III in an amount greater than set forth in paragraph (c)(i) of this section, is guilty of a felony punishable by imprisonment for not more than five (5) years, a fine of not more than ten thousand dollars ($10,000.00), or both.

Id.

[33] *See Houghton*, 119 S. Ct. at 1299-1300.

[34] *See id.* at 1300. Through the Fourteenth Amendment, the Fourth Amendment is binding on the states. *See* LAURENCE H. TRIBE, AMERICAN CONSTITUTIONAL LAW § 10-7, at 663 (2d ed. 1988).

[35] *See Houghton*, 119 S. Ct. at 1300.

convicted Houghton.[36]

Applying the "notice test,"[37] the Wyoming Supreme Court reversed Houghton's conviction.[38] The Wyoming Supreme Court held that when there is probable cause to search a vehicle, the police may search containers found within the automobile that are capable of concealing the object of the search.[39] The Wyoming Supreme Court qualified its conclusion, however, by holding that, when the police know or should know that a container belongs to a passenger not suspected of criminal wrongdoing, the container is not within the permissible scope of the search unless someone had the occasion to conceal the object of the search within the container.[40] The Wyoming Supreme Court reasoned that, because police knew that the purse did not belong to the driver and because there was no reason to suspect that contraband had been concealed therein, the search of Houghton's purse was unreasonable and violated the Fourth Amendment.[41]

The United States Supreme Court granted certiorari[42] to consider whether police may search a passenger's personal effects found inside an automobile when there is probable cause to believe that the automobile contains contraband.[43] The Supreme Court, in an opinion by Justice Scalia, held that when the police have probable cause to believe that contraband is present inside a vehicle, they may search a passenger's personal effects found inside that vehicle if those effects are large enough to conceal the object of the search.[44] In reaching its decision, the Court concluded that the search of Houghton's purse would have been regarded as reasonable at the time the Fourth Amendment was framed.[45] In addition, the Court determined that the governmental interest at stake outweighed the intrusion on individual privacy given the diminished expectation of

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[36] *See id.*

[37] *See* Houghton v. Wyoming, 956 P.2d 363, 369 (Wyo. 1998). The Wyoming Supreme Court explained that under a notice test the police "may assume that all containers on the premises may be searched unless they know or should know that the containers belong to someone not contemplated in the warrant or amenable to search on the basis of probable cause." *Id.* at 370 (citing State v. Thomas, 818 S.W.2d 350, 359 (Tenn. Crim. App. 1991)).

[38] *See id.* at 372.

[39] *See id.*

[40] *See id.*

[41] *See id.*

[42] *See* Wyoming v. Houghton, 119 S. Ct. 31 (1998).

[43] *See* Wyoming v. Houghton, 119 S. Ct. 1297, 1299 (1999).

[44] *See id.* at 1304.

[45] *See id.* at 1300.

privacy in a vehicle.[46]

The Supreme Court established the automobile exception to the Fourth Amendment's warrant requirement in *Carroll v. United States*.[47] In *Carroll*, federal prohibition agents had probable cause to believe that an automobile was transporting liquor in violation of the National Prohibition Act.[48] The agents stopped the car and, during the course of an immediate warrantless search, discovered large quantities of liquor hidden under the upholstery of the seats.[49] The defendants were convicted of transporting intoxicating liquor and, on appeal, contended that the warrantless search of the automobile violated their Fourth Amendment rights.[50] The Supreme Court held that when police have probable cause to believe that an automobile contains contraband, an immediate warrantless search of that vehicle is reasonable under the Fourth Amendment because of the exigency that the vehicle's mobility creates.[51] In light of legislation that authorized warrantless searches of ships at the time the Fourth Amendment was framed, the Court concluded that the warrantless search of an automobile is reasonable under the Fourth Amendment.[52]

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[46] *See id.* at 1302.

[47] 267 U.S. 132 (1925).

[48] *See id.* at 160-61. Probable cause to search the car arose in *Carroll* when government agents recognized occupants of a vehicle, who were known to be bootleggers, traveling along a route that the agents knew the bootleggers commonly used to retrieve contraband liquor. *See id.* Finding that the government agents had probable cause to search the vehicle, Justice Taft explained that "'[i]f the facts and circumstances before the officer are such as to warrant a man of prudence and caution in believing that the offense has been committed, [probable cause] is sufficient.'" *Id.* at 161 (citations omitted).

[49] *See id.* at 160-61.

[50] *See id.* at 143.

[51] *See id.* at 146. The Supreme Court upheld the search because the exigency created by the car's mobility made obtaining a warrant impractical. *See id.* The Court explained that "[i]t is impossible to get a warrant to stop an automobile. Before a warrant could be secured the automobile would be beyond the reach of the officer with its load of illegal liquor disposed of." *Id.*

"'Exigent circumstances' in relation to justification for warrantless arrest or search refers generally to those situations in which law enforcement agents will be unable or unlikely to effectuate an arrest, search or seizure for which probable cause exists unless they act swiftly and without seeking prior judicial authorization." BLACK'S LAW DICTIONARY 398 (6th ed. 1991).

[52] *See Carroll*, 267 U.S. at 151 (discussing early legislation authorizing warrantless searches of moveable vessels). The *Carroll* Court reasoned that "[t]he Fourth Amendment is to be construed in the light of what was deemed an unreasonable search and seizure when it was adopted, and in a manner which will conserve public interests as well as the interests and rights of individual citizens." *Id.* at 149. Recognizing the important distinction between structures and mobile vehicles, the

Fifty-two years later, in *United States v. Chadwick*,[53] the Supreme Court revisited the automobile exception to determine whether a container found inside an automobile may be searched without a warrant.[54] In *Chadwick*, federal narcotics agents had probable cause to believe that a footlocker, which defendants had placed in the trunk of an automobile, contained marijuana.[55] While the trunk of the car was open and before the engine was started, the agents arrested the defendants, seized the automobile with the footlocker still inside the trunk, and transported the vehicle to a federal building.[56] Ninety minutes later, the agents conducted a warrantless search of the 200-pound footlocker and discovered a large quantity of marijuana hidden inside.[57] The *Chadwick* Court held that the warrantless search of the footlocker violated the Fourth Amendment because an individual expects more privacy in his luggage and personal effects than he does in his automobile.[58] The Court additionally recognized that while the seizure of the footlocker was constitutionally permissible, the ensuing search was unconstitutional because it took place more than ninety minutes later, when the police had no reason to fear that the evidence would be destroyed.[59]

Carroll Court stated:

> [C]ontemporaneously with the adoption of the Fourth Amendment we find in the First Congress, and in the following Second and Fourth Congresses, a difference made as to the necessity for a search warrant between goods subject to forfeiture, when concealed in a dwelling house or similar place, and like goods in course of transportation and concealed in a moveable vessel where they readily could be put out of reach of a search warrant.

Id. at 151.

[53] 433 U.S. 1 (1977).

[54] *See id.* at 3.

[55] *See id.* at 3-5. In *Chadwick*, railroad officials in San Diego noticed the defendants loading an unusually heavy footlocker onto a train bound for Boston. *See id.* at 3. Officials became suspicious when they observed that the footlocker was leaking talcum powder, a substance used to conceal the odor of marijuana. *See id.* In addition, one of the defendants matched a profile used to identify drug traffickers. *See id.* Railroad officials reported their observations to federal agents in San Diego, who in turn relayed the information to federal agents in Boston, who were present with a police dog when the train arrived in Boston. *See id.* Probable cause arose when the police dog that was trained to detect marijuana signaled the presence of a controlled substance inside the footlocker. *See id.* at 3-4. The dog's action confirmed the officer's suspicions that the footlocker contained marijuana. *See id.* at 5.

[56] *See id.* at 4.

[57] *See id.* at 4-5.

[58] *See id.* at 13.

[59] *See Chadwick*, 433 U.S. at 15. The *Chadwick* Court reasoned that, because the police had the footlocker under their exclusive control, there was no danger that evidence could be destroyed before the police could obtain a warrant. *See id.*

To resolve the confusion surrounding the application of *Chadwick* to warrantless searches of luggage found in automobiles, the Supreme Court, in *Arkansas v. Sanders*,[60] considered whether the police, in the absence of exigent circumstances, must secure a warrant before searching luggage found in an automobile that is properly stopped and searched for contraband.[61] In *Sanders*, the police had probable cause to believe that a suitcase placed in the trunk of a taxi contained marijuana.[62] The Court held that, in the absence of exigent circumstances, a warrant must support a search of luggage found inside a vehicle, even if discovered during the course of an otherwise constitutional search.[63] The Court explained that the warrant requirement protects luggage found inside a vehicle just as it protects luggage found anywhere else.[64] Moreover, the Court declined to extend *Carroll* to luggage found within a vehicle because the dual rationales that justify the automobile exception, inherent mobility and a diminished expectation of privacy, are inapplicable to luggage.[65]

The Supreme Court again revisited the constitutionality of container searches two years later in *Robbins v. California*.[66] In *Robbins*, during the course of a traffic stop, police established probable cause to believe that the defendant's station wagon contained marijuana.[67]

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[60] 442 U.S. 753 (1979), *overruled by* California v. Acevedo, 500 U.S. 565 (1991).

[61] *See Sanders*, 442 U.S. at 754.

[62] *See id.* at 755. The police established probable cause in *Sanders* when they corroborated a tip provided by a reliable informant, who told them that the suspect would arrive on a certain flight at the local airport and that the suspect would be carrying a green suitcase containing marijuana. *See id.* Three months earlier, the same informant had provided police with information that led to the same defendant's arrest and conviction for possession of a controlled substance. *See id.*

[63] *See id.* at 766. The *Sanders* Court further asserted that "[t]he mere reasonableness of a search, assessed in light of the surrounding circumstances, is not a substitute for the judicial warrant requirement under the Fourth Amendment." *Id.* at 758. *Sanders* has been interpreted as one of the Court's last efforts to provide adequate protections for the privacy interest in containers transported in a vehicle. *See* Jensen, *supra* note 10, at 1570-71.

[64] *See Sanders*, 442 U.S. at 763-64.

[65] *See id.* at 763-65. The *Sanders* Court observed that, because the police can place luggage under their exclusive control, such a search should not be justified under a mobility theory. *See id.* Moreover, because luggage is a common repository of personal effects and thus is associated with an expectation of privacy, the *Sanders* Court concluded that such a search should not be justified under a diminished expectation of privacy theory. *See id.*

[66] 453 U.S. 420 (1981), *overruled by* United States v. Ross, 456 U.S. 798 (1982).

[67] *See Robbins*, 453 U.S. at 422. Probable cause arose in *Robbins* when, during the course of a traffic stop for erratic driving, police smelled marijuana smoke in the petitioner's car. *See id.*

During the ensuing search, an officer found two packages covered in green opaque plastic hidden in a recessed luggage compartment.[68] The police searched the packages and found fifteen-pound bricks of marijuana in each.[69] In a plurality opinion, Justice Stewart concluded that any closed opaque container found inside an automobile enjoys constitutional protection and may not be searched without a warrant.[70] The plurality reasoned that such a container is fully protected by the warrant requirement unless its contents are in plain view, because an individual manifests an expectation of privacy by placing items inside a container.[71] Moreover, the plurality declined to draw a distinction between types of containers, noting that there are no objective criteria to make such a distinction.[72]

The bright-line rule announced in *Robbins* was ephemeral, however, as the Court overruled itself a few months later in *United States v. Ross*.[73] In *Ross*, the police had probable cause to believe that the defendant was selling narcotics from the trunk of his car.[74] Having stopped the vehicle, an officer opened the trunk and discovered a closed paper bag.[75] Without a warrant, the officer searched the bag and found heroin.[76] The defendant was subsequently convicted of possession of heroin with intent to distribute.[77] Overruling the plurality decision set forth in *Robbins*, the Supreme Court held that when the police have probable cause to search an entire vehicle, they may conduct as thorough a search as a magistrate could legitimately authorize by warrant.[78] Moreover, the

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[68] *See id.*

[69] *See id.*

[70] *See id.* at 428-29.

[71] *See id.* at 427.

[72] *See id.* at 426. The plurality refused to draw a distinction on the basis of privacy interests in various types of packages, noting that "[w]hat one person may put into a suitcase, another may put into a paper bag." *Id.* (citing United States v. Ross, 655 F.2d 1159 (1981) (en banc)). Ironically, *Ross*, on which the *Robbins* plurality relied, was overruled by the Supreme Court.

[73] 456 U.S. 798 (1982).

[74] *See id.* at 800-01. In *Ross*, the police received an anonymous tip from a reliable informant, who told them that an individual was selling narcotics from the trunk of his car in a certain location in the District of Columbia. *See id.* Probable cause arose after the police corroborated the informant's tip by immediately driving to the location and matching the detailed descriptions given by the informant. *See id.* at 801.

[75] *See id.*

[76] *See id.*

[77] *See id.*

[78] *See id.* at 823. The Court noted that its decision in *Ross* was inconsistent with *Robbins*. *See id.* at 824. Consequently, the Court expressly rejected the precise

Court declared that when the police have probable cause to search a vehicle, a search of any part of that vehicle, including any compartment that may contain the object of the search, is justified.[79]

To reexamine the automobile exception and its application to searches of containers found inside of a vehicle, the Supreme Court, nine years later, decided *California v. Acevedo*.[80] The Court considered whether police must first obtain a warrant to search a container found inside of a vehicle when the police have probable cause specific to that container, but not extending to the entire vehicle.[81] In *Acevedo*, the police had probable cause to believe that a paper bag that the defendant had placed in the trunk of his car contained marijuana.[82] Fearing that evidence would be lost, the police stopped

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holding of *Robbins*, as well as the portion of *Sanders* on which the *Robbins* majority relied. *See id.*

[79] *See Ross*, 456 U.S. at 825. The Court distinguished the holdings of *Chadwick* and *Sanders* by recognizing that neither of those cases involved the automobile exception because police lacked probable cause to search the automobile "or anything within it except the footlocker in the former case and the green suitcase in the latter." *Id.* at 814. Moreover, the Court in *Ross* rejected *Chadwick's* distinction between cars and containers and held that "[a] warrant to search a vehicle would support a search of every part of the vehicle that might contain the object of the search." *Id.* at 821. At least one commentator has criticized the decision set forth in *Ross* and advocated a return to the Fourth Amendment warrant requirement. *See* R. Andrew Taggart, Jr., Note, *Criminal Procedure—Search and Seizure—Closed Containers Found Pursuant to Legitimate Automobile Search May Be Searched Without Benefit of a Warrant:* United States v. Ross, 57 TUL. L. REV. 1013, 1028-29 (1983). The author asserts that "the [F]ourth [A]mendment, in its protection against abusive searches and seizures, surely does not give way to prompt law enforcement solely in the interest of efficiency." *Id.*

[80] 500 U.S. 565 (1991).

[81] *See id.* at 573. The Court squared the issue by stating, "We must now decide . . . whether the Fourth Amendment requires the police to obtain a warrant to open [a container] in a moveable vehicle simply because they lack probable cause to search the entire car." *Id.*

[82] *See id.* at 580. In *Acevedo*, an investigator with the Santa Ana Police Department in California received a telephone call from an agent of the United States Drug Enforcement Agency (DEA) located in Hawaii. *See id.* at 566-67. The DEA agent told the Santa Ana police investigator that he had seized a package containing nine bags of marijuana that was addressed to J.R. Daza in Santa Ana and was to be delivered via Federal Express. *See id.* at 567. The DEA agent forwarded the package to the Santa Ana police investigator who, upon receiving the package, opened it and confirmed that it contained marijuana. *See id.* The police left the package at the Federal Express office in Santa Ana for pick up by Daza. *See id.* The next day, a man identifying himself as Daza picked up the package, brought it to his apartment, and carried it inside. *See id.* Shortly thereafter, the police observed Daza exit his apartment and discard in the trash the paper and the box that had concealed the marijuana. *See id.* Two hours later, Acevedo arrived and entered the apartment. *See id.* Acevedo exited only 10 minutes later carrying a paper bag that appeared to be full. *See id.* Probable cause arose when the police observed that the bag that Acevedo was carrying resembled one of the packages containing marijuana that had been

the defendant's vehicle, searched the trunk and the paper bag contained therein, and discovered marijuana.[83] The defendant pled guilty to the charge of possession of marijuana for sale, but reserved for appeal the issue of whether the trial court should have suppressed the evidence found inside the bag within the vehicle's trunk.[84] The Supreme Court held that a warrant is not required to conduct a search of a container found within a vehicle when that search is supported by probable cause to believe that the container holds contraband or evidence of a crime.[85] The Court's holding expressly overruled *Arkansas v. Sanders*.[86] The Court reasoned that the existing rule had provided only minimal protection for personal privacy and served as an unnecessary impediment to effective law enforcement.[87]

In a significant concurrence, Justice Scalia agreed with the majority, though not because the container in question is subject to the automobile exception; rather, Justice Scalia reasoned that the search of a container, outside of a privately-owned structure and supported by probable cause to believe the container conceals contraband, is not a search that would be unreasonable without a warrant.[88] Stressing the need for clarity and consistency in Fourth Amendment jurisprudence, Justice Scalia suggested that the Court should return to the traditional reasonableness requirement and demand a warrant only in those situations in which the common law so required.[89]

Against this background, the United States Supreme Court, in *Wyoming v. Houghton*,[90] concluded that when the police have probable

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delivered to the apartment by undercover officers earlier that day. *See id.*

[83] *See id.* at 567.

[84] *See id.* at 568.

[85] *See id.* at 580. The Court sought to eliminate what it described as the "curious line between the search of an automobile that coincidentally turns up a container and the search of a container that coincidentally turns up in an automobile." *Id.* The Court asserted that "[t]he protections of the Fourth Amendment must not turn on such coincidences." *Id. But see* Briscoe, *supra* note 10, at 225 (maintaining that the reduced expectation of privacy in an automobile should not extend to closed containers that are coincidentally present in a car).

[86] *See Acevedo*, 500 U.S. at 579. The *Acevedo* Court concluded that, in light of the anomalous results produced by *Sanders*, "it is better to adopt one clear-cut rule to govern automobile searches and eliminate the warrant requirement for closed containers set forth in *Sanders*." *Id.*

[87] *See id.* at 574. *Acevedo* has been interpreted as a "clear departure from prior decisions holding that a search of such a [closed] container is subject to the warrant requirement." Angell, *supra* note 10, at 733.

[88] *See Acevedo*, 500 U.S. at 584-85 (Scalia, J., concurring).

[89] *See id.* at 583 (Scalia, J., concurring).

[90] 119 S. Ct. 1297 (1999).

cause to search an automobile for contraband, they may also search any container found therein, irrespective of ownership, when that container is large enough to conceal the object of the search.[91]

Writing for the majority, Justice Scalia began the analysis by focusing on the Reasonableness Clause of the Fourth Amendment.[92] The Justice announced that, in considering whether governmental action violates the Fourth Amendment, the Court must employ a two-part test.[93] The Justice explained that the Court initially must inquire whether the governmental action would have been considered illegal under the common law at the time the Fourth Amendment was framed.[94] If that inquiry yields no answer, stated the Justice, then the Court must evaluate the action under the traditional standards of reasonableness by balancing the governmental interests against the intrusion upon individual privacy.[95]

After noting that the police had probable cause to believe that the automobile contained drugs, the Court evaluated the historical treatment of warrantless searches of vehicles that occurred when probable cause existed.[96] Drawing on *Carroll*, Justice Scalia highlighted the Court's conclusion that the framers of the Fourth Amendment would have regarded as reasonable a warrantless search of a vehicle for contraband as long as the search was supported by probable cause.[97]

Justice Scalia discussed early legislation, created in an effort to enforce duties and tariffs on imported merchandise, that permitted warrantless searches of ships and vessels upon probable cause.[98] The Justice observed that because such merchandise was shipped in containers, Congress, having authorized a warrantless search for such merchandise, could not have conceivably intended customs officials

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[91] *See id.* at 1304.

[92] *See id.* at 1300. For a discussion of the Reasonableness Clause, see *supra* notes 5-6 and accompanying text.

[93] *See Houghton*, 119 S. Ct. at 1300.

[94] *See id.*

[95] *See id.* For a detailed discussion of the reasonableness balancing test, see DRESSLER, *supra* note 3, § 18, at 255-57 (tracing the development of the reasonableness balancing standard in relation to the Fourth Amendment).

[96] *See Houghton*, 119 S. Ct. at 1300. Justice Scalia explained that the *Carroll* Court considered early congressional legislation from 1789 through 1799, as well as the legislation from the Founding era that followed, authorizing customs agents to conduct warrantless searches upon any ship or vessel when there was probable cause to believe that the ships contained contraband. *See id.*

[97] *See id.*

[98] *See id.* (citing Carroll v. United States, 267 U.S. 132, 150-53 (1925)). For a discussion of *Carroll*, see *supra* notes 47–52 and accompanying text.

to secure a warrant for every container found during the search.[99]

Justice Scalia then emphasized the breadth of the rule in *Ross*, in which the Court held that when probable cause supports a lawful search of a vehicle, it also supports a search of every part of the vehicle that may contain the object of the search, including the vehicle's compartments.[100] The Justice observed that the *Ross* Court took a crucial step by holding that closed containers in vehicles may be searched without a warrant because of their presence inside the vehicle.[101] Moreover, Justice Scalia noted that later cases expanded *Ross* to apply to all containers found inside a vehicle without qualification as to ownership.[102]

As a result of this expansion, the Court recognized that there was no ownership issue regarding the searched container in *Ross*.[103] Justice Scalia explained that if *Ross* had intended to limit the rule to items belonging to the driver or to items other than those belonging to passengers, the Court would have expressed such a substantial limitation.[104] Further, and more importantly, the Justice emphasized that nothing in the historical evidence upon which the *Ross* Court relied excepted from authorized warrantless search containers belonging to passengers on suspect ships, carriages, or automobiles.[105]

Next, the Court turned to the analytical principle underlying *Ross* that the permissible scope of a warrantless search is determined by the object of the search as well as the place where the police have probable cause to believe that an item may be found.[106] Justice Scalia emphasized that the reasonableness of a search does not require that the owner of the property is suspected of a crime, but rather, only that reasonable cause is present to believe that the object of the search is located on the premises to which entry is sought.[107]

Finally, the Court concluded its first inquiry by noting that the historical evidence upon which the *Ross* Court relied failed to draw a

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[99] *See Houghton*, 119 S. Ct. at 1301 (citing *Ross*, 456 U.S. at 820 n.26).

[100] *See id.* (citing *Ross*, 456 U.S. at 825).

[101] *See id.*

[102] *See id.* (citing California v. Acevedo, 500 U.S. 565, 572 (1991); United States v. Johns, 469 U.S. 478, 479-80 (1985)).

[103] *See id.*

[104] *See id.*

[105] *See Houghton*, 119 S. Ct. at 1301.

[106] *See id.* (citing *Ross*, 456 U.S. at 824).

[107] *See id.* (citing Zurcher v. Stanford Daily, 436 U.S. 547, 556 (1978)). In *Zurcher*, police obtained a warrant to search the files of a student newspaper for photographs relating to the identity of persons who attacked police officers during a demonstration. *See Zurcher*, 436 U.S. at 551.

distinction between containers on the basis of ownership.[108] Thus, the Court determined that when a search of an automobile is supported by probable cause, the police may search every container found therein without a showing of individualized suspicion for each container.[109] Echoing the critical step taken by the *Ross* Court, Justice Scalia concluded that the police may search not only the driver's belongings or containers found within the car, but also those of any passenger because of the presence of those items inside the vehicle.[110]

After concluding that the search at issue would have been regarded as reasonable at the time the Fourth Amendment was framed, Justice Scalia turned to the second inquiry to evaluate the search under the traditional standards of reasonableness.[111] At the outset, the Court opined that even if the historical evidence were equivocal, the balancing of individual privacy concerns with governmental interests weighs decidedly in favor of the government in this case.[112] The Justice advanced several reasons why both drivers and passengers have a reduced expectation of privacy in items that they transport in vehicles that travel public thoroughfares.[113] The Court first explained that automobiles usually are not used as repositories for personal effects.[114] Further, Justice Scalia observed that automobiles are subject to pervasive governmental controls.[115] The Justice additionally noted that if an automobile was involved in a traffic accident, its contents would be open to public view.[116]

Next, Justice Scalia distinguished the instant case from those cases upon which the Wyoming Supreme Court relied.[117] In so doing, the Justice emphasized that both *United States v. Di Re*[118] and *Ybarra v.*

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[108] *See Houghton*, 119 S. Ct. at 1301.

[109] *See id.*

[110] *See id.*

[111] *See id.* at 1302.

[112] *See id.*

[113] *See id.* (citing Cardwell v. Lewis, 417 U.S. 583, 590 (1974)). The *Cardwell* Court permitted a warrantless search, through which the police obtained paint scrapings from the exterior of a car, based on an individual's diminished expectation of privacy in his automobile. *See Cardwell*, 417 U.S. at 590.

[114] *See Houghton*, 119 S. Ct. at 1302 (quoting *Cardwell*, 417 U.S. at 590).

[115] *See id.*

[116] *See id.*

[117] *See id.*

[118] 332 U.S. 581 (1948). In *United States v. Di Re*, the Court reviewed the search of an automobile passenger that occurred during the arrest of the driver. *See id.* at 593-94. In considering the reasonableness of the search, the Court was 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." *Id.* at 587. Thus, the *Di Re* Court concluded that probable cause to search an automobile did not justify a body

Illinois[119] involved body searches.[120] The Justice stressed that *Di Re* and *Ybarra* implicated the heightened protection afforded against the search of a person.[121] Justice Scalia also observed that even a limited search of an individual's outer clothing is a severe intrusion upon personal privacy.[122] Thus, the Justice noted that the traumatic consequences associated with a body search should not be expected when the police search personal property.[123]

Having concluded that a passenger's privacy expectations are diminished considerably inside a vehicle, the Court illustrated why the governmental interests are substantial.[124] Justice Scalia initially noted that the mobility of a car creates a risk that evidence will be lost while a warrant is obtained.[125] The Justice explained that law enforcement would be appreciably impaired without the ability to conduct an immediate search of a passenger's belongings when there is reason to believe that evidence of a crime is hidden in the car.[126] Next, the Court maintained that a passenger and driver are often engaged in a common enterprise and, therefore, will share an

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search of a passenger. *See id.* at 593-94.

[119] 444 U.S. 85 (1979). In *Ybarra v. Illinois*, the Supreme Court reviewed the constitutionality of patting down a tavern patron during the execution of a search warrant for the tavern itself. *See id.* at 87-90. The Court was "asked to find that the first patdown search of Ybarra constituted a reasonable frisk for weapons under the doctrine of *Terry v. Ohio*." *Id.* at 92. The Court, however, refused to find that the patdown was reasonable, stating that "[t]he initial frisk of Ybarra was simply not supported by a reasonable belief that he was armed and presently dangerous, a belief which this Court has invariably held must form the predicate to a patdown of a person for weapons." *Id.* at 92-93. Thus, the Court concluded that the mere fact that Ybarra was present in a tavern that was subject to a search warrant did not, without more, provide the police officers with reasonable suspicion to believe that he was armed and dangerous. *See id.* at 91.

[120] *See Houghton*, 119 S. Ct. at 1302. The Justice noted that, due to "the degree of intrusiveness upon personal privacy and indeed even personal dignity," the cases relied upon by the Wyoming Supreme Court involving body searches differ substantially from searches of containers. *Id.*

[121] *See id.*

[122] *See id.* (citing Terry v. Ohio, 392 U.S. 1, 24-25 (1968)). In *Terry*, the Supreme Court announced that the police may conduct a limited seizure of an individual and a limited patdown of that individual when there is reasonable suspicion that the individual is armed and dangerous. *See Terry*, 392 U.S. at 30-31; *see also* Anthony C. Thompson, *Stopping the Usual Suspects: Race and the Fourth Amendment*, 74 N.Y.U. L. REV. 956, 962-63 (1999) (explaining that the reasonable suspicion standard utilized in *Terry* is based on "a quantum of suspicion that is less substantial than the 'probable cause' standard that the police must satisfy when conducting full-blown arrests and equivalent seizures of the person").

[123] *See Houghton*, 119 S. Ct. at 1302.

[124] *See id.*

[125] *See id.*

[126] *See id.*

interest in concealing the fruits of a crime.[127] Finally, the Court asserted that a criminal could hide contraband in a passenger's belongings, perhaps even surreptitiously and without the passenger's permission, as easily as in other containers within the vehicle.[128]

Justice Scalia then turned to the potential burdens that the Wyoming Supreme Court's rule would place on effective law enforcement.[129] The Court explained that imposing a rule that requires the police to have reason to suspect that a passenger and driver are involved in a common enterprise would dramatically reduce the ability of the police to find fruits of a crime. Likewise, the Justice explained that requiring the police to have reason to believe that the driver had a chance to conceal contraband in a passenger's belongings, either surreptitiously or with permission, would also impede effective law enforcement.[130] Further, the Court found that once a "passenger's property" exception became known to the public, passenger-confederates would undoubtedly lay claim to all contraband found during a search.[131] Moreover, the Justice warned that a flood of litigation could result from a "passenger's property" exception to automobile searches in the forms of increased motions to suppress in criminal proceedings and private civil lawsuits.[132] Thus,

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[127] *See id.*

[128] *See id.* at 1303. The Court reiterated Houghton's contention that most of the contraband must have been hidden in her purse by one of the other individuals in the car without her knowledge or permission. *See id.* The Court relied on precedent to support its assertion that a criminal could easily conceal contraband in another person's belongings. *See id.* (citing Rawlings v. Kentucky, 448 U.S. 98, 102 (1980)). In *Rawlings*, a defendant claimed ownership of drugs that were found in another individual's handbag. *See Rawlings*, 448 U.S. at 106. The *Rawlings* Court held that the defendant did not have a reasonable expectation of privacy in another's purse and thus lacked standing to challenge the admissibility of the evidence found therein. *See id.*

[129] *See Houghton*, 119 S. Ct. at 1303.

[130] *See id.*

[131] *See id.*

[132] *See id.* Justice Scalia speculated that the following questions may arise in the resulting lawsuits if the Wyoming Supreme Court's notice rule became the law of the land:

> [W]hether the officer should have believed a passenger's claim of ownership, whether [the officer] should have inferred ownership from various objective factors, whether [the officer] had probable cause to believe that the passenger was a confederate, or to believe that the driver might have introduced the contraband into the package with or without the passenger's knowledge.

Id. at 1303.

In addition, Justice Scalia criticized the dissent's confidence that a police officer could "'apply a rule requiring a warrant or individualized probable cause to search belongings that are . . . obviously owned by and in the custody of a passenger.'" *Id.* at

the Court concluded that the balancing of the competing interests weighs in favor of law enforcement and against an individual's privacy interest.[133]

Finally, Justice Scalia asserted that even if the Court were to create an exception from the historic practice detailed in *Ross*, such an exception, strangely, would protect only a passenger's property, rather than the property of a nonoccupant.[134] Thus, the Court held that when police have reason to believe that a vehicle contains contraband, the police may search a passenger's effects found therein, whether the owner of the effects is present or not, if that container is capable of concealing the object of the search.[135] Accordingly, the majority reversed the judgment of the Wyoming Supreme Court.[136]

In a concurring opinion, Justice Breyer agreed with the majority that when the police have probable cause to search a vehicle for drugs, the search of containers found therein is reasonable.[137] Justice Breyer cautioned, however, that while history may serve as an important guideline in answering Fourth Amendment questions, historical analysis should never automatically determine the outcome of a case.[138]

Justice Breyer also agreed with the majority that requiring the police to establish ownership of a container prior to its search would place a substantial burden on law enforcement.[139] Moreover, the Justice noted that when probable cause exists to search a vehicle, the police often have probable cause to search containers found therein.[140] Thus, Justice Breyer suggested that the bright-line rule announced by the Court will authorize only a small number of

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1303 n.2 (quoting *Houghton*, 119 S. Ct. at 1306 (Stevens, J., dissenting)). The Justice countered that "it seems not at all obvious precisely what constitutes obviousness" and, thus, the notice test is unclear and unadministrable. *Id.*

[133] *See id.*

[134] *See id.*

[135] *See Houghton*, 119 S. Ct. at 1303. In reaching this decision, Justice Scalia took into account that Houghton's privacy would have been invaded to the same extent whether she was present for the search or not, and that Houghton's presence in the car provided more reason to suspect that she and the driver were engaged in a common enterprise. *See id.*

[136] *See id.*

[137] *See id.* at 1303 (Breyer, J., concurring).

[138] *See id.* at 1303-04 (Breyer, J., concurring).

[139] *See id.* Justice Breyer asserted that "[i]f the police must establish a container's ownership prior to the search of [a] container . . . the resulting uncertainty will destroy the workability of the bright-line rule set forth in *United States v. Ross*." *Id.*

[140] *See id.* at 1304 (Breyer, J., concurring).

searches that the existing law would not already permit.[141]

Justice Breyer then gave consideration to the limitations placed upon the scope of the majority's bright-line rule.[142] The Justice noted that the rule announced by the majority only governs automobile searches and exclusively applies to containers found in vehicles.[143] Implicitly recognizing the distinction between searches of a person and searches of property, the Justice stressed that the search of a person, including a limited patdown of an individual's outer clothing, is the type of search for which the law provides heightened protection.[144]

Justice Breyer next addressed the nature of the container in the instant case.[145] The Justice argued that purses are special containers because they are repositories of personal effects that people generally carry with them.[146] Although Justice Breyer admitted a temptation to afford purses increased constitutional protection, the Justice decided not to draw such a distinction in light of the Court's prior opinions.[147] The Justice, however, did assert that if a person is wearing a purse at the time of a warrantless search, the purse may amount to a type of outer clothing that would be afforded increased protection.[148] Given that Houghton was not actually wearing the purse at the time of the search, Justice Breyer concurred with the majority.[149]

Justice Stevens, joined by Justices Souter and Ginsburg, authored a dissenting opinion.[150] Arguing that the Court has never restricted its analysis by considering the privacy and governmental interests at stake only when the common law yields no answer, the Justice rejected the majority's two-part test.[151] Further, the Justice contended that neither the precedent relied upon by the majority nor the Court's decision in the instant case required such an approach.[152]

Emphasizing the Court's established preference that the police should obtain search warrants at the outset, Justice Stevens criticized

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141 *See Houghton*, 119 S. Ct. at 1304 (Breyer, J., concurring).

142 *See id.*

143 *See id.*

144 *See id.* (citing Terry v. Ohio, 392 U.S. 1, 24-25 (1968)). For an explanation of *Terry*, see *supra* note 122.

145 *See Houghton*, 119 S. Ct. at 1304 (Breyer, J., concurring).

146 *See id.*

147 *See id.* (citing United States v. Ross, 456 U.S. 798, 822 (1982)).

148 *See id.* (citing *Terry*, 392 U.S. at 24).

149 *See id.*

150 *See id.* (Stevens, J., dissenting).

151 *See Houghton*, 119 S. Ct. at 1306 n.3 (Stevens, J., dissenting).

152 *See id.*

the majority for upholding the search of Houghton's purse in light of the State's admission that the police lacked probable cause or individualized suspicion as to the purse or passenger.[153] The Justice noted that the factors prompting the search in the instant case, as in *Di Re*, implicated the driver and not the passenger.[154] Further, Justice Stevens chided the majority for ignoring the settled distinction between searches of drivers and searches of passengers and, instead, fashioning a bright-line rule based on a distinction between property concealed in a pocket and property concealed in a passenger's purse.[155] In addition, the Justice criticized the Court's rights-restrictive application of the rule announced in *Ross*.[156] The dissent argued that regardless of whether the police should have obtained a warrant to search Houghton's purse, the officers were required to have probable cause to believe that Houghton's purse contained contraband.[157]

Next, Justice Stevens engaged in a reasonableness analysis and concluded that the passenger's privacy concerns outweigh the State's interest in efficient law enforcement.[158] Justice Stevens found that the search of a purse involves serious intrusion on individual privacy.[159] Finally, the Justice argued that a rule requiring the police to have probable cause or a warrant to conduct a search of a passenger's belongings is just as simple as the majority's rule, yet would provide more protection of privacy.[160] Thus, in light of the Court's long-standing preference for individualized suspicion and for warrants, Justice Stevens concluded that the Wyoming Supreme Court's

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[153] *See id.* at 1305 (Stevens, J., dissenting).

[154] *See id.* Justice Stevens noted that *Di Re* is the only automobile case involving the search of a passenger defendant. *See id.* The Justice emphasized that the *Di Re* Court refused to apply the automobile exception to a passenger defendant. *See id.* (citing United States v. Di Re, 332 U.S. 581, 583-87 (1948)).

[155] *See id.*

[156] *See id.* (citing United States v. Ross, 456 U.S. 798, 823-24 (1982)). *Ross* announced that the scope of a warrantless 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." *Ross*, 456 U.S. at 824.

[157] *See Houghton*, 119 S. Ct. at 1306 (Stevens, J., dissenting). Justice Stevens chided the majority for creating a rule that would permit "a warrantless search of a passenger's briefcase if there is probable cause to believe the taxidriver had a syringe somewhere in his vehicle." *Id.* at 1305 (Stevens, J., dissenting).

[158] *See id.*

[159] *See id.* Justice Stevens opined that the spatial association between a driver and passenger does not provide an adequate basis for "ignoring privacy interests in a purse." *Id.*

[160] *See id.* at 1306 (Stevens, J., dissenting).

judgment should be affirmed.[161]

The bright-line rule embraced by the United States Supreme Court in *Wyoming v. Houghton* exhibits the growing trend in Fourth Amendment jurisprudence to promote the governmental interest in efficient law enforcement at the expense of individual privacy.[162] The Court succeeded in setting forth a clear and unambiguous guideline capable of consistent application by the police in the context of automobile searches.[163] Yet although a clear rule of law is often attractive, clarity alone is insufficient to justify a rule's adoption.[164]

The clarity of the bright-line rule announced in *Houghton* leaves little to be disputed. What should be questioned, however, is the potential overextension of the rule. While *Houghton* is an automobile exception case, the rule announced by the Court appears to have applicability outside of the automobile context.[165] The reasoning underlying *Houghton* easily could be extended to support a "public place" exception to the Fourth Amendment's fading warrant requirement.[166] A strong argument could be made that a warrantless search of any closed container discovered in a public place, if supported by probable cause, would pass constitutional muster.[167] Justice Scalia has already announced his willingness to permit such

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[161] *See id.* at 1305 (Stevens, J., dissenting).

[162] *See* Stacey Paige Rappaport, Note, *Search and Seizure—Stop and Frisk—Police May Seize Nonthreatening Contraband Detected Through the Sense of Touch During a Protective Patdown Search So Long as the Search Stays Within the Bounds Marked by* Terry v. Ohio—Minnesota v. Dickerson, 24 SETON HALL L. REV. 2257, 2267-69 (1994) (explaining the Supreme Court's Fourth Amendment balancing test and highlighting the Court's belief that the governmental interest in effective law enforcement must often outweigh even a probable cause requirement in the context of a permissible stop and frisk).

[163] *See Houghton*, 119 S. Ct. at 1304.

[164] *See id.* at 1306 (Stevens, J., dissenting). Justice Stevens observed that "the ostensible clarity of the Court's rule is attractive. But that virtue is insufficient justification for its adoption." *Id.*

[165] *See* Prynkiewicz, *supra* note 10, at 1286.

[166] *See id.*

[167] *See* California v. Acevedo, 500 U.S. 565, 584-85 (Scalia, J., concurring). Justice Scalia writes:

> I would reverse the judgment in the present case, not because a closed container carried inside a car becomes subject to the "automobile" exception to the general warrant requirement, but because the search of a closed container, outside a privately owned building, with probable cause to believe that the container contains contraband, and when it in fact does contain contraband, is not one of those searches whose Fourth Amendment reasonableness depends upon a warrant.

Id.

searches,[168] and considering the rationale supporting the opinion in *Houghton*, a majority of the Court might not be far behind.

While the decision in *Houghton* is fully consistent with the Court's rights-restrictive approach to the automobile exception, the issue was, nevertheless, wrongly decided because the automobile exception should not extend to moveable containers found inside a vehicle.[169] The justifications that support the automobile exception, such as mobility, a diminished expectation of privacy, and the impracticability of obtaining a warrant, are not applicable to moveable containers. First, a warrantless search of a container should not be justified under a mobility theory because the police can place a container within their exclusive control and thereby eliminate any danger that evidence could be destroyed. Likewise, any exigency related to the vehicle's mobility effectively ceases once the container is removed from the vehicle. Similarly, because moveable containers are not subject to the same pervasive governmental regulations to which automobiles are subject, an individual's diminished expectation of privacy in a vehicle does not extend to containers found in that vehicle.[170] Finally, in light of technological

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[168] *See id.*

[169] *See* Katz, *supra* note 6, at 378-79 (1986). Katz maintains that the Court, in the interest of convenience, has replaced the true exigency requirement on which *Carroll* was based with a fictitious exigency rationale. *See id.*

[170] *See* Briscoe, *supra* note 10, at 225-26. Briscoe maintains that the extension of the automobile exception to moveable containers is inappropriate and unreasonable as a matter of law. *See id.* at 222-25. Moreover, Briscoe addresses the "impracticability of obtaining a warrant" rationale used to justify the automobile exception and concludes that "any warrantless search pursuant to the automobile exception should be found unreasonable when the opportunity to search is no longer 'fleeting.'" *Id.* at 224. Briscoe further maintains that an individual manifests a legitimate expectation of privacy in effects concealed within a container. *See id.* at 225. The mere fact that such a container is located in a car is coincidental and, thus, the container should not be subject to a warrantless search under the automobile exception. *See id.* at 225. This sentiment has been echoed by another commentator who observed that

> [t]he factors which diminish the privacy aspects of an automobile do not apply to [luggage]. Luggage contents are not open to public view, except as a condition to a border entry or common carrier travel; nor is luggage subject to regular inspections and official scrutiny on a continuing basis. Unlike an automobile, whose primary function is transportation, luggage is intended as a repository of personal effects. In sum, a person's expectations of privacy in personal luggage are substantially greater than in an automobile.

Jensen, *supra* note 10, at 1566 n.34.

The Supreme Court has recognized that a privacy interest in luggage is reasonable. *See* Arkansas v. Sanders, 442 U.S. 753, 762 (1979) (stating that luggage is a repository for personal effects and, therefore, is associated with an expectation of privacy); *see also* United States v. Chadwick, 433 U.S. 1, 13 (1977) (noting that expectations of privacy in luggage are substantially greater than expectations of

advancements, a warrantless search of a container found inside a vehicle should not be sanctioned under an impracticality theory because Congress has explicitly authorized the use of telephonic warrants.[171]

Indeed, modern technology offers a viable solution that would uphold the constitutional preference that probable cause be determined by a neutral and detached magistrate, as opposed to a police officer engaged in the practice of ferreting out crime.[172] Given the speed and efficiency of the technology available to the police, the Supreme Court should require law enforcement personnel to await the issuance of a telephonic warrant before searching a moveable container found during the course of an automobile search.[173] Telephonic warrants enable law enforcement personnel to receive prompt judicial authorization to search while ensuring maximum protection of an individual's constitutional right to be free from unreasonable governmental intrusion.[174] Given the Fourth

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privacy in a car).

[171] *See* FED. R. CRIM. P. 41(c)(2)(a). The Federal Rules of Criminal Procedure provide for the issuance of a warrant under certain circumstances "based upon sworn testimony communicated by telephone or other appropriate means including facsimile transmission." *Id.* For further discussion regarding the issuance of telephonic warrants, see Craig M. Bradley, *The Court's "Two Model" Approach to the Fourth Amendment: Carpe Diem!*, 84 J. CRIM. L. & CRIMINOLOGY 429, 441 (1993) (asserting that if the Fourth Amendment is to be taken seriously, courts should require that the police secure a warrant, even a telephonic warrant, before every search unless that search is necessitated by truly exigent circumstances); Geoffrey P. Alpert, Note, *Telephonic Search Warrants*, 38 U. MIAMI L. REV. 625, 634-35 (1984) (advocating the use of telephonic search warrants to authorize automobile-exception container searches).

[172] *See* Johnson v. United States, 333 U.S. 10, 13-14 (1948). Specifically, the Court stated that

> [t]he point of the Fourth Amendment, which often is not grasped by zealous officers, is not that it denies law enforcement the support of the usual inferences which reasonable men draw from evidence. Its protection consists in requiring that those inferences be drawn by a neutral and detached magistrate instead of being judged by the officer engaged in the often competitive enterprise of ferreting out crime.

Id.

[173] *See* Katz, *supra* note 6, at 388.

[174] *See* Donald L. Beci, *Fidelity to the Warrant Clause: Using Magistrates, Incentives, and Telecommunications Technology to Reinvigorate Fourth Amendment Jurisprudence*, 73 DENV. U. L. REV. 293, 295 (1996) (explaining that modern technology has created ways for the warrant requirement to be fulfilled virtually without exception through the use of mobile fax machines, telephones, and computers). Beci asserts that

> "[a]ll that would be needed . . . would be a central facility with magistrates on duty and available 24 hours a day. All police . . . could call in by telephone or other electronic device . . . . The magistrates would evaluate [the] facts and, if deemed sufficient to justify a search

Amendment's long-standing preference for warrants, warrantless searches of containers should be sanctioned only when true exigency exists and when the *immediate* needs of law enforcement outweigh the privacy interests that the Fourth Amendment was designed to protect.[175]

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and seizure, the magistrate would immediately issue an electronic warrant authorizing the officer on the scene to proceed."

Id. at 293 (quoting State v. Brown, 721 P.2d 1357, 1363 n.6 (Or. 1986)).

[175] *See* Katz, *supra* note 6, at 378. Katz maintains that the warrant requirement should be relaxed only in the presence of genuine exigent circumstances. *See id.* In stressing the importance of the role of a neutral and detached magistrate, Katz stated:

> "[T]he informed and deliberate determinations of magistrates empowered to issue warrants as to what searches and seizures are permissible under the Constitution are to be preferred over the hurried action of officers and others who may happen to make arrests. Security against unlawful searches is more likely to be attained by resort to search warrants than by reliance upon the caution and sagacity of petty officers while acting under the excitement that attends the capture of persons accused of crime."

Id. at 379 (quoting United States v. Lefkowitz, 285 U.S. 452, 464 (1932)). As one commentator suggested:

> [T]he Fourth Amendment strikes a balance between our need to be secure from criminals and our need to be secure from the police. To the extent that the police are free to conduct unlimited searches and seizures, more criminals are likely to be caught, but at the same time, more innocent citizens are likely to be subjected to the embarrassment and and/or offense of a search or seizure.

ARNOLD H. LOEWY & ARTHUR B. LAFRANCE, *supra* note 5, at 1.