

DIVINING AND DESIGNING THE FUTURE OF THE SEARCH INCIDENT TO ARREST DOCTRINE: AVOIDING INSTABILITY, IRRATIONALITY, AND INFIDELITY

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For over half a century, the scope of the “search incident to arrest” exception to the Fourth Amendment’s search warrant requirement repeatedly expanded and contracted. In Chimel v. California, the Supreme Court attempted to stabilize the doctrine by limiting searches incident to arrest to the areas that needed to be searched to ensure officer safety and to preserve destructible evidence. In the more than thirty-five years since Chimel, however, the Court has again steadily increased the reach of the exception, allowing police officers to search areas—in particular, passenger compartments of vehicles—when arrestees have no realistic access to those areas.

In the Supreme Court’s most recent exploration of the search incident to arrest doctrine, Thornton v. United States, Justice Antonin Scalia authored a concurrence that challenged the majority’s continued adherence to the twin rationales identified in Chimel, officer safety and evidence preservation. At least with regard to passenger compartment searches, Justice Scalia instead suggested that the Court should return to a prior justification, the interest in gathering evidence relevant to the crime that is the basis for an arrest. Based on this alternative rationale, he maintained that a warrantless search of a vehicle incident to the arrest of an occupant is unreasonable when the arrest is for an offense that furnishes no reasonable basis for believing evidence might be found in the vehicle. On the other hand, he asserted that such a search is reasonable when the offense supporting the occupant’s arrest is one that engenders a reasonable basis for believing that evidence might be found in the vehicle.

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This article examines the ramifications of Justice Scalia's proposed revision of the search incident to arrest doctrine and assesses whether the consequences of that revision are consistent with core Fourth Amendment principles. The author finds merit in Justice Scalia's conclusion that officers should not be allowed to search a vehicle incident to the arrest of an occupant for a "nonevidentiary offense"—i.e., an offense of a nature that makes it implausible to believe that probative evidence could be nearby. The author disagrees, however, with Justice Scalia's conclusion that a revived evidence gathering rationale can support a thorough vehicle search whenever an occupant is arrested for an "evidentiary offense"—i.e., an offense of a nature that makes it plausible to believe that probative evidence might be present. According to the author, the grant of automatic authority to search vehicles in such cases is inconsistent with the Fourth Amendment's probable cause requirement. Because the mere fact of an arrest does not give rise to a fair probability that evidence will be found nearby, a search lacks adequate Fourth Amendment justification. The author concludes that a search of a vehicle incident to the arrest of an occupant for any offense is permissible only when there is good reason to keep the occupant in a location that affords access to weapons or evidence inside the vehicle. In such a case, presumed interests in officer safety and evidence preservation can justify the privacy invasion occasioned by a search.

I. INTRODUCTION

Over fifty years ago, Justice Felix Frankfurter observed that “[i]t is a fair summary of history to say that the safeguards of liberty have frequently been forged in controversies involving not very nice people.”¹ The case that prompted this memorable remark involved interpretation of the Fourth Amendment guarantee “against unreasonable searches and seizures,”² a safeguard often relied upon by unsavory sorts to avoid responsibility for their criminal acts.³ More specifically, the “controversy” in that case centered around the “search incident to arrest” exception to the search warrant rule, a doctrine that is inextricably linked to the apprehension of “people” suspected of “not very nice” acts.⁴

1. *United States v. Rabinowitz*, 339 U.S. 56, 69 (1950) (Frankfurter, J., dissenting).

2. U.S. CONST. amend. IV.

3. The *Rabinowitz* case will play a prominent role in the discussions that follow. The majority opinion was a major development in the history of search incident doctrine. *See infra* text accompanying notes 52–64. Although it was subsequently overruled, it is the source of, and foundation for, the recent proposal to modify search incident to arrest law that is the impetus for this article. *See infra* text accompanying notes 193–208.

4. In light of the Supreme Court's generous interpretation of law enforcement authority under the Fourth Amendment, today the search incident to arrest doctrine may be triggered by criminal acts for which this description is not particularly apt. *See Atwater v. City of Lago Vista*, 532 U.S. 318, 354 (2001) (upholding constitutionality of warrantless custodial arrest for failing to use seatbelt); *see also United States v. Mahabir* No. CR-93-22-L, 1997 WL 297498, at *5 (4th Cir. June 4, 1997) (declaring unwrapping and opening of boxes in sleeper compartment of truck to be lawful search incident to arrest for driving

No Fourth Amendment doctrine has a more interesting, more unpredictable, more pendular history than the search incident to arrest doctrine.⁵ As will be seen, during the half-century between the Supreme Court's first peripheral reference to search incident to arrest power in 1914⁶ and the landmark Warren Court effort to define the exception's borders in 1969,⁷ the doctrine underwent at least five radical course changes. Perhaps more than any other branch of Fourth Amendment doctrine, its fate seems to have been dictated by changes in the prevailing winds.

The majority opinion in *Chimel v. California* acknowledged the somewhat inexplicable vacillations in search incident law and tried, mightily, to inject rationality and stability. A unanimous Court seemed determined to anchor the doctrine with weighty constitutional rationales that would enable it to withstand the next, inevitable shift in wind direction. The straightforward, commonsense approach of Justice Stewart's logic gave hope that future developments might be incremental, progressive, rooted in principle, and faithful to Fourth Amendment values.

Before long, however, the process of undermining *Chimel's* promise began. The search incident authority that the *Chimel* Court had sought to confine within sensible bounds began to grow once more, and the rationales that were designed to prevent dramatic drift were either ignored or subordinated. During the years preceding *Chimel*, the doctrinal pendulum had swung back and forth with regularity, expanding, then shrinking, then expanding search incident authority once again. *Chimel* cabined the authority, placing relatively restrictive constraints on its reach. In the over thirty-five years since *Chimel*, the doctrine has thrown off *Chimel's* shackles and swung again slowly, steadily, and with virtually no interruption, in the opposite, expansive direction.

with suspended license); *United States v. Pino*, 855 F.2d 357, 362–63 (6th Cir. 1988) (finding search incident to arrest constitutional following arrest for making illegal lane change); *Daniels v. State*, 416 So. 2d 760, 763–64 (Ala. Crim. App. 1982) (finding search of aspirin bottle in car valid incident to arrest for not having driver's license); *State v. Reed*, 157 S.W.3d 353, 357 (Mo. Ct. App. 2005) (holding valid a search incident to arrest following arrest for driving without a license).

5. In the landmark Warren Court opinion regarding the doctrine, Justice Stewart appropriately employed the pendulum metaphor to describe the mutable course of the doctrine's development. See *Chimel v. California*, 395 U.S. 752, 758 (1969) (observing, while documenting the several pre-*Chimel* changes of course, that “[o]nly a year after” the search incident to arrest doctrine had been interpreted very broadly “the pendulum swung again” in a restrictive direction). Justice White described the course of development of the search incident to arrest doctrine as a “modern odyssey,” asserting that “[f]ew areas of the law [had] been as subject to shifting constitutional standards,” and that the “whole area” had been characterized by “remarkable instability.” *Id.* at 770 (White, J., dissenting).

6. *Weeks v. United States*, 232 U.S. 383, 398 (1914).

7. See *Chimel*, 395 U.S. 752. *Chimel* arrived just as the curtain was falling on the Warren Court's revolution in criminal procedure. It was decided on the very day that Warren Burger was sworn in as Chief Justice. This was the first in a number of fairly rapid changes in the Court's membership that would have a profound influence on the course of Fourth Amendment law. Justice Blackmun assumed Justice Fortas's seat the next year, and Justices Rehnquist and Powell replaced Justices Harlan and Black just two years after that. Thus, within the four-year period that began the year *Chimel* was decided, almost half the Court's membership changed.

In one particular area, searches of vehicles in connection with the arrest of occupants, the growth has been particularly substantial and, to many observers, intolerably irrational. For Justice Antonin Scalia, the most recent development of the search incident to arrest doctrine in *Thornton v. United States*⁸ was the straw that broke the camel's back. Although he subscribed to the outcome in *Thornton*, he wrote separately, aiming scathing criticism at the logic that the Court has used to justify extensive searches of vehicles incident to arrests of occupants. He declared that the doctrine had lost its “constitutional moorings” and had come to grant officers an abusive, constitutionally unacceptable power to engage in “purely exploratory searches” and to “rummage around in a car to see what they might find.”⁹ Moreover, Justice Scalia called for the Court to “be honest about” the reasons why it might be reasonable to search vehicles subsequent to arrests of occupants.¹⁰ He discovered a rationale that was both “honest” and “plausible” in the pre-*Chimel* precedents and sketched some of the consequences that would flow from supplanting the implausible justifications currently relied upon with the alternative he had unearthed.¹¹

If Justice Scalia's views in *Thornton* were idiosyncratic or were likely to remain a distinct minority position,¹² they might deserve some attention, but there would be no pressing need to address them. Instead, given the likelihood that another shift in the search incident sands is not far off and that Justice Scalia's views *are* the future of this important Fourth Amendment doctrine, the time to explore them is now. If there is merit to his positions, the Court should hasten to abandon its indefensible logic and adopt them at the earliest possible opportunity. If there are flaws in his constitutional logic, however, it is important for the Court to avoid yet another misstep in defining officers' authority to invade private spaces surrounding the sites of lawful arrests.¹³ The history of the law in this area counsels careful, cautious reflection before another leap is taken.

The importance of this project is highlighted by the fact that the search incident doctrine is not merely an exception to the *procedural* demand that officers obtain a warrant—advance judicial authorization—prior to conducting a search. Like some other warrant rule exceptions,¹⁴

8. 541 U.S. 615 (2004).

9. *Thornton*, 541 U.S. at 628 (Scalia, J., concurring in the judgment) (quoting and agreeing with *United States v. McLaughlin*, 170 F.3d 889, 894 (9th Cir. 1999) (Trott, J., concurring)).

10. *Id.* at 631.

11. *Id.*

12. Only Justice Ginsburg signed onto his concurrence in *Thornton*.

13. As will become clear, my concern in this article is with the scope of the automatic authority that the doctrine grants to search areas other than the person of the arrestee. Although there are questions that can be raised about the legitimacy of the currently recognized authority to fully search the person and possessions found on the person of a lawful arrestee, I do not intend to focus on those questions or that authority.

14. See, e.g., *South Dakota v. Opperman*, 428 U.S. 364, 368–69 (1976) (affirming authority to conduct inventory searches of vehicles without warrants or probable cause); *Schneekloth v. Bustamonte*, 412 U.S. 218, 219 (1973) (holding that warrantless, causeless searches are valid if officers obtain voluntary

the search incident doctrine is also an exception to the central *substantive* requirement of reasonableness set forth explicitly in the Fourth Amendment, the demand that searches be supported by “probable cause.”¹⁵ Excessively broad interpretations of the power to search arrestees and surrounding areas can seriously undermine the vital protection afforded by the probable cause standard and severely erode privacy interests that the Framers of the Fourth Amendment sought to safeguard.

In this article, I train my attention on the past, the present, and the future of search incident to arrest law, but my main concern is the direction of that future. I begin with a brief account of the past, including a terse description of the precedents predating *Chimel* and a quick summary of *Chimel*'s critical contributions. I then turn to the current state of the law, documenting the post-*Chimel* developments through *Thornton*. My primary focus here is on both the contours of, and the rationales for, the broad authority to search vehicles that has matured in the post-*Chimel* era. My exploration of the future begins with a thorough investigation of Justice Scalia's concurrence in *Thornton* and continues with a detailed analysis and assessment of the merits and implications of his criticisms of the present and his suggestions for the future. The ultimate objective is to determine the breadth of search incident to arrest authority that is most consistent with the balance struck in the Fourth Amendment.¹⁶

II. THE PAST: THE ERRATIC PATH FROM *WEEKS* TO *RABINOWITZ*

As mentioned in the introduction, the first half-century of search incident to arrest law is characterized by vacillation regarding the scope of the searches that officers could conduct incident to arrests. Precedents that seemed to authorize extensive rummaging in the places surrounding the sites of arrests were followed by decisions tightly constricting the ambit of the searches deemed reasonable. The aim of Part II is to summarize

consent to search); *Terry v. Ohio*, 392 U.S. 1, 27 (1968) (concluding that limited searches of suspicious person for weapons are constitutional without warrants or probable cause to search).

15. See U.S. CONST. amend. IV (stating that “no warrants shall issue but upon probable cause”). Although the text of the guarantee specifies only that searches pursuant to warrants are impermissible unless the warrant is supported by a showing of probable cause to search, the Supreme Court has sensibly concluded that when there is reason to dispense with the warrant demand, probable cause is the normal showing required to render a search reasonable. See *Wong Sun v. United States*, 371 U.S. 471, 479–80 (1963).

16. I am an “originalist” insofar as I believe that the task of constitutional interpretation is to honor the values and objectives of the Framers—i.e., to ensure that the resolution of Fourth Amendment issues yields the level of privacy protection they intended to provide—no more and no less. I do not think it appropriate for those empowered to construe the guarantee to augment the protection afforded because they believe privacy should be more jealously safeguarded or to decrease the protection afforded because of a fear that the guarantee is too great an impediment to effective law enforcement. Cf. *Harris v. United States*, 331 U.S. 145, 198 (Jackson, J., dissenting) (“[T]he forefathers[, who] thought” that the shelter the Fourth Amendment provides for criminals “was not too great a price to pay for . . . privacy of home, papers, and effects . . . may have overvalued privacy, but I am not disposed to set their command at naught.”).

that law before describing the *Chimel* Court's attempt to bring stability and rationality to the area.

The Supreme Court's first reference to the search incident to arrest doctrine was in dictum in *Weeks v. United States*,¹⁷ a case better known as the source of the Fourth Amendment exclusionary rule. Justice Day, writing for a unanimous court, adverted to the "right on the part of the government always recognized under English and American law, to search the *person* of the accused when legally arrested, to discover and seize the fruits or evidences of crime,"¹⁸ observing that it had "been uniformly maintained in many cases."¹⁹ Eleven years later, in dictum in *Carroll v. United States*,²⁰ a case better known as the origin of the "automobile exception" to the search warrant rule,²¹ the Court recognized somewhat broader authority. The *Carroll* Court asserted that, upon a legal arrest, "whatever is found upon [the arrestee's] person *or in his control* which it is unlawful for him to have and which may be used to prove the offense may be seized."²² That very same year, relying only on *Weeks* and *Carroll*, the Court, in *Agnello v. United States*,²³ acknowledged an undoubted

right without a search warrant contemporaneously to search persons lawfully arrested while committing crime and to search *the place* where the arrest is made in order to find and seize things connected with the crime as its fruits or as the means by which it was committed, as well as weapons and other things to effect an escape from custody.²⁴

The final step in this first expansive phase occurred in *Marron v. United States*,²⁵ a decision that affirmed the right to conduct a warrantless search of "the place" of an arrest "to find and seize the things used to carry on [an

17. 232 U.S. 383, 392 (1914).

18. *Id.* (emphasis added). The only reason for the mention of this "right" was to point out that it was *not* at issue in *Weeks*—i.e., that the government was not asserting that the searches in the case could be validated on this ground.

19. *Id.* at 392. In support of these propositions, Justice Day cited a couple of established treatises and one Irish case.

20. 267 U.S. 132 (1925).

21. As developed today, the "automobile exception" to the search warrant rule authorizes officers to search a readily mobile vehicle and all its contents without a search warrant if there is *probable cause to search*. See *California v. Acevedo*, 500 U.S. 565, 580 (1991) (holding that all containers in vehicle where the object of the search could be located can be searched if there is probable cause to search the vehicle); *California v. Carney*, 471 U.S. 386, 392–93 (1985) (concluding that all readily mobile vehicles, both those stopped by officers in transit and those that are parked at the time officers approach, are subject to search without a warrant if officers have probable cause to search).

22. *Carroll*, 267 U.S. at 158 (emphasis added). The meaning and breadth of the phrase "in his control" was not clarified in *Carroll*.

23. 269 U.S. 20 (1925).

24. *Id.* at 30 (emphasis added). The Court did not specifically state how broadly "the place where the arrest is made" should be interpreted. It did assert, however, that "one's house cannot lawfully be searched without a search warrant, except as an incident to a lawful arrest therein." *Id.* at 32. Although it is not entirely clear, this assertion might suggest that the scope of the search permitted was the *entire dwelling* where the arrest occurred.

25. 275 U.S. 192 (1927).

ongoing] criminal enterprise” that was the basis for the arrest.²⁶ In affirming the authority to search a “closet” in the six- or seven-room establishment where the arrest occurred, the Court did use potentially limiting language, observing that an item located in the closet “was in [the arrestee’s] immediate possession and control.”²⁷ In the next sentence, however, the Justices asserted that “[t]he authority . . . to search . . . extended to *all parts of the premises* used for the unlawful purpose.”²⁸ By the end of the 1920s, the authority to search the *person* of an arrestee mentioned in passing in *Weeks* had grown to encompass “all parts of the premises” where an arrest occurred.

The first reversal of direction occurred in the early 1930s, in *Go-Bart Importing Co. v. United States*,²⁹ a case involving a relatively intensive search of an office following a lawful arrest therein. In condemning the search as a “lawless invasion” and a “general exploratory search,”³⁰ the Court distinguished *Marron* in two narrowing respects. First, in *Marron*, the officers had arrested a man “who in pursuance of a conspiracy was actually engaged in” committing an offense.³¹ Second, the items seized “were visible and accessible and in the offender’s immediate custody.”³² The reversal gained momentum the next year, in *United States v. Lefkowitz*,³³ a case involving a thorough search of a single room. Adhering to *Go-Bart*, the Court asserted that the case was unlike *Marron*, in which the items seized were “openly displayed to view”³⁴ and “[n]o search for them was made.”³⁵ In addition, *Lefkowitz* was not a case in which a “crime was being committed in the presence of the officers”³⁶ and officers seized objects that were being “used to commit th[at] offense.”³⁷ Rather, the officers had performed “exploratory and general” searches of the room “solely to find evidence of . . . guilt.”³⁸ Because the authority “to search one’s house or place of business contemporaneously with his lawful arrest therein” could not be “greater than that conferred by a [properly issued] search warrant”³⁹ and because “[a]n arrest may not be used as a pretext to search for evidence,”⁴⁰ the Court found the searches unreasonable.⁴¹

26. *Id.* at 199.

27. *Id.* (emphasis added).

28. *Id.* (emphasis added).

29. 282 U.S. 344 (1931).

30. *Id.* at 358.

31. *Id.*

32. *Id.*

33. 285 U.S. 452 (1932).

34. *Id.* at 462.

35. *Id.* at 465.

36. *Id.* at 463.

37. *Id.* at 465.

38. *Id.*

39. *Id.* at 464. Under the then-prevailing “mere evidence” rule, the papers the officers sought “solely for use as evidence of crime . . . could not lawfully be searched for and taken even under a search warrant” that was otherwise proper and valid. *Id.* This limitation on search and seizure power was ultimately discarded by the Supreme Court in *Warden v. Hayden*, 387 U.S. 294, 300–01 (1967).

40. *Lefkowitz*, 285 U.S. at 467.

A little over fifteen years of contraction ended abruptly with the expansive opinion in *Harris v. United States*,⁴² which found authority for the proposition that searches incident to arrest may sometimes “include the premises under [the arrestee’s] immediate control.”⁴³ The majority saw “nothing in” *Go-Bart* or *Lefkowitz* that “cast[] doubt on this proposition” and perceived no “support . . . for the suggestion” that a search incident may not “extend beyond the room” where an arrest occurs.⁴⁴ Because the arrestee was “in exclusive possession of [the] four room apartment” that had been searched and because the “instrumentalities of [his] crimes” sought by the officers “could easily have been concealed in any of the four rooms,” the Court deemed the search of the apartment reasonable.⁴⁵ The majority carefully noted that search incident authority was not unlimited, observing that in “[o]ther situations . . . the nature and size of the object sought or the lack of effective control over the premises . . . may require . . . less extensive” searches.⁴⁶ In *Harris*, the search was not too extensive because the items sought were likely to be concealed (not visible), because the “search was not a general exploration” for evidence of “some crime” but was “specifically directed to the means and instrumentalities” of the charged crimes, and because the items looked for and found were not “merely evidentiary materials” but “were properly subject to seizure” as the “instrumentalities of the crimes charged.”⁴⁷

During the next three years, the Court twice veered in different directions, first narrowing the constitutional authority to search incident to arrest, then once again generously expanding the power that officers could lawfully exercise. In *Trupiano v. United States*,⁴⁸ a five-Justice majority made its attitude clear, characterizing the expansive precedents as recognition of an officer’s authority to “look around at the time of [an] arrest and seize those fruits and evidences of crime or those contraband articles which are *in plain sight* and *in his immediate and discernible presence*”⁴⁹ and as-

41. *See id.*

42. 331 U.S. 145 (1947).

43. *Id.* at 151. The Court found support for this view in *Agnello*, *Marron*, and other cases. *See id.* at 151 nn.12 & 14. Neither *Go-Bart* nor *Lefkowitz* evoked dissent by any Justice. *Harris* was the first case to prompt sharp division on the Court concerning the breadth of the search incident to arrest doctrine. Four Justices expressed their contrary views at length in three separate dissents. *See id.* at 156 (Frankfurter, J., dissenting); *id.* at 183 (Murphy, J., dissenting); *id.* at 195 (Jackson, J., dissenting). I explore some of the *Harris* dissenters’ objections and themes in my analyses and critiques of the present and future of search incident law.

44. *Id.* at 151 n.14, 152. The *Go-Bart* Court had narrowly interpreted *Marron*. The *Harris* majority, proving that both sides could play that game, construed *Go-Bart* and *Lefkowitz* restrictively, opining that the searches in those cases were “found to be invalid . . . for reasons other than the areas covered by the searches.” *Id.* at 152 n.16.

45. *Id.* at 152.

46. *Id.*

47. *Id.* at 153–54. According to the majority, officers could lawfully seize not only the “instrumentalities” of crime, but the “fruits of crime . . . , weapons” which might be used to escape from arrest, “and property the possession of which is a crime.” *Id.* at 154.

48. 334 U.S. 699 (1948).

49. *Id.* at 704 (emphasis added).

serting that law enforcement power to conduct a warrantless search “incident to a lawful arrest ha[d] always been considered to be a strictly limited right.”⁵⁰ Opining that a valid arrest *alone* does not justify a warrantless search and that there “must be some other factor . . . that would make it unreasonable or impracticable to require an arresting officer” to secure a search warrant, the Court struck down a search of the premises because there had been a prior opportunity to secure a search warrant and the officers had failed to do so.⁵¹

Trupiano’s force was short-lived indeed. Just two years later, in *United States v. Rabinowitz*,⁵² the Court rejected the view that search warrants must be obtained “whenever practicable.”⁵³ The *Rabinowitz* Court held that the validity of a search incident to an arrest should not turn on whether an officer had a prior opportunity to obtain a warrant, but, instead, should hinge “upon the reasonableness of the search.”⁵⁴ Officers have a “right ‘to search *the place* where the arrest is made’” to find fruits or instrumentalities, a right that “seems to have stemmed . . . from the long-standing practice of searching for other proofs of guilt within the control of the accused found upon arrest.”⁵⁵ The majority revived *Agnello* and *Marron* and described *Go-Bart* and *Lefkowitz* as opinions that had merely “condemned general exploratory searches”⁵⁶ before sustaining an intensive, one-and-a-half-hour search of a one-room office as a reasonable search incident to arrest.⁵⁷

For the next two decades, there were no sudden, radical shifts in direction. During the 1950s, the *Rabinowitz-Harris* approach to the search incident to arrest exception went unquestioned. In the 1960s, however, a

50. *Id.* at 708.

51. *Id.* at 708–10. The Court distinguished *Harris* as a case in which the officers did not have an opportunity to secure a search warrant in advance and a case “concerned with the permissible scope of a general search” incident to arrest. *Id.* at 708–09. Asserting that the factual differences between *Trupiano* and *Harris* “may or may not be of significance so far as general principles are concerned,” the Court was content to rest on them for the time being and to leave questions about the viability of *Harris* “to another day.” *Id.* at 709.

52. 339 U.S. 56 (1950). For the third search incident case in a row, only five Justices joined the majority opinion. *Id.* The authority granted by the doctrine had clearly become quite controversial.

53. *Id.* at 66.

54. *Id.* at 65–66.

55. *Id.* at 61 (quoting *Agnello v. United States*, 269 U.S. 20, 30 (1925)) (emphasis added).

56. *Id.* at 62.

57. Although the Court’s attitude toward search incident authority was unmistakably generous, the reasons it gave for upholding the office search were potentially limiting and certainly engendered the possibility that *Rabinowitz* itself could be narrowly construed. The Court noted that the officers not only had “probable cause to believe” that the arrestee was conducting an illegal business, but had “most reliable information” that the items they sought were in his possession and “concealed . . . in the very room where he was arrested, over which room he had immediate control and in which he had been” carrying out his illegal enterprise. *Id.* at 62–63. The Court explained that it was affirming the lower court’s decision because the search was incident to a valid arrest, the place searched “was a business room to which the public, including the officers, was invited,” “the room was small and under the immediate and complete control” of the arrestee, the officers did not search “beyond the room used for unlawful purposes,” and the possession of the items seized “was a crime.” *Id.* at 64. It “seem[ed]” to the majority that the validity of so “limited” a search had “never . . . been questioned seriously.” *Id.* at 63.

slow, gradual drift began. There were indications that another significant change in the scope of permissible searches might be coming. In one opinion, Justice Frankfurter, the author of the main *Rabinowitz* dissent, observed that the Court's search incident decisions were conflicting, but concluded that an effort to reconcile or reexamine them was not in order because the petitioner had not requested reconsideration of *Harris* and *Rabinowitz*.⁵⁸ When the Court reaffirmed the search warrant requirement in another case,⁵⁹ two Justices pointedly observed that the majority's holding was consonant with *Trupiano*, but seriously inconsistent with *Rabinowitz*.⁶⁰ And in another significant opinion, a unanimous Court asserted that a search incident to arrest could extend to the arrestee's person, to "things under [his] immediate control, . . . and, to an extent depending on the circumstances of the case, to the place where he is arrested."⁶¹ Presaging *Chimel*, the Court specified the two justifications for these searches—the need to seize weapons to prevent assaults or escapes and the need to prevent evidence destruction.⁶² According to the Court, weapons and evidence on a "person or under his immediate control" pose the threats that justify searches, but the "justifications" for a search incident "are absent where a search is remote in time or place from the arrest."⁶³ Although the Court did not *hold* that searches of places where arrests occur cannot extend beyond the spaces that an arrestee might access, its reasoning certainly provided a foundation for that conclusion.⁶⁴ As the 1960s drew to a close, *Rabinowitz* remained the law, but its premises had been eroded and the winds of another change were blowing.

58. See *United States v. Abel*, 362 U.S. 217, 235 (1960).

59. See *Chapman v. United States*, 365 U.S. 610 (1961).

60. *Id.* at 618 (Frankfurter, J., concurring in the judgment); *id.* at 621 (Clark, J., dissenting).

61. *Preston v. United States*, 376 U.S. 364, 367 (1964).

62. *Id.*

63. *Id.*

64. *Preston* did not involve a search of the place where an arrest had occurred. At issue was the search of a vehicle long after an arrest and at a time when the men arrested were nowhere near the car but, instead, were in custody at the police station. *Id.* at 365–66. Thus, "the search was too remote in time or place to have been made as incidental to the arrest." *Id.* at 368.

The Court reaffirmed *Preston*'s temporal and spatial proximity demands in *Stoner v. California*, 376 U.S. 483 (1964), a case that involved the search of a hotel room when the occupant was not present two days *prior* to his arrest. *Id.* at 485–86. That search was declared unconstitutional because a search incident must be "substantially contemporaneous with the arrest and . . . confined to the immediate vicinity of the arrest." *Id.* at 486. Taking guidance from the principles of *Stoner* and *Preston*, in *James v. Louisiana*, 382 U.S. 36 (1965), the Court invalidated the search of a home after an arrest of the resident "on a street corner more than two blocks away." *Id.* at 37. Finally, in *Dyke v. Taylor Implement Mfg. Co.*, 391 U.S. 216 (1968), a case in which a car was stopped and the occupants were arrested, the Court relied on *Preston* to strike down a search of the car because it "did not take place until [the men] were in custody inside the courthouse and the car was parked on the street." *Id.* at 220.

III. THE PRESENT: THE CONSISTENT COURSE FROM *CHIMEL* TO *THORNTON*

The current state of search incident to arrest law finds its source in the Warren Court's landmark decision in *Chimel v. California*.⁶⁵ The pattern since *Chimel* has been anything but vacillatory or inconsistent. To the contrary, during the more than thirty-five years since its radical, contractive swing in *Chimel*, the search incident pendulum has moved slowly, yet steadily, in the opposite direction.⁶⁶ Part III first explains the content and significance of *Chimel*. It then describes the expansive decisions that have ensued, concluding with the majority opinion in *Thornton*.

A. *Chimel v. California: A Unanimous Effort to Stabilize, Rationalize, and Constrain Search Incident to Arrest Authority*

As noted, during the sixties there were signs of growing discontent with the *Rabinowitz* Court's generous definition of the search incident to arrest exception. On the final day of Earl Warren's reign, the depth of that dissatisfaction became apparent. The glacial movement away from *Rabinowitz* ended in an avalanche that swept that precedent off the books. A unanimous Court gave the pendulum a dramatic push that resulted in much narrower authority to conduct warrantless, causeless searches incident to arrest.

In *Chimel*, officers "looked through [an] entire three-bedroom house, including the attic, the garage, and a small workshop" after arresting a resident for burglary.⁶⁷ Guided by *Rabinowitz*, which had "come to stand for the proposition . . . that a warrantless search 'incident to a lawful arrest' may generally extend to the area that is considered to be in the 'possession' or under the 'control' of the person arrested," the California courts concluded that the search of the home was reasonable.⁶⁸ The Supreme Court concluded that the search had exceeded the bounds of a properly

65. 395 U.S. 752 (1969).

66. This is hardly surprising in light of the fact that the Burger and Rehnquist Court era began the day *Chimel* was decided. The more than thirty-five years since the end of the Warren Court have generally been characterized by shrinkage of the scope of constitutional liberties pertaining to the criminal process and by a corresponding growth in law enforcement authority. See generally Peter Arenella, *Rethinking the Functions of Criminal Procedure: The Warren and Burger Courts' Competing Ideologies*, 72 GEO. L.J. 185 (1983) (concluding that the Warren and Burger Courts followed dramatically different constitutional ideologies, with the Warren Court focusing on due process and the Burger Court emphasizing crime control); Tom Stacy, *The Search for the Truth in Constitutional Criminal Procedure*, 91 COLUM. L. REV. 1369 (1991) (analyzing the inconsistency of the Burger and Rehnquist Courts' tendency to liberally allow admission of inculpatory evidence in the name of accuracy while restricting the admission of exculpatory evidence); Carol S. Steiker, *Counter-Revolution in Constitutional Criminal Procedure? Two Audiences*, 94 MICH. L. REV. 2466, 2468 (1996) (arguing that the Burger and Rehnquist Courts have "clearly become less sympathetic to claims of individual rights and more accommodating to assertions of the need for public order" by changing the consequences of finding police conduct unconstitutional).

67. *Chimel*, 395 U.S. at 754.

68. *Id.* at 760.

defined search incident to arrest exception and declared it unconstitutional, overruling *Rabinowitz* and *Harris* in the process.⁶⁹

After declaring that the decisions regarding the scope of the search incident to arrest exception had “been far from consistent,”⁷⁰ Justice Stewart traced and summarized the tortuous path from *Weeks* through *Rabinowitz*.⁷¹ He quickly concluded that the *Rabinowitz* doctrine, insofar as it was understood to authorize broad searches of entire premises said to be in the possession or under the control of an arrestee, could “withstand neither historical nor rational analysis.”⁷² The decision in *Rabinowitz* surely did not have “unimpeachable” precedential support.⁷³ Moreover, it was not consistent with “a reasoned view of the background and purpose of the Fourth Amendment,” which “was in large part a reaction to the general warrants and warrantless searches that had so alienated the colonists and had helped speed the movement for independence.”⁷⁴

According to Justice Stewart, proper respect for the search warrant requirement—an outgrowth of the colonists’ alienation—requires that the *scope* of any exception from the warrant demand be limited by the rationales for granting that exception.⁷⁵ The two rationales for granting warrantless authority to search incident to lawful arrests are to prevent resistance or escapes by removing weapons an arrestee might use and to preserve evidence by seizing items an arrestee might conceal or destroy.⁷⁶ Because weapons pose threats and evidentiary items are at risk only when they are accessible to an arrestee, a search incident to arrest can extend only to the person of the arrestee and “the area ‘within his immediate control’”—i.e., “the area from within which he might gain possession of a weapon or destructible evidence.”⁷⁷ In the Court’s view, “[t]here is no comparable justification” that can support more extensive searches of premises based solely on the fact that an arrest has occurred.⁷⁸

The Court asserted that the argument “that it is ‘reasonable’ to search a man’s house when he is arrested in it . . . is founded on little more

69. *Id.* at 768. The Court was unanimous about the appropriate scope of a warrantless, causeless search incident to arrest and about the overbreadth of the *Rabinowitz* approach. Two Justices did dissent from the conclusion that the search in *Chimel* was unreasonable. In their view, the existence of probable cause to search the home coupled with the exigency created by the arrest justified a warrantless search. *See id.* at 770, 773–80 (White, J., dissenting). They did not suggest, however, that the extensive search in *Chimel* could have been justified in the absence of probable cause to search as a mere incident of the in-home arrest.

70. *Id.* at 755.

71. *Id.* at 755–60.

72. *Id.* at 760.

73. *Id.*

74. *Id.* at 760–61.

75. *Id.* at 761–62.

76. *Id.* at 763. The Court also described the area within an arrestee’s immediate control as “the area into which an arrestee might reach in order to grab a weapon or evidentiary items.” *Id.*

77. *Id.*

78. *Id.* The Court pointed out that precedents like *Preston v. United States*, 376 U.S. 364 (1964), had already established the limiting “principle” upon which it was basing its decision in *Chimel*. *Chimel*, 395 U.S. at 763–64.

than a subjective view regarding” acceptable police practices, “not on considerations relevant to Fourth Amendment interests.”⁷⁹ An arrest alone furnishes no basis for broad invasions of privacy that extend beyond readily accessible spaces, and, therefore, a search beyond the person and the area of *immediate* control is “unreasonable” within the meaning of the Fourth Amendment. The Court believed that this line between the area within an arrestee’s immediate control (including, of course, his person) and areas inaccessible to him was “[t]he only reasoned distinction” that could be drawn.⁸⁰ There “was no constitutional justification” for “extending [a] search beyond” the spaces from which an arrestee might secure a weapon or evidence.⁸¹

By exposing the pendular pattern of the prior decisions,⁸² by mustering unanimity for the decision to radically contract the search incident to arrest exception and for the limiting rationales that dictated contraction, and by tying its holding to historical goals and principles, the *Chimel* Court made clear its intent to develop a rational, principled, and stable search incident to arrest exception. The dual goals were to ensure that officers had the authority they need and deserve, while also preserving privacy interests those officers had no reason to invade. There was genuine reason for hope that Justice Stewart’s cogent, persuasive opinion might succeed where past opinions had failed and that future developments might be both incremental and guided by the logic and principles of *Chimel*.⁸³

79. *Chimel*, 395 U.S. at 764–65.

80. *Id.* at 766. The Court also noted that the *Rabinowitz* approach allowed officers to conduct broad searches of homes without probable cause “by the simple expedient of arranging to arrest” suspects in homes and pointed out that the authority to rummage that officers could generate in this way was similar to the authority given by the general warrants resented by our forebears and forbidden by the explicit terms of the Fourth Amendment. *Id.* at 767.

81. *Id.* at 768.

82. I have already noted that Justice Stewart called attention to the unsettling inconsistency of the prior decisions. Justice White was also troubled by the “shifting constitutional standards” that had governed searches incident to arrest and by the “rapid reversals” of direction in the decisions predating *Chimel*. *Id.* at 770–72 (White, J., dissenting).

83. I have always admired Justice Stewart’s majority opinion in *Chimel*, finding it lucidly written, exceptionally logical, and quite thorough. Research for this piece has proven that the credit really belongs to another Justice who was no longer on the Court at the time *Chimel* was decided. All of the ingredients that make *Chimel* a judicial work of art, and more, are present in the masterful dissents penned by Justice Frankfurter in *Harris* and *Rabinowitz*. See *United States v. Rabinowitz*, 339 U.S. 56, 68–86 (1950) (Frankfurter, J., dissenting); *Harris v. United States*, 331 U.S. 145, 155–82 (1947) (Frankfurter, J., dissenting). Very little, if any, of the *Chimel* opinion is an original creation.

In addition, through the years I have come to question whether it makes sense to allow officers to routinely search areas into which an arrestee might reach to grab a weapon or destructible evidence—areas like desk and dresser drawers, briefcases, and the pockets of clothing not worn, but resting nearby. Once an officer has searched the person of an arrestee and removed any weapons and evidentiary items, safety concerns would appear to dictate maintaining complete control over the arrestee’s person. Ignoring an uncontrolled arrestee in order to open drawers and briefcases would seem risky to officers—both unwise and unreasonable. And if an officer has an arrestee under control, it is arguable that there is inadequate reason to open adjacent spaces—i.e., weapons or evidence located there do not *really* pose the sorts of dangers highlighted by *Chimel*. Of course, there may be cases in which an officer cannot effectively control an arrestee or multiple arrestees and must leave him or them in the vicinity of closed spaces that might contain weapons or evidence. In those cases, a search of the area of immediate control would be defensible. My concern in this article, however, is *not* the propri-

B. United States v. Robinson: *The First Crack in Chimel's Foundations?*

The first search incident to arrest decision following *Chimel* concerned only a search of the *person* of an arrestee, not the authority to search spaces around the person. The case is nonetheless important to the instant discussion because the premises the Court relied upon to resolve the defendant's claim would prove instrumental in later expansions of the authority to search *beyond* an arrestee's person.

In *United States v. Robinson*,⁸⁴ a lower court had relied on the limiting justifications pinpointed by *Chimel* to sustain the argument that officers are not *always* entitled to conduct thoroughgoing searches of an arrestee's person.⁸⁵ More specifically, the lower court had concluded that when the offense for which a person is arrested is of a sort that involves no evidence or fruits, the concealment or destruction of evidence rationale could not justify any search.⁸⁶ Weapon removal was the only possible justification for a search incident to arrest.⁸⁷ Because a frisk—a pat down of the outer clothing—and the extraction of any weapons felt would adequately serve the interest in preventing resistance or escape, there was, according to the court, no reason to allow a more extensive search.⁸⁸ It was unreasonable to remove items other than weapons from an arrestee's person and to open those items to inspect their contents because neither action served any legitimate purpose.⁸⁹

In an opinion by Justice Rehnquist, a majority of the Supreme Court disagreed with both the logic and the conclusion of the lower court and held that, no matter what the character of the offense, an officer is always entitled to thoroughly search the person of an arrestee, to remove all items, and to inspect the contents of those items.⁹⁰ Justice Rehnquist observed that the authority to search an arrestee's person had been “virtually

ety of allowing *any* search beyond the person of the arrestee. Instead, my focus is on the propriety of searching areas that truly are beyond the reach of arrestees, searches that clearly cannot be justified by the rationales identified in *Chimel*.

84. 414 U.S. 218 (1973).

85. *Id.* at 227–29 (referring to *United States v. Robinson*, 471 F.2d 1082, 1093 (D.C. Cir. 1972)).

86. *Robinson*, 471 F.2d at 1094. In *Robinson*, the offenses that were the basis for arrest were traffic violations—operating a motor vehicle after license revocation and obtaining a permit by misrepresentation. *Robinson*, 414 U.S. at 220. The Court of Appeals believed “that there could be no evidence or fruits in the case of” these offenses. *Id.* at 233.

87. *Robinson*, 471 F.2d at 1093–94.

88. *Id.* at 1094–1101.

89. *Id.*

90. *Robinson*, 414 U.S. at 235–36. A *lawful* arrest, of course, is a necessary predicate for a legitimate search incident to arrest. *See id.* at 224. For an arrest to be lawful, officers must have probable cause to arrest the particular individual. *See Whiteley v. Warden*, 401 U.S. 560, 565–66 (1971). For misdemeanors not committed in an officer's presence, an arrest warrant may be required. *See generally Atwater v. City of Lago Vista*, 532 U.S. 318 (2001) (holding that a warrant is not needed for a minor offense committed in an officer's presence, but not deciding whether a warrant is required for such offenses not committed in an officer's presence).

unchallenged”⁹¹ since it was first recognized, that such authority had been “repeatedly affirmed in the decisions of [the] Court,”⁹² and that statements in the precedents “clearly imply that such searches” are not merely exceptions to the warrant rule but are reasonable.⁹³ He did acknowledge, however, that almost all of the Court’s statements regarding “unqualified authority to search” an arrestee were “dicta” and that history did not provide a definitive answer because early authorities on the subject were “sparse” and “sketchy.”⁹⁴

Treating the question as not necessarily controlled by past decisions, the majority first rejected the lower court’s holding that only a frisk is permissible because “[t]he justification or reason” for a search incident to arrest is “as much . . . the need to disarm the suspect in order to take him into custody as it [is] the need to preserve evidence.”⁹⁵ In the Court’s view, every arrested offender, no matter the nature of his offense, poses a cognizable threat to an arresting officer. The danger is generated partly by the stress of arrest and the resulting motivation to use any available weapon and partly by the “extended exposure which follows the taking of a suspect into custody.”⁹⁶ To ensure the integrity of the arrest and his own safety, an officer must be entitled to thoroughly search every arrestee and remove any item that might be used as a weapon. Because pat downs are not an adequate means of detecting small but nonetheless dangerous items, full searches are justified and reasonable.

The Court posited a second, “more fundamental” reason for disagreeing with the lower court’s restriction on the authority to search arrestees’ persons.⁹⁷ According to Justice Rehnquist, the historical practice regarding search incident to arrest authority does not require “case-by-case adjudication” of whether one of the reasons for that authority actually is present.⁹⁸ Officers need to make “quick ad hoc judgment[s]” about searching arrestees, and the Fourth Amendment does not mandate individualized “analysis of each step in the search” an officer decides to perform.⁹⁹ Although the authority to search is “based upon the need to disarm and to discover evidence,” the validity of a search simply does not hinge on a court’s assessment of whether one of those two justifications actually did exist in the particular case.¹⁰⁰ In sum, a “lawful arrest . . . establishes the authority to search, and . . . a full search of the person” of any individual lawfully taken into custody “is not only an exception

91. *Robinson*, 414 U.S. at 224.

92. *Id.* at 226.

93. *Id.*

94. *Id.* at 230, 232.

95. *Id.* at 234.

96. *Id.* at 234–35 & n.5.

97. *Id.* at 235.

98. *Id.*

99. *Id.*

100. *Id.*

to the warrant requirement of the Fourth Amendment, but is also a ‘reasonable’ search.”¹⁰¹

The *Robinson* majority’s logic is important because it supplements and seems to qualify the reasoning of *Chimel*. The Court did not suggest that the *Chimel* Court was wrong about the twin justifications for searches incident to arrest or that it had erred in relying on those justifications to limit the scope of permissible searches. The Court did, however, restrict the analytical utility of the *Chimel* justifications by rejecting the notion that the reasonableness of searching an arrestee’s person depends at all on a determination of whether there was any danger of a weapon or destructible evidence in the particular case. In part, the Court rested on the lack of any indication in the precedents that case-by-case assessments were appropriate. The Court also suggested that it is unjustifiable to burden officers with difficult, potentially distracting decisions that could impede and interfere with their safe and efficient completion of the arrest process. In the *Robinson* majority’s view, officers need to be able to neutralize threats quickly. The delays and the errors that could result from requiring them to make particularized evaluations of whether a specific arrest or arrestee poses a threat—knowing that there was a risk of being second-guessed later by a court—could be counterproductive, even harmful. In the Court’s view, categorical authority to conduct automatic searches of all arrestees serves substantive law enforcement interests that render those searches reasonable.¹⁰²

C. New York v. Belton: *The Pendulum Begins to Swing Back in Earnest*

Robinson rejected a claim that search incident to arrest authority should be *restricted* further. Although the opinion’s reasoning had distinct differences from that undergirding *Chimel*, the holding did not augment the scope of officers’ authority to conduct warrantless, causeless searches. The first post-*Chimel* case in which the sands shifted once again, in an expansive direction, was *New York v. Belton*.¹⁰³ The doctrine of that case clearly increased the breadth of officers’ authority to search areas surrounding arrestees.

In *Belton*, after stopping a car for speeding, making the occupants debark, and arresting the occupants for possession of marijuana, an officer searched the passenger compartment of the vehicle and a jacket found on

101. *Id.*

102. *Robinson* was a case in which police regulations required the officer to take the offender into custody for the offense at issue and also prescribed that a full search of the person be conducted when an arrest is made. See *id.* at 221 n.2. In *Gustafson v. Florida*, 414 U.S. 260 (1973), a companion case to *Robinson*, the Court concluded that the automatic authority to conduct full searches of the persons of arrestees was triggered by arrest even though the officer making the arrest had discretion to effect a custodial arrest for the offense and even though the officer had discretion to decide whether to conduct a search. *Id.* at 263, 265.

103. 453 U.S. 454 (1981).

the back seat.¹⁰⁴ In a zippered pocket of the jacket, the officer found cocaine.¹⁰⁵ After affirming the warrant requirement and sketching the constraining reasoning that led to the redefinition of search incident authority in *Chimel*, Justice Stewart, the author of *Chimel*, announced that the “principle” of that case had proven “difficult to apply” in situations involving arrests of vehicle occupants.¹⁰⁶ The problem was that “no straightforward rule ha[d] emerged” and courts had reached “conflicting” results with regard to whether the authority to search the area within an arrestee’s control entitled officers to “search inside [an] automobile after the arrestees are no longer in it.”¹⁰⁷ Put simply, “courts ha[d] found no workable definition of ‘the area within the immediate control of the arrestee’ when that area arguably include[d] the interior of an automobile and the arrestee [was] its recent occupant.”¹⁰⁸ In the Court’s view, continuing conflict and ambiguity were intolerable. To carry out their responsibilities efficiently, effectively, and safely, officers needed a clear, predictable standard that could be applied quickly and easily in the pressing, stressful situations created by arrests of vehicle occupants.¹⁰⁹ The *Belton* Court satisfied that need by holding “that when a policeman has made a lawful custodial arrest of the occupant of an automobile, he may, as a contemporaneous incident of that arrest, search the passenger compartment of that automobile.”¹¹⁰ Moreover, containers within the vehicle, “whether . . . open or closed” may also be searched, regardless of whether they could contain a weapon or evidence of the crime that was the basis for the arrest.¹¹¹

The Court claimed that it was merely applying “*Chimel*’s principles in this particular and problematic context,” but “in no way alter[ing] the fundamental principles” of that case “regarding the basic scope of searches incident to lawful custodial arrests.”¹¹² According to the majority, the Court was still committed to the proposition that such searches may *not* extend beyond the area within an arrestee’s immediate control. The holding that a passenger compartment and its contents are subject to search reflected a conclusion, and was a declaration, that those areas *are* within the control of a “recent occupant” of a vehicle.¹¹³ In fact, the *Belton* majority

104. *Id.* at 455–56.

105. *Id.* at 456.

106. *Id.* at 457–58.

107. *Id.* at 459.

108. *Id.* at 460.

109. *Id.* at 458–60. The Court observed that *Robinson*’s holding that every arrest justifies a full search of the person of the arrestee without inquiry into the presence of *Chimel*’s justifications in individual cases was based on this premise. *Id.* at 459.

110. *Id.* at 460.

111. *Id.* at 460–61.

112. *Id.* at 460 n.3.

113. *Id.* at 460. The *Belton* Court made no attempt to define the terms “recent occupant.” In fact, the Court still has not specified definitively the temporal or spatial boundaries of this significant category. See *infra* notes 175–77 and accompanying text. Although the Court observed that *Belton* had been an occupant “just before he was arrested,” it is not clear that this phrase was intended to impose a specific,

was indulging two fictions. One posed relatively modest peril to *Chimel's* scope-confining principle, whereas the other threatened serious erosion of that principle.

The first fiction was that a person who is seated inside a vehicle's passenger compartment can always readily gain access to weapons or evidence anywhere therein. This premise yielded a small spatial extension of *Chimel*, authorizing searches of some spaces that, in fact, are not within a particular occupant's reach. Justice Stewart essentially declared that an arrestee who *is* inside a vehicle is able to reach a weapon or evidentiary item no matter where it is located inside that vehicle.¹¹⁴ He explained that this premise or assumption was a fair, bright-line "generalization."¹¹⁵ In other words, weapons and evidence within passenger compartments, even those items inside other containers, are "generally, even if not inevitably, within" arrestees' reach.¹¹⁶ For that reason, authorizing officers to search entire passenger compartments and containers would produce relatively few unjustified invasions of privacy.¹¹⁷ Moreover, the damage to Fourth Amendment liberties sustained when an area is, in fact, beyond the reach of an occupant of a vehicle, is outweighed by the significant interest in clear guidance for officers.¹¹⁸

strict temporal limitation on the class of occupants who could qualify as "recent." *Belton*, 453 U.S. at 462 (emphasis added).

114. The Court did not clearly authorize the search of locked containers, stating only that containers—such as purses, satchels, luggage, shopping bags, pockets of clothing, and the like—may be searched "whether . . . open or closed." *Belton*, 453 U.S. at 461. In addition, for some vehicles—motor homes, vans, hatchbacks, and sport utility vehicles, for example—the definition of what constitutes a "passenger compartment" is not beyond dispute. On the one hand, it is arguable that the entire inside of the vehicle is the passenger compartment. See, e.g., *United States v. Doward*, 41 F.3d 789 (1st Cir. 1994) (holding that the hatch area of a vehicle is generally accessible from the passenger compartment); *United States v. Hatfield*, 815 F.2d 1068 (6th Cir. 1987) (leaving open the question of whether the entire interior of a van is subject to search); *State v. Dexter*, 596 So. 2d 88 (Fla. Dist. Ct. App. 1992) (holding that a hatchback area that could be reached from inside a car was "part of the passenger compartment"). On the other hand, it is arguable that some spaces inside these vehicles are not within the generalization of *Belton* and should be treated like trunks, beyond the scope of a proper search incident to an arrest of an occupant. See, e.g., *Sellman v. State*, 828 A.2d 803 (Md. Ct. Spec. App. 2003) (observing that whether the hatchback area of a vehicle is part of the passenger compartment is not an "abstract" question but, instead, depends on whether it is, in fact, accessible to occupants); *State v. Savva*, 616 A.2d 774 (Vt. 1991) (concluding that the rationale of *Belton* was irrelevant to the search of a bag found in a hatchback because the trial court made a factual finding that the hatchback was not part of the vehicle's passenger compartment).

115. *Belton*, 453 U.S. at 460.

116. *Id.*

117. The Court's acknowledgment that all areas are not "inevitably" within the reach of an occupant was a concession that there will be some invasions of the privacy of spaces that pose no safety or evidence-loss dangers. Such an invasion of privacy is "unjustified" in the sense that the government interests that are said to support searches incident to arrest are not, in fact, implicated. In the *Belton* majority's view, however, the law enforcement interests furthered by a "workable" bright-line rule do "justify" the privacy invasions that extend beyond the actual reach of *Chimel's* twin rationales. *Id.* at 458–60.

118. It is arguable that many areas within a passenger compartment are inaccessible to many occupants and, therefore, that the magnitude of the unjustified infringements upon Fourth Amendment interests is much larger than the majority thought. In addition, one might plausibly contend that gains in terms of needed clarity are not as substantial as the Court believed and, in any event, are insufficient to counterbalance the actual costs to privacy from a rule that authorizes full searches of every vehicle and the containers inside. The *Belton* dissenters' positions were, in part, rooted in such disagreements with the majority's assumptions. See *id.* at 466–71 (Brennan, J., dissenting) (arguing that by creating a bright-line

The second, and much more significant, fiction was that a “recent occupant” of a vehicle who is no longer in the vehicle at the time of the arrest or, more importantly, at the time of the search can readily gain access to weapons or evidence located inside the passenger compartment. This premise produced a sizeable temporal extension of the authority to search dictated by *Chimel*’s limiting logic. As Justice Brennan pointed out in dissent, fidelity to the reasoning that animated *Chimel* requires that the area within an arrestee’s immediate control be defined “at the time of arrest and search.”¹¹⁹ By defining the area of immediate control to include spaces the arrestee could have reached *only* at some earlier time—i.e., prior to the arrest and/or prior to the search—but *not* at the time those spaces are searched, the Court seemed to be freeing officers of a constraint imposed by *Chimel*’s limiting justifications.¹²⁰ Put otherwise, the Court was approving of more than a few invasions of privacy that could not be justified by the safety or evidence-preservation rationales that were the guiding lights and anchors of the *Chimel* decision.

The *Belton* majority offered no explanation for the decision to indulge this second fiction. Consequently, we are left to speculate about the rationale. One possibility is that recent occupants who are outside of but near a vehicle might gain access to weapons or evidence within passenger compartments by “lunging” into their vehicles.¹²¹ It is arguable that a passenger compartment, therefore, is “generally, even if not inevitably,” within reach of an arrestee who is still in proximity to a vehicle he recently occupied. The problems with this justification are twofold. First, the Court did not rely upon it, perhaps because it is an unfair, implausible

rule, “the Court ignores both precedent and principle and fails to achieve its objective of providing police officers with a more workable standard for determining the permissible scope of searches incident to arrest”); *id.* at 472 (White, J., dissenting) (describing the automatic authority to search all containers in a vehicle incident to arrest as “an extreme extension of *Chimel*”). Nonetheless, the premises underlying the majority’s fiction regarding the reach of an arrestee who *is* inside a vehicle are far from implausible and the balance of interests struck by the majority seems rationally defensible. For that reason, I have characterized this aspect of *Belton*’s bright-line holding as a relatively modest threat to *Chimel*’s constraining principle.

119. *Id.* at 469 (Brennan, J., dissenting).

120. There is little doubt that officers possess the authority granted by *Belton* both when an occupant is arrested inside a car, then moved outside the passenger compartment prior to the search and when an occupant is moved out of the car, then arrested prior to the search of the passenger compartment. In both cases, the search is ostensibly inconsistent with the guiding principle of *Chimel* because at the time the search is conducted there is no risk that the arrestee could gain access to a weapon or evidentiary item located in the area searched. From *Chimel*’s perspective, the fact that the arrest occurred when the occupant was inside the passenger compartment seems irrelevant if the arrestee no longer has access to that area at the time officers conduct their search.

121. The concept of “lunging distance” has played a role in lower courts’ efforts to define the boundaries of the authority granted by *Chimel*. See, e.g., *People v. Hufnagel*, 745 P.2d 242, 247–48 (Colo. 1987) (defining the area within an arrestee’s immediate control as his lunging distance, even when the arrestee is handcuffed); *People v. Clouse*, 859 P.2d 228, 234–35 (Colo. Ct. App. 1992) (holding that a search underneath a bed on which an arrestee was sitting was a proper search incident to arrest because the area was within the arrestee’s lunging distance); *State v. Bracco*, 517 P.2d 335, 337 (Or. Ct. App. 1973) (holding that police could validly search an attaché case incident to arrest because the arrestee was within lunging distance of the case).

predicate not a realistic, accurate generalization. In addition, the *Belton* Court did not suggest that a recent occupant must be sufficiently proximate to the searched vehicle to gain access—i.e., within lunging distance.

Another possibility is that the Court believed that the interest in preventing the concealment of evidence justifies entry of a space an arrestee was in prior to arrest because an occupant who fears an imminent arrest may hide evidence within the passenger compartment. There are two difficulties with this premise as well. First, the Court did not draw any support from it. Second, it is a questionable extension of the evidence-preservation justification for a search incident to arrest. The doctrine presumes that there is some likelihood that evidence will be found in the vicinity of arrestees and also presumes that there is a sufficient need to find and seize this evidence immediately because an arrest might well motivate a person to conceal or destroy it. The reason offered stretches the latter presumption, extending it into the pre-arrest period *and* thereby broadens the justification for an automatic search incident, permitting officers not only to *prevent* concealment from occurring but to *undo* concealment that has presumptively occurred. A final possibility is that the Court felt a need to give officers the authority to search even after they have removed arrestee-occupants from vehicles because a contrary rule could induce officers to elect the dangerous option of leaving arrestees inside vehicles so that they would not forfeit the authority to search passenger compartments. The problems with this explanation are again that the Court did not express it and that it is arguably unreasonable for an officer to choose an unsafe arrest practice in order to generate the dangers that give rise to automatic authority to conduct a warrantless, causeless search.¹²² It should be noted that the need for bright-line guidance does not seem like an adequate reason for this second fiction. Adequate clarity can be attained by telling officers that passenger compartments may not be searched when arrestees are not inside the vehicle at the time the search occurs.

In sum, the Court's decision in *Belton* increased the scope of officers' authority to conduct searches incident to arrests of vehicle occupants. The opinion authorized the close inspection of the entire passenger compartment and the inside of private repositories located therein whenever officers have lawfully arrested a recent occupant.¹²³ Although *Belton* involved narcotics possession, an offense for which probative evidence could be found, there is ample reason to conclude that it was intended for *all* arrest situations. The *Belton* majority declared that a container can be searched even though it could hold neither a weapon "nor evidence of the criminal conduct for which the suspect was arrested."¹²⁴ Moreover, it recited and relied upon the *Robinson* Court's assertion that a lawful arrest gives rise to search incident authority which does not hinge on "the probability in a

122. See *Thornton v. United States*, 541 U.S. 615, 627 (2004) (Scalia, J., concurring in the judgment).

123. See *Belton*, 453 U.S. at 460.

124. *Id.* at 461.

particular arrest situation that weapons or evidence would in fact be found” and “requires no additional justification.”¹²⁵ Although the majority proclaimed its fidelity to *Chimel*, there can be little doubt, especially in light of *Belton*’s aftermath, that the Court was instigating a new era of expansion for search incident authority.

D. From Belton to Thornton: The Slow, Expansive Swing Continues

Between 1981 and 2004, the Court issued only one ruling that directly addressed the permissible scope of a search incident to arrest. A handful of other rulings, however, treat the circumstances that trigger search incident authority and support the conclusion that the pattern since *Chimel* has been consistent movement in an expansive direction. I briefly sketch the Court’s path here.

In *Washington v. Chrisman*,¹²⁶ a majority recognized for the first time that, upon a lawful arrest, officers have “a right to remain literally at [the] elbow” of the arrestee and to enter private places without a warrant or probable cause to search when necessary to exercise this “right.”¹²⁷ According to the Court, it is reasonable under the Fourth Amendment for an officer, “as a matter of routine, to monitor the movements of an arrested person, as his judgment dictates, following the arrest.”¹²⁸ If the arrested person seeks to enter his dwelling and the officer allows him to do so, the officer may accompany him inside. The “search” of the premises effected by this entry is constitutionally justified, despite the absence of either a warrant or probable cause to search the place, because of the “compelling” interest the officer has in “ensur[ing] his own safety” and “the integrity of the arrest.”¹²⁹ It is unclear whether an arrestee’s request to enter is an essential predicate for this authority to monitor. There may be interests that would justify an officer in requesting or commanding an arrestee to enter a dwelling, and the same authority to follow along might exist in such a case.

*Maryland v. Buie*¹³⁰ is the one opinion that has directly dealt with, and enhanced, search incident to arrest authority. The central issue was whether probable cause is required to justify a “protective sweep” of a home for dangerous persons following a lawful in-home arrest.¹³¹ The Court held that a “reasonable, articulable suspicion that the house is har-

125. *Id.* (quoting *United States v. Robinson*, 414 U.S. 218, 235 (1973)).

126. 455 U.S. 1 (1982).

127. *Id.* at 6.

128. *Id.* at 7.

129. *Id.* Dissenting Justices did not agree that interests in keeping track of, and maintaining control over, an arrestee justify a “per se rule” allowing the entry of a home to monitor an arrestee’s movements. *Id.* at 14 (White, J., dissenting). In their view, “the Court should move with [more] care where the home or living quarters are involved.” *Id.* at 15. They advocated a case-by-case approach. Instead of permitting officers to enter a dwelling in every case, the dissenters would have limited monitoring authority to situations in which there is a particularized showing of necessity. *Id.* at 14–15.

130. 494 U.S. 325 (1990).

131. *Id.* at 330.

boring a person posing a danger to those on the arrest scene”¹³² is sufficient and allows officers to conduct a “a cursory inspection of those spaces where a person may be found.”¹³³ In the course of so concluding, the Court went out of its way to “hold that as an incident to the arrest” officers may, with no warrant and “without probable cause or reasonable suspicion, look” for persons who might launch an attack “in closets and other spaces immediately adjoining the place of arrest.”¹³⁴ Thus, as with the searches incident to arrest authorized by the *Chimel* doctrine, the search that *Buie* authorized is automatic and requires no additional, individualized showing. A lawful, in-home arrest suffices. Presumptive interests in officer safety and the integrity of arrests were again deemed weighty enough to justify the limited invasion of home privacy occasioned by searching for persons in spaces adjacent to the site of arrest.¹³⁵ In *Belton*, the Court had expanded search incident to arrest authority to permit invasions of the “diminished” privacy interests associated with vehicles.¹³⁶ In *Buie*, a majority of the Court was willing not only to further broaden the authority to conduct causeless, warrantless searches, but to do so in the context of the sacred privacy interests associated with homes.¹³⁷

In *Whren v. United States*,¹³⁸ police stopped a vehicle based on probable cause that the driver had committed a variety of traffic offenses—failing to give proper attention to operation of the vehicle, failing to give

132. *Id.* at 336.

133. *Id.* at 335.

134. *Id.* at 334. I say “went out of its way” because no such search occurred or was at issue in *Buie*. This “holding,” therefore, would seem to be dictum. Nonetheless, the Court’s insistence that the expansion of the scope of a permissible search incident to arrest was holding makes it clear that it should be considered settled, controlling law.

135. *Id.* at 334–35. Dissenters argued that the “assumption” underlying *Buie*’s expansion of the search incident to arrest exception is “much less plausible” than the assumption underlying the *Chimel* doctrine. *Id.* at 343 n.6 (Brennan, J., dissenting). In their view, while there is a cognizable likelihood that weapons or evidence may be in the area surrounding an arrestee and that he may take steps to access them, it is unlikely that arrestees will “sprinkle hidden allies throughout the rooms in which they might be arrested.” *Id.*

136. The Court has repeatedly opined that the expectations of privacy in vehicles are “reduced” or “diminished”—that is, that they are less substantial than the privacy interests in homes and in other private repositories. See *Wyoming v. Houghton*, 526 U.S. 295, 303 (1999) (asserting that passengers in cars “possess a reduced expectation of privacy with regard to the property that they transport in cars”); *California v. Carney*, 471 U.S. 386, 392 (1985) (explaining the “reduced expectations of privacy” in automobiles); *United States v. Chadwick*, 433 U.S. 1, 12 (1977) (referring to “the diminished expectation of privacy which surrounds the automobile”).

137. There can be no doubt about the Supreme Court’s view that the interests in homes are the most significant privacy interests safeguarded by the Fourth Amendment. See *Kyllo v. United States*, 533 U.S. 27, 34, 37 (2001) (referring to “the Fourth Amendment sanctity of the home,” stating that “[i]n the home . . . all details are intimate details,” and holding that thermal imaging of residences constitutes a search in part because it threatens diminution of interests in “the interior of homes—the prototypical and hence most commonly litigated area of protected privacy”); *Payton v. New York*, 445 U.S. 573, 585 (1980) (asserting that “the physical entry of the home is the chief evil against which . . . the Fourth Amendment is directed”) (quoting *United States v. U. S. Dist. Court*, 407 U.S. 297, 313 (1972)). I have previously questioned whether the Court’s emphasis and focus on the sanctity of home privacy has led to an inappropriate devaluation of other significant privacy interests. See James J. Tomkovicz, *Technology and the Threshold of the Fourth Amendment: A Tale of Two Futures*, 72 Miss. L.J. 317, 388–91 (2002).

138. 517 U.S. 806 (1996).

an appropriate turn signal, and speeding.¹³⁹ The driver and a passenger challenged the stop, claiming that it was unreasonable because the reason offered by the officer—the traffic offenses—was “pretextual.”¹⁴⁰ The petitioners contended that the officer had an ulterior, investigatory motive for stopping the car that rendered the seizure unreasonable.¹⁴¹ Had the Court agreed with this contention, the result would have been a limitation on the circumstances that give rise to search incident power. A pretextual arrest would have been unconstitutional and any search incident to such an arrest would have been invalid. A unanimous Court, however, held that, under the Fourth Amendment, if the seizure of a person—a stop or arrest—is supported by known facts that *do* give rise to probable cause, an officer’s actual, subjective motivation is irrelevant.¹⁴² Even a hope, an unfounded suspicion, or a baseless hunch that a search incident to an arrest may uncover contraband or evidence of a more serious offense does not render an arrest itself unconstitutional *if* the arrest is “objectively justifiable”¹⁴³—i.e., if facts known to the officer do establish probable cause for the arrest.¹⁴⁴ Consequently, an officer possesses the authority to conduct a search incident to arrest as long as he has taken a person into custody on the basis of facts that generate a “fair probability”¹⁴⁵ that the arrestee has committed or is committing an offense.¹⁴⁶

139. *Id.* at 808–09.

140. *Id.* at 809.

141. *Id.* at 809, 811.

142. *Id.* at 813–14 (“Subjective intentions play no role in ordinary, probable-cause Fourth Amendment analysis. . . . [T]he Fourth Amendment’s concern with ‘reasonableness’ allows certain actions to be taken in certain circumstances, *whatever* the subjective intent.”).

143. *Id.* at 812.

144. *See id.* at 813 (discussing the holding in *United States v. Robinson*, 414 U.S. 218 (1973), that “a traffic-violation arrest” is not “invalid” because the officer arrested the suspect in order to search him for narcotics). An officer who performs an arrest does not have to have personal knowledge of the facts that give rise to probable cause. If an officer arrests an individual based on directions received from another officer, the arrest is valid if the latter officer was aware of facts that furnished probable cause to arrest the individual. *See United States v. Hensley*, 469 U.S. 221, 231 (1985) (indicating that an arrest is valid when an arresting officer relies on a flyer issued by other officers if those “who *issued* the flyer possessed probable cause to make an arrest”).

145. *See Illinois v. Gates*, 462 U.S. 213, 235, 238 (1983) (concluding that the requisite likelihood for probable cause is not “a preponderance of the evidence,” i.e., more likely than not, but only a “fair probability”).

146. The *Whren* Court did not discuss when, if ever, an officer needs a warrant in order to arrest a suspect in a public place. Prior to *Whren*, the Court had decided that the Fourth Amendment does not require a warrant for a public arrest for a felony-grade offense. *See United States v. Watson*, 423 U.S. 411, 414, 416–17, 423 (1976). The Court subsequently addressed the propriety of warrantless public arrests for less serious offenses. *See infra* text accompanying notes 153–57.

The Court embellished the holding in *Whren* a bit in *Devenpeck v. Alford*, 543 U.S. 146 (2004). Therein, the Court addressed whether an arrest is constitutional when there is no probable cause for the offense stated by the officer to be the basis for the arrest, but there is probable cause for another offense that is not “closely related” to the stated offense. *Id.* at 148. A unanimous Court held such an arrest to be consistent with the Fourth Amendment’s probable cause demand. *Id.* at 152–53. According to Justice Scalia, *Whren* made it “clear that an arresting officer’s state of mind (except for the facts that he knows) is irrelevant to the existence of probable cause” and that “his subjective reason for making the arrest need not be the criminal offense as to which the known facts provide probable cause.” *Id.* at 153.

Another unanimous decision in *Knowles v. Iowa*¹⁴⁷ overturned a state court's conclusion that an officer may conduct a search incident to the issuance of a citation if she *could have* lawfully taken the individual into custody for the offense that justifies the citation.¹⁴⁸ *Knowles* did not contract search incident authority, but did refuse to extend it to situations in which there has been no "custodial arrest."¹⁴⁹ The Court reasoned that neither *Chimel* rationale could justify such an expansion of search incident authority. First, although mere stops and citations do generate some risk to officers' safety, the threat is insufficient to "justify the . . . intrusion attending a full field-type search."¹⁵⁰ Second, there is no need to act to find or preserve evidence because in the case of an offense such as speeding, the basis for the citation in *Knowles*, "all the evidence necessary . . . ha[s] been obtained."¹⁵¹ In sum, when an officer does not take a person into custody, but merely issues a citation for speeding, "the concern for officer safety is not present to the same extent and the concern for destruction or loss of evidence is not present at all."¹⁵² At least for speeding and analogous offenses, a citation does not trigger the power to conduct any automatic search of an arrestee or surrounding areas.

The significance of the *Knowles* Court's refusal to extend search incident power was severely limited by the later opinion in *Atwater v. City of Lago Vista*.¹⁵³ After *Knowles*, it was arguably unreasonable to arrest for some minor offenses.¹⁵⁴ Put differently, it was conceivable that, in some situations, the Fourth Amendment permitted *only* citations. If that were the case, there would be a category of offenses that could *never* give rise to search incident to arrest authority. In *Atwater*, however, a bare majority of

147. 525 U.S. 113 (1998).

148. *Id.* at 115–16. The Court had reserved this question in *United States v. Robinson*, 414 U.S. 218, 236 n.6 (1973).

149. *Knowles*, 525 U.S. at 117.

150. *Id.*

151. *Id.* at 118. The premise that speeding is not an offense for which there could be additional evidence may be in some tension with the reasoning of *Robinson* and *Belton*, which rejected the notion that the likelihood that a weapon or evidence is accessible should be assessed on the basis of the particular facts of the case or the nature of the offense that is the basis for an arrest. *See supra* text accompanying notes 97–101 & 124–25. If a search for evidence is permissible when a citation is for an offense for which there might be additional evidence, then officers will have to make quick, on-the-spot decisions of the sort *Robinson* and *Belton* sought to avoid. Although it seems unlikely that the Court would allow a search incident to a mere citation for such an "evidentiary" offense, the narrow reasoning in *Knowles* does not foreclose that possibility. If the Justices had wanted to conclusively resolve the question for *all* citation situations, they could have more broadly reasoned that the second *Chimel* rationale is inapplicable to those cited for offenses because, unlike those taken into custody, individuals who are merely cited do not have sufficient motivation to destroy or conceal any evidence that might be on their persons or within their immediate control. The Court chose, instead, to limit its reasoning and, consequently, its holding, to cases involving citations for nonevidentiary offenses like speeding.

152. *Knowles*, 525 U.S. at 119.

153. 532 U.S. 318 (2001).

154. Justice Stewart once suggested that he found potential merit in that position. *See Gustafson v. Florida*, 414 U.S. 260, 266–67 (1973) (Stewart, J., concurring) (suggesting that subsection to a custodial arrest for driving without a license in the arrestee's possession may have violated his Fourth and Fourteenth Amendment rights).

five Justices concluded that the Constitution does allow an officer to take a person into custody for *any* crime committed in his presence—“even a very minor criminal offense”—as long as the officer has probable cause for the arrest.¹⁵⁵ No warrant is needed and a custodial arrest is not too intrusive despite the “very minor” character of the offense.¹⁵⁶ By virtue of the rulings in *Robinson* and *Belton*, a lawful arrest for such a minor offense does trigger automatic authority to search the arrestee, the entire passenger compartment of the vehicle in which he was a recent occupant, and separate containers inside that compartment. Four dissenters highlighted the severe costs to personal privacy occasioned by searches incident to arrest as a reason militating strongly against the conclusion that warrantless arrests are constitutional for every minor criminal offense committed in an officer’s presence.¹⁵⁷

In sum, during the two decades following *Belton*, the Court modestly, but consistently, increased the scope of law enforcement authority to conduct automatic searches following lawful arrests. And, by rejecting claimed restrictions upon the circumstances that justify a custodial arrest, the Justices ensured that officers possess broad power to trigger search incident authority by deciding to take individuals into custody. Their only refusal to augment the authority to conduct a warrantless, causeless search incident was in a situation that did not involve an arrest at all.¹⁵⁸

155. *Atwater*, 532 U.S. at 354.

156. The Court left open the possibility that a minor offense not committed in the officer’s presence might require an arrest warrant. *Id.* at 340 n.11. It is even arguable that *no* custodial arrest is permissible—i.e., that the intrusion of such a seizure is simply too great—when the offender has committed a minor or very minor offense outside the officer’s presence.

157. *See id.* at 371–72 (O’Connor, J., dissenting).

158. I have not discussed *Illinois v. Lafayette*, 462 U.S. 640 (1983), in this section because it did not involve either the scope of a search incident to arrest or the grounds on which a valid arrest may be based. In *Lafayette*, a unanimous Court validated warrantless, causeless searches of arrestees in order to “inventory” the items on their person and in their possession at the time they are incarcerated. *Id.* at 646. Like a search incident to arrest, a valid inventory search requires a lawful arrest. Unlike a search incident, an inventory must be conducted pursuant to a “routine procedure” and may only be performed if the arrestee is to be incarcerated. *Id.* at 648. In these senses, the inventory doctrine affords narrower authority to search arrestees and their belongings. It expands authority to search arrestees insofar as the searches need not be “substantially contemporaneous” with the arrests, but, instead, may be remote in time or place. *See supra* text accompanying notes 24, 63, & 110 (discussing holdings that search incident must be contemporaneous with arrest, not remote in time or place).

The inventory doctrine has some relevance to a discussion of search incident authority. To the extent that thorough inventories of an arrestee and items in his possession are justified incident to his incarceration, searches of those areas incident to arrest might be unobjectionable because they merely accelerate reasonable deprivations of privacy that will occur at the time of a subsequent inventory. *See United States v. Robinson*, 414 U.S. 218, 258 n.7 (1973) (Marshall, J., dissenting) (discussing the government’s argument that because an arrestee’s belongings will be subject to search upon arrival at the police station, “the search might just as well take place in the field at the time of arrest”).

F. Thornton v. United States: *The Belton Wedge Widens*

My account of “the present” concludes with a description of *Thornton v. United States*,¹⁵⁹ the most recent development in search incident to arrest law. As with most post-*Chimel* decisions, the decision in *Thornton* expanded the search incident exception. Only a slim majority of five Justices, however, subscribed to the majority opinion upholding the search, and one did so grudgingly, expressing serious discontent with the state of the law and its logic. Two additional Justices agreed that the search in the case was reasonable, but voiced profound disagreement with the majority’s reasoning. Two others rejected both the reasoning and result of the majority.

Thornton involved the search of an automobile incident to the arrest of an occupant who was first approached and contacted by an officer after the occupant had parked and gotten out of the vehicle.¹⁶⁰ Upon legally discovering that the man possessed marijuana and crack, the officer handcuffed and arrested him, placing him in the back seat of a patrol car.¹⁶¹ The officer then searched the arrestee’s vehicle, finding a handgun under the driver’s seat.¹⁶² The sole issue was whether the vehicle search was a valid search incident to the arrest.

In sustaining the search, the majority relied heavily upon *Belton*’s ruling and reasoning. According to Chief Justice Rehnquist, the need to furnish “a clear rule for police and citizens alike” had led the *Belton* majority to authorize the search of a passenger compartment incident to the arrest of any recent occupant.¹⁶³ The *Belton* Court had not relied “on the fact that the officer . . . [had] ordered the occupants out of the vehicle, or initiated contact with them while they remained within it.”¹⁶⁴ Moreover, there was no reason to make a distinction on that basis because “[t]here is simply no basis to conclude that the span of the area generally within the arrestee’s immediate control is determined by whether” the officer first made contact when the arrestee was inside or outside of his vehicle.¹⁶⁵ An arrest “next to a vehicle” and an arrest “inside the vehicle” give rise to “identical concerns regarding officer safety and the destruction of evi-

159. 541 U.S. 615 (2004). For discussions of the *Thornton* decision and its impact on the development of search incident to arrest law, see George Dery & Michael J. Hernandez, *Turning a Government Search Into a Permanent Power: Thornton v. United States and the “Progressive Distortion” of Search Incident to Arrest*, 14 WM. & MARY BILL RTS. J. 677 (2005); Leslie A. Lunney, *The (Inevitably Arbitrary) Placement of Bright Lines: Belton and Its Progeny*, 79 TUL. L. REV. 365 (2004); David S. Rudstein, *Belton Redux: Reevaluating Belton’s Per Se Rule Governing the Search of an Automobile Incident to Arrest*, 40 WAKE FOREST L. REV. 1287 (2005); Craig M. Bradley, *Just One Cheer for the Court*, TRIAL Aug. 2004, at 62.

160. *Thornton*, 541 U.S. at 617–18.

161. *Id.* at 618.

162. *Id.*

163. *Id.* at 620.

164. *Id.*

165. *Id.*

dence.”¹⁶⁶ The dangers are equivalent because the “stress” generated by the arrest “is no less” when an arrestee has “exited his car before the officer initiated contact” and because it is no “less likely” that an arrestee first contacted “outside of, but still in control of, the vehicle” will “attempt to lunge for a weapon or to destroy evidence.”¹⁶⁷ Search incident to arrest authority must extend to that context because “[i]t would make little sense to apply two different rules to what is, at bottom, the same situation.”¹⁶⁸

According to the Chief Justice, a contrary rule could jeopardize interests in safety and evidence preservation by inducing officers to forego what may, “[i]n some circumstances[,] . . . be [a] safer and more effective” choice, “conceal[ing] their presence . . . until [after a suspect] has left his vehicle.”¹⁶⁹ Thornton contended that extending the authority to search to situations where arrestees are not “occupants” when approached would undermine *Belton*’s goal of providing “a ‘bright-line’ rule.”¹⁷⁰ The majority responded that *Belton* itself authorized searches of passenger compartments incident to the “arrest of both ‘occupants’ and ‘recent occupants’” and upheld a search involving an arrestee who “was not inside the car at the time of the arrest and search.”¹⁷¹ The Court did acknowledge that not everything in a passenger compartment “is likely to be readily accessible to a ‘recent occupant,’” but asserted, once again, that the “need for a clear rule . . . justify[d] the . . . generalization which *Belton* enunciated.”¹⁷² Put simply, “it is reasonable” for officers to exercise unqualified authority to search entire passenger compartments of vehicles incident to lawful arrests of recent occupants.¹⁷³

The *Thornton* majority categorically rejected the notion that search incident to arrest authority should “turn on whether [an arrestee] was inside or outside the car at the moment that the officer first initiated contact.”¹⁷⁴ The Court did concede, however, that “an arrestee’s status as a ‘recent occupant’ may turn on his temporal or spatial relationship to the car at the time of the arrest and search.”¹⁷⁵ It left open the possibility that *Belton* authority could be limited to cases of “‘recent occupants’ who are

166. *Id.* at 621.

167. *Id.*

168. *Id.*

169. *Id.*

170. *Id.* at 622.

171. *Id.* According to the majority, a “‘contact initiation’ rule would [actually] obfuscate” the boundaries of an officer’s authority to search a vehicle incident to arrest. *Id.* at 623. Officers would have to make difficult determinations about whether they had “confronted or signaled confrontation” while the individual was in his vehicle, “or whether the suspect exited his vehicle unaware of, and for reasons unrelated to, the officer’s presence.” *Id.* The consequence would be the sort of “impracticable” rule that “*Belton* sought to avoid.” *Id.*

172. *Id.* at 622–23.

173. *Id.* at 623.

174. *Id.* at 622.

175. *Id.* (emphasis added).

within ‘reaching distance’ of the car.”¹⁷⁶ In an ultimate conclusion that was both narrow and ambiguous—and that seemed intended to accommodate the possibility that restrictions of the sort alluded to could be placed on the terms “recent occupant” in a future case—Chief Justice Rehnquist stated that “[s]o long as an arrestee is *the sort of ‘recent occupant’ of a vehicle such as [Thornton] was here*, officers may search that vehicle incident to the arrest.”¹⁷⁷

In sum, *Thornton* reaffirmed *Belton*’s holding that when an officer lawfully arrests a recent occupant of a vehicle, he has the authority to search the entire passenger compartment incident to that arrest. The Court made it clear that an individual can qualify as a recent occupant whether an officer first makes contact while the individual is inside or outside of his vehicle. Finally, the majority acknowledged a possibility that an arrestee’s temporal or spatial distance from a vehicle at the time of an arrest, or perhaps at the time of a search, may preclude characterizing him as

176. *Id.* at 622 n.2. The Court refused to entertain Thornton’s request to impose a “reaching distance” limitation because it was “outside the question on which [it] granted certiorari,” but did observe that it was “unlikely” he would have benefited from such a limitation because “he apparently conceded” in the lower court “that he was in ‘close proximity, both temporally and spatially,’ to his vehicle when he was approached” by the officer. *Id.* This suggestion that Thornton himself could not have prevailed if the search incident to arrest exception was restricted to recent occupants within “reaching distance” suggests that the Court had given his argument a narrow construction. The Court’s response makes sense only if Thornton’s contention was that the authority to search should be limited to cases where an arrestee is within reach of the vehicle *at the time of an arrest*. If the relevant time for assessing “reaching distance” was instead *the time of the search*, then the facts would not have undercut Thornton’s claim because he was handcuffed in the back of the patrol car at that time. On the other hand, the Court had already conceded that one’s status as a recent occupant might hinge on his “temporal or *spatial* relationship to the car at the time of the arrest *and search*.” *Id.* at 622 (emphasis added). Based on this concession, it seems arguable in a future case that physical distance at the time the search occurs could render a search incident unreasonable. *Thornton* could then be explained as a case in which the sole issue resolved by the Court was whether an officer must first make contact with an arrestee while he is in his vehicle.

177. *Id.* at 623–24 (emphasis added). It is uncertain what the Chief Justice meant by the ostensibly restrictive phrasing of this holding. By referring to “the sort of ‘recent occupant’ . . . [Thornton] was here” he might merely have meant recent occupants first confronted outside vehicles. After all, the propriety of a search incident to the arrest of that sort of recent occupant was the only question before the Court. *See supra* text accompanying note 160–62. Alternatively, he might have also meant to confine the holding to recent occupants who are in close proximity to the vehicle, both temporally and spatially, at the time the officer approaches. As noted, Thornton conceded that he fell within that category. On the other hand, the Chief Justice might have intended to announce, more broadly, that arrests of recent occupants who are confronted outside of, but in proximity to, their vehicles, do trigger the authority to search the cars incident to arrest *even though* the arrestees are no longer in spatial proximity when the search occurs. Thornton, after all, *was* that “sort of” recent occupant. Others have accurately noted that the majority’s bottom-line conclusion generates unclarity and confusion about the circumstances that give rise to search incident authority. *See, e.g.,* Dery & Hernandez, *supra* note 159, at 698 (asserting that “[w]hat exactly constituted a ‘recent occupant’ was unclear, even to the *Thornton* Court” and predicting that “*Thornton*’s not-so-bright-line rule” will produce “needless litigation” and will “create[] confusion”); Peter Bowman Rutledge & Nicole L. Angarella, *An End of Term Exam: October Term 2003 at the Supreme Court of the United States*, 54 CATH. U. L. REV. 151, 161 (2004) (observing that the *Thornton* “majority concluded, somewhat unhelpfully, that” officers have the authority to search vehicles when “an arrestee is the sort of ‘recent occupant’” that Thornton was (quoting *Thornton*, 541 U.S. at 623–24)); *The Supreme Court, 2003 Term Leading Cases*, 118 HARV. L. REV. 248, 268, 272, 273 (2004) (concluding that the “Court’s decision in *Thornton* . . . created new ambiguities,” adopted “a muddy standard,” and generated “greater confusion for officers and lower courts”).

a recent occupant and deprive an officer of the authority to search the passenger compartment.

IV. THE FUTURE: A FOURTH AMENDMENT ASSESSMENT OF THE POST-*THORNTON* POSSIBILITIES

In the previous Section, I did sketch one possible future for the search incident to arrest doctrine. The Court may continue its efforts to refine the doctrine, giving additional meaning to the terms “recent occupant” in vehicular contexts and gradually, incrementally expanding the authority to search on the basis of lawful arrests alone. This article, however, is premised on the prediction that a different future is more likely, a future that will bring more radical revision of the sort endorsed by Justice Scalia’s *Thornton* concurrence.¹⁷⁸ An analysis of that future requires detailed explanation of the Scalia opinion.

A. *A Description of Justice Scalia’s Suggestions for Contraction, Expansion, and Revision of the Search Incident to Arrest Doctrine*

Justice Scalia refused to join the majority opinion in *Thornton*, declaring that it had “stretche[d]” the search incident to arrest doctrine “beyond its breaking point.”¹⁷⁹ In his view, to attempt to justify the search of Thornton’s vehicle on the ground that he might gain access to a weapon or evidence was senseless because at the time his “car was searched . . . , he was neither in, nor anywhere near, the passenger compartment.”¹⁸⁰ Justice Scalia did entertain “three reasons why the search” might have served the goals of officer safety or evidence preservation, but rejected each as simply unpersuasive.¹⁸¹

One possibility was that Thornton might have escaped from the handcuffs and the patrol car and “retrieved a weapon or evidence from his vehicle.”¹⁸² In Justice Scalia’s view, the risk of such an occurrence was “far from obvious.”¹⁸³ Moreover, the Government had not been able to cite a single case in which an arrestee had managed to perform such an impressive feat.¹⁸⁴ Because the danger of such an escape was unrealistic, the vehicle search could not be sustained on that ground.

178. *Thornton*, 541 U.S. at 625 (Scalia, J., concurring in the judgment).

179. *Id.*

180. *Id.*

181. *Id.*

182. *Id.* at 625–26.

183. *Id.* at 626.

184. *Id.* Justice Scalia’s extreme skepticism about the danger that a handcuffed arrestee seated in a police vehicle might gain access to weapons or evidence inside the passenger compartment of his vehicle was palpable. He asserted that it was “a theory that call[ed] to mind” a federal judge’s “reference to the mythical arrestee ‘possessed of the skill of Houdini and the strength of Hercules.’” *Id.* at 625–26 (quoting *United States v. Frick*, 490 F.2d 666, 673 (5th Cir. 1973) (Goldberg, J., concurring in part and dissenting in part)).

Another argument was that because “the officer could have conducted the search at the time of arrest (when the suspect was still near the car), he should not be penalized for having taken the sensible precaution of securing the suspect in the squad car first.”¹⁸⁵ To Justice Scalia, the flaw in this reasoning was an assumption “that, one way or another, the search must take place.”¹⁸⁶ A search incident to arrest “is not the Government’s right,” but a necessary exception to the normal rule requiring cause and a warrant.¹⁸⁷ If the sensible procedure is to secure arrestees in police cars, then officers should be required to do so and should not be allowed to leave them unrestrained in the vicinity of their vehicles in order to create “dangerous conditions” and thereby “manufacture authority to search.”¹⁸⁸ In sum, if safety and security reasons dictate that an officer should control an arrestee and if control of the arrestee eliminates the justifications for a search incident to arrest, those justifications cannot support such a search.

Finally, it is possible that the search of a vehicle when an arrestee is restrained and has no access could be justified *if* arrestees do have access in *most* cases. The “benefits of a bright-line rule” that is generally accurate—i.e., a rule that typically governs situations in which there *are* genuine threats of the sort posited by *Chimel*—could “justify upholding that small minority of searches that, on their particular facts, are not reasonable.”¹⁸⁹ The problem again is the reality—i.e., the vast majority of cases in fact involve restrained arrestees with no access to their vehicles.¹⁹⁰ A bright-line rule authorizing searches based on accessibility and the resulting dangers is *not* generally accurate. Instead, the authority it grants to officers is rarely justified by the actual facts. In sum, “it certainly is not true today” that passenger compartments generally are within the immediate control of recent occupants of vehicles.¹⁹¹

According to Justice Scalia, the consequences of vehicle and container searches in so many situations where the justifications do not really exist are clear and constitutionally intolerable. The current law “‘approves of purely exploratory searches of vehicles’” and allows officers “‘to rummage around in a car to see what they might find.’”¹⁹² Reform of some sort is imperative. The question is what direction and shape that reform should take.

Although Justice Scalia was convinced that the searches of vehicles authorized by *Belton* and *Thornton* could not be justified by *Chimel*’s offi-

185. *Id.* at 627.

186. *Id.*

187. *Id.*

188. *Id.* Justice Scalia noted that a search is arguably unreasonable if the dangers that are relied upon to justify it exist only because an officer chose not “to follow sensible procedures” so that he would be able to conduct an otherwise unjustified search. *Id.*

189. *Id.*

190. *Id.* at 628.

191. *Id.*

192. *Id.* at 628–29 (quoting *United States v. McLaughlin*, 170 F.3d 889, 894 (9th Cir. 1999) (Trott, J., concurring)).

cer safety or evidence preservation rationales, he did not dismiss the possibility of an alternative foundation that might render such searches reasonable. In his view, a possible alternative justification for a vehicle search following the arrest of a recent occupant is that “the car might contain evidence relevant to the crime for which he was arrested.”¹⁹³ This “more general interest in gathering evidence relevant to the crime for which [a] suspect ha[s] been arrested” was the basis for the Court’s decision in *United States v. Rabinowitz*¹⁹⁴—the search incident to arrest precedent overruled by *Chimel*—and could find additional support in “[n]umerous earlier authorities.”¹⁹⁵ In fact, it was “[o]nly in the years leading up to *Chimel*” that the Court narrowed the interest supporting searches incident to arrest to “frustrating concealment or destruction of evidence.”¹⁹⁶ According to Justice Scalia there is “nothing irrational” about this alternative justification.¹⁹⁷ “[B]roader police authority to search for evidence when and where the perpetrator of a crime is lawfully arrested” is defensible because the arrest “distinguishes the arrestee from society at large, and distinguishes a search for evidence of *his* crime from general rummaging.”¹⁹⁸ In addition, “it is not illogical to assume that evidence of a crime is most likely to be found where the suspect was apprehended.”¹⁹⁹

Justice Scalia did concede that there was also “historical support” for more narrowly defining the interest that validates a search incident as the “concealment or destruction of evidence.”²⁰⁰ He concluded that both of the alternative evidentiary rationales for the doctrine “are plausible accounts of what the Constitution requires, and neither is so persuasive as to justify departing from settled law.”²⁰¹ Because *Belton* searches can derive constitutional support from the *Rabinowitz* rationale, the Court can “continue to allow [them] on *stare decisis* grounds.”²⁰² Nonetheless, the Court “should at least be honest” and admit that the *Belton* doctrine “is a return,” in the context of vehicles, “to the broader sort of search incident to arrest that we allowed before *Chimel*.”²⁰³

Justice Scalia highlighted “one important practical consequence” of his proposed reformulation of *Belton*’s premises.²⁰⁴ Under the current doctrine as developed by *Robinson* and *Belton*, a lawful arrest is all that is necessary to legitimate a search. It does not matter whether one of the

193. *Id.* at 629.

194. 339 U.S. 56 (1950).

195. *Thornton*, 541 U.S. at 629 (Scalia, J., concurring in the judgment).

196. *Id.* at 630; see *supra* text accompanying notes 61–63.

197. *Thornton*, 541 U.S. at 630 (Scalia, J., concurring in the judgment).

198. *Id.*

199. *Id.*

200. *Id.*

201. *Id.* at 631.

202. *Id.*

203. *Id.* Justice Scalia suggested reasons why the revival of the *Rabinowitz* approach could be limited to vehicle searches, specifically the “reduced” privacy interests in vehicles and the “heightened law enforcement needs” served by vehicle searches. See *id.*

204. *Id.*

Chimel rationales is actually present in the particular case. The *Rabinowitz* approach, on the other hand, “did not treat the fact of arrest alone as sufficient.”²⁰⁵ To preclude general or exploratory searches, *Rabinowitz* also required “a reasonable belief that evidence would be found.”²⁰⁶ Consequently, if the “evidence-gathering” rationale of *Rabinowitz* is to supplant the “concealment or destruction” rationale of *Chimel* as an explanation for the searches that are currently authorized by *Belton*, those searches would remain constitutional *only* in “cases where it is reasonable to believe evidence relevant to the crime of arrest might be found in the vehicle.”²⁰⁷ If a recent occupant is arrested for a traffic or other offense that furnishes “no reasonable basis to believe relevant evidence might be found in the car,” a passenger compartment search would not be justified.²⁰⁸

Justice Scalia did not take issue with the *Chimel* doctrine or with the justifications it posits for searches of arrestees’ persons²⁰⁹ and the areas within their immediate control. His target in *Thornton* was *Belton*’s fictional extension of *Chimel* and the resulting authority to search vehicles where the safety or evidence preservation rationales are patently inapplicable. In his view, those justifications are a dishonest explanation for the reasonableness of *Belton* searches because in reality arrestees in virtually all cases have no access to weapons or evidence inside passenger compartments. For the very same reason, the *Belton* rule is not a legitimate bright line—i.e., an ordinarily accurate generalization with occasional overbreadth that is justified by the clear guidance it furnishes.

205. *Id.* at 632.

206. *Id.* According to Justice Scalia, the absence of exigency in an “evidence-gathering search” makes that a sensible demand. When an officer is legitimately concerned with preventing an arrestee from gaining immediate access to a weapon or from destroying or concealing evidence, the urgency of the situation makes it reasonable to allow the officer to act without taking the time to assess whether the particular facts give rise to sufficient risk that either harm will occur. Put otherwise, “officers should not have to make [such] fine judgments in the heat of the moment.” *Id.* However, when the goal is to gather evidence, there is no need for quick, preventive action. As a result, “the state interests that might justify any overbreadth are far less compelling.” *Id.* Officers can be expected to take the time to decide whether there is a “reasonable basis to believe relevant evidence might be found in the car.” *Id.*

207. *Id.* Because *Thornton* was such a case, Justice Scalia agreed that the search of the vehicle was reasonable and concurred in the judgment. *See id.*

208. *Id.*

209. It is fair to say that Justice Scalia has no doubts about the propriety of automatically searching the *person* of every arrestee—that is, he fully subscribes to the holding in *Robinson* that an officer may inspect everything found on a person incident to an arrest for any offense. *See supra* text accompanying notes 84–101. He described the holding in *Robinson*, suggesting that its “rule[] make[s] sense.” *Thornton*, 541 U.S. at 632 (Scalia, J., concurring in the judgment). He asserted that when “officer safety” is at issue officers should not have to make “fine judgments in the heat of the moment.” *Id.* And he observed that “*Chimel*’s officer-safety rationale has its own pedigree.” *Id.* at 631 n.2.

B. An Analysis of the Future Proposed by Justice Scalia

Despite some ambiguities, Justice Scalia's preferences seem relatively clear.²¹⁰ The regime he appears to desire would shrink *Belton* by prohibiting searches of vehicles incident to the arrest of recent occupants whenever the offense that is the basis for the arrest is of a sort that engenders no cognizable likelihood that evidence of that offense will be located in the vicinity of the arrestee.²¹¹ He would preserve *Belton* authority, allowing passenger compartment searches incident to a recent occupant's arrest—whether the arrestee is in, near, or beyond the reach of the vehicle at the time of the arrest and search—whenever the nature of the offense raises a possibility that probative evidence might be in the arrestee's vicinity.²¹² The latter searches would no longer be justified on the basis of any threat posed by the arrestee. They would be “evidence-gathering” searches, deemed constitutional because of “a reasonable belief that evidence [will] be found” in the passenger compartments.²¹³ Justice Scalia's proposed contraction of the search incident to arrest doctrine—denying the power to search for some arrests—is rooted in a genuine concern that Fourth Amendment interests are seriously endangered by the expansive authority currently granted to search cars and containers incident to any arrest of a recent occupant.²¹⁴ His retention of some of the authority granted by *Bel-*

210. The future Justice Scalia envisions is not *entirely* clear because his criticisms are firmly rooted in current law enforcement practices. His analysis rests on the premise that most *Belton* searches of vehicles have been and are taking place when arrestees have no genuine access to passenger compartment contents. If officers were to alter practices and conduct searches while arrestees were in or very near their vehicles, he would need to decide whether those searches were now reasonable—that is, whether officers may leave arrestees in or near vehicles in order to establish the predicate for searching. He intimated in *Thornton* that it *might* be unreasonable for officers not to take the precaution of securing occupants beyond reach of their vehicles, but his language was certainly not unequivocal. He opined that “*one could argue* that [a] search is unreasonable” because an “officer's failure to follow sensible procedures” has given rise to “the dangerous conditions” relied upon to justify the search. *Thornton*, 541 U.S. at 627 (emphasis added).

211. Justice Scalia would apparently prohibit *Belton*-authorized searches of passenger compartments in these cases whether the occupant-arrestee is in fact inside, near, or beyond the reach of the vehicle at the time of the arrest and at the time of the search.

212. Justice Scalia's scheme would need further development to clarify which offenses would be legitimate bases for vehicle searches and to specify the temporal or spatial relationship between the arrestee and the vehicle that is needed under his reformulated version of the search incident to arrest doctrine. Once the rationale for the doctrine is revised and evidence gathering furnishes the predicate for a passenger compartment search, temporal and spatial limitations that have roots in a concern with ready access to weapons or evidence would have to be rethought. The question now would be whether the time since an occupant was in a vehicle, the time since he was arrested, or the distance between the occupant-arrestee and his vehicle at the time of the arrest or at the time of the search diminish the force of the inference that evidence will be found inside the vehicle he once occupied.

213. *Thornton*, 541 U.S. at 632 (Scalia, J., concurring in the judgment).

214. Justice Scalia is not the first to express concern with the infringements of privacy resulting from the recognition of automatic authority to conduct searches of vehicles following a lawful arrest for *any* offense. Justice O'Connor was troubled by the holding in *Atwater v. City of Lago Vista*, 532 U.S. 318 (2001), that officers may arrest without warrants for even minor offenses committed in their presence in part because an “arrest exacts an obvious toll on an individual's . . . privacy The arrestee is subject to a full search of her person,” and if she “is the occupant of a car, the entire passenger compartment of the car, including packages therein, is subject to search as well.” *Id.* at 364 (O'Connor, J., dissenting). The dissenters in *Belton* were also undoubtedly prompted by a fear of the costs to privacy resulting from the

ton is based on a belief that legitimate law enforcement interests, albeit not the interests identified in *Chimel*, do justify passenger compartment searches after occupants are arrested for some offenses.²¹⁵

I would not have undertaken this project unless I was convinced of two things. First, there is a considerable chance that a majority of the Justices will adopt both of Justice Scalia's proposals for reform of the *Belton* doctrine. Second, the ramifications of Justice Scalia's proposals for the search incident to arrest doctrine and for Fourth Amendment freedoms are very significant. Before turning to those ramifications, I briefly explain why Justice Scalia's vision of the future might well become a reality.

1. *Potential Majority Support for Both Scalia Proposals*

In *Thornton*, Justice Scalia's opinion was joined by Justice Ginsburg. In addition, although she joined most of the majority's opinion, Justice O'Connor declared that she was dissatisfied with the "state of the law," particularly with the decisions that treat a search incident to arrest of a vehicle "as a police entitlement rather than as an exception justified by

authority to conduct car and container searches following every lawful arrest of a recent occupant. See *New York v. Belton*, 453 U.S. 454, 464 (1981) (Brennan, J., dissenting) (describing the Fourth Amendment's "essential purpose" as "'shield[ing] the citizen from unwarranted intrusions into his privacy'" (quoting *Jones v. United States*, 357 U.S. 493, 498 (1958))); *id.* at 472 (White, J., dissenting) (concluding that there is a "separate interest in privacy" in containers found within vehicles that should not be discarded without more "caution than the Court . . . exhibit[ed]").

215. In a sense, Justice Scalia's "split" opinion in *Thornton* is emblematic of his Fourth Amendment jurisprudence. His positions on issues have been far from predictable. He has authored some noteworthy endorsements of generous protection for Fourth Amendment privacy rights. See, e.g., *Kyllo v. United States*, 533 U.S. 27 (2001) (holding that thermal imaging of homes is a search); *Nat'l Treasury Employees Union v. Von Raab*, 489 U.S. 656, 680–81 (1989) (Scalia, J., dissenting) (strenuously objecting to the holding that suspicionless drug testing is reasonable); *Arizona v. Hicks*, 480 U.S. 321 (1987) (concluding that movement of a turntable to inspect the serial number is a search). On the other hand, he has also penned a number of opinions that limit Fourth Amendment protection to ensure that law enforcement officers have ample authority to further their objectives. See, e.g., *Wyoming v. Houghton*, 526 U.S. 295 (1999) (deciding that automobile exception to warrant requirement applies to passengers' belongings); *California v. Hodari D.*, 499 U.S. 621 (1991) (concluding that a person is not seized by a show of authority until he or she submits or yields to it); *Illinois v. Rodriguez*, 497 U.S. 177 (1990) (holding that searches are reasonable when officers reasonably believe person giving consent has authority even if that person lacks actual authority).

In *Kyllo*, Justice Scalia authored an opinion for a bare majority of five Justices, concluding that thermal imaging of a home is a search because it reveals some information about the interior of the home. *Kyllo*, 533 U.S. at 34–35. Justice Stevens, who is perhaps the most "liberal" member of the Court, authored a powerful dissent arguing that the Fourth Amendment does not regulate thermal imaging. *Id.* at 41 (Stevens, J., dissenting). On the other hand, in *Bond v. United States*, 529 U.S. 334 (2000), Justice Scalia joined a dissent that disagreed with the holding that squeezing soft luggage is a Fourth Amendment search. See *id.* at 339 (Breyer, J., dissenting). Chief Justice Rehnquist, who was notoriously stingy in his interpretation of Fourth Amendment rights, authored the majority opinion. See generally Craig M. Bradley, *The Fourth Amendment: Be Reasonable, in THE REHNQUIST LEGACY* 81 (Craig M. Bradley ed. 2006) (discussing and describing the Chief Justice's restrictive attitude regarding the breadth of constitutional protection against unreasonable searches and seizures). *Bond* is apparently the only Fourth Amendment case in the Chief Justice's thirty-three years on the Court in which any Justice adopted a more "conservative" view of Fourth Amendment rights than he did. Justice Scalia is one of only two Justices to earn that distinction. *Id.* at 86–88.

[*Chimel's*] twin rationales.”²¹⁶ She attributed the problem to “*Belton's* shaky foundation” and suggested that Justice Scalia’s approach was “built on firmer ground.”²¹⁷ She was “reluctant to adopt” Justice Scalia’s approach not because it was unpersuasive, but because neither party in *Thornton* “had a chance to speak to its merit.”²¹⁸ Justices Stevens and Souter dissented in *Thornton*, believing that the Court had expanded the search incident to arrest exception beyond rational bounds.²¹⁹ Although the dissenters expressed no specific agreement with any of Justice Scalia’s views, their dissatisfaction with the majority’s expansion of *Belton*, coupled with their contention that *Belton* authority to search containers in cars was originally and remains “both unnecessary and erroneous,”²²⁰ indicates that they might well be inclined to join any effort to reduce that doctrine’s scope. In a case where the issue is actually presented, it is also entirely conceivable that Justice Kennedy, Justice Breyer, or even Chief Justice Roberts might be persuaded to eliminate the authority to rummage in vehicles incident to the arrest of an occupant for a “nonevidentiary” offense.²²¹ In sum, there is a substantial chance that the contraction of *Belton* authority proposed by Justice Scalia could garner at least five votes.

The reaffirmation of *Belton* authority for “evidentiary” offenses, albeit on a reformulated foundation, would also seem to have a decent chance of attracting a majority. Again, Justices Scalia and Ginsburg have already endorsed it. The three additional votes necessary for a majority could come from Justices Thomas, Alito, Roberts, Kennedy, or Breyer. It is not hard to imagine at least three of these Justices endorsing the “evi-

216. *Thornton*, 541 U.S. at 624 (O’Connor, J., concurring in part).

217. *Id.* at 624–25.

218. *Id.* at 625. Justice O’Connor, of course, is no longer on the Court. In light of his record as an appellate judge, it seems entirely possible that Justice Alito, her replacement, would not be as troubled by *Belton's* irrational growth as Justice O’Connor was. He might well be unwilling to join any effort to trim law enforcement authority to search vehicles. As I suggest in the text, however, there is a fair likelihood that at least five *other* Justices will subscribe to Justice Scalia’s proposed restriction of *Belton*.

219. *Id.* at 633–34 (Stevens, J., dissenting).

220. *Id.* at 634. Although the two *Thornton* dissenters disagreed with the majority’s extension of *Belton* to occupants first contacted outside their vehicles, they did not propose the elimination of *Belton* authority entirely for nonevidentiary offenses. Nonetheless, the dissenters did not cast any aspersions on Justice Scalia’s proposed contraction of *Belton* authority and both Justice Stevens and Justice Souter have shown concern for the preservation of Fourth Amendment privacy interests. It seems fair to count them among those who might embrace Justice Scalia’s proposed narrowing of the search incident exception.

221. Justices Kennedy and Breyer joined Chief Justice Rehnquist’s majority opinion and did not write separately. Unlike Justice O’Connor, they said nothing positive about Justice Scalia’s views. On the other hand, they did not indicate any hostility to his proposals. In a lengthy footnote at the end of the majority opinion, the Chief Justice explained that Justice Scalia’s positions, “[w]hatever the [ir] merits,” should not be adopted in *Thornton* because they were not encompassed by the issue on which the Court granted review and because the parties had not had opportunities to address them. *Id.* at 624 n.4 (majority opinion). Thus, it is entirely possible that Justices Kennedy and Breyer might agree with Justice Scalia when the issue of *Belton's* excessive scope does come before the Court. In light of his inveterate hostility to Fourth Amendment claims, *see supra* note 215, it would have been unlikely that Chief Justice Rehnquist would have endorsed Justice Scalia’s effort to limit vehicle search authority. There is no reason to believe, however, that his replacement, Chief Justice Roberts, will be equally resistant to unreasonable search and seizure claims.

dence-gathering” rationale that Justice Scalia relied upon to sustain the search in *Thornton* itself.

2. *The Ramifications and Merits of Justice Scalia’s Proposal to Eliminate Belton Authority for “Nonevidentiary” Offenses*²²²

The current doctrine allows officers to search passenger compartments after the lawful arrest of an occupant or a recent occupant for *any* offense. Justice Scalia began with the narrow suggestion that the application of the *Belton* doctrine to the search in *Thornton* had “stretche[d] it beyond its breaking point.”²²³ It soon became evident, however, that his concern was broader than the result in one case and even broader than the extension of search incident to arrest doctrine to cases involving arrestees first contacted outside their vehicles. Ultimately, he proposed scaling back the *Belton* doctrine by eliminating the automatic authority to search vehicles and containers incident to the arrest of a recent occupant when an arrest is for an offense of a sort that furnishes “no reasonable basis to believe relevant evidence might be found in the car.”²²⁴

Justice Scalia proposed this considerable diminution of search incident authority because in his view there is no plausible justification for the privacy invasions occasioned by passenger compartment and container searches in cases involving such nonevidentiary offenses. Because no government interest supports these searches, they constitute exploratory rummaging in clear contravention of the Fourth Amendment’s reasonableness command.²²⁵ The Scalia proposal to contract search incident authority rests on the premise that *Belton* searches typically occur at times when arrested occupants have no realistic chance of accessing the contents of their vehicles. If his depiction of the landscape is accurate—and no one has challenged it as flawed—then his conclusion has considerable merit.

First, *Chimel*’s twin rationales cannot justify vehicle searches because weapons or evidentiary items inside passenger compartments are, in fact, beyond the reach of arrestees. Neither the safety interest nor the evidence

222. Throughout this article, I use the phrase “nonevidentiary offense” to refer to a crime which, by its nature, does not give rise to cognizable grounds for concluding that evidence probative of its commission might be found in the vicinity of the arrestee.

223. *Thornton*, 541 U.S. at 625 (Scalia, J., concurring in the judgment).

224. *Id.* at 632. Justice Scalia’s contraction proposal would inject some unclarity into a doctrine which currently allows officers to search passenger compartments no matter what the offense as long as there is a lawful arrest. While it is certain that traffic offenses such as speeding and failing to wear a seat belt could no longer be a basis for vehicle searches, *id.* (using *Atwater v. City of Lago Vista*, which involved a seatbelt violation, and *Knowles v. Iowa*, which arose out of a speeding infraction, as illustrations of the sorts of cases in which it would not be reasonable to believe that evidence of the offense of arrest would be found in the vehicle), the precise borders of the category of disqualified offenses would not be entirely clear. Officers might sometimes have difficulty deciding whether an evidence-gathering search was permissible.

225. *Id.* at 628 (agreeing that we have “floated to a place where the law approves of purely exploratory searches of vehicles during which officers with no definite objective or reason for the search are allowed to rummage around in a car to see what they might find” (quoting *United States v. McLaughlin*, 170 F.3d 889, 894 (9th Cir. 1999) (Trott., J., concurring))).

preservation interest that are the anchors of the *Chimel* doctrine are implicated. Moreover, the logic of *United States v. Robinson* is unavailing. A bright-line rule that would allow passenger compartment searches because that area is *generally* accessible to arrestees and that only reaches “erroneous” results in a modest number of cases is indefensible because, in fact, arrestees rarely, if ever, have any access to vehicle interiors. A standard that authorizes vehicle and container searches does not reflect a fair approximation of the relevant interests and does not reach accurate results in most cases.

Justice Scalia’s conclusion about the irrelevance of the *Chimel* justifications makes sense because of the widespread current practice of restraining arrestees away from their vehicles.²²⁶ One significant question is whether the analysis and outcome should change if officers modify their practices by leaving most, if not all, arrestees unrestrained either inside or in close proximity to their vehicles. If officers alter the current reality in situations involving arrests for nonevidentiary offenses, should automatic authority to search follow? If one accepts the logic of *Chimel* and *Robinson*—that weapons or evidence within an arrestee’s reach pose the same dangers as those on his person²²⁷ and that every arrestee poses a sufficient threat no matter the nature of his or her offense—then searches of passenger compartments could in fact be justified by *Chimel*’s twin justifications. The authority to search vehicles would no longer rest on a fiction of access to dangerous weapons or destructible evidence.²²⁸ Moreover, an interest in

226. Justice Scalia is uncertain whether arrestee-occupants typically had access to passenger compartment contents at the time *Belton* was decided, but is sure that they do not have access today. *See id.* (“If it was ever true that the passenger compartment is ‘in fact generally, even if not inevitably,’ within the arrestee’s immediate control, . . . it certainly is not true today.” (quoting *New York v. Belton*, 453 U.S. 454, 460 (1981))).

227. Not everyone accepts this logic. In a brief, perceptive comment on the *Thornton* decision, Professor Craig Bradley has suggested that the extension of search incident to arrest authority to the area within the immediate control of an arrestee was a misstep and that the Court should now hold that *only* the person of an arrestee and all objects found there should be subject to an automatic search incident to a lawful arrest. Bradley, *supra* note 159, at 64 (“*Chimel*’s ‘area within immediate control’ approach should be abandoned, and the automatic, suspicionless, search incident to arrest should be limited to the person of the suspect, including any containers found on him . . .”).

Professor Bradley makes a cogent case for curing the *Belton* problem by trimming back on *Chimel* itself. It is interesting that every member of the Warren Court agreed that the scope of an automatic search incident to arrest should include the area within an arrestee’s immediate control. Not a single Justice questioned whether there really is reason to allow officers to routinely invade private spaces around an arrestee rather than simply eliminating the arrestee’s ability to gain access to those areas. Of course, the *Chimel* Court was focused on reining in the excessive authority afforded by the holdings in *Rabinowitz* and *Harris*. *See supra* text accompanying notes 67–83. Limiting officers to the person and a relatively limited area surrounding the person of the arrestee provided significant protection for privacy that was not provided by these prior decisions. Moreover, despite vacillation over the scope, from early on the Court had recognized that searches incident to arrest extended to some spaces beyond the person of the arrestee. *See supra* text accompanying notes 22–64.

228. For “nonevidentiary offenses,” the evidence destruction rationale would seem to be irrelevant. Nonetheless, when a quick decision is necessary to prevent imminent peril, officers should not have to decide whether an offense is of a nature that evidence might be present. *See Thornton*, 541 U.S. at 632 (Scalia, J., concurring in the judgment) (asserting that “officers should not have to make fine judgments”

bright-line guidance could also justify a categorical grant of authority that would permit searches even in those relatively few instances when an arrestee might actually be unable to gain access.²²⁹

If there were objectively reasonable bases for leaving arrestees unrestrained in or near vehicles, law enforcement's decision to adopt that policy should be unchallengeable and searches of areas within arrestees' immediate control—including surrounding or nearby passenger compartments—would necessarily be in accord with *Chimel's* principles. It is difficult to conceive of genuine reasons, however, that would provide general support for this modification of norms.²³⁰ The question, then, is whether the profession's decision to change their standard practices should require *any* constitutional justification. It is arguable that the Fourth Amendment is simply not concerned with whether officers remove an arrestee from the site or vicinity of an arrest and with whether they restrain arrestees.²³¹ A failure to move or a refusal to restrain an arrestee hardly seems to qualify as an unreasonable "seizure" or "search."²³² Consequently, those choices might be committed to the unfettered discretion of law enforcement. According to this view, if officers or departments decide it is preferable to leave arrestees in or near vehicles and not to restrict their reach, that is their constitutional prerogative. Judges should not use the Fourth Amendment as a basis for creating or imposing a manual of "preferred" police procedures.²³³

There are counterarguments, logical reasons for concluding that the Constitution does not allow officers to augment their authority to search vehicles by altering conventional, and sensible, arrest practices. In light of

in situations where they are acting to protect their safety or to prevent "imminent evidence destruction"). In any event, the safety interest itself would be sufficient to justify a search of the vehicle.

229. If those who are understandably motivated to increase their powers to search—"officer[s] engaged in the often competitive enterprise of ferreting out crime," *Johnson v. United States*, 333 U.S. 10, 14 (1948)—could do so by altering their own standard procedures, Justice Scalia's proposed narrowing of *Belton* might still be interesting in theory. Its practical impact, however, could turn out to be negligible.

230. In light of the practices that have evolved during *Belton's* reign, the serious infringements upon privacy that would result from allowing automatic searches of vehicles and containers for any offense because officers have opted to keep arrestee-occupants in proximity, and the lack of an apparent reason for changing the way arrestee-occupants are handled, it seems fair to put the burden on law enforcement officers to explain why a radically different way of conducting arrests now makes sense.

231. The Fourth Amendment guarantee against unreasonable seizures would, of course, prevent officers from imposing excessive, unnecessary constraints upon an arrestee's liberty following an arrest. For example, officers undoubtedly could not bind and gag an arrestee and confine him in a patrol car trunk. The quite different issue here is whether the decision to impose *lesser* restrictions on an arrestee by not removing him from the vicinity of a vehicle and by leaving him unrestrained is constitutionally problematic.

232. For a "seizure" to occur, there must be some deprivation of a person's liberty. *See Terry v. Ohio*, 392 U.S. 1, 19 n.16 (1968) (noting that a seizure occurs only when an officer uses physical force or a show of authority to restrain the liberty of a citizen). Not moving and not placing restraints on an arrestee are the antithesis of liberty deprivation. For a "search" to occur, there must be an intrusion upon a reasonable expectation of privacy. *See Smith v. Maryland*, 442 U.S. 735, 739–40 (1979). A failure to move or restrain certainly does not deprive the arrestee of any privacy interest.

233. *See Illinois v. Lafayette*, 462 U.S. 640, 647 (1983) (observing that in interpreting the Fourth Amendment "it is not our function to write a manual on administering routine, neutral procedures of the stationhouse").

the procedures that developed in the post-*Belton* years—removing and restraining arrestee-occupants—it would be fair to conclude that the implementation of a radically new regime—keeping arrestees near vehicles and unrestricted—is designed to “manufacture” a predicate for otherwise unjustified authority to search.²³⁴ The resulting searches might be deemed pretextual—not prompted by *Chimel*’s twin concerns but motivated, in fact, by a desire to “rummage” for evidence or contraband.²³⁵

Those who believe that law enforcement ought to have unrestricted discretion to decide how to arrest might erect a defense of their position upon the foundation provided by the Court’s ruling in *Whren v. United States*.²³⁶ There, a unanimous Court rejected a “pretext” contention, holding that “objectively justifiable” police “behavior” is not rendered unreasonable by officers’ subjective motivations.²³⁷ The argument here would be that a search incident to an arrest is objectively justifiable and immune from challenge on actual motivation grounds as long as the arrestee is subject to a lawful arrest and is in or near the vehicle at the time of the arrest and search.

Whren, however, can be distinguished. Its governing principles are arguably inapplicable to this very different context and claim.²³⁸ Unlike a seizure or search that is, in fact, supported by probable cause, a search that is based on a decision to afford an arrestee ready access to weapons or evidence inside a passenger compartment might not be “objectively justifiable.” If interests in safety and efficiency militate in favor of removing and restraining arrestees and if there is no objective reason to leave them within reach of objects inside passenger compartments, then a search based on the deliberately created dangers might be deemed objectively unreasonable. At best, the perils relied upon to justify vehicle searches have been engendered unnecessarily. At worst, they have been created by acting contrary to interests in safe, effective policing. Under these circum-

234. See *Thornton v. United States*, 541 U.S. 615, 627 (2004) (Scalia, J., concurring in the judgment) (intimating that an officer might “leave[] a suspect unrestrained nearby just to manufacture authority to search”).

235. I use the word “rummage” to suggest virtually unlimited authority to search places—in this case entire passenger compartments and their contents—in the hope of finding something incriminating and without probable cause, perhaps with no objective basis for believing that something will be found.

236. 517 U.S. 806 (1996).

237. *Id.* at 812–13. Specifically, the Court held that a stop of a vehicle based on facts that gave rise to probable cause to believe that the driver had committed multiple traffic infractions was reasonable under the Fourth Amendment and was not subject to challenge on the grounds that the officers had actually stopped the car for an ulterior motive such as race or an interest in detecting illegal narcotics. The *Whren* Court made it clear that the same rules apply to allegedly pretextual searches—that is, that a search that is actually supported by probable cause is not rendered unconstitutional because an officer in fact had a different, objectively unsupported, reason for searching. See *id.* at 819 (concluding that in ordinary cases, “there is no realistic alternative to the traditional common-law rule that *probable cause justifies a search and seizure*” (emphasis added)).

238. It is noteworthy that Justice Scalia, who was the author of *Whren*, suggested in *Thornton* that pretextual decisions to ensure that arrestee-occupants have access to cars could undermine the validity of searches incident to arrest even though the arrestees are within reach of the passenger compartments at the time of the searches. See *Thornton*, 541 U.S. at 627–28 (Scalia, J., concurring in the judgment).

stances, it would not be illogical to conclude that the government's interests in conducting searches are insufficiently weighty to justify the intrusions on personal privacy.

The *Whren* Court rejected pretext claims in cases where government interests that support a search or seizure *do* exist, but an officer is in fact motivated by other interests.²³⁹ In those instances, the relevant balance of extant interests actually does tip in favor of the reasonableness of the search or seizure.²⁴⁰ The situations at issue here involve searches that are arguably supported by dangers officers have intentionally created in order to justify fishing expeditions and circumvent Fourth Amendment requirements. In these cases, the reasons that the safety and evidence-destruction risks exist make it plausible to conclude that the interests in conducting searches do not outweigh the costs to protected privacy interests.²⁴¹

As already noted, there is an alternative possible constitutional justification for the authority to conduct a search incident to a lawful arrest—the government interest in finding and securing probative evidence of guilt or contraband. That interest, however, cannot support a vehicle search incident to an arrest for a nonevidentiary offense. To put it simply, an arrest for an offense in this category does not provide *any* rational basis for believing that items properly seizable by the government—i.e., evidence, fruits of crime, instrumentalities of crime, or contraband—might be found in the vicinity of the arrestee. The arrest itself does not give rise to an interest in acquiring items that can aid the government's legitimate efforts to establish an arrestee's guilt. Offenses of the sort Justice Scalia would exclude provide no objective basis for believing that a search will be productive.²⁴² Consequently, the balance of interests that underlies Fourth Amendment reasonableness assessments does not favor the government.

239. *Whren*, 517 U.S. at 813.

240. *Id.* at 818.

241. If an officer can show in a particular case that there was a genuine reason to leave an arrestee within reach, a search incident to arrest of the area within the arrestee's immediate control ought to be constitutional, under *Chimel*, despite the nonevidentiary nature of an offense. There is no reason to believe that Justice Scalia would reject a vehicle search in such an exceptional case. His affirmation of the authority to search the person of all arrestees, *see supra* note 209, would support similar authority to search a passenger compartment when there is a good reason that an arrestee has been afforded access to that area.

242. It is true that some vehicles in cases of arrests for nonevidentiary offenses will, in fact, contain evidence of crime or contraband. The question under the Fourth Amendment, however, is not whether a search might conceivably be fruitful or whether a search has, in fact, been productive. If the constitutional standard was "any possibility of productivity" or if evaluations of reasonableness were made after the fact, the Fourth Amendment's protection would be eviscerated. Random searches of homes and other private places would be justified. The appropriate question is whether the government has demonstrated a sufficient, objectively supported, *a priori* probability that something subject to seizure would be discovered. *See United States v. Di Re*, 332 U.S. 581, 595 (1948) (asserting that "a search is not to be made legal by what it turns up" and that a search "is good or bad when it starts and does not change character"); *Byars v. United States*, 273 U.S. 28, 29 (1927) (declaring that "[a] search prosecuted in violation of the Constitution is not made lawful by what it brings to light"); *see also Beck v. Ohio*, 379 U.S. 89, 96 (1964) (observing that probable cause to arrest is shown only when "the facts available to the officer at the moment of the arrest" support a reasonable belief "that an offense has been committed" (emphasis

Although the privacy interests in vehicles may be less significant than those in homes and other private repositories, they are important, constitutionally safeguarded interests. Nonconsensual deprivations of vehicle privacy interests typically require a showing of probable cause or a demonstration of some other cognizable government interests. As explained at greater length in the next Section, searches that are not supported by showings of countervailing interests are inconsistent with core principles that motivated and inform the Fourth Amendment guarantee against unreasonable searches and seizures.²⁴³ Justice Scalia's conclusion that *Belton* searches of vehicles should be prohibited after arrests for nonevidentiary offenses is motivated by a legitimate concern with fidelity to those core principles. Therefore, a majority of the Court should probably endorse Justice Scalia's conclusion. A prohibition of vehicle searches following arrests for traffic violations and similar offenses will surely be "costly"—some criminal activity will not come to light. Such costs, however, are inherent in the Fourth Amendment demand that governmental intrusions upon privacy be justified.²⁴⁴ Experience taught the Framers of the Fourth Amendment that the gains in terms of privacy, security, and freedom were worth the price paid.

3. *The Ramifications and Merits of Justice Scalia's Proposal to Affirm Belton Authority for "Evidentiary" Offenses*

In his *Thornton* concurrence, Justice Scalia proposed not only to curtail *Belton* authority in cases involving arrest for "nonevidentiary offenses," but to affirm, and possibly even expand, *Belton* authority when a

added)); *Johnson v. United States*, 333 U.S. 10, 16–17 (1948) (concluding that an arrest could not be justified by the probable cause officers acquired only after their unlawful, warrantless entry of a hotel room).

243. See *infra* text accompanying notes 267–85.

244. The legitimacy of the Court's decision to expand search incident authority in *Belton* has been questioned from the start. Justice Brennan authored a dissent that was highly critical of the majority's infidelity to the principles underlying *Chimel's* limiting doctrine and of the unclarity created by the putative bright-line rule of the case. See *New York v. Belton*, 453 U.S. 454, 463–64 (1981) (Brennan, J., dissenting). Justice White also dissented from the majority's "extreme extension of *Chimel*," declaring that there was a need for "more caution than the Court today exhibits." *Id.* at 472 (White, J., dissenting). A commentator on which the *Belton* majority had relied subsequently distanced himself from the Court's analysis and conclusion. See Wayne R. LaFave, *The Fourth Amendment in an Imperfect World: On Drawing "Bright Lines" and "Good Faith"*, 43 U. PITT. L. REV. 307, 324–33 (1982).

It is interesting that Justice Scalia's proposed contraction of *Belton* would, in one respect, yield more Fourth Amendment protection than the positions advocated by dissenters in *Belton*. In *Belton*, Justice Brennan, writing for himself and for Justice Marshall, contended that officers should have the authority to search vehicles and containers only when an arrestee actually has access at the time of the search. *Belton*, 453 U.S. at 469 (Brennan, J., dissenting) ("[T]he crucial question under *Chimel* is not whether the arrestee could ever have reached the area that was searched, but whether he could have reached it at the time of arrest and search."). This authority ostensibly would have extended to cases involving arrests for nonevidentiary crimes. Moreover, the sole objection of Justice White was that the *Belton* majority had empowered officers to search closed containers "incident to the arrest of an occupant" and without any probable cause to search. *Id.* at 472 (White, J., dissenting). Justice White did not suggest any opposition to the automatic search of a vehicle interior based on an arrest for any offense. In contrast, Justice Scalia's position seems to be that automatic searches of vehicles and containers should be entirely impermissible for all nonevidentiary offenses.

vehicle occupant's arrest is for an offense furnishing a "reasonable basis to believe relevant evidence might be found in the car."²⁴⁵ This subsection examines the latter proposal, its logical underpinnings, and the practical consequences of adopting it.

In Justice Scalia's view, a search of a passenger compartment incident to the arrest of an occupant for an evidentiary offense is *not* supported by the twin *Chimel* rationales—safety and evidence preservation. Current police practices routinely ensure that all arrestees, no matter the nature of their offense, are separated and restrained in ways that deprive them of access to weapons or evidence in their vehicles. According to Justice Scalia, however, a distinct government interest—the "more general interest in gathering evidence relevant to the crime"²⁴⁶ of arrest—can provide support for searches following arrests of occupants for offenses that do involve evidence or contraband. The arrest for drug possession in *Thornton* is illustrative. Because there might have been additional evidence or contraband in the arrestee's vehicle, Justice Scalia agreed with the Court's decision to uphold the search.²⁴⁷ Successful prosecution of those apprehended for crimes is an undeniably important objective. The interest in gathering probative evidence that will aid the government's efforts to meet its demanding burden of proof can, and often does, justify invasions of constitutionally protected privacy interests. The critical question is whether that interest can justify an *automatic* vehicle and container search incident to every lawful arrest for an "evidentiary" offense.

Justice Scalia found both precedential and historical support for the view that the interest in gathering relevant evidence justifies searches of the areas surrounding the arrestee. The precedents on which he relied were *Rabinowitz*, which was overruled by *Chimel*, and other discredited opinions that, prior to *Rabinowitz*, had swung the search incident pendulum in an expansive direction.²⁴⁸ It does not seem unfair to understand these opinions as resting on an evidence-gathering rationale. Nor is it inappropriate to attempt to breathe life into these opinions if they rest on defensible interpretations of the Fourth Amendment. The mere existence of these questionable precedents, however, should carry no weight, and none of them includes a persuasive explanation of the constitutionality of automatic authority to search for evidence in private spaces surrounding an arrestee at the time of his arrest, much less the spaces that surrounded an arrestee prior to his arrest. This does not mean, of course, that the evidence-gathering justification is constitutionally indefensible. The opinions cited by Justice Scalia, however, simply do not explain the logical underpinnings of this alternative explanation for searches incident to arrest.

245. *Thornton v. United States*, 541 U.S. 615, 632 (2004) (Scalia, J., concurring in the judgment).

246. *Id.* at 629.

247. *Id.* at 632.

248. *Id.* at 629. For a discussion of these opinions, see *supra* text accompanying notes 17–51.

More is needed to reconcile the evidence-gathering rationale with Fourth Amendment objectives.

Justice Scalia suggested that in “[n]umerous earlier authorities” there is historical support for search incident to arrest authority based on an evidence-gathering rationale.²⁴⁹ The authorities he listed, however, consist of a smattering of lower court opinions from the nineteenth and early twentieth centuries and a couple of treatises, the earliest of which is dated 1872. These authorities do predate the Supreme Court opinions that recognized broad search incident powers,²⁵⁰ but none is a framing-era authority. Justice Scalia furnished no historical evidence that automatic searches of places near arrestees for evidence of their crimes was, or would have been, acceptable to those who designed and adopted constitutional protection against unreasonable searches and seizures. In addition, he conceded that some of the authorities he cited addressed *only* the authority to search an arrestee’s *person*,²⁵¹ and that there is similar “historical support” for *Chimel*’s “narrower focus on concealment or destruction of evidence” as a governing, and limiting, rationale.²⁵² In sum, Justice Scalia’s historical case for the evidence-gathering justification for searches incident to arrest is hardly compelling. It provides no genuine insight into the Framers’ attitudes toward the authority to search private spaces where arrestees are found.

249. *Thornton*, 541 U.S. at 629 (Scalia, J., concurring in the judgment).

250. The first Supreme Court decision addressing search incident to arrest power was *Weeks v. United States* in 1914, and the Court first endorsed authority to search a place of arrest in 1925, in *Agnello v. United States*. See *supra* text accompanying notes 17–24.

251. *Thornton*, 541 U.S. at 631 (Scalia, J., concurring in the judgment). Neither of the treatises referred to by Justice Scalia contains a clear recognition of law enforcement power to search areas around arrestees. Bishop recognized that there was very little established law on the subject of searches following arrests. See 1 JOEL PRENTISS BISHOP, COMMENTARIES ON THE LAW OF CRIMINAL PROCEDURE 126–27 (2d ed. 1872) (observing that “[t]here is but little to be found in the books, relating to” this subject; acknowledging that “it is not easy to lay down a general doctrine on this subject, with any great assurance of its being everywhere accepted as sound;” and admitting that “the author has before him no case” to support a “proposition” which he has presented). He states that after an arrest an officer “should consider the nature of the charge” and that “if he finds about the prisoner’s *person*, or otherwise *in his possession*, either goods or moneys” which are “connected” to the crime of arrest as fruits, instrumentalities, or evidence, “he may take” them. *Id.* at 127 (emphasis added); see also *id.* at 128 (asserting that an “officer may take stolen property which is *in the possession*, though not on the person, of the defendant” (emphasis added)). Even if this was the law at the time, it is hardly acknowledgment of broad power to invade the privacy of spaces surrounding an arrestee.

Similarly, according to Wharton, “[t]he general rule” was that “an officer has no right to take money or property from *the person or possession* of a prisoner,” unless it may constitute evidence of the crime charged, may serve as a “means of identifying the criminal,” or may help “the prisoner in effecting an escape.” 1 FRANCIS WHARTON, A TREATISE ON CRIMINAL PROCEDURE 136 (10th ed. 1918) (emphasis added). Thus, the “undoubted right to make a search” which he described was limited in scope to items on an arrestee’s person and in his possession. *Id.*; see also *id.* at 138 (referring only to authority to search the “prisoner,” to “take [items] from his person,” and “to remove money from the defendant’s person”). In an earlier edition, Wharton described the scope of the search allowed even more narrowly, stating that officers “are bound to take from [the] person” of the arrestee “any articles which may be of use as proof . . . of the offense . . . charged” and that officers have a “right . . . to remove money from the defendant’s person” if it is connected to the offense charged. FRANCIS WHARTON, A TREATISE ON CRIMINAL PLEADING AND PRACTICE 45 (8th ed. 1880).

252. *Thornton*, 541 U.S. at 630 (Scalia, J., concurring in the judgment).

The point is not that the *Chimel* approach rests on unimpeachable common law authority or that it is clear from the historical record that the Framers approved of searches of only those areas accessible to arrestees in order to prevent one of the dangers highlighted by *Chimel*. In fact, the most accurate characterization of the history of the search incident to arrest doctrine would appear to be then-Justice Rehnquist's acknowledgment that early authorities dealing with the topic are "sparse" and "sketchy."²⁵³ Justice Scalia asserted that *both* the more expansive interpretation of *Rabinowitz* and the narrower approach of *Chimel* have historical support from "earlier authorities."²⁵⁴ In my view, both positions lack direct, persuasive historical support. Neither can find roots in authorities that reflect what the drafters of the Fourth Amendment thought about the particular practice of searching arrestees and/or any areas around them.²⁵⁵ The important point here is that Justice Scalia's proposed preservation of *Belton* authority for arrests involving evidentiary offenses is not validated by historical evidence that the Framers approved of automatic searches of the places surrounding arrestees for the purpose of gathering evidence of the arrestees' offenses.²⁵⁶

253. See *United States v. Robinson*, 414 U.S. 218, 230, 232 (1973).

254. *Thornton*, 541 U.S. at 629 (Scalia, J., concurring in the judgment).

255. As will be seen, I do believe that Fourth Amendment history can be of substantial aid to analysis of this topic. See *infra* text accompanying notes 267–85. The aid does not come from direct historical evidence concerning the specific practice of searching incident to arrest and its acceptability during the framing era. Instead, it comes from evidence about the more general objectives and goals of the Fourth Amendment guarantee against unreasonable searches and seizures. See JACOB W. LANDYNSKI, *SEARCH AND SEIZURE AND THE SUPREME COURT: A STUDY IN CONSTITUTIONAL INTERPRETATION* 20 (1966) (contending that "history can shed a beam of light to illuminate the underlying purposes of the [fourth] amendment and thereby provide some guidance for a selection from the possible interpretations of the one that would best realize those purposes").

256. At least one scholar believes that history does support expansive power to conduct automatic searches incident to arrest. In a book published just before *Chimel* was decided, Telford Taylor sharply disagreed with the notion that the Fourth Amendment contains a search warrant requirement, see TELFORD TAYLOR, *TWO STUDIES IN CONSTITUTIONAL INTERPRETATION* 41–43 (1969), and argued that the Framers considered it reasonable for officers to search not only the person of an arrestee, but the place where an arrestee is apprehended. See *id.* at 29, 39, 43, 49–50. Taylor maintained that "[t]here is little reason to doubt that search of an arrestee's person and premises is as old as the institution of arrest itself." *Id.* at 28. He explained that there are "very few traces of the matter in the early records" because the "practice . . . was taken for granted" and because "felons were the only victims." *Id.* To him, it "seem[ed] entirely clear" that "the practice had the full approval of bench and bar . . . when our Constitution was adopted." *Id.* at 29. "If there was any 'original understanding' on this point, it was that such searches were quite normal and, in the language of the fourth amendment, 'reasonable.'" *Id.* at 39.

Taylor asserted that the Framers "took for granted that arrested persons could be searched without a search warrant," *id.* at 43, and found "no indication . . . in any of the early statutory or case material, that the fourth amendment . . . affected the power of search incident to arrest." *Id.* at 45. In his view, a search incident to arrest could "be broader in . . . scope than a search authorized by a warrant" because the former "is not for specific, pre-designated articles, but for whatever may be legitimately sought and seized incident to the arrest." *Id.* at 49. The scope must "depend[] upon the circumstances of the arrest, including particularly the nature of the crime for which the arrest is made, and upon what is deemed in law to be legitimately 'incidental' to the arrest." *Id.* at 50. Relatively "extensive" searches of premises were permissible because the purpose of searching was not only to seize "unlawfully possessed articles or dangerous weapons," but to find and seize "evidence of the arrestee's guilt." *Id.* at 50, 57–64, 70 (acknowledging disagreement over the proper scope of a premises search, asserting that courts did not bar searches for "mere evidence" incident to arrest, contending that there is no

In his effort to disinter the evidence-gathering rationale of *Rabinowitz* and put it to use in defense of *Belton* authority, Justice Scalia did not rest entirely on precedent and history. He declared that there was “nothing irrational” about allowing officers to conduct searches incident to arrest on this alternative basis.²⁵⁷ In his view, an evidence-gathering approach might be rational because an arrest sets an arrestee apart from other members of society, because the authority to search for evidence of a particular crime is not the authority to rummage, and because it is sensible

reason to bar searches of premises for evidence, and ultimately concluding that only “testimonial documents” should be immune from seizure incident to arrest).

In my view, Taylor’s historical case for broad power to search places where arrests occur is woefully deficient. It most certainly does not support the conclusion that the Framers would consider it reasonable for officers today to automatically search the place where a person is arrested for any evidentiary offense. Although he did not furnish persuasive evidence for his claim that the practice of searching arrestees *and premises* had a long history of approval in England, I am willing to accept that contention for the sake of argument. I am unwilling, however, to accept Taylor’s inference that our ancestors’ silence about searches incident to arrest signifies their approval of what he describes as the prevailing practice. Although there may be no affirmative evidence of resentment toward abusive searches incident to arrest, it is clear that our forebears were offended by broad searches and seizures unsupported by showings of adequate cause. The Fourth Amendment was an effort to change past practices and to constrain the government’s authority to search and seize. The absence of an outcry against a specific practice does not necessarily indicate approval of that practice. Taylor furnishes no affirmative evidence that the Framers found it reasonable for officials to rummage through premises in search of evidence incident to the arrest of a person.

Moreover, the historical practice that Taylor described was extremely limited. He admitted that the only premises that were subject to search were those where a “felon” was apprehended, that “[t]o be a suspected felon was often as good as being a dead one,” and that “felons were ordinarily those who had done violence or stolen property.” *Id.* at 28; *see also id.* at 39. Moreover, the searches occurred only after a “chase . . . in hot pursuit, by hue and cry, or by a constable armed with an arrest warrant.” *Id.* at 28; *see also id.* at 39, 49. A “seventeenth-century work” on which he relied describes the authority to search homes as limited to looking for the felon and for stolen goods. *Id.* at 28–29. Thus, the class of offenders triggering the authority was extremely narrow—violent felons and thieves who were arrested pursuant to warrant, hot pursuit, or hue and cry. And the objects that could be looked for were potentially limited to stolen goods. Even if the Framers did find this practice to be reasonable, it provides no foundation for searches of premises where *any criminal* or even *any felon* is found today. It furnishes no foundation for authority to rummage for *anything* connected to *any* offense.

Finally, Taylor suggested that the reasons that the Framers would have found the searches he describes to be reasonable and quite unlike searches pursuant to general warrants and writs of assistance was that the former involved “none of the abuses” of the latter. *Id.* at 39. His basis for this conclusion was that only felons arrested with warrants, in hot pursuit, or after hue and cry were victimized. *Id.* He found no reason for concern about invasions of “their persons,” no reason why “a habitation” in which they were “cornered” should not be examined, “no threat to the honest householder,” and no basis for fearing that “desks or trunks” would be broken open in search of “smuggled jewels or libellous documents.” *Id.* Once again, the authority he depicted was tightly restricted to very limited circumstances. The authority to search any place where any arrestee or even any felon is found today would victimize a much broader class of suspected offenders. Moreover, there are reasons to protect privacy interests in the places where such arrestees are found. In addition, innocent persons with privacy interests in those places will suffer harm. And if a general search for relevant evidence is allowed, small enclosed spaces will typically be broken open and searched.

In sum, Taylor offered little historical support for his claim that the Framers intended to sanction broad authority to search premises incident to arrest and the history which he described furnishes support for only an exceedingly limited authority to conduct searches of places surrounding arrestees. It cannot sustain Justice Scalia’s proposed general authority to conduct evidence-gathering searches of vehicles incident to all arrests for evidentiary offenses.

257. *Thornton*, 541 U.S. at 630 (Scalia, J., concurring in the judgment).

to conclude that evidence will be located in the vicinity of an arrestee.²⁵⁸ I examine each of these defenses of the reasonableness of evidence-gathering searches in turn.

According to Justice Scalia, an arrest “distinguishes the arrestee from society at large.”²⁵⁹ I admit to some uncertainty about the meaning or logic of this assertion. A lawfully arrested person is of course “distinguished” from the rest of society insofar as there is probable cause to believe that she has committed an offense. For that reason, an officer is entitled to and has decided to deprive her of her liberty. Neither the probable cause to arrest nor the infringement of physical freedom, however, can explain why it is rational to further deprive the arrestee of constitutionally protected privacy interests in the place of arrest and the objects located there.²⁶⁰ The loss of control over one’s person and the prospect of a thorough inventory search at the police station arguably makes a search of the arrestee’s *person* less harmful,²⁶¹ but it is difficult to understand how these realities diminish the invasiveness of, or otherwise justify the deprivation of, privacy interests in spaces surrounding the site of the arrest. Interests in physical freedom and in the privacy of one’s person are surely distinct from interests in the privacy of one’s vehicle and the private repositories located there. There is no reason to think that the Framers would have devalued privacy in the areas around those suspected of crime. If Justice Scalia’s point is merely that the cumulative threat to privacy interests is, on the whole, limited because officers may search only the places surrounding lawful arrestees and may not invade the privacies of presumptively law-abiding citizens, he is right as a matter of fact. The fact that the authority to search and the resulting invasions of privacy are not unlimited, however, provides precious little support for a conclusion that these deprivations of privacy are reasonable as a matter of constitutional law.

Justice Scalia’s case for the rationality of the evidence-gathering approach did not rest alone on the distinction of an arrestee from the rest of society. He also asserted that the “fact of prior lawful arrest distinguishes . . . a search for evidence of [the arrestee’s] crime from general rummaging.”²⁶² Again, Justice Scalia is correct insofar as the doctrine he

258. *Id.*

259. *Id.*

260. See *Harris v. United States*, 331 U.S. 145, 165 (1947) (Frankfurter, J., dissenting) (asserting that “[a]uthority to arrest does not dispense with the requirement of authority to search”); see also *United States v. Rabinowitz*, 339 U.S. 56, 70–71 (1950) (Frankfurter, J., dissenting) (contending that “it makes a mockery of the Fourth Amendment to sanction search without a search warrant merely because of the legality of an arrest”); *Harris*, 331 U.S. at 198 (Jackson, J., dissenting) (noting that the authority to conduct a search incident to arrest becomes “an easy way to circumvent the protection [the Fourth Amendment] extended to the privacy of individual life”).

261. Even this logical defense of the search of persons of arrestees does not apply to every arrestee. Those who are released without even brief incarceration are not subject to inventory searches. See *Illinois v. Lafayette*, 462 U.S. 640, 644 (1983) (concluding that the Fourth Amendment allows only those who are to be incarcerated to be subjected to inventory searches because the reasons justifying an inventory are applicable only in that situation).

262. *Thornton*, 541 U.S. at 630 (Scalia, J., concurring in the judgment).

endorses permits officers to search surrounding areas *only* for evidence or contraband connected to the offense that was the basis for arrest. An arrest does not give them *carte blanche* to “rummage” for anything they might find.

This limitation, however, may be more theoretical than real. After all, if an officer is looking for contraband that might be in the vehicle of a person arrested for drug possession, as in *Thornton*, there would be no significant limit on the scope of the search. Small amounts of contraband could be virtually anywhere in the passenger compartment and in the smallest of private containers therein. Moreover, if an officer were to find some narcotics, surely he would not be bound to assume nothing else is present. If anything, the cause to search further may now be greater. The searches authorized in such cases—and in light of the high volume of drug-related arrests that occur, one could surmise that there would undoubtedly be a large number of such cases—are hardly distinguishable from general rummaging both in appearance and in the effects on privacy. More to the point, even if searches of the areas around arrestees are limited by the character of the suspected offense and are not unrestricted fishing expeditions for *anything* of interest, that does not make them reasonable. A limited privacy invasion is still a privacy invasion that requires constitutional justification. The existence of a limitation on scope is scarcely enough to satisfy the Fourth Amendment’s demands. Although the constraint upon the scope of the search allowed may prevent *general* rummaging, it does nothing to prevent a more limited, but nonetheless constitutionally objectionable, sort of rummaging—i.e., a search without the justification required by the Fourth Amendment.

Justice Scalia’s third and final reason why it is not “irrational” to grant officers “authority to search for evidence when and where the perpetrator of a crime is lawfully arrested” is that “it is not illogical to assume that evidence of a crime is most likely to be found where the suspect was apprehended.”²⁶³ This reason is comprehensible and more substantial than the first two reasons, but is ultimately unpersuasive in light of the history and terms of the Fourth Amendment. The first flaw in this explanation is “factual.” The “assumption” that Justice Scalia indulges, and would have the Court adopt, is not always “logical.” At least in some cases, the fact of an arrest for a particular crime at a particular time and in a particular place provides a basis for belief that there is some likelihood—a higher likelihood than otherwise would be the case—that evidence or contraband related to that crime is located in the place where the arrestee was apprehended. Thus, if a drug dealer is arrested inside or just outside his vehicle after driving to a location and making a sale on the street, there is a basis for concluding that more contraband may be found in the vehicle. In other cases, however, the mere fact of arrest tells us little, if anything, about the

263. *Id.*

existence of seizable objects in nearby areas. If a person drives to a location, gets out of his vehicle, purchases child pornography, and is then arrested, it does not seem logical to assume that there is any particular likelihood that more child pornography is in the car. Or, if a person sells firearms from his home and is arrested two weeks later, after being stopped while driving to or from the movies, the probability of firearms in the vehicle does not seem to be elevated by the arrest for the earlier firearm transaction. Before endorsing the “logic” of Justice Scalia’s “assumption” about the presence of evidence in the vicinity of an arrestee, it is important to determine how frequently there actually is reason to believe that evidence of an arrestee’s “evidentiary offense” will be located in the surrounding areas.

The second deficiency in Justice Scalia’s reasoning is “legal.” He contends that it is “not illogical to assume that evidence of a crime is most likely to be found where the suspect was apprehended.”²⁶⁴ He never asserts, because it would not be defensible to do so, that an arrest for an evidentiary offense will always, or nearly always, satisfy the *constitutional* standard—*probable cause* to believe that an item of interest to the government will be found in surrounding areas (in particular, within the passenger compartment of a recently occupied vehicle). Probable cause is the explicit Fourth Amendment norm for a reasonable search. It requires a case-specific demonstration of a “fair probability” that evidence or contraband will be found in the place to be searched.²⁶⁵ Absent facts that give rise to that threshold level of likelihood in the particular case, a search is presumptively unreasonable.²⁶⁶

The historical record does not provide specific insights into the Framers’ views regarding searches incident to arrest.²⁶⁷ There are more general lessons of history, however, that are highly relevant to the instant analysis. The insights the historical record furnishes into the motivations and objectives of the Framers do provide considerable assistance for evaluating the merits of Justice Scalia’s suggestion that some searches incident to arrests can be grounded in an evidence-gathering rationale. The relevant evidence pertains not to the contested “warrant” requirement, but to the accepted “probable cause” demand.

264. *Id.*

265. *See Illinois v. Gates*, 462 U.S. 213, 238 (1983) (stating that the probable cause requirement is met if there is a “fair probability that contraband or evidence of a crime will be found in a particular place” to be searched); *see also id.* at 244 n.13 (stating that “probable cause requires” a demonstration of a “substantial chance” that a search will be productive).

266. The probable cause demand is explicit in the warrant clause, which precludes the issuance of a warrant to search on anything less. *See U.S. CONST. amend. IV* (stating that “no Warrants shall issue, but upon probable cause”). It is also implicit in the reasonableness mandate that governs cases where a need to act expeditiously exempts officers from the search warrant requirement. Thus, the probable cause standard is a norm for both searches under warrants and warrantless searches. *See Wong Sun v. United States*, 371 U.S. 471, 479–80 (1963).

267. *See supra* text accompanying note 249–56.

There is much dispute over whether the Framers' evident hostility to general warrants and writs of assistance led them to include a warrant requirement in the Fourth Amendment.²⁶⁸ There is no debate, however, that the Framers did incorporate a probable cause demand as a vital safeguard against unjustified searches of the sort that were conducted pursuant to general warrants and writs of assistance.²⁶⁹ These devices were objectionable, in large part, because there was no need to make a substantive showing that items of legitimate interest to the government would be found in the place to be searched.²⁷⁰ They granted broad discretion which included authority to search on relatively insubstantial bases—i.e., on less than probable cause. The explicit probable cause demand in the Warrant Clause establishes a norm of reasonableness reflecting the Framers' conclusion that the government should be required to show a certain level of likelihood that a seizable item is located in a place before intruding upon the privacy of that place.

Insofar as it authorizes searches of areas around arrestees on the mere assumption that evidence or contraband is “most likely” to be there,

268. There is no reason to rehash the debate over the search warrant requirement here. Suffice it to say that there is no explicit, unarguable command that searches be supported by warrants. Some believe that there was no intent to include a search warrant requirement and no basis for inferring a search warrant demand. See AKHIL REED AMAR, *THE CONSTITUTION AND CRIMINAL PROCEDURE: FIRST PRINCIPLES* 3–17 (1997) (explaining the arguments against the Supreme Court's conclusion that the Fourth Amendment includes a search warrant requirement); TAYLOR, *supra* note 256, at 41 (arguing that “our constitutional fathers were not concerned about warrantless searches, but about overreaching warrants” and did not “look[] at the warrant as a protection against unreasonable searches”); Akhil Reed Amar, *Fourth Amendment First Principles*, 107 HARV. L. REV. 757, 761 (1994) (stating that the “words of the Fourth Amendment really do mean what they say” and “[t]hey do not require warrants, even presumptively, for searches and seizures”). Others find logical bases for inferring a Fourth Amendment search warrant rule. See Carol S. Steiker, *Second Thoughts About First Principles*, 107 HARV. L. REV. 820, 852–56 (1994) (discussing how the warrant requirement responds to “‘unreasonable’ threats to individual security created by the inevitable bias injected by hindsight in decision making, the problems of police perjury, and the unreliability of police officers as the primary administrators of amorphous standards of ‘reasonableness’”); James J. Tomkovicz, *California v. Acevedo: The Walls Close in on the Warrant Requirement*, 29 AM. CRIM. L. REV. 1103, 1122–65 (1992) (sketching the precedential, textual, historical, policy, and symbolic bases for and against the warrant requirement and explaining why, “[i]f the choice were mine, the warrant rule would survive”).

269. See LANDYNSKI, *supra* note 255, at 20 (observing that the Fourth Amendment “was drafted by the framers for the express purpose of providing enforceable safeguards against a recurrence of high-handed search measures which Americans . . . had recently experienced”); TAYLOR, *supra* note 256, at 24–25, 38, 41 (stating that “writs of assistance were anathema in the colonies” and asserting that because the Framers' experiences with these devices led them to view warrants as sources of “authority for unreasonable and oppressive searches,” they sought, in the Fourth Amendment “to confine [the] issuance and execution [of warrants] in line with the stringent requirements applicable to common-law warrants for stolen goods,” which included a probable cause demand).

270. See NELSON B. LASSON, *THE HISTORY AND DEVELOPMENT OF THE FOURTH AMENDMENT TO THE UNITED STATES CONSTITUTION* 54, 60 (1937) (stating that writs of assistance “empowered the officer and his deputies and servants to search, at their will, wherever they suspected uncustomed goods to be” and that “bare suspicion without oath was sufficient” (emphasis added)); Tomkovicz, *supra* note 268, at 1131 (contending that the “objectionable aspect” of writs of assistance “was that they empowered government agents to” conduct searches “without a concrete showing of cause”); *id.* at 1140 (suggesting that “the truly objectionable aspect of writs of assistance was that they authorized searches without objective demonstrations of cause” and that “substantively unjustified searches” were the primary concern of the Framers).

the *Rabinowitz* doctrine that Justice Scalia attempts to resuscitate in *Thornton* seems inconsistent with this Fourth Amendment history and unfaithful to a core principle that played a central historical role.²⁷¹ An inference based solely on the fact of an arrest for an offense that might entail evidence is not a sufficient justification for the search of a private place, including a vehicle, unless it rises to the level of probable cause. If probable cause to search is shown, a vehicle search is reasonable. And the fact of arrest for a particular offense, together with other facts such as the recency of the offense, may well furnish a fair probability that evidence or contraband is currently located inside a vehicle that an arrestee recently occupied. But probable cause to arrest and a lawful arrest for an evidentiary offense alone do not satisfy the standard for a reasonable search—probable cause that a seizable item is located in the place to be searched. For all these reasons, the proposed search incident to arrest authority based on an evidence-gathering rationale seems incompatible with the history, objectives, and terms of the Fourth Amendment.²⁷²

Perhaps I am guilty of unfairly dividing and conquering Justice Scalia's efforts to revive the *Rabinowitz* approach. Put in the best light, his argument is that the harm to privacy done by a *Belton* search is less serious or substantial for three reasons: because there are diminished privacy expectations in a vehicle,²⁷³ because an occupant of the vehicle has been lawfully arrested,²⁷⁴ and because the search of the vehicle will be confined to areas where evidence or contraband connected to the specific offense that

271. See *Chimel v. California*, 395 U.S. 752, 767 (1969) (observing that as a consequence of the *Rabinowitz* decision, "searches not justified by probable cause" can be arranged by law enforcement "by the simple expedient of arranging to arrest suspects at home" (emphasis added)).

272. Some scholars disagree with the Supreme Court's view that probable cause is also a Fourth Amendment norm of reasonableness for warrantless searches, contending that the text does not support that conclusion. See Akhil Reed Amar, *The Bill of Rights as a Constitution*, 100 YALE L.J. 1131, 1179 (1991); Richard A. Posner, *Rethinking the Fourth Amendment*, 1981 SUP. CT. REV. 49, 72 (1981). It is true that the Fourth Amendment does not explicitly demand probable cause for warrantless searches. In my view, however, it is eminently sensible to conclude, as the Court has, that the decision to require probable cause showings for warranted searches reflects a judgment that the invasion of privacy occasioned by a search ordinarily is justified—i.e., reasonable—only when the government's interests rise to that level.

The dissenters in *Harris v. United States* and *United States v. Rabinowitz* asserted that the broad search incident to arrest authority recognized in those cases was unfaithful to the history of the Fourth Amendment and to the purposes of that guarantee. See *United States v. Rabinowitz*, 339 U.S. 56, 68–71, 78–79, 80 (1950) (Frankfurter, J., dissenting). They argued that widespread, intensive searches of premises simply because occupants had been arrested there were similar to the abusive invasions of privacy effected pursuant to the general warrants and writs of assistance that had been condemned and forbidden by our ancestors. See *id.* at 70–71, 81 (Frankfurter, J., dissenting); *Harris v. United States*, 331 U.S. 145, 174 (1947) (Frankfurter, J., dissenting); *id.* at 183, 191 (Murphy, J., dissenting); *id.* at 195–96, 198 (Jackson, J., dissenting). In their view, sweeping authority to search premises incident to lawful arrests was inconsistent with the warrant requirement, see *Rabinowitz*, 339 U.S. at 70–71, 80 (Frankfurter, J., dissenting), and with the probable cause demand, see *Harris*, 331 U.S. at 183 (Murphy, J., dissenting).

It is interesting that the result in *Rabinowitz* was not inconsistent with the probable cause requirement. The majority noted that the officers in that case did have probable cause to search the office where the arrest occurred for "stamps overprinted illegally." *Rabinowitz*, 339 U.S. at 62–63.

273. *Thornton*, 541 U.S. 615, 631 (2004) (Scalia, J., concurring in the judgment).

274. See *supra* text accompanying notes 259.

is the basis for the arrest might be located.²⁷⁵ Furthermore, his contention is that the government's interest in searching is the product of the inherent likelihood that evidence or contraband will be found in the vicinity of an arrestee²⁷⁶ and the "heightened law enforcement needs"²⁷⁷ engendered by the widespread use of vehicles to conduct illegal enterprises. Justice Scalia believes that society's interest in finding and seizing evidence or contraband in these situations is weighty enough to counterbalance the privacy invasion that results from such a search. This is not an entirely irrational argument and might prove persuasive to a majority of the Justices. In my view, however, it has fatal flaws.

The Scalia position rests first on the premise that the limited nature of the privacy invasion occasioned by the search of a vehicle and the containers inside furnishes a basis for suspending the probable cause norm.²⁷⁸ Although the Court has held that vehicle privacy is "reduced" vis-à-vis homes and private containers located outside vehicles,²⁷⁹ the probable

275. See *supra* text accompanying note 262.

276. See *supra* text accompanying note 263.

277. *Thornton*, 541 U.S. at 631 (Scalia, J., concurring in the judgment).

278. The Court has found exceptions to the probable cause norm in situations where invasions of privacy are thought to be less serious *and* the interests in searching are distinguishable from ordinary crime detection interests. See, e.g., *New Jersey v. T.L.O.*, 469 U.S. 325, 341–42 (1985) (concluding that standard is lower than probable cause for searches of students by school officials in school settings because the privacy injuries that occur are not as substantial and because interests in maintaining order and in preserving educational environment are at stake); *Terry v. Ohio*, 392 U.S. 1, 27–30 (1968) (holding that probable cause is not needed to pat down a suspect for weapons even though a pat down is a search because the privacy loss entailed is less serious and because the interest in officer safety is implicated).

279. This premise is far from indisputable. In the Court's view, the privacy interests in a vehicle are reduced because of the "pervasive regulation of vehicles capable of traveling on the public highways," *California v. Carney*, 471 U.S. 386, 392 (1985), and because a vehicle's primary "function is transportation and it seldom serves as one's residence or as the repository of personal effects." *United States v. Chadwick*, 433 U.S. 1, 12 (1977) (quoting *Cardwell v. Lewis*, 417 U.S. 583, 590 (1974) (plurality opinion)). It is certainly arguable that the licensing, registration and other official regulations pertaining to vehicles do not diminish the privacy interests therein. Regulatory schemes do not bring government agents into frequent contact with vehicles, and, to the extent that contact occurs, it rarely infringes upon the privacy interests in the enclosed spaces within vehicles—i.e., spaces not visible to the outside world. Moreover, I venture to say that many of us do, and sometimes must, use the enclosed spaces inside vehicles (glove compartments, consoles, and trunks) to store objects which we do not wish to expose to others. Our automobiles are integral parts of our lives that transport us and our private belongings both short and long distances. For most of us, they may not serve as long-term storage sites for private objects. Nonetheless, they do function quite frequently as temporary locations for items which we wish to keep confidential.

Even if one is persuaded by the Court's logic and agrees that we have diminished privacy interests in our vehicles themselves, it is extremely difficult to justify the extension of this logic to containers located within vehicles. The Court has declared that both passengers and drivers "possess a reduced expectation of privacy with regard to the property that they transport in cars." *Wyoming v. Houghton*, 526 U.S. 295, 303 (1999); see also *California v. Acevedo*, 500 U.S. 565, 573 (1991) (observing that the Court had already "concluded that the expectation of privacy in one's vehicle is equal to one's expectation of privacy in [a] container" in that vehicle). The reasons offered to support this conclusion are that the cars travel public roads, seldom serve as private repositories, are subject to pervasive regulations, and are involved in accidents "that may render all their contents open to public scrutiny." *Houghton*, 526 U.S. at 303. The first three reasons, in all honesty, have *no* relevance to the privacy interests in separate containers. Those objects do *not* travel on public highways, *do* function primarily as private repositories, and are *not* regulated at all. The spaces inside personal belonging such as purses, briefcases, suitcases, or paper sacks do not become less private once they enter vehicles. If

cause norm still governs ordinary automobile searches for evidence or contraband.²⁸⁰ There is no constitutionally defensible reason for concluding that the privacy interests inside cars and inside the private containers placed within those cars are *further diminished* by the fact that an arrestee (who may or may not be an owner or driver of the car) was inside the car at the time of, or just before, the arrest. Fourth Amendment interests in liberty and privacy are separable, and the privacy interests in one's person are separable from the privacy interests in the places and objects surrounding the site of one's arrest.²⁸¹ Neither history nor the logic of the Fourth Amendment's protective scheme support the conclusion that cause to deprive a person of one interest diminishes the worth of other, divisible interests. The Fourth Amendment has long been thought to protect the innocent and guilty alike.²⁸² Justice Scalia has furnished no reason to alter this time-honored, and sensible, understanding of our Constitution.

The Scalia argument rests also on the premise that the inherent likelihood of evidence or contraband being nearby, when coupled with the peculiar law enforcement needs generated by vehicles, furnishes a foundation for exemption from the probable cause demand. As already pointed out, however, the probability that evidence or contraband is near is variable. The likelihood engendered by the mere fact of arrest ordinarily, and perhaps always, falls well short of the probable cause level. The ready mobility of vehicles does create a special need to act without prior judicial au-

anything, the *additional* layer of protection provided by the vehicle should *enhance* the privacy interests within those belongings. Finally, the suggestion that the risk of a traffic accident exposing the contents of a vehicle reduces the privacy interests *inside* closed containers is worse than strained. The incidence of privacy-invading accidents—i.e., episodes that expose the contents of private containers inside cars—must be so minuscule as to be negligible. Because of the infrequency of such accidents, the conclusion that privacy interests are diminished by the risk is indefensible. Fires, tornadoes, hurricanes, earthquakes and the like probably expose the contents of homes more often, yet the risks of those events do not justify a conclusion that home privacy is “reduced.”

280. The heightened needs resulting from ready mobility, coupled with the diminished privacy expectations, have led to suspension of the search warrant requirement for vehicle searches, but have not led to exemption from the probable cause norm. See *Carney*, 471 U.S. at 390–91 (concluding that the ready mobility of automobiles and the diminished privacy expectations are the twin justifications that support warrantless searches of automobiles based on probable cause to search); *Chambers v. Maroney*, 399 U.S. 42, 51 (1970) (holding that “an immediate search” of a car “without a warrant” is reasonable “[g]iven probable cause to search”); see also *South Dakota v. Opperman*, 428 U.S. 364, 386 (1976) (Marshall, J., dissenting) (asserting that even though privacy interests in vehicles have been deemed “diminished” . . . a person’s constitutional interest in protecting the integrity of closed compartments of his locked automobile may [not] routinely be sacrificed to governmental interests . . . that are less compelling than” interests that are “necessary to justify a search of . . . [a] person’s home or office”); cf. *Arizona v. Hicks*, 480 U.S. 321, 327 (1987) (pointing out that “[d]ispensing with the need for a warrant is worlds apart from permitting a lesser standard of *cause*” than “probable cause” to justify the seizure of an object).

281. See *supra* text accompanying notes 259–62.

282. See *Trupiano v. United States*, 334 U.S. 699, 709 (1948) (noting that the “Fourth Amendment was designed to protect both the innocent and the guilty from unreasonable intrusions upon their right of privacy”); *United States v. Lefkowitz*, 285 U.S. 452, 464 (1932) (stating that the Fourth Amendment’s “protection extends to offenders as well as to the law abiding”); *Weeks v. United States*, 232 U.S. 383, 392 (1914) (observing that the “protection” of the Fourth Amendment “reaches all alike, whether accused of crime or not”).

thorization to prevent the loss of evidence or contraband.²⁸³ But there is nothing special about vehicles as means of aiding in the commission of crimes that heightens the government's substantive interest in searching. Put otherwise, there is no feature of a vehicle that increases the magnitude of society's interest in finding and acquiring evidence of crime. Facile citation of the "heightened law enforcement needs" present when a vehicle is involved cannot justify suspension of the critical probable cause norm.

In sum, interest balancing is an appropriate way of assessing Fourth Amendment reasonableness.²⁸⁴ The balance that underlies Justice Scalia's effort to preserve *Belton* authority for evidentiary offenses, however, seems quite inconsistent with the core balance struck by the Framers of the Constitution.²⁸⁵ Our ancestors' hostility to the oppressive devices that authorized searches of private places on relatively insubstantial grounds led to their specification of a probable cause standard. That standard calls for an assessment of all the facts to determine whether there is a constitutionally sufficient likelihood—more than a mere possibility—that evidence or contraband is present in the place where privacy is to be forfeited. Because an arrest for an evidentiary offense alone does not establish a "fair probability," automatic searches of vehicles incident to the arrest of occupants or recent occupants should not be approved on an evidence-gathering rationale. If Justice Scalia is right that *Chimel's* rationales cannot justify the exploratory searches of automobiles that *Belton* allows and if he is correct that changes in law enforcement practices designed to generate *Chimel* dangers in vehicle arrest settings should not alter that conclusion, then all *Belton* searches—those that follow arrests for both nonevidentiary and evidentiary offenses—should be eliminated. Vehicles should be subject to search incident to an arrest *only* if and when there is a specific, demonstrated need to keep an arrestee within reach of weapons or evidence within a passenger compartment.

283. The exigency created by ready mobility creates a need to take *some* action to prevent the loss of the contraband or evidence that is "probably" in the vehicle. A majority of the Court has concluded that officers should be allowed to choose whether to satisfy that need by seizing and immobilizing a vehicle and then applying for a search warrant or by conducting a warrantless search of the vehicle. See *Chambers*, 399 U.S. at 51–52. The Court affords officers the choice because in its view a seizure and immobilization of a vehicle is no less intrusive than a search of that vehicle. See *Chadwick*, 433 U.S. at 13 n.8. There is a plausible argument that the damage done to privacy interests by the search of a vehicle (and its contents) is markedly more severe than the damage done to possessory interests by a seizure of that same vehicle, and, as a consequence, that officers should be compelled to choose the seizure alternative so that if they are wrong in their probable cause assessments the less serious injury will be inflicted. See *Chambers*, 399 U.S. at 62–64 (Harlan, J., concurring in part and dissenting in part).

284. See *Terry v. Ohio*, 392 U.S. 1, 20–21 (1968) (observing that the way to determine the reasonableness of a search or seizure is to balance the intrusion on individual interests against the government's need to conduct the search or seizure).

285. In *Arizona v. Hicks*, 480 U.S. 321 (1987), Justice Scalia himself recognized the centrality of the probable cause norm, holding that the minimal privacy invasion involved in moving a turntable in an apartment to examine its serial number was a search that required the normal substantive showing for reasonableness—probable cause. *Hicks*, 480 U.S. at 324–28. According to his majority opinion, the "proper balance" of interests was "struck" in *Hicks* by "adher[ing] to the textual and traditional standard of probable cause." *Id.* at 329.

The constitutional deficiencies in Justice Scalia's case for the preservation of *Belton* authority following arrests of vehicle occupants for evidentiary offenses are adequate reason to reject his proposal. The practical consequences and dangers of sanctioning *Belton* searches, however, cast further doubt on the advisability of the evidence-gathering alternative advocated by his *Thornton* concurrence. I now turn briefly to the potential impacts and ramifications of adopting Justice Scalia's approach.

An endorsement of the evidence-gathering theory for searches incident to arrest would likely *expand* officers' authority to conduct searches incident to arrest whenever an offense is of a sort that "might" entail evidence or contraband. The current *Belton* doctrine imposes two temporal constraints upon the ambit of searches of vehicles incident to arrest. The arrestee must have been present inside the vehicle recently—not too long before the arrest.²⁸⁶ Moreover, the search must be "substantially contemporaneous" with the arrest. If an officer waits too long after the arrest without reason, a search may be impermissibly remote in time.²⁸⁷ If searches are no longer to be justified based on the exigencies created by arrestee access to weapons or evidence, but are instead to be rooted in the possibility of finding and securing probative evidence of guilt in the place that an arrestee occupied when, or just before, he was arrested, there may be no reason to perpetuate either of these temporal limits. Evidence is just as likely to be located in a vehicle if an arrest takes place long after the arrestee has emerged, and, if a vehicle is secured, evidence is just as likely to remain inside the passenger compartment long after the arrest occurred. Take, for example, a situation where an arrestee exits a vehicle and enters the dwelling of another or a commercial establishment where she remains for an hour. Upon exiting, she is arrested based on probable cause to believe that she has trafficked in narcotics she had on her person. Officers wait two hours after the arrest, then search the vehicle which the arrestee had occupied three hours earlier. Neither the one-hour time lapse between the exit of the vehicle and the arrest nor the two-hour period between the arrest and the search in any way diminishes the likelihood that evidence may be found in the vehicle. Consequently, the two current time restrictions could disappear if the *Rabinowitz* rationale were to supplant the *Chimel* justifications.

Similarly, the current doctrine, based on access or, at least, on the fiction of access, allows searches of a passenger compartment and open or closed containers. Searches of the trunk and other areas outside the pas-

286. See *supra* text accompanying notes 108–13, 171–77. The precise nature of this limitation is not clear. The Court has not specified the time lapse that would make an arrestee's occupancy no longer recent.

287. See e.g., *Chadwick*, 433 U.S. at 15 (concluding that the search of a footlocker was too remote in time and place from the arrest to be a valid search incident because it was "conducted more than an hour after federal agents had gained exclusive control . . . and long after [the arrestees] were securely in custody").

senger compartment are not permitted.²⁸⁸ Searches of locked containers may also exceed the permissible bounds.²⁸⁹ The logic of an evidence-gathering rationale, however, might well undermine the prohibition on trunk searches and could provide powerful support for the view that locks on any spaces should not matter. Why is it not logical to believe that evidence located in the arrestee's vicinity might be found inside her trunk? Why is an evidence-gathering rationale less applicable to the interiors of locked suitcases, glove compartments, and trunks? Trunks might be unreachable and locks might preclude the possibility of ready access to weapons or destructible evidence, but probative evidence is just as likely, perhaps *more* likely,²⁹⁰ to be found inside trunks and locked repositories.²⁹¹

The Court has indicated that it might be receptive to modifying the *Belton* doctrine to require that a recent occupant be within reach of a vehicle at the time of an arrest or even at the time of the search of the vehicle.²⁹² Such a restriction would be sensible and defensible if the *Chimel* justifications continue to govern. Under the *Rabinowitz* rationale, however, it would be illogical to require proximity to the vehicle at either the time of the arrest or the time of the search. Whether an arrestee is proximate or remote, the likelihood that evidence is present in the vehicle is, once again, the same. Nearness to the vehicle is irrelevant under an evidence-gathering regime.

The Scalia proposal might also pose threats to important privacy interests other than those within vehicles. Justice Scalia was prepared to put the evidence-gathering rationale to work in the service of searches of vehicles. He indicated that his proposed revival of *Rabinowitz* would be restricted, for the present, to vehicular contexts.²⁹³ In fact, his reliance on the *Rabinowitz* rationale resulted from an assessment of whether any part of the *vehicle* search authority spawned by the Court's decision in *Belton* could be sustained on *stare decisis* grounds.²⁹⁴ He suggested that automobiles could be distinguished from homes and other private domains on two

288. *New York v. Belton*, 453 U.S. 454, 460 n.4 (1981). The scope of the "passenger compartment" has also not been precisely defined for *Belton* search purposes. *See supra* text accompanying notes 114–18.

289. *See supra* note 114.

290. It would certainly make more sense to conceal contraband or evidence within the more secure spaces inside trunks and locked containers. Therefore, the likelihood that it would be found in those places is arguably higher.

291. These increases in the scope of vehicle searches are not idle or speculative possibilities, but seem entirely likely. *See supra* text accompanying note 72. The searches authorized by the evidence-gathering-based search incident to arrest doctrine of *Rabinowitz* included entire *residences* where arrests occurred. Surely the logic of that doctrine extends to entire vehicles.

292. *See Thornton v. United States*, 541 U.S. 615, 622 (2004) (stating that "an arrestee's status as a 'recent occupant' may turn on his temporal or spatial relationship to the car at the time of the arrest and search").

293. *Id.* at 631 (Scalia, J., concurring in the judgment) (opining that *Belton* is, in reality, "a return to the broader sort of search incident to arrest that we allowed before *Chimel*—limited, of course, to searches of motor vehicles").

294. *Id.*

grounds—diminished privacy and “heightened law enforcement needs.”²⁹⁵ Nonetheless, Justice Scalia’s *Thornton* concurrence made no commitment to keep the logic of *Rabinowitz* confined to vehicle settings.²⁹⁶ Once the evidence-gathering justification is resurrected, there is nothing to prevent a majority from restoring it to its original status—as a rationale for allowing searches of entire dwellings in order to gather evidence of the crime that is the basis for arresting an occupant.²⁹⁷ And while the Court is at it, why should it matter that an arrest has occurred outside a home if the arrestee was inside the home some time prior to the arrest? Although it is not inevitable, it is certainly possible that once the *Rabinowitz* approach is unleashed it will return to the site of its origins. For evidentiary offenses, this would mark a return to the regime that produced a result found unacceptable by the entire Warren Court in *Chimel*. The result would not only be indefensible vehicle privacy deprivations, but also constitutionally intolerable home privacy losses.²⁹⁸ This is yet another reason to be chary of Justice Scalia’s attempt to preserve *Belton* authority for evidentiary offenses.²⁹⁹

In sum, the potential consequences of the Scalia proposal to retain authority to search vehicles incident to arrest, but to place it on the “hon-

295. *Id.* (observing that vehicles are “effects” which give rise to a reduced expectation of privacy . . . and heightened law enforcement needs”).

296. Justice Scalia’s confinement of his revival of the *Rabinowitz* approach was solely the result of the narrowness of the question he was addressing—whether the *Belton* vehicle search doctrine could be grounded in an alternative constitutional rationale. Although he did advert to the distinctions between automobiles and other private places, he did not state that the evidence-gathering rationale made sense only in vehicle settings. In addition, he suggested that *Rabinowitz* is as “plausible [an] account[] of what the Constitution requires” as *Chimel*. *Id.* Finally, his three reasons for finding there to be “nothing irrational about broader police authority to search for evidence when and where the perpetrator of a crime is lawfully arrested,” *id.* at 630, are not logically pertinent to vehicles alone—but would seem equally relevant to searches of homes and other private spaces. The arrestee is still distinct from the rest of society, a search for evidence of his crime is still distinguishable from “general rummaging,” and the assumption that evidence of his crime is “most likely to be found” in his home or nearby containers is no less “illogical.” *Id.*

297. When the evidence-gathering approach to searches incident governed, homes were not beyond its reach. See *Harris v. United States*, 331 U.S. 145, 151 (1947) (asserting that it was “clear that a search incident to arrest, which is otherwise reasonable, is not automatically rendered invalid by the fact that a dwelling place . . . is subjected to search”).

298. For that matter, the interests inside private repositories not located in vehicles could fall prey as well. Under *Chimel*, a container must be accessible to the arrestee. Under the *Rabinowitz* logic, however, access would not matter. As long as the repository was in the possession or vicinity of the arrestee prior to arrest, it should be subject to an evidence-gathering search. For example, if officers found an arrestee in possession of narcotics, or if the arrest was the result of involvement in a drug transaction, it would seem logical to conclude that more contraband might be found inside a container that he was near prior to the arrest even though the container was at a distance—stored in a locker, for example—at the time of the arrest and the search.

299. Yet another reason for concern is the doctrinal unclarity resulting from a new dichotomy between evidentiary and nonevidentiary offenses. It is true that officers would not need to make quick determinations in necessitous circumstances, but would instead have time to reflect on whether an arrest was for an offense providing a reasonable basis to believe evidence might be nearby. Nonetheless, there may be a number of offenses for which the inquiry does not yield a clear, ready answer. Courts, too, might not find it easy to determine when an offense justifies a *Belton* search and when officers must be content to search only the person of an arrestee.

est”³⁰⁰ foundation he discovered in the discredited majority opinion in *Rabinowitz*, are serious. Not only would it perpetuate constitutionally questionable authority to search vehicles and containers inside those vehicles, it could expand that authority and could eventually threaten home and other privacy interests that the Warren Court endeavored to shelter with its landmark decision in *Chimel*. The Court should be extremely reluctant to follow Justice Scalia down this perilous path.

V. CONCLUSION

For more than ninety years, the Supreme Court has wrestled mightily with the search incident to arrest doctrine and its relationship to the commands of the Fourth Amendment. The first five-and-a-half decades were marked by dramatic fluctuations of the scope of officers’ authority to search places where arrests occurred. As the 1960s and the Warren Court era were coming to a close, a unanimous Court, in the landmark ruling in *Chimel v. California*, endeavored to bring closure and stability to the area. Therein, the Court tightly constrained the constitutionally permissible scope of search incident authority to the person and the area within his immediate control and explained why the rationales for automatic authority to search following an arrest—ensuring safety and preventing the loss of evidence—required such a limitation.

In the more than three-and-a-half decades since *Chimel*, the Court has steadily broadened the scope of authority to search incident to arrest. This trend has been most noticeable and noteworthy in vehicular contexts where today, under the *Belton* doctrine, officers possess the power to thoroughly search passenger compartments and containers therein whenever they arrest an occupant or a recent occupant of a vehicle. In 2004, in *Thornton v. United States*, this trend continued as a majority of the Court concluded that *Belton* authority to search the vehicles of recent occupants did not depend on whether the officer first approached the arrestee when he was inside the vehicle. Prompted by the fact that the arrestee in *Thornton* was handcuffed and in the backseat of a patrol car at the time of the search and by the fact that this scenario was commonplace, not extraordinary, Justice Scalia decided it was time to tell the emperor the truth about his wardrobe.

In a pointed and fascinating concurrence, Justice Scalia called for reform of the *Belton* doctrine, putting forth two distinct proposals, one of which would narrow and the other of which would preserve, and perhaps even expand, *Belton* authority. The *Belton* doctrine was constitutionally suspect from the start and, over time, has become even more questionable. I have undertaken this exploration of Justice Scalia’s proposals because his vision may well be the future of the search incident to arrest doctrine and

300. *Thornton*, 541 U.S. at 631 (Scalia, J., concurring in the judgment) (asserting that “if we are going to continue to allow *Belton* searches . . . we should at least be honest about why we are doing so”).

because that doctrine is of vital importance to the balance the Fourth Amendment strikes between effective crime control and freedom from government oppression.

The first Scalia proposal would diminish officers' authority by prohibiting searches of vehicles incident to arrests for nonevidentiary offenses—i.e., those that provide no reason to believe that evidence might be found. In my view, Justice Scalia makes a persuasive case that neither the *Chimel* justifications nor any alternative rationale can, in reality, support such searches. The one potential vulnerability is Justice Scalia's suggestion that law enforcement should not be allowed to create a predicate for searches of vehicles by changing currently prevalent practices and leaving arrestees within reach of their vehicles. Although I agree with that proposition, I acknowledge the arguments to the contrary.

Justice Scalia's proposed preservation of *Belton* authority for evidentiary offenses—i.e., those that provide some reason to believe that evidence might be found—is worthy of even more attention. As I have explained, I find his case for resurrecting the overthrown “evidence-gathering” rationale for searching vehicles of recent occupants incident to their arrest to be ultimately unpersuasive. I arrive at this conclusion not merely because of the weaknesses I have identified in his support of the evidence-gathering approach. My main reason for disagreeing with Justice Scalia's attempt to provide an “honest” explanation for *Belton* authority is its inconsistency with a core Fourth Amendment protection—the probable cause demand. In my view, probable cause is a critically important norm that finds roots in the history and purposes of the Fourth Amendment. There is, quite simply, no adequate reason to exempt officers from making such a showing before searching the vehicles of arrestees, and the mere fact of a lawful arrest for an evidentiary offense does not meet that standard. Consequently, I would suggest that *Belton* authority be eliminated for all offenses and that searches of vehicles incident to arrest only be permitted in cases where arrestees, for good reason, have access to the areas searched at the time of the search.

I conclude this discussion as I began it, with a memorable quote from Justice Felix Frankfurter. “A decision,” regarding the appropriate scope of officers' power to search incident to arrests, “may turn on whether one gives [the Fourth] Amendment a place second to none in the Bill of Rights, or considers it on the whole a kind of nuisance, a serious impediment in the war against crime.”³⁰¹ I admit that I am firmly in the camp of those who believe that the Fourth Amendment safeguard against unrea-

301. *Harris*, 331 U.S. at 157 (Frankfurter, J., dissenting); see also *Rabinowitz v. United States*, 339 U.S. 56, 69 (1950) (Frankfurter, J., dissenting) (stating that it “is true . . . of journeys in the law that the place you reach depends on the direction you are taking” and that “where one comes out on a case depends on where one goes in” and declaring that it “makes all the difference in the world whether one approaches the Fourth Amendment as . . . a safeguard against recurrence of abuses so deeply felt by the Colonies as to be one of the potent causes of the Revolution, or one thinks of it as merely a requirement for a piece of paper”).

sonable searches is one of the most important provisions in the Bill of Rights. It is critical to a free society in part because of the inherent worth of privacy, but also because generous protection of privacy is essential for the “enjoyment of the other guarantees” provided by our Constitution.³⁰²

An expansive power to rummage in private places incident to an arrest is particularly dangerous because it furnishes “an easy way to circumvent the protection [the Fourth Amendment] extend[s] to the privacy of individual life.”³⁰³ The *Belton* doctrine and the expansive authority it grants officers permits widespread circumvention of Fourth Amendment privacy protection for vehicles and private containers. Justice Scalia is right to urge the Court to reconsider the current regime. In my view, however, his suggestion that the Court preserve a significant part of *Belton* would be yet another constitutional misstep in the evolution of the search incident to arrest doctrine.³⁰⁴ The future I envision is a future Justice Frankfurter advocated over half a century ago, a future faithful to Fourth Amendment values, a future without the *Belton* doctrine.

302. *Harris*, 331 U.S. at 163 (Frankfurter, J., dissenting); see also *Rabinowitz*, 339 U.S. at 74 (Frankfurter, J., dissenting) (maintaining that “due observance” of the Fourth Amendment is “importan[t]” to “political liberty and to the welfare of our country” (quoting *Gouled v. United States*, 255 U.S. 298, 303–04 (1921))). See generally James J. Tomkovicz, *Beyond Secrecy for Secrecy’s Sake: Toward an Expanded Vision of the Fourth Amendment Privacy Province*, 36 HASTINGS L.J. 645 (1985) (arguing that privacy is important for its own sake, but also is a critical predicate for the ability to exercise other liberties).

303. *Harris*, 331 U.S. at 198 (Jackson, J., dissenting).

304. When the Court decided to discard the *Rabinowitz* approach nearly forty years ago, Justice Harlan joined because he could not “in good conscience vote to perpetuate bad Fourth Amendment law.” *Chimel v. California*, 395 U.S. 752, 769 (1969) (Harlan, J., concurring). Harlan’s pithy, pointed description of *Rabinowitz* was on target at the time and is no less accurate today. There is no good reason to “resurrect” the evidence-gathering approach and its much too expansive grant of authority to conduct searches without probable cause.

