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ARTICLES

RULES AND STANDARDS IN JUSTICE SCALIA'S FOURTH AMENDMENT

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INTRODUCTION

When looking at Justice Scalia's approach to the Fourth Amendment, most would say he was an originalist and a textualist.¹ Justice Scalia himself would like to explain, "I'm an originalist and a textualist, not a nut."² Although originalism and textualism were often prevalent in his Fourth Amendment decisions, even more important to his decision-making was his disdain for judicial activism.³ To limit judicial discretion, Justice Scalia frequently opted to

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1. See, e.g., DAVID A. KAPLAN, *THE MOST DANGEROUS BRANCH: INSIDE THE SUPREME COURT'S ASSAULT ON THE CONSTITUTION* 12 (2018) ("Scalia made a career of preaching 'originalism' and 'textualism.'"); Timothy C. MacDonnell, *Justice Scalia's Fourth Amendment: Text, Context, Clarity, and Occasional Faint-Hearted Originalism*, 3 VA. J. CRIM. L. 175 (2015) (examining Justice Scalia's Fourth Amendment opinions where he employs originalism and textualism). Originalism is a theory of constitutional interpretation based on the idea that words have fixed meanings and should be understood the way they were understood at the time of the framing. See ANTONIN SCALIA & BRYAN A. GARNER, *READING LAW: THE INTERPRETATION OF LEGAL TEXTS* 78–92, 435 (2012). Textualism is the theory of interpreting the Constitution based only on what the text says and fairly implies. See *id.* at xxvii, 16.

2. Nina Totenberg, *Justice Scalia, the Great Dissenter, Opens Up*, NPR (Apr. 28, 2008, 7:32 AM), <http://www.npr.org/templates/story/story.php?storyId=89986017> [<https://perma.cc/L62G-DE37>].

3. Professor John Manning makes this argument with respect to Justice Scalia's overall jurisprudence. See John F. Manning, *Justice Scalia and the Idea of Judicial Restraint*, 115 MICH. L. REV. 747, 748 (2017); see also Kathleen M. Sullivan, *Foreword: The Justices of Rules and Standards*, 106 HARV. L. REV. 22, 78 (1992) ("In other words, for Justice Scalia,

impose bright-line rules rather than vague standards.⁴ This is apparent not only within his jurisprudence as a whole, but also specifically in his Fourth Amendment decisions.⁵

In his article *Originalism: The Lesser Evil*, Justice Scalia denounced nonoriginalists because their approach invites judicial activism.⁶ Though Scalia acknowledged that originalism had its defects,⁷ he argued that it was strongly preferable to nonoriginalism because it constrained a judge's ability to impose his or her own moral or political values onto the law.⁸ Making decisions about current social values, Scalia argued, was better left to the elected legislature.⁹ Originalism was superior because it required judges to justify their rulings with something external to themselves.¹⁰

In his book *A Matter of Interpretation*, Justice Scalia further disparaged the common law—or as he would call it, judge-made law.¹¹

the rule's the thing; originalism and traditionalism are means, not ends.”).

4. Stephen G. Calabresi & Gary Lawson, *The Rule of Law as a Law of Law*, 90 NOTRE DAME L. REV. 483, 486 (2014) (discussing Scalia's preference for rules).

5. Professor Orin Kerr, in a panel discussion at the 2016 Federalist Society National Lawyers Convention, noted that Justice Scalia's impact on Fourth Amendment jurisprudence has been partially overlooked. See David Stras, Orin Kerr, Rachel Barkow, Stephanos Bibas & Paul J. Larkin, Jr., *Justice Scalia and the Criminal Law*, 86 U. CIN. L. REV. 743, 744 (2018).

6. Antonin Scalia, *Originalism: The Lesser Evil*, 57 U. CIN. L. REV. 849, 854 (1989) [hereinafter Scalia, *Originalism*] (“The principal theoretical defect of nonoriginalism, in my view, is its incompatibility with the very principle that legitimizes judicial review of constitutionality.”).

7. In 1989 Scalia admitted that he might be merely a “faint-hearted originalist” because he could not imagine himself upholding a statute requiring flogging—even though it would have been upheld in 1791. *Id.* at 864. By 2013, though, his faint-heartedness had receded. In an interview with *New York* magazine, he stated that he would, in fact, uphold a law permitting flogging because though “it is immensely stupid . . . it is not unconstitutional.” Jennifer Senior, *In Conversation: Antonin Scalia*, NEW YORK (Oct. 4, 2013), <https://nymag.com/news/features/antonin-scalia-2013-10/> [https://perma.cc/2PKG-W2F4]. Instead of faint-hearted, he now referred to himself as an honest originalist—that is, one who “take[s] the bitter with the sweet.” *Id.*

8. Scalia, *Originalism*, *supra* note 6, at 863 (“It is very difficult for a person to discern a difference between those political values that he personally thinks most important, and those political values that are ‘fundamental to our society.’”).

9. *Id.* at 854.

10. *Id.* at 864 (“Originalism does not aggravate the principal weakness of the system, for it establishes a historical criterion that is conceptually quite separate from the preferences of the judge himself.”).

11. ANTONIN SCALIA, *A MATTER OF INTERPRETATION: FEDERAL COURTS AND THE LAW* 4 (1997) [hereinafter SCALIA, *INTERPRETATION*] (noting that the common law does not necessarily reflect people's practices but is rather law created by judges).

Describing a first-year law school class discussing a series of hypotheticals, he wrote mockingly, “What intellectual fun all of this is!”¹² He noted law school is exhilarating because it consists of “playing king”—that is, playing common-law judge—by deciding how and what the law should be.¹³ All of this would be well and good, Scalia said, if it weren’t for a little thing called democracy.¹⁴

In the criminal context, one justification for choosing between a standard and a rule is the need to safeguard the rights of unpopular criminal defendants.¹⁵ Justice Scalia discussed this issue in *The Rule of Law as a Law of Rules*. He wrote that one of the utilities of bright-line rules was that they allowed judges to serve countermajoritarian interests.¹⁶ Firm rules are most important, he said, in cases where the popular will might come out the other way:

It is very difficult to say that a particular convicted felon who is the object of widespread hatred must go free because, on balance, we think that excluding the defense attorney from the line-up process in this case may have prevented a fair trial. It is easier to say that our cases plainly hold that, absent exigent circumstances, such exclusion is a per se denial of due process.¹⁷

Bright-line rules, Scalia argued, allowed judges to be “courageous”—that is, to stand up to “occasional excesses of [the] popular will.”¹⁸

Justice Scalia didn’t only condemn judicial activism in his extracurricular writing, but also—often quite sharply—in his decisions. In his dissent in *Dickerson v. United States*, for example, he re-

12. *Id.* at 7.

13. *Id.* (“[First-year law school] consists of playing king—devising, out of the brilliance of one’s own mind, those laws that ought to govern mankind. How exciting! And no wonder so many law students, having drunk at this intoxicating well, aspire for the rest of their lives to be judges!”).

14. *Id.* at 9.

15. See 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, 1189 (1988) (arguing that Fourth Amendment cases that use balancing tests deserve increased scrutiny to properly protect the rights of unpopular criminal defendants).

16. Antonin Scalia, *The Rule of Law as a Law of Rules*, 56 U. CHI. L. REV. 1175, 1180 (1989) [hereinafter Scalia, *Law of Rules*].

17. *Id.* (citing *United States v. Wade*, 388 U.S. 218 (1967)). Justice Scalia expressed a similar sentiment in *Arizona v. Hicks*, when he stated that “the Constitution sometimes insulates the criminality of a few in order to protect the privacy of us all.” 480 U.S. 321, 329 (1987).

18. Scalia, *Law of Rules*, *supra* note 16, at 1180.

buked the majority for holding that the rule from *Miranda v. Arizona* was constitutional and therefore could not be superseded by Congress.¹⁹ The *Miranda* decision, Scalia argued, was pure judicial activism: it was in no way required by the Constitution.²⁰ He accused the majority of violating the separation of powers and becoming “some sort of nine-headed Caesar, giving thumbs-up or thumbs-down to whatever outcome, case by case, suits or offends its collective fancy.”²¹ Justice Scalia’s concern with judicial discretion also manifested in his theory of statutory interpretation. For example, in *Zuni Public School District Number 89 v. Department of Education*, he dissented, berating the majority for purporting to interpret “unenacted congressional intent.”²² He characterized the majority’s theory of statutory interpretation as “sheer applesauce,” and voiced his concern that when a judge purports to interpret congressional intent, the interpretation tends to have a remarkable similarity to whatever judges think Congress *should* have meant.²³ Though *Zuni Public School District* dealt with per-pupil expenditures—a relatively apolitical issue—Justice Scalia noted his concern with the impact that interpreting so-called congressional intent would have in cases “more likely to arouse the judicial libido” such as voting rights or antidiscrimination.²⁴ He preferred bright-line rules that would restrict judges’ ability to impose their own morals, ethics, and politics onto the law.²⁵

19. 530 U.S. 428, 445–46 (2000) (Scalia, J., dissenting) (citing *Miranda v. Arizona*, 384 U.S. 436 (1966)).

20. *See id.* at 448–49.

21. *Id.* at 455. He called the majority opinion “antidemocratic” and wrote that it “converts *Miranda* from a milestone of judicial overreaching into the very Cheops’ Pyramid (or perhaps the Sphinx would be a better analogue) of judicial arrogance.” *Id.* at 446, 465.

22. 550 U.S. 81, 108 (2007) (Scalia, J., dissenting).

23. *Id.* at 113, 117.

24. *Id.* at 118.

25. Justice Scalia further criticized activist judging in the civil procedure context in *Burnham v. Superior Court*, 495 U.S. 604, 623 (1990). Writing for the plurality, he denounced Justice Brennan’s concurrence for relying on “contemporary notions of due process.” *Id.* He argued that this formulation gave judges license to break with the test of “traditional notions of fair play and substantial justice” and replace it with merely *their* notions of fair play and substantial justice. *Id.* In his formulation he focused on the term “tradition” to argue for a historical approach. *Id.* at 621. He thought we should formulate rules of jurisdiction the way we have always done it. *See id.*

This Article examines Justice Scalia's effort to limit judicial discretion through the lens of the debate between rules and standards.²⁶ It is the first article to situate Scalia's goal of limited discretion within the framework of the debate between rules and standards, as well as the first to discuss this issue specifically with respect to his Fourth Amendment decisions.²⁷ Rules are binding directives that leave little room for considering the specific facts of any given situation.²⁸ Critics argue that they tend to be over- or under-inclusive, but the value of rules is that by taking power away from the decisionmaker, they limit judicial discretion.²⁹ Further, some argue that rules promote democracy because they properly leave the power to make decisions based on politics or value judgments to the legislature.³⁰ On the flip side, proponents of standards argue that standards produce judgments that are less arbitrary and more substantively fair because they allow decisionmakers to consider all of the relevant facts and circumstances of the case.³¹

26. See Sullivan, *supra* note 3, at 57–121 (outlining the debate between rules and standards as a debate around how much discretion judges should have and by what means courts should keep discretion in check). Professor Kathryn Urbonya has analyzed the implications of how modern Fourth Amendment jurisprudence vacillates between rules and standards. See Kathryn R. Urbonya, *Rhetorically Reasonable Police Practices: Viewing the Supreme Court's Multiple Discourse Paths*, 40 AM. CRIM. L. REV. 1387, 1387–89 (2003).

27. Other scholars have analyzed Justice Scalia's interest in judicial restraint in his jurisprudence writ large, but to our knowledge no one has situated it within the framework of rules and standards. See, e.g., Manning, *supra* note 3, at 748–50 (discussing what he calls Scalia's "anti-discretion principle"); Calabresi & Lawson, *supra* note 4 (critiquing Justice Scalia's preference for rules from an originalist perspective); David A. Strauss, *On the Origin of Rules (with Apologies to Darwin): A Comment on Antonin Scalia's The Rule of Law as a Law of Rules*, 75 U. CHI. L. REV. 997 (2008) (discussing Scalia's preference for rules). Further, various scholars have discussed Justice Scalia's Fourth Amendment jurisprudence, yet have not specifically analyzed his preference for rules in the Fourth Amendment. See, e.g., MacDonnell, *supra* note 1 (analyzing Scalia's Fourth Amendment decisions through an originalist and textualist lens); Steven Wisotsky, *The Fourth Amendment Jurisprudence of Justice Scalia*, 52 CRIM. L. BULL. 531 (2016) (cataloging and summarizing all of Scalia's Fourth Amendment decisions); see generally Stras et al., *supra* note 5, at 744 (panel discussion where Professor Orin Kerr argued that the two broad themes in Scalia's jurisprudence were originalism and limiting judicial discretion).

28. Sullivan, *supra* note 3, at 58.

29. *Id.* at 62–66 (listing arguments for rules as fairness as formal equality, utility, liberty, and democracy); see also *New Jersey v. T.L.O.*, 469 U.S. 325, 353, 369 (1985) (Brennan, J., concurring in part and dissenting in part) (“[B]alancing 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.”).

30. Sullivan, *supra* note 3, at 64–65.

31. *Id.* at 66–69 (listing arguments in favor of standards as fairness as substantive justice, utility, equality, and deliberation).

Justice Scalia has been called the leading supporter of the “rules-as-democracy argument.”³² He argued that rules were preferable because they are more likely to ensure equal treatment among like cases, they make the law clear in a system where the Supreme Court can review only a small number of cases, and they ensure predictability.³³

How does this philosophy of limited judicial discretion manifest in the Fourth Amendment context? Because the Fourth Amendment specifically prohibits “unreasonable” searches—which arguably dictates a standard—Justice Scalia often sought to construct rules that could curb a limitless interpretation of “unreasonable.”³⁴ Further, the Fourth Amendment context is unique because of the strong interest for police to have intelligible rules dictating the scope of any potential search.³⁵

In criminal Fourth Amendment cases, Justice Scalia usually applied rules.³⁶ He noted that rules allowed judges to serve counter-majoritarian interests by protecting the rights of unpopular criminal defendants.³⁷ However, Scalia occasionally strayed from his rules-oriented philosophy and applied a standard.³⁸ This was especially true in cases involving civil special needs as well as cases dealing with remedies for Fourth Amendment violations.³⁹ Attempts to classify Justice Scalia as favoring the government or favoring individual Fourth Amendment rights are fraught with difficulty. It is probably best to characterize him as in favor of rules in the criminal context, and in favor of standards in other contexts.

32. *Id.* at 65.

33. *See* Scalia, *Law of Rules*, *supra* note 16, at 1178–79. He stated that sometimes “even a bad rule is better than no rule at all.” *Id.* at 1179. He argued that general rules that constrain judges are good—not only because they constrain lower courts, but also because they constrain future Supreme Court decisions. *Id.* at 1179–80.

34. *See infra* section I.B.2.

35. *See, e.g.*, *Bailey v. United States*, 568 U.S. 186, 203, 206 (2013) (Scalia, J., concurring) (noting the importance of workable rules for police). *But see* *New York v. Belton*, 453 U.S. 454, 463, 469 (1981) (Brennan, J., dissenting) (dissenting from the majority’s imposition of a bright-line rule because “the mere fact that law enforcement may be made more efficient can never by itself justify disregard of the Fourth Amendment” (quoting *Mincey v. Arizona*, 437 U.S. 385, 393 (1978))).

36. *See infra* Part I.

37. Scalia, *Law of Rules*, *supra* note 16, at 1180.

38. *See infra* Part II.

39. *See infra* Part II.

Part I of this Article discusses Scalia's Fourth Amendment cases in the criminal context.⁴⁰ It first discusses his methodology when approaching Fourth Amendment cases, and then outlines the cases where he advocated for bright-line rules that would limit judicial discretion.⁴¹ Part II demonstrates his departure from the rules approach in civil special needs cases and cases involving remedies for Fourth Amendment violations.⁴²

I. RULES: "FIRM BUT ALSO BRIGHT"⁴³

In his Fourth Amendment decisions, Justice Scalia favored bright-line rules that would limit judicial discretion. He spoke frequently about the need to root decisions in something external to a judge's own political predilections.⁴⁴ In his Fourth Amendment cases, he rooted his bright-line rules in probable cause, textualism, and originalism.⁴⁵

Section A of this Part outlines Justice Scalia's basic Fourth Amendment philosophy.⁴⁶ Section B discusses the relationship between the two clauses of the Fourth Amendment and lays out what we will call Scalia's "probable cause presumption."⁴⁷ Section C looks at cases where Justice Scalia used originalism and textualism to limit judicial discretion.⁴⁸ Finally, Section D discusses Justice Scalia's revival of the trespass test for when a Fourth Amendment violation has occurred, and discusses its lasting legacy as the Court grapples with how to apply the Fourth Amendment in the digital age.⁴⁹

40. See *infra* Part I.

41. See *infra* Part I.

42. See *infra* Part II.

43. See *Kyllo v. United States*, 533 U.S. 27, 40 (2001) ("That line . . . must not only be firm but also bright.").

44. See, e.g., Scalia, *Originalism*, *supra* note 6, at 864.

45. See *infra* Part I.

46. See *infra* section I.A.

47. See *infra* section I.B.

48. See *infra* section I.C.

49. See *infra* section I.D.

A. *Basic Fourth Amendment Philosophy*

Justice Scalia hated Fourth Amendment cases.⁵⁰ He did not like the often fact-specific inquiry of determining what was “reasonable,” but because the Constitution specifically prohibits “unreasonable” searches, as a textualist he could not avoid it.⁵¹ He preferred to leave lower courts to determine “reasonableness,” and wrote that the Supreme Court should only take Fourth Amendment cases periodically to indicate the limits of acceptable variation.⁵²

Justice Scalia prescribed a two-step analysis for Fourth Amendment cases:

[W]e inquire first whether the action was regarded as an unlawful search or seizure under the common law when the Amendment was framed. Where that inquiry yields no answer, we must evaluate the search or seizure 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.⁵³

In other words, first he asked whether there was an analogous practice when the Fourth Amendment was adopted in 1791.⁵⁴ If so, then that answer remains true today. On the other hand, for novel questions where there was no equivalent practice in 1791, the

50. See Stras et al., *supra* note 5, at 744 (citing Interview by Susan Swain with Antonin Scalia, in Washington, D.C. (June 19, 2019), <https://www.c-span.org/video/?286079-1/supreme-court-justice-scalia> [<https://perma.cc/U4T2-KYCZ>] (“I just hate Fourth Amendment cases. It’s almost a jury question, you know, whether this variation is an unreasonable search or seizure. It’s variation 3,542. Yes, I’ll write the opinion, but I don’t consider it a plum.”)).

51. See U.S. CONST. amend. IV. Other legal standards that use “reasonableness,” like the “reasonable man” in torts or the “reasonable expectation of privacy” from *Katz v. United States*, 389 U.S. 347, 360–62 (1967) (Harlan, J., concurring), are not specifically prescribed by the Constitution. See Scalia, *Law of Rules*, *supra* note 16, at 1181–82 (discussing the differences between the “reasonable man” and “reasonable search” analyses); *infra* section I.D (discussing the *Katz* test).

52. Scalia, *Law of Rules*, *supra* note 16, at 1186.

53. *Wyoming v. Houghton*, 526 U.S. 295, 299–300 (1999); see also *Arizona v. Gant*, 556 U.S. 332, 351 (2009) (Scalia, J., concurring) (“To determine what is an ‘unreasonable’ search within the meaning of the Fourth Amendment, we look first to the historical practices the Framers sought to preserve; if those provide inadequate guidance, we apply traditional standards of reasonableness.”).

54. See *County of Riverside v. McLaughlin*, 500 U.S. 44, 60 (1991) (Scalia, J., dissenting) (“There is assuredly room for such an approach in resolving novel questions of search and seizure under the ‘reasonableness’ standard that the Fourth Amendment sets forth. But not, I think, in resolving those questions in which a clear answer already existed in 1791 and has been generally adhered to by the traditions of society ever since.”).

Court should apply “traditional standards of reasonableness” by balancing the degree of privacy intrusion against the governmental interest.⁵⁵

This balancing should ostensibly be geared towards what would have been “reasonable” in 1791, not merely what is expedient today.⁵⁶ Justice Scalia believed that the Fourth Amendment must protect the same degree of privacy that was protected in 1791, regardless of what new ways technology has found to invade our privacy.⁵⁷ To determine whether a novel type of search or seizure is “reasonable” requires balancing the competing concerns of the privacy interests of individuals versus the needs of law enforcement.⁵⁸ Nevertheless, Justice Scalia limited his use of the balancing approach to civil special needs cases and cases involving remedies for Fourth Amendment violations.⁵⁹ In criminal cases, he would often turn to the second clause of the Fourth Amendment to help him

55. See *Houghton*, 526 U.S. at 300. Justice Stevens criticized this approach in his dissent in *Wyoming v. Houghton*. *Id.* at 311 n.3 (Stevens, J., dissenting). He argued: “[W]e 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.’ Neither the precedent cited by the Court, nor the majority’s opinion in this case, mandate that approach.” *Id.*

56. *Minnesota v. Dickerson*, 508 U.S. 366, 380 (1993) (Scalia, J., concurring) (noting that the Fourth Amendment’s prohibition of “unreasonable” searches and seizures “is to be construed in the light of what was deemed an unreasonable search and seizure when it was adopted” (quoting *Carroll v. United States*, 267 U.S. 132, 149 (1925))); see also Lawrence Rosenthal, *An Empirical Inquiry into the Use of Originalism: Fourth Amendment Jurisprudence During the Career of Justice Scalia*, 70 HASTINGS L.J. 75, 90–91 (2018) (discussing the original public meaning of “unreasonable”).

57. *United States v. Jones*, 565 U.S. 400, 406 (2012) (“At bottom, [the Court] must ‘assur[e] preservation of that degree of privacy against government that existed when the Fourth Amendment was adopted.’” (quoting *Kyllo v. United States*, 533 U.S. 27, 34 (2001))); *Dickerson*, 508 U.S. at 380 (Scalia, J., concurring) (“The purpose of the provision, in other words, is to preserve that degree of respect for the privacy of persons and the inviolability of their property that existed when the provision was adopted—even if a later, less virtuous age should become accustomed to considering all sorts of intrusion ‘reasonable.’”); *California v. Acevedo*, 500 U.S. 565, 583 (1991) (Scalia, J., concurring) (“[T]he ‘reasonableness’ requirement of the Fourth Amendment affords the protection that the common law afforded.”).

58. See *Scott v. Harris*, 550 U.S. 372, 383 (2007) (“In determining the reasonableness of the manner in which a seizure is effected, ‘we must balance the nature and quality of the intrusion on the individual’s Fourth Amendment interests against the importance of the governmental interests alleged to justify the intrusion.’” (quoting *United States v. Place*, 462 U.S. 696, 703 (1983))); *Vernonia School Dist. 47J v. Acton*, 515 U.S. 646, 652–53 (1995) (“[W]here there was no clear practice, either approving or disapproving the type of search at issue, at the time the constitutional provision was enacted, whether a particular search meets the reasonableness standard ‘is judged by balancing its intrusion on the individual’s Fourth Amendment interests against its promotion of legitimate governmental interests.’” (quoting *Skinner v. Ry. Labor Execs.’ Ass’n*, 489 U.S. 602, 619 (1989))).

59. See *infra* Part II.

define the vague term “unreasonable.”⁶⁰ In this way he often looked to the probable cause standard in the second clause to give meaning to the term “unreasonable” in the first.⁶¹

An example of Justice Scalia’s two-step approach can be found in *County of Riverside v. McLaughlin*.⁶² There, Justice Scalia based his opinion in the first part of the two-step analysis.⁶³ He dissented, berating the majority for engaging in a balancing test even though a clear answer existed in 1791.⁶⁴ In that case, the majority held that someone who is arrested without a warrant must be brought in front of a judge no later than 48 hours after the arrest.⁶⁵ Justice Scalia criticized the majority for engaging in a balancing test—between public safety on the one hand, and the need to avoid prolonged detention on the other—when a clear answer existed in 1791.⁶⁶ In 1791, Scalia said, a suspect arrested without a warrant was required to be put in front of a magistrate “as soon as he reasonably can.”⁶⁷ Scalia argued that different courts would strike the balance in different ways, and that the Fourth Amendment served to “put this matter beyond time, place, and judicial predilection.”⁶⁸

Justice Scalia favored bright-line rules because they limited judicial discretion. But not just any bright-line rule would do.⁶⁹ The rule needed to be faithful to the text of the Constitution and based on something external to the judge’s own will.⁷⁰ In *McLaughlin*,

60. See *infra* section I.B.2.

61. See *infra* section I.B.2.

62. 500 U.S. 44, 60 (1991) (Scalia, J., dissenting).

63. *Id.*

64. *Id.*

65. *Id.* at 56 (majority opinion).

66. *Id.* at 60 (Scalia, J., dissenting).

67. *Id.* at 61 (citing 2 HALE, PLEAS OF THE CROWN 95 n.13 (1847)).

68. *Id.* at 65, 66.

69. Professor Manning argued that contrary to popular opinion, Justice Scalia did not care only about rules *qua* rules. Manning, *supra* note 3, at 748–49. Rather, his philosophy was based more deeply on the insistence that judges must justify their decisions on something external to their own wills. See *id.*

70. See *id.* at 770. For an example outside of the Fourth Amendment context, see Justice Scalia’s dissent in *Dickerson v. United States*, 530 U.S. 428, 444 (2000). There, Justice Scalia sharply criticized a bright-line rule—the requirement of *Miranda* warnings—because he found it had no basis in the text or history of the Constitution. See *Dickerson*, 530 U.S. at 450 (Scalia, J., dissenting) (citing *Miranda v. Arizona*, 384 U.S. 436 (1966)). He argued that the clear rule from *Miranda* was no easier to apply than a totality of the circumstances test. See *id.* at 463 (“It is not immediately apparent, however, that the judicial burden has been eased by the ‘bright-line’ rules adopted in *Miranda* . . . Moreover, it is not clear why the Court thinks that the ‘totality-of-the-circumstances’ test . . . is more difficult than *Miranda*

the majority's judgment was indeed a bright-line rule, but it was a rule that was not faithful to the original meaning of the Constitution: the 48-hour rule conflicted with the practices used at the time the Fourth Amendment was enacted.⁷¹ Thus, Scalia criticized it, finding that it eliminated a right that existed at the time of the framing.⁷²

Justice Scalia touched on this distinction in his essay *The Rule of Law as a Law of Rules*.⁷³ He noted that it was *possible* to establish a general rule that was not based on something external to the judges' own wills, but only because "with five votes anything is possible."⁷⁴ He found that if a general rule was not based on a "solid textual anchor or an established social norm" then there was no difference between it and rule-making properly done by the legislature.⁷⁵

B. *Limited Reasonableness: The Warrant & Probable Cause Presumptions*

1. The Warrant Presumption

A critical issue for interpreting the Fourth Amendment is whether its two clauses should be read separately or together.⁷⁶ The first clause dictates the right to be free from "unreasonable" searches and seizures and the second clause states that "no Warrants shall issue, but upon probable cause."⁷⁷ The traditional view was that the second clause gave meaning to the first: a search without a warrant was presumptively unreasonable.⁷⁸ This view is also

for law enforcement officers to conform to, and for courts to apply in a consistent manner.").

71. 500 U.S. at 60 (Scalia, J., dissenting).

72. *Id.* (arguing that the majority opinion "eliminates a very old right indeed").

73. Scalia, *Law of Rules*, *supra* note 16, at 1184–85.

74. *Id.*

75. *Id.* at 1185.

76. See ROBERT M. BLOOM & MARK S. BRODIN, *CRIMINAL PROCEDURE: THE CONSTITUTION AND THE POLICE* 12 (9th ed. 2020); Nicholas A. Kahn-Fogel, *An Examination of the Coherence of Fourth Amendment Jurisprudence*, 26 *CORNELL J.L. & PUB. POL'Y* 275, 279–80 (2016).

77. U.S. CONST. amend. IV. For a comprehensive analysis of the two views of the Fourth Amendment, see Craig M. Bradley, *Two Models of the Fourth Amendment*, 83 *MICH. L. REV.* 1468 (1985).

78. See Silas J. Wasserstrom, *The Incredible Shrinking Fourth Amendment*, 21 *AM. CRIM. L. REV.* 257, 257–58 (1985) (calling this reading the "conventional interpretation").

referred to as the “warrant preference” school of interpretation.⁷⁹ It is exhibited in the frequently cited line from *Katz v. United States*, a Warren Court decision, where the Court stated that warrantless searches were “*per se* unreasonable . . . subject only to a few specifically established and well-delineated exceptions.”⁸⁰

The Warren Court preference for a warrant was later displaced by the Burger Court’s approach, which expanded on existing exceptions to the warrant requirement.⁸¹ In his 1991 concurrence in *California v. Acevedo*, Justice Scalia noted that the warrant requirement now contained so many exceptions that it was practically unrecognizable.⁸² He noted that while it was “textually possible” that the word “unreasonable” implicitly contained the requirement of a warrant, the general rule requiring a warrant in all circumstances had no basis in the common law.⁸³ This view is often referred to as the “reasonableness” school of interpretation.⁸⁴ A majority of the Court has, at times, adopted this view, stating that the touchstone of the Fourth Amendment is merely “reasonableness.”⁸⁵ Under this view, the Warrant Clause does not modify

79. See, e.g., BLOOM & BRODIN, *supra* note 76, at 12.

80. 389 U.S. 347, 357 (1967).

81. See Robert M. Bloom, *Warrant Requirement—The Burger Court Approach*, 53 U. COLO. L. REV. 691, 693 (1982); see also Richard H. Seamon, *Kyllo v. United States and the Partial Ascendance of Justice Scalia’s Fourth Amendment*, 79 WASH. U. L.Q. 1013, 1026–27 (2001) (noting that the Court began to stray from the warrant preference view in the 1990s).

82. 500 U.S. 565, 582 (1991) (Scalia, J., concurring) (listing exceptions including “searches incident to arrest . . . automobile searches . . . exigent circumstances . . . search[es] incident to nonarrest when there is probable cause to arrest . . . boat boarding for document checks . . . welfare searches . . . inventory searches . . . airport searches . . . school search[es] . . .” (quoting Craig M. Bradley, *Two Models of the Fourth Amendment*, 83 MICH. L. REV. 1468, 1773–74 (1985))).

83. *Id.* at 582–84.

84. See, e.g., BLOOM & BRODIN, *supra* note 76, at 12. An early expression of the reasonableness school appears in *United States v. Rabinowitz*, 339 U.S. 56, 65–66 (1950) (“A rule of thumb requiring that a search warrant always be procured whenever practicable may be appealing from the vantage point of easy administration. But we cannot agree that this requirement should be crystallized into a *sine qua non* to the reasonableness of a search . . . The relevant test is not whether it is reasonable to procure a search warrant, but whether the search was reasonable.”).

85. See, e.g., *Fernandez v. California*, 571 U.S. 292, 298 (2014) (“[T]he ultimate touchstone of the Fourth Amendment is ‘reasonableness.’”); *Michigan v. Fisher*, 558 U.S. 45, 47 (2009) (“The ultimate touchstone of the Fourth Amendment, we have often said, is ‘reasonableness.’”); *Brigham City v. Stuart*, 547 U.S. 398, 403 (2006) (“Nevertheless, because the ultimate touchstone of the Fourth Amendment is ‘reasonableness,’ the warrant requirement is subject to certain exceptions.”); *Illinois v. McArthur*, 531 U.S. 326, 330 (2001) (“[T]he Fourth Amendment’s] ‘central requirement’ is one of reasonableness.” (quoting *Texas v. Brown*, 460 U.S. 730, 739 (1983))).

the Reasonableness Clause; the Warrant Clause solely lays out the requirements of a valid warrant.⁸⁶ Various critics have stated that Justice Scalia endorsed the “reasonableness” school of interpretation.⁸⁷

As evidence, these critics cite the fact that, in 2004, Justice Scalia signed on to Justice Thomas’s dissent in *Groh v. Ramirez*, which endorsed the reasonableness school.⁸⁸ There, a federal agent applied for a warrant to search a large ranch in Montana, but did not properly list with particularity the items he intended to seize.⁸⁹ The majority held that the warrant was plainly invalid because it did not meet the Fourth Amendment’s particularity requirement.⁹⁰ It stated that because the warrant was so obviously defective, the search was essentially warrantless.⁹¹ It adopted the “warrant preference” view of the Fourth Amendment, stating that warrantless searches were presumptively unreasonable.⁹² Thus, it held that the search at issue in the case was unreasonable.⁹³

Justice Scalia joined Justice Thomas’s dissent, arguing against the warrant presumption.⁹⁴ Justice Thomas cited a long line of cases vacillating between requiring a warrant and recognizing some exception to the warrant requirement.⁹⁵ He wrote that though the precise relationship between the clauses was not certain, neither clause explicitly required a warrant.⁹⁶ He followed the

86. Kahn-Fogel, *supra* note 76, at 279–80.

87. See MacDonnell, *supra* note 1, at 194–95 (noting that Scalia believed the Fourth Amendment did not contain a warrant presumption); Seamon, *supra* note 81, at 1026–29 (noting that Scalia has played a “major role” in the trend away from a broad warrant presumption). Each of these analyses, though, was published before Scalia’s 2015 dissent in *Los Angeles v. Patel*, 576 U.S. 409 (2015), which provides greater clarity on his view of the relationship between the two clauses.

88. See *Groh v. Ramirez*, 540 U.S. 551, 571, 573–74 (2004) (Thomas, J., dissenting); MacDonnell, *supra* note 1, at 199.

89. *Groh*, 540 U.S. at 554. The application for the warrant listed various types of weapons and was supported with a detailed affidavit. *Id.* The warrant itself, however, was much less specific: it described only the house the agent intended to search, but did not describe the weapons he intended to seize. *Id.* It did not incorporate by reference the detailed list of weapons he had provided in the warrant application. *Id.* at 554–55.

90. *Id.* at 557. Though the application listed the “things to be seized,” that did not rescue the warrant from the failure. *Id.*

91. *Id.* at 559.

92. *Id.* (citing *Payton v. New York*, 445 U.S. 573, 586 (1980)).

93. *Id.* at 563.

94. *Id.* at 571, 573–74 (Thomas, J., dissenting).

95. *Id.* at 572–73.

96. *Id.* at 571.

reasonableness school and argued that the search in the case had been reasonable, and therefore was constitutional.⁹⁷

Justice Scalia's own views on the warrant presumption, however, were slightly more nuanced. In his 2015 dissent in *City of Los Angeles v. Patel*, Justice Scalia expounded on the relationship between the two clauses.⁹⁸ There, a group of motel operators in California facially challenged a municipal code that required hotel operators to keep records with identifying information about their guests and let police officers inspect the records on demand.⁹⁹ The majority held that the statute was facially unconstitutional because it did not afford an opportunity for motel operators to seek judicial review before being required to turn over requested records.¹⁰⁰ It adopted the warrant preference interpretation, citing the clause in *Katz* stating that warrantless searches were “*per se* unreasonable . . . subject only to a few specifically established and well-delineated exceptions.”¹⁰¹ The search at issue did not comply with the requirements of the administrative search exception because it did not provide an option for precompliance review, and thus the Court struck it down.¹⁰²

Justice Scalia dissented. He argued that the touchstone of the Fourth Amendment was “reasonableness” and that the search at issue was reasonable because it was constitutional in almost every instance.¹⁰³ Despite appearing to endorse the reasonableness school of interpretation, though, Justice Scalia suggested that two clauses of the Fourth Amendment were not wholly separate:

Grammatically, the two clauses of the Amendment seem to be independent—and directed at entirely different actors. The former tells the executive what it must do when it conducts a search, and the latter tells the judiciary what it must do when it issues a search warrant. But in an effort to guide courts in applying the Search-and-Seizure Clause's indeterminate reasonableness standard, and to maintain coherence in our case law, *we have used the Warrant Clause as a guidepost for assessing the reasonableness of a search, and have erected a*

97. *Id.* at 573.

98. 576 U.S. 409, 428, 430–31 (2015) (Scalia, J., dissenting).

99. *Id.* at 412–13 (majority opinion).

100. *Id.* at 418. The statute provided that hotel operators who did not comply with police requests could be arrested on the spot. *Id.* at 421.

101. *Id.* at 419 (quoting *Katz v. United States*, 389 U.S. 347, 357 (1967)).

102. *Id.* at 421.

103. *Id.* at 430–31 (Scalia, J., dissenting).

framework of presumptions applicable to broad categories of searches conducted by executive officials. Our case law has repeatedly recognized, however, that these are mere presumptions, and the only constitutional *requirement* is that a search be reasonable.¹⁰⁴

Though Scalia argued that the clauses were technically separate, he stated that the second one was a “guidepost” to understand the word “reasonableness” in the first.¹⁰⁵ Justice Scalia did not believe in a warrant *requirement*, but appeared—at least at the end of his career—to believe in a warrant *presumption*.¹⁰⁶

A warrant presumption, though, does not add much utility in crafting bright-line rules because there are so many exceptions to the warrant requirement.¹⁰⁷ In 1991, Justice Scalia wrote that the warrant requirement “had become so riddled with exceptions that it was basically unrecognizable.”¹⁰⁸ It has essentially reached the point that it is no longer a rule at all, but rather a standard.¹⁰⁹

Nevertheless, in his concurrence in *Bailey v. United States*, Justice Scalia argued that extending an exception to the warrant requirement should be limited.¹¹⁰ He argued that the categorical bright-line rule which allowed for the temporary detention of occupants during the execution of a search warrant should not be extended to include an occupant who had recently left the premises.¹¹¹ He quoted the language of *Michigan v. Summers*, stating that, “If police are to have workable rules, the balancing of the competing interests . . . ‘must in large part be done on a categorical basis—not in an ad hoc, case-by-case fashion by individual police officers.’”¹¹²

104. *Id.* (emphasis added).

105. *Id.*

106. *See id.*

107. *See Groh v. Ramirez*, 540 U.S. 551, 572 (Thomas, J. dissenting) (citing the following exceptions to the warrant requirement: searches incident to arrest, automobile searches, searches of “pervasively regulated” businesses, administrative searches, exigent circumstances, mobile home searches, inventory searches, border searches).

108. *California v. Acevedo*, 500 U.S. 565, 582 (1991) (Scalia, J., concurring).

109. *See Sullivan*, *supra* note 3, at 58 n.231 (noting that the difference between rules and standards is a continuum, not a divide; at some point a rule can have so many exceptions that it becomes a standard).

110. 568 U.S. 186, 203 (2015) (Scalia, J., concurring).

111. *Id.* at 204.

112. *Id.* at 206 (quoting *Michigan v. Summers*, 452 U.S. 692, 705 (1981)).

2. The Probable Cause Presumption

The warrant presumption is not the only part of the second clause that Justice Scalia appears to read into the word “reasonableness.” Many of his cases evince what we will call a “probable cause presumption”: often, when deciding whether a search is reasonable, Justice Scalia based his decision on whether there was probable cause. This method gave him a benchmark with which to craft bright-line rules.

As with the notion of warrants, from the second clause, Justice Scalia appeared not to believe in a probable cause *requirement*, but rather a probable cause *presumption*.¹¹³ He acknowledged that there were categories of cases, such as administrative searches, that required less justification than probable cause.¹¹⁴ And yet in the criminal context, Justice Scalia chose to root his analysis in probable cause again and again. If there was probable cause, he declined to engage in a balancing analysis and found the search was “*ipso facto*” reasonable.¹¹⁵ This strategy facilitated making bright-line rules that limited judicial discretion.

For example, in *Arizona v. Hicks*, Justice Scalia rooted his opinion in the need for probable cause.¹¹⁶ In that case, a bullet was fired through the floor of James Hicks’s apartment.¹¹⁷ Police entered without a warrant to search for the shooter, and found and seized three weapons.¹¹⁸ While in the apartment, one of the officers observed some expensive stereo equipment, which he deemed out of

113. See *Los Angeles v. Patel*, 576 U.S. 409, 431 (2015). The probable cause *presumption* should be distinguished from the probable cause *requirement*, which various scholars have examined. See, e.g., Wasserstrom, *supra* note 78, at 304–09. The probable cause requirement is the idea that even warrantless searches must have probable cause to be reasonable. *Id.* Under this view, the real harm the Framers sought to protect against was not warrantless searches, but rather searches done without probable cause. *Id.* Professor Akhil Reed Amar has criticized this view. See Akhil Reed Amar, *Fourth Amendment First Principles*, 107 HARV. L. REV. 757, 782–85 (1994). He argued the idea of a probable cause requirement was nonsensical both because it is not textually required by the words of the Fourth Amendment, and because there are numerous searches for which probable cause is *not* required, such as consent searches, administrative searches, and weapons pat-downs. *Id.* at 783.

114. See *Patel*, 576 U.S. at 430–31.

115. *Arizona v. Gant*, 556 U.S. 332, 353 (2009) (Scalia, J., concurring).

116. 480 U.S. 321 (1987). Professor Kannar provided a valuable analysis of *Hicks* in his 1990 article *The Constitutional Catechism of Antonin Scalia*. See George Kannar, *The Constitutional Catechism of Antonin Scalia*, 99 YALE L.J. 1297, 1324–28 (1990).

117. *Hicks*, 480 U.S. at 323.

118. *Id.* at 323–34.

place in the otherwise “squalid” apartment.¹¹⁹ To determine if the equipment was stolen, the officer moved the stereo slightly so he could record its serial number.¹²⁰ He reported the serial number to police headquarters by phone, was advised that some of the equipment had been stolen in a recent armed robbery, and seized it.¹²¹

Justice Scalia noted that though the officer had lawfully entered the apartment pursuant to the exigent circumstances exception, moving the equipment to inspect the serial number was an unrelated “search.”¹²² And that search required probable cause.¹²³

The dissents made policy arguments: Justice Powell argued that the distinction between “merely looking at” an item in plain view and slightly moving it was trivial.¹²⁴ Justice O’Connor argued that the case presented a mere “ cursory inspection” and not a “full-blown search” and balanced the government and individual interests to find that it was justified.¹²⁵ She accused Justice Scalia of ignoring precedent and placing serious constraints on law enforcement in order to establish a bright-line rule—something which, she argued, had only theoretical advantages.¹²⁶

In response, Justice Scalia stated that the standard Justice O’Connor proposed would “send police and judges into a new thicket of Fourth Amendment law, to seek a creature of uncertain description that is neither a ‘plain view’ inspection nor yet a ‘full-blown search.’”¹²⁷ “A search is a search,” he wrote, “even if it happens to disclose nothing but the bottom of a turntable.”¹²⁸ He resisted the use of any policy-inflected balancing tests, even acknowledging that there might have been no lawful way for the officer to have ascertained whether the equipment was stolen if he did not have probable cause.¹²⁹ “[T]here is nothing new,” he wrote, “in the

119. *Id.* at 323.

120. *Id.*

121. *Id.*

122. *Id.* at 324–25.

123. *Id.* at 324–26.

124. *Id.* at 328, 333 (Powell, J., dissenting).

125. *Id.* at 335 (O’Connor, J., dissenting).

126. *Id.* at 339.

127. *Id.* at 328–29 (majority opinion).

128. *Id.* at 325.

129. *Id.* at 329.

realization that the Constitution sometimes insulates the criminality of a few in order to protect the privacy of us all.”¹³⁰ Instead of allowing Justice O’Connor’s flexible standard of something less than a “search” that would require some lesser justification, Justice Scalia firmly rooted his bright-line rule in the requirement of probable cause.

Similarly, in *California v. Acevedo*, Justice Scalia again rooted his decision in probable cause presumption.¹³¹ There, officers observed a man leaving an apartment known to contain multiple packages of marijuana.¹³² The man carried a paper bag, got into his car, and began to drive away.¹³³ Officers stopped and searched the man’s car—including the paper bag—where they found marijuana.¹³⁴ The majority found that the automobile exception to the warrant requirement applied to this search, and therefore it was lawful.¹³⁵ It eliminated any separate container analysis, noting that a clear-cut rule was preferable: police officers can search cars—including containers therein—without a warrant if they have probable cause.¹³⁶ The majority endorsed the warrant preference interpretation in dicta, noting that the automobile exception was merely one of the “specifically established and well-delineated exceptions.”¹³⁷

Justice Scalia concurred, but disagreed with the majority’s warrant preference approach.¹³⁸ He stated that the Fourth Amendment contains no warrant requirement; it merely prohibits “unreasonable” searches.¹³⁹ He acknowledged that it was “textually possible” to consider that the word “unreasonable” implicitly contained the requirement of a warrant.¹⁴⁰ But, he noted that the

130. *Id.*

131. 500 U.S. 565, 581–85 (1991) (Scalia, J., concurring).

132. *Id.* at 567 (majority opinion).

133. *Id.*

134. *Id.*

135. *Id.* at 579–80. The majority held that there was no distinction between a standard search of a vehicle, and a search of the closed containers within that vehicle. *Id.* So long as there was probable cause to justify the search, each is constitutional. *Id.*

136. *Id.* at 579.

137. *Id.* at 580.

138. *Id.* at 581–85 (Scalia, J., concurring).

139. *Id.* at 581 (“The Fourth Amendment does not by its terms require a prior warrant for searches and seizures; it merely prohibits searches and seizures that are ‘unreasonable.’”).

140. *Id.* at 582.

Court had “lurched back and forth” between the two views, such that the “warrant requirement” was so “riddled with exceptions that it was basically unrecognizable.”¹⁴¹ He went on to say that a general rule requiring a warrant in all circumstances had no basis in the common law.¹⁴² Like in *Hicks*, Justice Scalia allowed a warrantless search so long as it was based upon probable cause.¹⁴³ Though he professed to adopt the view that the clauses were separate, he nonetheless required that the warrantless search be based upon probable cause.¹⁴⁴

In *Wyoming v. Houghton*, too, Justice Scalia rooted his analysis in probable cause.¹⁴⁵ There, David Young and his girlfriend, Sandra Houghton, were stopped by Wyoming Highway Patrol for a traffic violation.¹⁴⁶ During the stop, the officer noticed a hypodermic syringe in Mr. Young’s shirt pocket.¹⁴⁷ He asked Mr. Young why he had the syringe, and Mr. Young replied candidly that he used it to take drugs.¹⁴⁸ The officer then searched the vehicle, and found Ms. Houghton’s purse which contained methamphetamine and drug paraphernalia.¹⁴⁹

The trial court denied Ms. Houghton’s motion to suppress, holding that the officer had probable cause to search the car, and therefore could search all closed containers in the vehicle.¹⁵⁰ The Wyoming Supreme Court reversed, holding that probable cause did not extend to the personal effects of a passenger who was not suspected

141. *Id.* In 2001, Professor Seamon noted that this criticism had apparently resonated, as at that time the majority’s opinion in *Acevedo* was the last time the warrant preference school appeared in a majority opinion. Seamon, *supra* note 81, at 1027. He posited that “the broad version of the presumption seems to have died from embarrassment.” *Id.* In more recent years, though, this prediction has not borne out. Since 2001, the Court has continued to fluctuate between the warrant preference school and the reasonableness school, and has adopted the warrant preference school in various cases. *See, e.g.*, *City of Los Angeles v. Patel*, 576 U.S. 409, 419–20 (2015); *Arizona v. Gant*, 556 U.S. 332, 338 (2009); *Groh v. Ramirez*, 540 U.S. 563 (2004).

142. *Acevedo*, 500 U.S. at 583–84 (Scalia, J., concurring).

143. *See id.* at 585.

144. *See id.*

145. *Wyoming v. Houghton*, 526 U.S. 295, 300–01 (1999).

146. *Id.* at 297–98.

147. *Id.* at 298.

148. *Id.*

149. *Id.*

150. *Id.* at 299.

of criminal activity.¹⁵¹ Justice Scalia, writing for the majority, reversed the decision of the Wyoming Supreme Court, holding that the search did not violate Ms. Houghton's Fourth Amendment rights.¹⁵² He focused on the fact that officers had probable cause to believe the car contained drugs.¹⁵³ He cited *Carroll v. United States* and *United States v. Ross*, which discussed historical legislation that let customs officials search ships if they had probable cause.¹⁵⁴ Because merchandise was shipped in containers, the authority to search with probable cause must have included the authority to search closed containers; officers could not have needed a separate warrant for each shipping container.¹⁵⁵ Thus, he held that neither precedent nor historical evidence recognized a distinction between closed containers based on who owned them.¹⁵⁶ He laid down a bright-line rule that where there is probable cause to search a car, it is reasonable for officers to search all closed containers in the car—including the passenger's personal possessions.¹⁵⁷

In *Arizona v. Gant*, Justice Scalia again used the notion of probable cause in the second clause to inform his interpretation of "reasonableness" in the first.¹⁵⁸ In that case, Rodney Gant was arrested for driving with a suspended license.¹⁵⁹ After he was handcuffed and placed in the backseat of a police patrol car, two officers searched his vehicle.¹⁶⁰ They found a gun and a bag of cocaine.¹⁶¹

151. *Id.*

152. *Id.* at 302.

153. *Id.* at 300.

154. *Id.* at 300–01 (first citing *Carroll v. United States*, 267 U.S. 132 (1925); and then citing *United States v. Ross*, 456 U.S. 798, 820 n.26 (1982)).

155. *Id.* at 301 (citing *Ross*, 456 U.S. at 820 n.26).

156. *Id.* at 302.

157. *Id.* Justice Scalia then went on to say that even if the historical evidence was unpersuasive, a balancing of interests also weighed in favor of allowing the search. *Id.* at 303. He noted that passengers in cars on public roads have a reduced expectation of privacy, whereas the government interest in being able to search a vehicle—which could easily leave the scene if officers were required to wait for a warrant—was substantial. *Id.* at 303–04. He noted that a criminal could easily hide contraband in his passenger's belongings—even without the passenger's knowledge or permission—to evade a potential search. *Id.* at 304–05. He stated that the gray area of this rule would invite a flood of litigation about various factors showing whether an item was owned by the driver or a passenger. *Id.* at 305–06. He wrote that this practical reality must be accounted for in the balancing analysis. *Id.* at 306.

158. 556 U.S. 332, 351–54 (2008) (Scalia, J., concurring).

159. *Id.* at 336 (majority opinion).

160. *Id.*

161. *Id.*

Mr. Gant moved to suppress the items, arguing that the warrantless search violated the Fourth Amendment.¹⁶² The majority adopted the warrant preference school, citing the statement in *Katz* that the warrant requirement is “subject only to a few specifically established and well-delineated exceptions.”¹⁶³ One of those exceptions, it noted, was a search incident to a lawful arrest, which was espoused in *Chimel v. California*.¹⁶⁴

In 1969, in *Chimel*, the Court had held that a search incident to arrest extends not only to the arrestee’s person, but also to the “grabbable space” around him.¹⁶⁵ In 1981, in *New York v. Belton*, the Court applied this exception to people arrested while driving.¹⁶⁶ There, the Court held that the *Chimel* exception extended to the interior of the passenger compartment of the vehicle, even if the occupant was no longer in reaching distance of it.¹⁶⁷

In *Gant*, the Court rejected this broad reading of *Belton*, and held that the *Chimel* rationale only applies where the arrestee is “unsecured and within reaching distance of the passenger compartment at the time of the search.”¹⁶⁸ The majority stated, alternatively, that a search of the interior of the vehicle could be justified if it was “reasonable to believe evidence relevant to the crime of arrest might be found in the vehicle.”¹⁶⁹ In this case, the majority

162. *Id.*

163. *Id.* at 338 (citing *Katz v. United States*, 389 U.S. 347, 357 (1967) (footnote omitted)).

164. *Id.* (citing *Chimel v. California*, 395 U.S. 752 (1969)).

165. *Chimel*, 395 U.S. at 763.

166. 453 U.S. 454, 460 (1981).

167. *Id.* Much of the rationale in *Belton* was regarding the necessity of clear rules in the Fourth Amendment context. *Id.* at 458. The Court cited Professor LaFave’s article, arguing that Fourth Amendment protection is futile unless law enforcement is bound by a set of clear rules. *Id.* (citing Wayne R. LaFave, “Case-By-Case Adjudication” Versus “Standardized Procedures”: *The Robinson Dilemma*, 1974 SUP. CT. REV. 127, 142). The Court stated: “When a person cannot know how a court will apply a settled principle to a recurring factual situation, that person cannot know the scope of his constitutional protection, nor can a policeman know the scope of his authority.” *Id.* at 459–60. The dissent called the majority’s bright-line “arbitrary,” and argued that the mere fact that a rule is supposedly more efficient for law enforcement “can never by itself justify disregard of the Fourth Amendment.” *Id.* at 469 (Brennan, J., dissenting). The dissent argued, moreover, that the majority’s rule abandoned the primary justifications from *Chimel* because it applied whether or not the occupant was, in fact, still in reaching distance of the interior of the car. *Id.* at 470.

168. 556 U.S. at 343. The *Gant* opinion was 5–4; Justice Scalia’s concurring vote was necessary to reach a majority.

169. *Id.* (quoting *Thornton v. United States*, 541 U.S. 615, 632 (2004) (Scalia, J., concurring)). Justice Scalia had previously espoused this view in his concurrence in *Thornton*, 541 U.S. at 632.

stated that the defendant was arrested for a traffic violation, and therefore there was no reasonable basis to believe the vehicle would contain evidence of that crime.¹⁷⁰ Thus, because Mr. Gant was secured in the backseat of a police vehicle, and there was no reason to believe his car would contain evidence of the crime of arrest, the majority held the search was unreasonable.¹⁷¹

Justice Scalia concurred, arguing that the Court should “simply abandon the *Belton–Thorton* charade of officer safety and overrule those cases.”¹⁷² Justice Scalia was needed to make up a majority, and characterized the majority concession to probable cause as an artificial narrowing of the majority opinion. He agreed only with the majority’s second rationale: that officers could search a vehicle incident to arrest if they had probable cause to believe that evidence of the crime of arrest would be found.¹⁷³ He stated that such a search was “ipso facto ‘reasonable.’”¹⁷⁴ This statement is consistent with the idea that the word “reasonable” contains within it a presumption of probable cause.¹⁷⁵ Justice Scalia used this analysis to cut through the uncertainties produced by the majority’s holding, which allowed “reasonableness” to be proven in multiple ways.¹⁷⁶ The rule he professed was simple: if officers had probable cause that evidence would be found in the vehicle, they could search it. If not, they could not.

In *Whren v. United States*, Justice Scalia once again rooted his analysis in probable cause.¹⁷⁷ There, plainclothes officers were patrolling a “high drug area” of Washington, D.C. in an unmarked car.¹⁷⁸ They noticed a truck with temporary license plates and “youthful occupants” stop at an intersection for an “unusually long time.”¹⁷⁹ The officers did a U-turn to follow the truck.¹⁸⁰ The truck turned right without signaling and took off at an “unreasonable”

170. *Gant*, 556 U.S. at 343.

171. *Id.* at 344.

172. *Id.* at 353 (Scalia, J., concurring).

173. *Id.*

174. *Id.*

175. *See id.*

176. *See id.* at 343 (majority opinion).

177. *Whren v. United States*, 517 U.S. 806, 817 (1996).

178. *Id.* at 808.

179. *Id.*

180. *Id.*

speed.¹⁸¹ The officers followed, eventually pulled up next to it, and directed the driver to pull over.¹⁸² The officer then noticed two large plastic bags he believed to contain crack cocaine in Michael Whren's—the passenger's—hands.¹⁸³ Mr. Whren and the driver—James Brown—were both indicted on various drug charges.¹⁸⁴

Mr. Whren and Mr. Brown moved to suppress the drugs, arguing that the alleged purpose for the stop—giving the driver a warning about traffic violations—was pretextual.¹⁸⁵ They pointed out that it was not common for vice detectives to worry about traffic violations.¹⁸⁶ Though they acknowledged that the officers had probable cause to believe they had committed a civil traffic violation, they argued that “in the unique context of civil traffic regulations’ probable cause is not enough.”¹⁸⁷ They argued that because the civil traffic code was so vast, officers will almost always have reason to stop someone for some technical violation.¹⁸⁸ This created an environment, they argued, where police could choose whom to stop based on discriminatory factors—such as race—as both Mr. Whren and Mr. Brown were African-American.¹⁸⁹

Mr. Whren and Mr. Brown proposed a balancing analysis, arguing that the Court should determine “whether the officer’s conduct deviated materially from usual police practices, so that a reasonable officer in the same circumstances would not have made the stop for the reasons given.”¹⁹⁰ They asserted that the Court should engage in a balancing analysis, and weigh the governmental and individual interests.¹⁹¹

Justice Scalia, writing for the majority, refused to adopt the balancing analysis.¹⁹² While he acknowledged that various Fourth

181. *Id.*

182. *Id.*

183. *Id.* at 808–09.

184. *Id.* at 809.

185. *Id.*

186. Brief for Petitioners at 5–7, *Whren*, 517 U.S. 806 (No. 95-5841).

187. *Whren*, 517 U.S. at 810.

188. *Id.*

189. *Id.*

190. *Id.* at 814.

191. *Id.* at 816.

192. *Id.* at 817. He also stated that while the petitioners’ proposed standard claimed to be objective by not looking at the officer’s subjective motivations, it was nonetheless a subjective standard. *Id.* at 813–14.

Amendment cases did rely on balancing analyses, he stated that if the search or seizure was based upon probable cause, the balance clearly weighed in favor of the government.¹⁹³ He noted that the searches in the cases petitioners cited all took place without probable cause, and thus balancing had been necessary.¹⁹⁴ The only exceptions to this rule, he said, were “extraordinary” searches or seizures—such as seizures by means of deadly force—where the Court should balance interests even though there had been probable cause.¹⁹⁵ But for the ordinary case, Scalia said, the rule was that probable cause justifies a search and seizure.¹⁹⁶ Thus, because here the officers had probable cause to believe that petitioners had violated a traffic code, the search and seizure was reasonable.¹⁹⁷ Instead of determining whether an officer’s action was “reasonable” based on a variety of factors, Scalia again rooted his analysis in the bright-line rule of probable cause.

C. *Originalism and Textualism*

Justice Scalia also used originalism and textualism to limit judicial discretion. This framework aided him in formulating bright-line rules. He argued that this method made it easier for him to develop general rules, because without grounding one’s reasoning within a textualist or originalist framework, rules could sound eerily like legislation.¹⁹⁸ He thought that nonoriginalism left judges too much discretion to impose their own politics and morals into their decisions.¹⁹⁹ In this context he was a true textualist, turning

193. *Id.* at 817 (“It is of course true that in principle every Fourth Amendment case, since it turns upon a ‘reasonableness’ determination, involves a balancing of all relevant factors. With rare exceptions not applicable here, however, the result of that balancing is not in doubt where the search or seizure is based upon probable cause.”).

194. *Id.*

195. *Id.* at 818.

196. *Id.* at 819.

197. *Id.*

198. *See* Scalia, *Law of Rules*, *supra* note 16, at 1184–85.

199. *See* Scalia, *Originalism*, *supra* note 6, at 854–56. Scalia’s originalist and textualist philosophy was not without its critics. Professors Lawrence Tribe and Ronald Dworkin have argued that they, not Scalia, are the genuine originalists and textualists. David M. Zlotnick, *Justice Scalia and His Critics: An Exploration of Scalia’s Fidelity to His Constitutional Methodology*, 48 EMORY L.J. 1377, 1406 (1999). Professors Calabresi and Lawson, further, have examined to what extent the Constitution itself prescribes rules over standards. *See* Calabresi & Lawson, *supra* note 4, at 489–97. They determined that there are many places where the Constitution itself prescribes standards—such as “due process,” “speedy” trials, “impartial” juries, bails that are not “excessive.” *Id.* at 497. In many cases, though—such as

to the words of the Fourth Amendment itself. In these cases, he was not determining whether a search or seizure was “reasonable,” but whether a search or seizure had even occurred in the first place.

For example in *California v. Hodari D.*, Justice Scalia, writing for the majority, replaced the vague standard from *United States v. Mendenhall* with a bright-line rule.²⁰⁰ In that case, a group of young men in Oakland, California, saw officers patrolling the area, panicked, and ran.²⁰¹ The officers, suspicious, chased the men.²⁰² While running, one of the men—Hodari D.—tossed away a small item.²⁰³ One of the officers subsequently tackled Hodari and handcuffed him.²⁰⁴ Hodari moved to suppress the item, which was discovered to be cocaine, on the basis that he had been “seized” within the meaning of the Fourth Amendment while the officer was chasing him.²⁰⁵ Hodari argued that by chasing him, the officer had engaged in a “show of authority.”²⁰⁶ He cited the plurality in *Mendenhall* to argue that a seizure occurs where “a reasonable person would have believed that he was not free to leave.”²⁰⁷

Justice Scalia found that the language of the Fourth Amendment did not support Hodari’s argument.²⁰⁸ “Seizure,” Scalia said, meant some application of physical force; a mere “show of authority” was not sufficient.²⁰⁹ The *Mendenhall* test was a necessary, but not sufficient, factor for a seizure to have occurred.²¹⁰ Justice Scalia held that a “seizure” required either physical force, or, not only a show of authority but submission to that authority.²¹¹ Merely being

the nondelegation doctrine—they argue that Scalia ignored original meaning, and opted instead to create bright-line rules. *Id.* at 489–90. Thus, they argue that Scalia’s preference for rules often thwarts other considerations such as original meaning. *Id.* at 495.

200. *California v. Hodari D.*, 499 U.S. 621, 627–28 (1991) (citing *United States v. Mendenhall*, 446 U.S. 544, 554 (1980)); Zlotnick, *supra* note 199, at 1390–91 (noting that Scalia tends to define words as narrowly as possible, and calling *Hodari D.* an example of “constitutional law by Webster’s”).

201. *Hodari D.*, 499 U.S. at 622–23.

202. *Id.* at 623.

203. *Id.*

204. *Id.*

205. *Id.*

206. *Id.* at 625–26 (citing *Terry v. Ohio*, 392 U.S. 1, 19 n.16 (1968)).

207. *Id.* at 627–28 (citing *United States v. Mendenhall*, 446 U.S. 544, 554 (1980)).

208. *Id.* at 626.

209. *Id.*

210. *Id.* at 628.

211. *Id.* at 626.

chased by the police and not complying did not constitute a seizure because there was no submission.²¹²

Justice Scalia discussed the definition of “seizure” two years prior in his essay *The Rule of Law as a Law of Rules*.²¹³ He criticized the *Mendenhall* test as it was applied in *Michigan v. Chesternut*.²¹⁴ There, the majority applied the *Mendenhall* test and found that a “seizure” had occurred when “a person in the defendant’s position would not have felt that he was free to disregard the police and go about his business.”²¹⁵ Justice Scalia called this “a rule of sorts,” but found it was not as precise as it should be.²¹⁶ He instead joined Justice Kennedy’s concurrence, stating that there had been no “seizure” until there was a “restraining effect.”²¹⁷ Scalia noted that his textualist methodology made it easier for him than for other judges to develop general rules.²¹⁸

Similarly, in *Minnesota v. Carter*, Justice Scalia turned to the wording of the Fourth Amendment.²¹⁹ In that case, a police officer looked in an apartment window through a gap in the closed blinds and saw two men bagging cocaine.²²⁰ The Court held that one of the men, Mr. Carter, did not have standing to contest the alleged search.²²¹ Mr. Carter did not have a reasonable expectation of privacy, the plurality contended, because he was merely at the apartment to engage in a short-term business transaction.²²² There was no suggestion, the plurality stated, that Mr. Carter had a previous relationship with the person who lived in the apartment, or anything akin to the relationship of an overnight guest at his host’s

212. *Id.*

213. Scalia, *Law of Rules*, *supra* note 16, at 1184.

214. *Id.* (citing *Michigan v. Chesternut*, 486 U.S. 567 (1988)).

215. *Id.*

216. *Id.*

217. *Id.* (citing *Chesternut*, 486 U.S. at 576–77 (Kennedy, J., concurring)).

218. *Id.* Professor David Strauss, though, argued that Scalia’s interpretation of the word “seizure” is *not* based on its plain meaning. Strauss, *supra* note 27, at 1005. Strauss noted that in context, a “seizure” applies to police action, and there are plenty of circumstances in which an officer has “seized” someone though he has not physically grabbed or taken possession of him. *Id.* For example, when an officer points a weapon at a person and orders him to stop. *Id.* Professor Strauss argued that instead of deriving the rule from the text, Scalia first decided he would like to use a rule, not a standard, and second crafted a rule that could then be made compatible with the meaning of “seizure.” *Id.* at 1005.

219. 525 U.S. 83, 92–93 (1998) (Scalia, J., concurring).

220. *Id.* at 85 (majority opinion).

221. *Id.* at 90.

222. *Id.* at 91.

apartment.²²³ While an overnight visitor might have a reasonable expectation of privacy, someone who visited an apartment only to participate in a brief business transaction did not.²²⁴

Justice Scalia concurred, rooting his analysis in the meaning of the word “their” in the Fourth Amendment.²²⁵ He analyzed founding-era materials to determine that the phrase “right of the people to be secure in *their* persons, houses, papers, and effects”²²⁶ meant that each person had a right to be free in “*his own* person, house, papers, and effects.”²²⁷ He concurred with the majority that because Mr. Carter was not in *his* house, or even any house that he could have considered a temporary residence, the Fourth Amendment was not violated.²²⁸ Thus, Justice Scalia used textualism to formulate a bright-line rule.

D. *Keeping Easy Cases Easy: The Trespass Test and Its Applicability in the Digital Age*

Probably the most significant contribution Justice Scalia made to future Fourth Amendment jurisprudence was reintroducing the trespass standard.²²⁹ Some argue that this standard could provide a more predictable way to analyze searches in the digital age.²³⁰ Justice Scalia favored the trespass test over the test from *Katz v. United States*, which analyzed expectations of privacy.²³¹ The *Katz* test originated in Justice Harlan’s 1967 concurrence in *Katz*.²³² It established a two-fold requirement: first, that one have a subjective expectation of privacy; and second, that society recognizes this

223. *Id.* at 90–91 (citing *Minnesota v. Olson*, 495 U.S. 91 (1990)).

224. *Id.*

225. *Id.* at 92–93 (Scalia, J., concurring). He rejected the majority’s reliance on the *Katz* test to determine if a search had occurred. *Id.* at 91–92.

226. U.S. CONST. amend. IV (emphasis added).

227. *Carter*, 525 U.S. at 92 (Scalia, J., concurring).

228. *Id.* at 97 (noting that it is implausible to call an apartment someone uses only to package cocaine his “temporary residence”).

229. MacDonnell, *supra* note 1, at 232.

230. *See infra* notes 308–13 and accompanying text.

231. *See United States v. Jones*, 565 U.S. 400, 405 (2012); *Katz v. United States*, 389 U.S. 347, 360–62 (1967) (Harlan, J., concurring).

232. *See Katz*, 389 U.S. at 360–62 (Harlan, J., concurring).

expectation as reasonable.²³³ For years, the *Katz* test was considered the only standard.²³⁴

Not surprisingly, Scalia loathed the *Katz* test. It allowed for judicial activism to an extreme. Even before reviving the alternative trespass test to use in its stead,²³⁵ he repeatedly questioned *Katz*'s validity. For example, in 1987 in *O'Connor v. Ortega*, the majority opinion used *Katz* to hold that searches and seizures by government employers of the offices of their employees should be analyzed on a case-by-case basis.²³⁶ Scalia—then in only his second term on the Court—concurring, writing that the majority's standard was “so devoid of content that it produces rather than eliminates uncertainty in this field.”²³⁷

In 1998, Justice Scalia attacked *Katz* even more explicitly in *Minnesota v. Carter*.²³⁸ The majority rooted its analysis in *Katz*: it stated that one does not have a reasonable expectation of privacy in an apartment which one has entered only to engage in a short-term business transaction—in this case, bagging cocaine.²³⁹ Justice Scalia concurred, criticizing the plurality for using the *Katz* test, which he called not only “fuzzy” but also “self-indulgent.”²⁴⁰ He argued that the second prong of the *Katz* test—whether society recognizes an expectation as “reasonable”—bore an “uncanny resemblance to those expectations of privacy that this Court considers reasonable.”²⁴¹ He saw *Katz* as a means for judges to impose their

233. *See id.* at 361.

234. MacDonnell, *supra* note 1, at 233 (noting that until 2012, *Katz* was the primary test); Orin S. Kerr, *The Mosaic Theory of the Fourth Amendment*, 111 MICH. L. REV. 311, 316 (2012) (noting that from the 1960s until 2012, the *Katz* test governed).

235. *See Jones*, 565 U.S. at 406–07. Justice Scalia did, however, occasionally employ the *Katz* test, most notably in *Kyllo v. United States* and his special needs cases. *See infra* notes 246–57 and accompanying text; *infra* Part II.A.

236. 480 U.S. 709, 717–18 (1987) (“Given the great variety of work environments in the public sector, the question whether an employee has a reasonable expectation of privacy must be addressed on a case-by-case basis.”).

237. *Id.* at 730 (Scalia, J., concurring).

238. 525 U.S. 83, 97–98 (1998) (Scalia, J., concurring); *see also supra* notes 219–28 and accompanying text.

239. *Carter*, 525 U.S. at 86, 90–91.

240. *Id.* at 91, 97 (Scalia, J., concurring).

241. *Id.* at 97.

own values and policy views onto the Fourth Amendment, and argued that such decisions should be more properly left to the legislature.²⁴²

In other instances, however, Scalia did allow the Court to determine what was “reasonable,” because the determination was based on the text of the Fourth Amendment. Analyzing whether a warrantless search is “unreasonable”—in contrast to whether one has a “reasonable expectation of privacy”—is based on the text of the Fourth Amendment itself.²⁴³ Justice Scalia noted that the *Katz* test might have some utility in determining whether a search was “unreasonable.”²⁴⁴ But he thought that employing a “reasonable expectation of privacy” analysis to determine whether a search had even occurred, in contrast, had no justification in the text of the Fourth Amendment.²⁴⁵

When Justice Scalia was tasked to write the majority opinion of the Court, he would occasionally give lip-service to the *Katz* test. For example, in *Kyllo v. United States*, federal agents became suspicious that Danny Kyllo was growing marijuana in his triplex and used a thermal imager to scan the building from the outside to detect whether it contained high-intensity lamps typically used to grow marijuana.²⁴⁶ The scan showed that parts of Mr. Kyllo’s home were substantially warmer than the neighboring apartments, and based on that information—as well as tips from informants and utility bills—the officers applied for and were granted a warrant to search his home.²⁴⁷ The search revealed more than one hundred marijuana plants and Mr. Kyllo was charged with manufacturing marijuana.²⁴⁸

242. *Id.* at 97–99.

243. *See* U.S. CONST. amend. IV; *supra* section I.B; *see also* Calabresi & Lawson, *supra* note 4, at 497 (noting that the Fourth Amendment’s prohibition of “unreasonable” searches and seizures is an example of when the Constitution prescribes using a standard and not a rule); Scalia, *Law of Rules*, *supra* note 16, at 1181–82 (expounding on why a “reasonable search” is a question of law, yet “reasonable care” in a torts case is a question of fact).

244. *Carter*, 525 U.S. at 86, 91–92 (Scalia, J., concurring) (noting that the “legitimate expectation of privacy” analysis “is often relevant to whether a search or seizure covered by the Fourth Amendment is ‘unreasonable’”).

245. *Id.* at 91, 97 (Scalia, J., concurring).

246. 533 U.S. 27, 29–30 (2001). Scalia also used *Katz* in special needs cases. *See infra* section II.A.

247. *Kyllo*, 533 U.S. at 30.

248. *Id.*

Justice Scalia, writing for the majority, used the *Katz* test despite his distaste for it.²⁴⁹ He wrote that while in other areas *Katz* was difficult to apply, in the home—the “prototypical” area of protected privacy—it was clear what baseline expectation of privacy was reasonable.²⁵⁰ Here, applying *Katz* was consistent with the wording of the Fourth Amendment, which specifically protects “houses.”²⁵¹ Justice Scalia employed *Katz* to protect the amount of privacy people enjoyed when the Fourth Amendment was adopted.²⁵² He held that when the government uses technology not in general public use to glean information about the home that would formerly have been unknowable without physically entering the home, “the surveillance is a ‘search.’”²⁵³

Though in *Kyllo* he used *Katz*, Scalia formulated a bright-line rule, not a “fuzzy standard.”²⁵⁴ The line he chose was at the entrance to the home.²⁵⁵ “That line,” he wrote, “must not only be firm but also bright.”²⁵⁶ Despite the fact that Justice Scalia intended to implement a bright-line rule, Justice Stevens commented on the use of technology not in general public use and argued that it was not as clear as Scalia had intended. Justice Stevens wrote that “the contours of the new rule are uncertain because its protection apparently dissipates as soon as the relevant technology is ‘in general public use.’”²⁵⁷

In *United States v. Jones* in 2012, Justice Scalia renewed his attack on *Katz*, this time reviving an alternative test to use in its stead.²⁵⁸ The common-law trespass test, which Scalia revived, had dominated Fourth Amendment law until the second half of the

249. See *id.* at 32–33. Justice Scalia cited his concurrence in *Carter* and acknowledged that the *Katz* test had “often been criticized as circular, and hence subjective and unpredictable.” *Id.* at 34 (citing *Carter*, 525 U.S. at 97).

250. *Id.*

251. See U.S. CONST. amend. IV; *Kyllo*, 533 U.S. at 32.

252. *Kyllo*, 533 U.S. at 34; see Rosenthal, *supra* note 56, at 117 (describing *Kyllo* as originalist because it insisted on preserving original degree of privacy). Here, Justice Scalia was employing the second part of his two-step methodology: because thermal imaging did not exist in 1791, there was no clear practice to look to. See *Arizona v. Gant*, 556 U.S. 332, 351 (2009) (Scalia, J., concurring). Thus, he proceeded to the second step, and determined “traditional standards of reasonableness.” See *id.*

253. *Kyllo*, 533 U.S. at 40.

254. See *id.*; see also *Carter*, 525 U.S. at 91 (criticizing *Katz* for being a “fuzzy standard”).

255. *Kyllo*, 533 U.S. at 40.

256. *Id.*

257. *Id.* at 47 (Stevens, J., dissenting) (quoting majority opinion).

258. *United States v. Jones*, 565 U.S. 400, 405–06 (2012).

20th century.²⁵⁹ In *Jones*, the FBI suspected nightclub owner Antoine Jones of drug trafficking.²⁶⁰ The government obtained a warrant to install a GPS tracking device on Mr. Jones's wife's Jeep.²⁶¹ The warrant was valid in the District of Columbia for ten days.²⁶² On the eleventh day—and in Maryland, not D.C.—agents physically installed a GPS tracker on the bottom of the Jeep while it sat in a public parking lot.²⁶³ The government proceeded to track the Jeep for the next twenty-eight days.²⁶⁴ The government then used the location information to indict Mr. Jones on various drug distribution charges.²⁶⁵

Justice Scalia, writing for the majority, held that the government “search[ed]” Mr. Jones's vehicle when it physically installed the GPS tracker.²⁶⁶ The government invoked *Katz* and argued that Mr. Jones had no reasonable expectation of privacy in the underside of the Jeep.²⁶⁷ Justice Scalia rejected this argument, stating that “Jones's Fourth Amendment rights do not rise or fall with the *Katz* formulation.”²⁶⁸ Instead of using *Katz*, Scalia revived the common-law trespass test.²⁶⁹ This test dictated that when “the Government obtains information by physically intruding on a constitutionally protected area . . . a search has undoubtedly occurred.”²⁷⁰ As in *Kyllo*, Scalia was concerned about preserving the degree of

259. *Id.* at 405.

260. *Id.* at 402.

261. *Id.*

262. *Id.* at 402–03.

263. *Id.* at 403. The government conceded that the warrant had not been complied with. *Id.* at 403 n.1.

264. *Id.* at 403.

265. *Id.*

266. *Id.* at 404.

267. *Id.* at 406.

268. *Id.*

269. *Id.* at 405–07. Note, though, that despite relying on the common-law notion of “trespass,” under this test the Fourth Amendment does not protect against all common-law trespasses. See *id.* at 411 n.8. In *Jones*, Justice Scalia replied to the government's concern that intrusion onto an open field in *Oliver v. United States* had been a “trespass” and yet the Court had held it was not a “search.” *Id.* at 410–11 (citing *Oliver v. United States*, 466 U.S. 170, 176–77, 183 (1984)). Justice Scalia noted that the Court's theory was “not that the Fourth Amendment is concerned with ‘any technical trespass that led to the gathering of evidence.’” *Id.* at 411 n.8 (quoting concurring opinion). Rather, he stated that the Fourth Amendment only protects against trespasses of those areas enumerated in the Fourth Amendment. *Id.* An open field is not a person, house, paper, or effect, and thus a trespass onto an open field is not protected by the Fourth Amendment. *Id.* at 411.

270. *Id.* at 406 n.3.

privacy citizens enjoyed at the time the Fourth Amendment was enacted.²⁷¹

He did not, however, go as far as to eliminate *Katz*.²⁷² He stated that it still had some utility as a secondary test.²⁷³ He added that the *Katz* test had been “added to, not substituted for, the common-law trespassory test.”²⁷⁴ This may be because he was writing the majority opinion.²⁷⁵ Professor Timothy MacDonnell has called this analysis the “trespass plus” test: first, determine whether the government has trespassed on some constitutionally protected space; if not, second, determine whether a reasonable expectation of privacy has been violated.²⁷⁶

In *Jones*, Justice Scalia also rejected the so-called “mosaic theory” used by the lower court and seemingly endorsed by the concurrences.²⁷⁷ The mosaic theory, as defined by Professor Orin Kerr, is the idea that instead of analyzing the sequential steps of government activity, courts should look at the aggregate government action to determine whether a “search” has occurred.²⁷⁸

271. *Id.* at 406 (citing *Kyllo v. United States*, 533 U.S. 27, 34 (2001)).

272. He was writing the majority opinion, so his disdain for *Katz* was not as prevalent as in his concurrence in *Carter*. See *Minnesota v. Carter*, 525 U.S. 83, 97 (1998) (Scalia, J., concurring).

273. *Jones*, 565 U.S. at 411 (“For unlike the concurrence, which would make *Katz* the exclusive test, we do not make trespass the exclusive test.”).

274. *Id.* at 409.

275. Scholars have questioned whether Scalia’s ultimate goal was to eliminate the *Katz* test, leaving only the trespass analysis. See, e.g., Stras et al., *supra* note 5, at 746. Professor Kerr noted that if the *Katz* test is retained, then Scalia’s revival of the trespass test does not make an obvious impact. See *id.* It alters the analytical steps but may not change how cases come out. See *id.*

276. See MacDonnell, *supra* note 1, at 246; Timothy C. MacDonnell, *Florida v. Jardines: The Wolf at the Castle Door*, 7 N.Y.U. J.L. & LIBERTY 1, 79 (2013).

277. See *Jones*, 565 U.S. at 412 (describing the “vexing problems” posed by the approach of the concurrences); *id.* at 416 (Sotomayor, J., concurring) (noting that whether a search has occurred depends in part on “whether people reasonably expect that their movements will be recorded and aggregated”); *id.* at 430–31 (Alito, J., concurring) (noting that long-term GPS monitoring is a search, even if short-term is not); *United States v. Maynard*, 615 F.3d 544, 561–62 (D.C. Cir. 2010) (holding that prolonged surveillance may constitute a search because “th[e] whole reveals far more than the individual movements it comprises”), *aff’d sub nom. Jones*, 565 U.S. 400; see also Kerr, *supra* note 234, at 313 (citing Orin Kerr, *D.C. Circuit Introduces “Mosaic Theory” of Fourth Amendment, Holds GPS Monitoring a Fourth Amendment Search*, VOLOKH CONSPIRACY (Aug. 6, 2010, 2:46 PM), <http://volokh.com/2010/08/06/d-c-circuit-introduces-mosaic-theory-of-fourth-amendment-holds-gps-monitoring-a-fourth-amendment-search> [<https://perma.cc/D2BQ-6AAM>] (coining the term “mosaic theory”).

278. Kerr, *supra* note 234, at 313.

Because Justice Scalia decided *Jones* using the trespass test, he did not engage with the mosaic theory.²⁷⁹ The trespass test is rooted in what Professor Kerr called the traditional “sequential approach,” wherein courts analyze government action step-by-step to determine when a “search” occurs.²⁸⁰ In *Jones*, a search occurred the moment the officer physically installed the GPS tracker on Antoine Jones’s vehicle.²⁸¹ Justice Scalia declined to look at the totality of the government’s action and instead focused on a single snapshot.²⁸² Thus, the trespass test allowed Scalia to draw a bright-line rule instead of balancing the totality of the government’s action.²⁸³ He was critical of the mosaic test because there was no bright-line showing when a search became unconstitutional.

Justice Scalia employed the revived trespass test again the next term in *Florida v. Jardines*.²⁸⁴ There, two detectives approached the home of Joelis Jardines, who was suspected of growing marijuana.²⁸⁵ One of the detectives brought his drug-sniffing dog.²⁸⁶ When the detectives and the dog walked onto the porch, the dog signaled to the presence of drugs inside the house.²⁸⁷ At trial, Mr. Jardines argued that the dog sniff was an unreasonable search.²⁸⁸

Justice Scalia, writing for the majority, held that because the government had physically intruded onto the curtilage of Mr. Jardines’s home, a search had clearly occurred.²⁸⁹ Thus, when the

279. *Jones*, 565 U.S. at 411–12.

280. Kerr, *supra* note 234, at 315–16. Professor Kerr cited Justice Scalia’s opinion in *Arizona v. Hicks* as an example of the sequential approach; there, the Court looked at distinct steps: the officer saw the expensive stereo equipment, he moved it, then he recorded the serial number. *Id.* at 316.

281. *Jones*, 565 U.S. at 404.

282. *See id.* at 412.

283. Not only is there a line-drawing problem regarding how prolonged surveillance would need to be to constitute a search, but Professor Kerr has detailed the numerous other uncertainties of the mosaic theory: the test that should be used to determine when a mosaic has been created, what surveillance methods are applicable, how to determine whether a mosaic search is reasonable, and what remedies apply to mosaic searches. Kerr, *supra* note 234, at 329.

284. 569 U.S. 1, 6–7 (2013). Note, though, that in *Jardines*, Justice Scalia did not explicitly use the term “trespass” anywhere in the opinion. *See generally id.*

285. *Id.* at 3.

286. *Id.* at 3–4.

287. *Id.* at 4–5.

288. *Id.*

289. *Id.* at 5–6 (citing *United States v. Jones*, 565 U.S. 400, 406 n.3 (2012)). As he did in *Kyllo*, Scalia expounded on the importance of the home. *Id.* at 6. He noted that the right to be free from the government in one’s home was at the “very core” of the Fourth Amendment

government “physically intrud[es]” on an area protected by the Fourth Amendment, Scalia said there was no need to even consider *Katz*.²⁹⁰ He noted that one feature of the property analysis was that it “keeps easy cases easy.”²⁹¹ Either the government has physically intruded or it has not.²⁹² This analysis eliminates the need to engage in the wishy-washy analysis from *Katz*.²⁹³

Justice Scalia’s enthusiasm for the trespass test and disdain for the fluffy *Katz* standard has had a lasting impact on the Court since his departure. Justice Gorsuch’s dissent in *Carpenter v. United States* evinces many of the same concerns, and contemplates how Scalia’s reasoning could be applied in the digital age.²⁹⁴

In *Carpenter*, the Court examined whether the warrantless search and seizure of location information from one’s cell phone violated the Fourth Amendment.²⁹⁵ The majority used the rationale from *Katz* to determine that the Fourth Amendment had been violated.²⁹⁶ It held that even though individuals share their records with a third party—the cell phone company—they do not forfeit their reasonable expectations of privacy in the records.²⁹⁷ The majority thus refused to apply the “third-party doctrine”—a doctrine based on the *Katz* rationale where individuals lose their reasonable expectations of privacy in information when they share it with a third party.²⁹⁸

and called the home “first among equals.” *Id.* Because the curtilage is both spatially and psychologically linked to the home, he deemed it part of the home itself. *Id.* at 6–7.

290. *Id.* at 11.

291. *Id.* However, *Jardines* is one of the few cases where Justice Scalia acknowledged the need to look at an officer’s subjective intent. See MacDonnell, *supra* note 1, at 216. Subjective intent was relevant to the issue of whether the officers had committed a trespass. *Id.* at 216–17. He noted that visitors are generally implicitly licensed to approach a home on the front walkway, knock, and wait for someone to come to the door—as commonly done by girl scouts or trick-or-treaters. *Jardines*, 569 U.S. at 8. But here, Scalia noted, the officer’s conduct indicated that their subjective intent was not to enter the curtilage for some customary reason, but rather, to conduct a search. *Id.* at 10.

292. *Jardines*, 569 U.S. at 5.

293. *See id.*

294. 138 S. Ct. 2206, 2261–62 (2018) (Gorsuch, J., dissenting). Scalia himself, though, did not argue that the trespass test had an application to digital searches. In *Jones*, Scalia wrote that searches “involving merely the transmission of electronic signals without trespass would remain subject to *Katz* analysis.” *Jones*, 565 U.S. at 411.

295. 138 S. Ct. at 2211 (majority opinion).

296. *Id.* at 2217.

297. *Id.*

298. *Id.* at 2216–17. The third-party doctrine is derived from *United States v. Miller*, 425 U.S. 435 (1976), and *Smith v. Maryland*, 442 U.S. 735 (1979). *Carpenter*, 138 S. Ct. at 2216

Justice Gorsuch dissented. Not only did he argue that *Katz* was misguided, but he expressed concern that the majority's reasoning required courts to perform not one, but two "amorphous balancing tests."²⁹⁹ He argued that the majority required courts to first conduct the *Katz* analysis, then further balance the privacy interests to determine whether to apply the third-party doctrine.³⁰⁰ He argued that the majority opinion did not offer a workable test and was susceptible to the same fuzziness as *Katz*: "At what point does access to electronic data amount to 'arbitrary' authority? When does police surveillance become 'too permeating'? And what sort of 'obstacles' should judges 'place' in law enforcement's path when it does?"³⁰¹ In addition, Justice Gorsuch's rationale was reminiscent of Justice Scalia's abhorrence for judicial activism. He noted that judges should decide based on "democratically legitimate sources of law" and not "their own biases or personal policy preferences."³⁰²

Instead, Justice Gorsuch advocated for using the trespass test.³⁰³ He noted that in the digital age, the third-party doctrine—a legacy of *Katz*—is no longer tenable because we now store so much of our private information digitally on servers held by third parties.³⁰⁴ He argued that digital data is an "effect[]" under the Fourth Amendment, and its owner has a legal interest in it.³⁰⁵ That legal interest, he argued, "might even rise to the level of a property right."³⁰⁶ Because the issue had not been briefed or argued before the lower

(describing the third-party doctrine).

299. *Carpenter*, 138 S. Ct. at 2267 (Gorsuch, J., dissenting).

300. *Id.*

301. *Id.* at 2266.

302. *Id.* at 2268 (quoting Todd E. Pettys, *Judicial Discretion in Constitutional Cases*, 26 J.L. & POL. 123, 127 (2011)).

303. *Id.* at 2267–68 (citing *Florida v. Jardines*, 569 U.S. 1, 11 (2013)).

304. *Id.* at 2262, 2266.

305. *Id.* at 2269.

306. *Id.* at 2272. Justice Gorsuch noted that one issue that would need to be developed is what body of property law federal courts should apply. *Id.* at 2268. He posited that the answer might be current positive law, the common law at 1791, or some combination of the two. *Id.* Justices Thomas and Alito have also raised this concern. In *Byrd v. United States*, Justice Thomas concurred, and asked "what body of law determines whether that property interest is present—modern state law, the common law of 1791, or something else?" 138 S. Ct. 1518, 1531 (2018) (Thomas, J., concurring). Justice Alito raised this concern in his *Jones* concurrence, positing that under the property rationale, Fourth Amendment protections could differ from state to state. *United States v. Jones*, 565 U.S. 400, 425–26 (2012) (Alito, J., concurring). In *Jones*, the Jeep belonged to Mr. Jones's wife, and therefore his property interest in it might depend on whether the state where the search took place recognized community property between spouses. *Id.*

courts, Justice Gorsuch did not decide whether the government committed a trespass when it seized Mr. Carpenter's cell site location information, but he noted that it would have been Mr. Carpenter's most promising argument that his Fourth Amendment rights had been violated.³⁰⁷

Scholars differ on the applicability of the trespass analysis to digital searches.³⁰⁸ Justice Scalia himself never advocated for its use for searches of digital data where there was no physical trespass; he said the *Katz* test was still applicable in those instances.³⁰⁹ Indeed, some scholars argue that under a narrow reading of the trespass test from *Jones*, it would not apply to searches of data without physical trespass.³¹⁰ Others, though, argue that the property analysis is worthy of serious consideration and could offer broader and more secure protections than *Katz* in the digital age.³¹¹ As we look to the future, we should note that the majority of the current Supreme Court Justices have indicated a willingness to

307. *Carpenter*, 138 S. Ct. at 2272 (Gorsuch, J., dissenting).

308. See 1 WAYNE R. LAFAVE, SEARCH & SEIZURE § 2.1(e) (5th ed. 2019) (discussing trespass test in digital age and citing sources).

309. In *Jones*, Scalia wrote that searches "involving merely the transmission of electronic signals without trespass would remain subject to *Katz* analysis." *Jones*, 565 U.S. at 411.

310. E.g., Andrew G. Ferguson, *The "Smart" Fourth Amendment*, 102 CORNELL L. REV. 547, 580–81 (2017). Professor Kerr has argued that the proper way to deal with digital searches is to use the standard from the *Carpenter* majority: courts should look at the type of data implicated and whether the disclosure was voluntary. Orin S. Kerr, *Implementing Carpenter: The Digital Fourth Amendment* 20 (USC Legal Studies Paper No. 18-29, 2018), https://papers.ssrn.com/sol3/papers.cfm?abstract_id=3301257 [<https://perma.cc/DD5U-GWXU>]. In his concurrence in *Jones*, Justice Alito noted that in recent years courts had analyzed cases about unwanted electronic contact under a tort theory of trespass, holding that the transmission of electrons is a sufficient physical touching. 565 U.S. at 426 (Alito, J., concurring) (citing cases). Yet Justice Alito questioned whether that same analysis could also apply to Fourth Amendment cases. *Id.* at 426–27.

311. E.g., Melody J. Brannon, *Carpenter v. United States: Building a Property-Based Fourth Amendment Approach for Digital Data*, CRIM. JUST. MAG. (Winter 2019), https://www.americanbar.org/groups/criminal_justice/publications/criminal-justice-magazine/2019/winter/carpenter-v-united-states [<https://perma.cc/DRR7-CVX5>]; Megan Blass, Note, *The New Data Marketplace: Protecting Personal Data, Electronic Communications, and Individual Privacy in the Age of Mass Surveillance Through a Return to a Property-Based Approach to the Fourth Amendment*, 42 HASTINGS CONST. L.Q. 577, 588 (2015) ("Vesting property rights in personal data and electronic communications will provide the Court with a tangible foundation for applying its trespass theory."); see also LAFAVE, *supra* note 308, § 2.1(e) n.145 (citing sources).

use the trespass test.³¹² Only Justices Alito and Breyer have been unwilling to use it.³¹³

II. STANDARDS: “SLOSHING THROUGH THE FACTBOUND MORASS OF ‘REASONABLENESS’”³¹⁴

Despite his avowed support of bright-line rules and disdain for totality-of-the-circumstances tests involving balancing,³¹⁵ Justice Scalia acknowledged that “for my sins, I will probably write some opinions that use them.”³¹⁶ He wrote a number of opinions which departed from his general preference for rules, and instead applied standards.³¹⁷ But even though he acknowledged this inconsistency, he specifically declined to address what he called the “hardest question”: when is a standard avoidable and when is it not?³¹⁸

312. See *Carpenter*, 138 S. Ct. at 2268 (Gorsuch, J., dissenting) (praising the trespass test); *Florida v. Jardines*, 569 U.S. 1, 13 (2013) (Justices Thomas, Ginsburg, Sotomayor, and Kagan joining Justice Scalia’s majority opinion); *Jones*, 565 U.S. at 400 (Chief Justice Roberts and Justices Thomas and Sotomayor joining Justice Scalia’s majority opinion). Further, Justice—then Judge—Kavanaugh was on the D.C. Circuit when it heard *Jones*. Judge Kavanaugh dissented from a denial of a rehearing en banc, arguing that the court should have analyzed the case using the trespass rationale. *United States v. Jones*, 625 F.3d 766, 769–771 (D.C. Cir. 2010) (Kavanaugh, J., dissenting), *denying reh’g en banc to United States v. Maynard*, 615 F.3d 544 (D.C. Cir. 2010), *aff’d sub nom. Jones*, 565 U.S. 400. He did not say definitively whether he thought the trespass rationale would have applied in that case, but asserted that it should have been briefed and argued. *Id.* at 771. We do not know what Justice Barrett’s position is as she did not have any cases involving this issue when she was a judge on the Seventh Circuit. However, as a former clerk for Justice Scalia, one can predict she would be a proponent of the trespass doctrine.

313. *Jardines*, 569 U.S. at 16 (Alito, J., dissenting).

314. *Scott v. Harris*, 550 U.S. 372, 383 (2007).

315. Professor Rachel Barkow, a former Scalia clerk, joked that if you wanted to make Scalia gasp, mention a totality-of-the-circumstances test. Stras et al., *supra* note 5, at 770. In one of his administrative law dissents, Justice Scalia jeeringly referred to such tests as “th’ol’ totality of the circumstances’ test.” See *United States v. Mead Corp.*, 533 U.S. 218, 241 (2001) (Scalia, J., dissenting).

316. Scalia, *Law of Rules*, *supra* note 16, at 1187.

317. See Calabresi & Lawson, *supra* note 4, at 495 (examining cases in which Scalia deviated from his stated preference for rules and referring to him as something of a “faint-hearted rule-ist”). In various cases, Justice Scalia balanced the rights of individuals versus the needs of the government based on what would make good policy, despite, on other occasions, disavowing the “good-policy-is-constitutional-law school of jurisprudence.” *Minnesota v. Dickerson*, 508 U.S. 366, 382 (1993) (Scalia, J., concurring); see Calabresi & Lawson, *supra* note 4, at 494–95 (examining cases where Scalia used standards rather than rules).

318. Scalia, *Law of Rules*, *supra* note 16, at 1187.

This Part will attempt to tackle that question. In substantive Fourth Amendment decisions and in cases involving criminal defendants, Scalia usually applied rules.³¹⁹ But in special needs cases that were largely civil in nature, as well as in cases regarding the correct remedies for Fourth Amendment violations, Scalia strayed and applied a standard.³²⁰

Section A of this Part outlines Justice Scalia's special needs cases, many of which use balancing tests.³²¹ Section B examines cases involving remedies for Fourth Amendment violations,³²² and Section C discusses the implications of choosing to apply a rule rather than a standard.³²³

A. *Special Needs*

One exception to the warrant requirement is the "special needs" search. The special needs doctrine grew out of the "administrative search[]" framework, which originated in the 1960s.³²⁴ The term "special needs" was first used by Justice Blackmun in 1985 in *New Jersey v. T.L.O.* to refer to cases which required a lower standard of justification than probable cause.³²⁵ Because a warrant and probable cause are not required in these cases, reasonableness is determined by balancing governmental and private interests.³²⁶ The special needs doctrine is applicable in "exceptional circumstances" where there is a special need distinct from ordinary law enforcement.³²⁷ The term "special needs" is now a catch-all for many types of searches that require less than probable cause, such

319. See *supra* Part I (substantive Fourth Amendment); *infra* notes 353–71 and accompanying text (criminal defendants).

320. See *infra* sections II.A, II.B.

321. See *infra* section II.A.

322. See *infra* section II.B.

323. See *infra* section II.C.

324. *Camara v. Mun. Court*, 387 U.S. 523, 534 (1967); see *See v. City of Seattle*, 387 U.S. 541, 543–44 (1967). For a description of the evolution of the special needs exception, see Eve Brensike Primus, *Disentangling Administrative Searches*, 111 COLUM. L. REV. 245, 260, 276 (2011).

325. *Ferguson v. City of Charleston*, 532 U.S. 67, 74 n.7 (2001) (citing *New Jersey v. T.L.O.*, 469 U.S. 325, 351 (1985) (Blackmun, J., concurring)).

326. *Id.*

327. *Id.* This distinction is not always clear or easy to apply. See Barry Friedman & Cynthia Benin Stein, *Redefining What's "Reasonable": The Protections for Policing*, 84 GEO. WASH. L. REV. 281, 295 (2016) (describing inconsistencies in special needs cases regarding "ordinary crime control").

as administrative searches, border searches, and searches of closely regulated industries.³²⁸

Justice Scalia wrote six special needs decisions while on the Court; in four of them he found for the government and in two he found for the individual.³²⁹ Unlike in other Fourth Amendment cases, where Scalia avoided balancing tests at all costs, in special needs cases he occasionally embraced them.³³⁰ Scholars have noted that the dispositive issues for Justice Scalia in special needs cases appeared to be (1) whether there was a real, documented special need behind the policy, and (2) whether the search was in a civil context or predominately geared towards ordinary criminal wrongdoing.³³¹ In special needs cases that dealt largely with civil issues, Justice Scalia appeared to be more amenable to using balancing tests. But where the issue was whether a search sought criminal wrongdoing, Justice Scalia was less open to balancing policy interests, and instead utilized his rule-based approach.

Two cases involving urinalysis drug tests—*National Treasury Employees Union v. Von Raab* and *Vernonia School District 47J v. Acton*—illustrate the first of those issues: whether there is a documented special need behind the policy.³³² In *Von Raab*, Justice Scalia explicitly engaged in a balancing analysis.³³³ There, the majority held that it was reasonable for the U.S. Customs Service to randomly drug test its employees without a warrant and without probable cause.³³⁴ The majority weighed the government's inter-

328. Friedman & Stein, *supra* note 327, at 294–95.

329. See *Maryland v. King*, 569 U.S. 435, 466 (2013) (Scalia, J., dissenting) (finding for the individual); *Ferguson*, 532 U.S. at 91–92 (Scalia, J., dissenting) (finding for the government); *Vernonia Sch. Dist. 47J v. Acton*, 515 U.S. 646 (1995) (finding for the government); *Nat'l Treasury Emps. Union v. Von Raab*, 489 U.S. 656, 680 (1989) (Scalia, J., dissenting) (finding for the individual); *Griffin v. Wisconsin*, 483 U.S. 868, 872 (1987) (finding for the government); *O'Connor v. Ortega*, 480 U.S. 709, 729 (1987) (Scalia, J., concurring) (finding for the government).

330. See Manning, *supra* note 3, at 767–68 (noting that in special needs cases, Scalia “acted on a perceived invitation to exercise the kind of common law discretion he presumed judges generally should not have”).

331. See MacDonnell, *supra* note 1, at 221–26 (noting one distinguishing factor in Scalia's special needs cases was whether the search was for ordinary law enforcement purposes); Kannar, *supra* note 116, at 1338–42 (distinguishing cases based on whether there was a documented special need).

332. See *Vernonia*, 515 U.S. at 662–63; *Von Raab*, 489 U.S. at 681 (Scalia, J., dissenting).

333. *Von Raab*, 489 U.S. at 681 (Scalia, J., dissenting).

334. *Id.* at 677 (majority opinion).

ests against the individuals' interests and found that the government's interest in public safety outweighed the individuals' privacy interests.³³⁵

Justice Scalia dissented.³³⁶ But his issue was not with the balancing analysis. In fact, he endorsed it: he wrote that while there were "some absolutes" in Fourth Amendment law, "as soon as those have been left behind . . . the question comes down to whether a particular search has been 'reasonable,' [and] the answer depends largely on the social necessity that prompts the search."³³⁷

Scalia dissented instead because he found that the case lacked "real evidence of a real problem" of drug use among customs officials.³³⁸ He noted that the government had failed to show even one example in which a customs employee used drugs and that use caused him to accept bribes, reveal classified information, or commit any other misconduct.³³⁹ Thus, Scalia found that the alleged policy interest behind the search did not exist, and therefore the search was not reasonable.³⁴⁰

Vernonia also dealt with urinalysis drug tests, but Justice Scalia came out in favor of the testing.³⁴¹ There, a district-wide policy allowed random drug tests of student athletes in a school district in Oregon.³⁴² Justice Scalia, writing for the majority, first noted that there was no clear practice either approving or disapproving of urine tests for public school students in 1791.³⁴³ He then proceeded to balance the individual interests against the government's.³⁴⁴ He noted that the case involved a supervisory relationship between children and their schoolteachers, similar to *in loco parentis*.³⁴⁵ He

335. *Id.*

336. *Id.* at 680–81 (Scalia, J., dissenting).

337. *Id.* He cited *T.L.O.* as an example, and noted that there, the search was appropriate because drug use in schools had become a serious social problem. *Id.* (citing *New Jersey v. T.L.O.*, 469 U.S. 325, 339 (1985)).

338. *Id.* at 681.

339. *Id.* at 683.

340. *Id.* at 683–84.

341. *Vernonia Sch. Dist. 47J v. Acton*, 515 U.S. 646, 658, 662–63 (1995).

342. *Id.* at 650.

343. *Id.* at 652–53.

344. *Id.*

345. *Id.* at 654–55. Justice Scalia noted that the supervisory relationship here was akin to the one between a man on probation and his probation officer in *Griffin v. Wisconsin*. *Id.* (citing *Griffin v. Wisconsin*, 483 U.S. 868 (1987)).

wrote that to determine whether a search is “reasonable,” one must take that relationship into account.³⁴⁶ He described the manner in which urine samples were collected—male students used a urinal and were observed from behind; female students produced a sample in a stall with a female monitor standing outside—and found the privacy interests “negligible.”³⁴⁷ On the other side, he found that the interest in deterring drug use among school children was great, and that student athletes were at a particularly high risk of harm if they used drugs.³⁴⁸ He cited the district court’s finding that not only was drug use a serious problem in Vernonia schools, but that student athletes were among the strongest users.³⁴⁹ Not only did he do a balancing analysis, but he referenced the test from *Katz v. United States*, writing that student athletes have even lesser expectations of privacy because they are accustomed to using public locker rooms and because they have voluntarily chosen to join a sports team and subject themselves to greater regulation.³⁵⁰

Though both *Vernonia* and *Von Raab* dealt with urinalysis drug tests, Justice Scalia explained the divergence in his opinions: in *Von Raab* there was no evidence that customs officials were using drugs, but in *Vernonia* there was an “immediate crisis” of students indulging in drug use.³⁵¹ As Professor George Kannar noted, these cases exhibit one of the dispositive issues in special needs cases for Scalia: whether there was, in fact, a documented special need.³⁵² That need must be more than a mere policy interest, but rather must include a “demonstrated basis for a policy.”³⁵³

346. *Id.* at 656 (“[T]he ‘reasonableness’ inquiry cannot disregard the schools’ custodial and tutelary responsibility for children.”).

347. *Id.* at 658.

348. *Id.* at 662.

349. *Id.* at 648–49.

350. *Id.* at 657–58; *see also* *Katz v. United States*, 389 U.S. 347, 360–62 (1967) (Harlan, J., concurring) (expectations of privacy). Professor MacDonnell noted that in *Vernonia*, Scalia clearly deviated from his originalist approach, electing instead to use the *Katz* test. *See* MacDonnell, *supra* note 1, at 222.

351. *Vernonia*, 515 U.S. at 663; *Nat’l Treasury Emps. Union v. Von Raab*, 489 U.S. 656, 681 (1989) (Scalia, J. dissenting). The district court found that “a large segment of the student body, particularly those involved in interscholastic athletics, was in a state of rebellion, that disciplinary actions had reached epidemic proportions, and that the rebellion was being fueled by alcohol and drug abuse as well as by the student’s misperceptions about the drug culture.” *Vernonia*, 515 U.S. at 662–63 (quoting district court opinion) (internal quotation marks omitted).

352. Kannar, *supra* note 116, at 1338–42.

353. *Id.* at 1342.

Justice Scalia's dissents in two other special needs cases—*Ferguson v. City of Charleston* and *Maryland v. King*—address the second issue: whether the primary purpose of the search was ordinary criminal wrongdoing.³⁵⁴ In *Ferguson*, the majority held that warrantless urinalysis tests of pregnant women by a state hospital without their consent violated the Fourth Amendment.³⁵⁵ The majority found that the primary purpose of the policy was to detect evidence of criminal wrongdoing, and thus the special needs exception did not apply.³⁵⁶

Justice Scalia dissented. He endorsed the lower court's finding that the primary purpose of the urine tests was to protect both mothers and their unborn children, and noted that the finding was binding upon the Court unless it was clearly erroneous.³⁵⁷ He compared the doctors in that case to the probation officers in *Griffin v. Wisconsin*, and argued that they were concerned with public welfare, not law enforcement.³⁵⁸ Thus, he argued that the special needs doctrine applied.³⁵⁹

In contrast, in *King*, Justice Scalia argued that the search did not seek anything beyond ordinary criminal wrongdoing and therefore the special needs exception did not apply.³⁶⁰ *King* dealt with whether the Fourth Amendment prohibited collecting DNA swabs from people arrested on felony charges.³⁶¹ The majority engaged in a balancing test and found that the government interest (the need for law enforcement to safely and accurately identify people in custody)³⁶² outweighed the "minimal" privacy intrusion of having one's cheek swabbed for DNA.³⁶³

354. *Maryland v. King*, 569 U.S. 435, 470 (2013) (Scalia, J., dissenting); *Ferguson v. City of Charleston*, 532 U.S. 67, 98 (2001) (Scalia, J., dissenting).

355. 532 U.S. at 86 (majority opinion).

356. *Id.* at 81–84.

357. *Id.* at 98 (Scalia, J., dissenting).

358. *Id.* at 101.

359. *Id.* at 98.

360. *Maryland v. King*, 569 U.S. 435, 470 (2013) (Scalia, J., dissenting).

361. *Id.* at 440–41 (majority opinion).

362. In addition, the majority cited the need to ascertain an arrestee's identity and criminal history—in order to assess their level of dangerousness—as another government interest. *Id.* at 459–50.

363. *Id.* at 449, 461, 465–66.

Justice Scalia dissented, refusing to engage in a balancing analysis.³⁶⁴ He stated that balancing analyses were only appropriate in special needs cases where the primary purpose was not detecting criminal wrongdoing.³⁶⁵ Here, he argued that the primary purpose *was* to seek ordinary criminal wrongdoing: police were using the DNA data to tie arrestees to other, unsolved crimes.³⁶⁶ The lag in time between the arrest and the DNA results showed that the purpose could not possibly be merely to identify who was in custody.³⁶⁷ That purpose could be accomplished through standard fingerprinting.³⁶⁸ He ended his dissent on a forceful note: “I doubt that the proud men who wrote the charter of our liberties would have been so eager to open their mouths for royal inspection.”³⁶⁹

The divergence between *Ferguson* and *King* can be drawn on whether the primary purpose of the search was to uncover ordinary criminal wrongdoing.³⁷⁰ In instances where the purpose of the search was a civil issue, Scalia had no objection to warrantless searches without probable cause. But where the search sought to uncover criminal wrongdoing, Scalia objected. In *King*, he noted that no matter the result of a balancing analysis, a suspicionless search would never be appropriate if its subject was ordinary criminal wrongdoing.³⁷¹ And in *Ferguson*, he noted that the “social judgment” was irrelevant—policy issues should be dealt with by the legislature.³⁷²

364. *Id.* at 469 (Scalia, J., dissenting) (“No matter the degree of invasiveness, suspicionless searches are *never* allowed . . . [for] ordinary crime-solving.”).

365. *Id.* at 468.

366. *Id.* at 470.

367. *Id.* at 471–76.

368. *Id.* at 480.

369. *Id.* at 482.

370. *See id.* at 469; *Ferguson v. City of Charleston*, 532 U.S. 67, 98 (2001) (Scalia, J., dissenting).

371. 569 U.S. at 469.

372. 532 U.S. at 92.

B. Remedies for Fourth Amendment Violations

In cases involving remedies for Fourth Amendment violations, Justice Scalia seemed to abandon his verve for limited judicial discretion. In this area he unapologetically used balancing tests and decided cases based on the “substantial social costs.”³⁷³

Murray v. United States is an early indication of Justice Scalia’s concern with the exclusionary rule.³⁷⁴ There, police broke into a warehouse, saw bales of marijuana, then left and got a warrant without using the fact that they had already entered the warehouse and seen the marijuana.³⁷⁵ Writing for the majority, Scalia held that the marijuana should not be suppressed because although the original search was unlawful, the search pursuant to the valid warrant was an independent source.³⁷⁶ Justice Marshall dissented, pointing out that this would provide an incentive for officers to conduct illegal searches and then get warrants afterwards.³⁷⁷ He wrote that the majority’s holding “severely undermine[d] the deterrence function of the exclusionary rule.”³⁷⁸

Justice Scalia’s disdain for the exclusionary rule crystalized in *Hudson v. Michigan*.³⁷⁹ Writing for the majority, he cited policy issues to justify not applying the exclusionary rule.³⁸⁰ In *Hudson*, police executed a search warrant at the house of Booker Hudson, searching for drugs and firearms.³⁸¹ When officers arrived at Mr. Hudson’s home, they announced their presence, but waited only “three to five seconds” before opening his unlocked door.³⁸² Mr. Hudson argued that the evidence obtained should be suppressed because the officers violated the knock-and-announce rule.³⁸³

373. *Hudson v. Michigan*, 547 U.S. 586, 591 (2006); *Anderson v. Creighton*, 483 U.S. 635, 638 (1987); see Friedman & Stein, *supra* note 327, at 296 (noting the real curiosity of Scalia’s Fourth Amendment jurisprudence is that he did not provide for a remedy); Stras et al., *supra* note 5, at 763 (“When you look to the remedy, he seemed to not necessarily be the friend of criminal defendants . . .”).

374. 487 U.S. 533, 536–37 (1988).

375. *Id.* at 535–36.

376. *Id.* at 538.

377. *Id.* at 546 (Marshall, J., dissenting).

378. *Id.*

379. 547 U.S. 586, 591 (2006).

380. *Id.*

381. *Id.* at 588.

382. *Id.*

383. *Id.* at 588–89.

Michigan conceded that the knock-and-announce rule had been violated, but argued that exclusion of the evidence was too great a remedy.³⁸⁴

Justice Scalia agreed. He noted that the exclusionary rule generated “substantial social costs’ . . . which sometimes include setting the guilty free and the dangerous at large.”³⁸⁵ He also worried that excluding evidence distorted the truth-finding process because it suppressed reliable evidence.³⁸⁶ He proceeded to balance the deterrence benefits the exclusionary rule provided against the social costs in the case.³⁸⁷ The deterrence benefits, he found, were miniscule: law enforcement officials had little incentive to violate the knock-and-announce rule as they already had a search warrant.³⁸⁸ Thus, deterrence was not paramount.³⁸⁹ In contrast, the social costs were high: they would include not only releasing dangerous criminals, but also inviting a flood of litigation regarding the knock-and-announce rule.³⁹⁰

Further, Scalia noted that while perhaps in 1961 the exclusionary rule was a necessary deterrent because *Dollree Mapp*³⁹¹ could not file a § 1983 claim, now there were other remedies besides the exclusionary rule.³⁹² Victims of Fourth Amendment violations could now file claims under § 1983 or *Bivens v. Six Unknown Named Agents of Federal Bureau of Narcotics*,³⁹³ and moreover, they could find attorneys to represent them in such cases because Congress had authorized attorney’s fees for civil rights plaintiffs.³⁹⁴ Further, Scalia had confidence in law enforcement and did not think deterrence was necessary. He wrote that there is now “increasing evidence that police forces across the United States take the constitutional rights of citizens seriously” and stated that “modern police forces are staffed with professionals.”³⁹⁵ He thought

384. *Id.* at 590.

385. *Id.* at 591 (citing *United States v. Leon*, 468 U.S. 897, 907 (1984)).

386. *Id.*

387. *Id.* at 594.

388. *Id.* at 596–97.

389. *Id.* at 596.

390. *Id.* at 595.

391. *See Mapp v. Ohio*, 367 U.S. 643 (1961).

392. *Hudson*, 547 U.S. at 597.

393. 403 U.S. 388 (1971).

394. *Hudson*, 547 U.S. at 597–98.

395. *Id.* at 599.

that the threat of internal discipline for police officers would be a significant enough deterrent.³⁹⁶ After explicitly balancing these factors, Justice Scalia found in favor of the government.³⁹⁷ He considered the “massive remedy” of the exclusionary rule unjustified and thought other remedies, such as civil suits, were more appropriate.³⁹⁸

But when faced with these civil suits, Justice Scalia denied recovery again and again. He wrote a total of eight *Bivens* and § 1983 Fourth Amendment decisions and found for the government in all but one of them.³⁹⁹ And in these decisions, he frequently used balancing tests.

For example, in *Anderson v. Creighton*, Justice Scalia held that FBI agents were entitled to qualified immunity after they violated an individual’s Fourth Amendment rights.⁴⁰⁰ There, agents searched the Creighton family’s home without a warrant.⁴⁰¹ The Creighton family was not the target of the search; rather, the agent believed that a man suspected of bank robbery might be there, but he was not.⁴⁰²

Justice Scalia, writing for the majority, held that the agents were entitled to qualified immunity; they could not be held personally liable for the violation.⁴⁰³ He balanced the interests on both sides, noting that civil damages were often the only realistic remedy for constitutional violations.⁴⁰⁴ On the other hand, though, he wrote that allowing suits against government officials would lead

396. *Id.* at 598–99.

397. *Id.* at 599.

398. *Id.* at 598–99.

399. *City of Ontario v. Quon*, 560 U.S. 746, 767 (2010) (Scalia, J., concurring in part and concurring in the judgment) (finding for the government); *Wallace v. Kato*, 549 U.S. 384, 397 (2007) (finding for the government); *Scott v. Harris*, 550 U.S. 372, 386 (2007) (finding for the government); *Albright v. Oliver*, 510 U.S. 266, 275 (1994) (Scalia J., concurring) (finding for the government); *Heck v. Humphrey*, 512 U.S. 477, 490 (1994) (finding for the government); *County of Riverside v. McLaughlin*, 500 U.S. 44, 71 (1991) (Scalia, J., dissenting) (finding for the individual); *Brower v. County of Inyo*, 489 U.S. 593, 599–600 (1989) (finding for the government); *O’Connor v. Ortega*, 480 U.S. 709, 729 (1987) (Scalia, J., concurring) (finding for the government); *Anderson v. Creighton*, 483 U.S. 635, 646 (1987) (finding for the government).

400. 483 U.S. at 637–41.

401. *Id.* at 637.

402. *Id.*

403. *Id.* at 641.

404. *Id.* at 638.

to “substantial social costs, including the risk that fear of personal monetary liability and harassing litigation will unduly inhibit officials in the discharge of their duties.”⁴⁰⁵ He noted that qualified immunity addressed this concern and that it should be applied as long as the official’s actions were objectively “reasonable.”⁴⁰⁶ He relied not on textualism or originalism, but on precedent, and unapologetically stated that the doctrine of qualified immunity “reflects a balance that has been struck ‘across the board.’”⁴⁰⁷

The plaintiffs put forward an originalist argument, pointing out that at common law officers were strictly liable if they searched an innocent third party’s home for a fugitive who was not present.⁴⁰⁸ Justice Scalia rejected this argument, calling it “procrustean.”⁴⁰⁹ He stated that “we have never suggested that the precise contours of official immunity can and should be slavishly derived from the often arcane rules of the common law.”⁴¹⁰

Scholars have pointed out how much this opinion contradicts Scalia’s commitment to originalism. Professor MacDonnell noted that *Anderson* is not only inconsistent with Scalia’s originalist approach, but seems to “dismiss core tenants of originalism.”⁴¹¹ Professor Kerr also stated that he had struggled to reconcile *Anderson* with Scalia’s originalist views, and wondered if it came out that way because it was only Scalia’s first term.⁴¹²

Anderson not only betrayed Justice Scalia’s originalism, but it also failed to limit judicial discretion. Because he did not root the decision in originalism or textualism, Scalia decided the case by balancing interests.⁴¹³ It is unclear how Justice Scalia would or could have distinguished this decision from the legislating from the bench that he claimed to abhor.

405. *Id.*

406. *Id.*

407. *Id.* at 642.

408. *Id.* at 644.

409. *Id.*

410. *Id.* at 645.

411. MacDonnell, *supra* note 1, at 230.

412. Stras et al., *supra* note 5, at 764. In 2011, though, Justice Scalia reaffirmed the holding from *Anderson* in his decision in *Ashcroft v. al-Kidd*, 563 U.S. 731, 741 (2011).

413. 483 U.S. at 642.

Another civil suit where Scalia explicitly balanced individual and state interests was *Scott v. Harris*.⁴¹⁴ There, officers and Victor Harris were involved in a high-speed car chase.⁴¹⁵ When Mr. Harris did not follow officers' directives to pull over, Officer Scott bumped his vehicle into Mr. Harris's, causing him to spin off the road, flip over, and crash.⁴¹⁶ As a result, Mr. Harris was rendered a quadriplegic.⁴¹⁷

Mr. Harris filed a § 1983 action, asserting that Officer Scott used excessive force which resulted in an unreasonable seizure and thus violated his Fourth Amendment rights.⁴¹⁸ Mr. Harris argued that the Court should apply the bright-line rule from *Tennessee v. Garner*: use of deadly force is only reasonable when officers have probable cause to believe (1) the suspect "poses[] an immediate threat of serious physical harm," and (2) "deadly force must have been necessary to prevent escape."⁴¹⁹ Justice Scalia commended Mr. Harris's attempt to craft a clear test, but stated that instead of applying it, the Court "must still slosh [its] way through the fact-bound morass of 'reasonableness.'"⁴²⁰ Here, he was not enthusiastic about a bright-line rule based on probable cause because it was in the context of a civil remedy, not a criminal case.⁴²¹

Instead, he turned to a balancing test. On Mr. Harris's side, Scalia noted the high likelihood of serious injury or death that Officer Scott caused by bumping into Mr. Harris's car.⁴²² On the government's side, he pointed out the actual and imminent threat that Mr. Harris's driving posed to pedestrians, civil motorists, and the officers involved in the chase.⁴²³ Justice Scalia posed the question of how the Court should weigh "the perhaps lesser probability of injuring or killing numerous bystanders against the perhaps larger

414. *Scott v. Harris*, 550 U.S. 372 (2007). Orin Kerr stated that *Scott v. Harris* was an example of where Scalia could find no alternative to considering the totality of the circumstances. Stras et al., *supra* note 5, at 769.

415. 550 U.S. at 374–75.

416. *Id.* at 375.

417. *Id.*

418. *Id.* at 375–76.

419. *Id.* at 381–82 (citing *Tennessee v. Garner*, 471 U.S. 1, 11 (1985)).

420. *Id.* at 383.

421. *See supra* section I.B.

422. *Harris*, 550 U.S. at 384.

423. *Id.* at 383–84.

probability of injuring or killing a single person.”⁴²⁴ Scalia decided that the Court should take into account the “relative culpability” of the lives at risk.⁴²⁵ Mr. Harris, he argued, had caused the risk by engaging in the high-speed chase in the first place—and that was dispositive on the issue.⁴²⁶ Thus, Scalia found that Officer Scott’s actions were reasonable. He laid down a rule: “A police officer’s attempt to terminate a dangerous high-speed car chase that threatens the lives of innocent bystanders does not violate the Fourth Amendment, even when it places the fleeing motorist at risk of serious injury or death.”⁴²⁷

Justice Stevens, dissenting, argued that the determination of whether the seizure was “reasonable” should have been left to the jury.⁴²⁸ Justice Stevens noted that in the video of the incident, it was not clear whether there were even any pedestrians on the road who would have been at risk of injury.⁴²⁹ Further, he noted that the chase was “hardly the stuff of Hollywood” and there were not any “close calls” in which innocent bystanders could have been injured.⁴³⁰ Justice Stevens criticized the general rule that Scalia had put forth, arguing that it was not clear that Mr. Harris’s conduct had threatened the lives of any innocent bystanders.⁴³¹

CONCLUSION

Throughout his career, Justice Scalia was adamant about using bright-line rules instead of fuzzy standards. He was especially intentional about using rules when dealing with criminal matters,

424. *Id.* at 384.

425. *Id.*

426. *Id.* Earlier in the opinion, Scalia described the incident as a “Hollywood-style car chase of the most frightening sort.” *Id.* at 380.

427. *Id.* at 386. The concurring Justices disagreed, though, about whether the holding constituted a *per se* rule. Justice Breyer stated that he disagreed with the majority insofar as it articulated a *per se* rule, arguing that statement of the holding was too absolute. *Id.* at 389 (Breyer, J., concurring). Justice Ginsburg, though, noted that she did not consider the majority’s holding a “mechanical, *per se* rule.” *Id.* at 386 (Ginsburg, J., concurring). She cited the Court’s balancing analysis, and argued that the inquiry was fact specific and did not lay down a clear test. *Id.*

428. *Id.* at 390 (Stevens, J., dissenting).

429. *Id.* at 392–93.

430. *Id.* at 392.

431. *Id.* at 396.

believing that rules could help protect the rights of unpopular criminal defendants.

And yet, in cases involving civil special needs as well as remedies for Fourth Amendment violations, Justice Scalia seemed to abandon his enthusiasm for rules. In these cases, he used standards that allowed for unbridled judicial discretion in balancing individual and government interests. He used balancing tests that let judges impute their own subjective preferences onto the law under the veneer of objectivity.⁴³²

Further, in these cases, Justice Scalia almost always sided with the government. Indeed, scholars have pointed out that when courts use balancing tests, the government usually wins.⁴³³ In civil special needs cases, Justice Scalia sided with the government as long as the search was not directed at criminal evidence. When dealing with remedies for Fourth Amendment violations, he chipped away at the exclusionary rule, arguing that police officers were “professionals” who did not need the deterrent effect of suppression.⁴³⁴ He argued there were better remedies, like civil suits, and yet when faced with those civil suits he repeatedly granted officers qualified immunity.⁴³⁵ Finally, though Justice Scalia professed to take seriously the rights of unpopular criminal defendants,⁴³⁶ his decision in *Scott v. Harris*—albeit a civil case—seemed

432. See Morgan Cloud, *Pragmatism, Positivism, and Principles in Fourth Amendment Theory*, 41 UCLA L. REV. 199, 239 (1993) (“The very concept of balancing suggests that the Court must develop some objective measure for this task. It has never done so, leaving these opinions open to the criticism that the Justices are imposing their subjective preferences, while pretending that these judgments are the product of some neutral, objective, almost scientific process.”).

433. *E.g.*, Friedman & Stein, *supra* note 327, at 297 (“In reality, the Court’s idea of ‘balancing’ is illusory—the test is rigged such that the government almost always wins.”); Cloud, *supra* note 432, at 280 (noting that in Fourth Amendment balancing cases, collective government interests tend to outweigh individual privacy interests); Strossen, *supra* note 15, at 1176 (arguing the Court overvalues government interests in balancing tests); T. Alexander Aleinkoff, *Constitutional Law in the Age of Balancing*, 96 YALE L.J. 943, 965 (1987) (“Balancing has been a vehicle primarily for weakening earlier categorical doctrines restricting governmental power to search and seize.”). *But see* Sullivan, *supra* note 3, at 95–97 (arguing there is no “conservative” or “liberal” bent to the choice of rules versus standards).

434. *Hudson v. Michigan*, 547 U.S. 586, 597 (2006).

435. See *Anderson v. Creighton*, 483 U.S. 635, 641 (1987) (qualified immunity for officer who conducts warrantless search); *Ashcroft v. al-Kidd*, 563 U.S. 731, 744 (2011) (qualified immunity for attorney general after arresting and detaining terrorism suspects using material witness warrants but with improper motive).

436. Scalia, *Law of Rules*, *supra* note 16, at 1180.

to depart from that rationale and had no problem taking into account the “relative culpability”⁴³⁷ of the lives at risk.

Justice Scalia’s lasting impact in insisting on a rule over a standard may be his reintroduction of the trespass approach to the Fourth Amendment. Especially as we move forward into the digital age, the trespass approach may offer a clearer rule showing when a search has occurred, alleviating the need to rely only on the open-ended standard from *Katz v. United States*. Justice Gorsuch stated as much in his dissent in *Carpenter v. United States*: “These ancient principles may help us address modern data cases too.”⁴³⁸ Not only has Justice Gorsuch argued to build on the reintroduced trespass test, but a substantial majority of the current Court has accepted its revival.

437. *Scott v. Harris*, 550 U.S. 372, 384 (2007).

438. *Carpenter v. United States*, 138 S. Ct. 2206, 2269 (2018) (Gorsuch, J., dissenting).