Improbable Cause: The Court's Purposeful Evasion of a Traditional Fourth Amendment Protection in Wyoming v. Houghton

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ARTICLES

IMPROBABLE CAUSE: THE COURT'S PURPOSEFUL EVASION OF A TRADITIONAL FOURTH AMENDMENT PROTECTION IN WYOMING V. HOUGHTON

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INTRODUCTION

If a person admitted to you that she had stolen your lawnmower, would you go looking for it in the thief's upstairs bedroom or in her garage?¹ If a motorist confessed to transporting undocumented aliens, would it be reasonable to search in a suitcase found in the driver's van?² Before you reject the bedroom and suitcase options, consult the current Supreme Court. A majority of the Justices have been able to justify an intrusive search despite the lack of probable cause historically required for such a government intrusion.³ This gap between justification and invasion occurred in Wyoming v. Houghton.⁴

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¹ See United States v. Ross, 456 U.S. 798, 824 (1981) (holding that when police officers have probable cause to conduct a warrantless search of an area, any part of that area is searchable as long as there is probable cause that the object of the search could be concealed therein).

² See id.

³ See Wyoming v. Houghton, 119 S. Ct. 1297 (1999); see also Brief for Respondent at 1, Wyoming v. Houghton (No. 98-184) [hereinafter Respondent's Brief]; During the suppression hearing, "the officer admitted that he had no probable cause to search Ms. Houghton and that men do not usually carry purses." The requirement of probable cause to search is housed in the Fourth Amendment. The Fourth Amendment provides: The right of the people to be secure in their persons, houses, papers, and effects, against unreasonable searches and seizures, shall not be violated, and no Warrants shall issue, but upon probable cause, supported by Oath or affirmation, and particularly describing the place to be searched, and the persons or things to be seized.

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In *Houghton*, the Court held that "police officers with probable cause to search a car may inspect passengers' belongings found in the car that are capable of concealing the object of the search." Thus, so long as there exists probable cause to search the car, police have the right to search all sufficiently large containers, even if they possess information undermining probable cause to search a particular container. This holding releases the automobile exception from its core requirement: probable cause. In this respect, *Houghton* dramatically expands the reach of police search powers under the automobile exception. Moreover, *Houghton*'s holding was reached by both a curiously selective view of history and a novel use of special needs balancing. Therefore, not only the Court's ruling, but its underlying rationale call decades of precedent into question.

This Article begins, in Part I, with a review of the history of both the automobile exception and closed container search law. Part II presents *Houghton*; its factual background, lower court rulings, and the Supreme Court's decision. Finally, Part III critically examines *Houghton*'s analytical flaws and the potential dangers caused by the Court's extension of the automobile exception.

I. THE CREATION AND EVOLUTION OF THE AUTOMOBILE EXCEPTION AS PART OF THE FOURTH AMENDMENT REASONABLENESS INQUIRY

A. Vehicle Searches

In *Houghton*, the Supreme Court focused on the scope of Fourth Amendment rights through the lens of one simple fact: that the search in question occurred in a car. Justice Scalia, the author of the Court's opinion, began what he called his "historical evidence" inquiry into the validity of the search of Houghton's purse by citing the case that created the automobile exception, *Carroll v. United States*. Thereafter, he selected tailored passages from *Carroll*'s automobile exception progeny that were sufficiently ambiguous to avoid conflict with his newly crafted rule defining the scope of the automobile exception. Even during the later balancing analysis in the Court's opinion, Jus-

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U.S. CONST. amend. IV.


5 Id. at 1304.

6 See id. at 1301 (stating "neither Ross itself nor the historical evidence it relied upon admits of a distinction among packages or containers based on ownership").

7 Id. at 1300; *Carroll v. United States*, 267 U.S. 132 (1925).

tice Scalia failed to get out of the car to look at the bigger picture. In weighing Houghton’s privacy interests, Justice Scalia equated her mere “presence in the car” with the increased likelihood that she was “in league” with the driver.9 Similarly, precedent promoting individual privacy against the government’s assumption of guilt by association was dismissed as involving “traumatic consequences” that simply “are not to be expected” by searches of a car.10

Notwithstanding the Supreme Court’s contrary attempt in Wyoming v. Houghton, the automobile exception can neither be fully understood nor properly applied in a vacuum. By its very name, the automobile exception speaks to a larger rule. Searches are valid under the Fourth Amendment not because they take place in or out of an automobile, but because they are “reasonable;” the Fourth Amendment prohibits only searches that are unreasonable.11

Thus, to survive Fourth Amendment scrutiny, a search, including a search of a vehicle, must be “reasonable.” This inquiry leads to yet another question: what is meant by reasonableness? The answer lies in the Fourth Amendment’s structure. The Amendment has two clauses: (1) a Reasonableness Clause; and (2) a Warrant Clause. The Reasonableness Clause provides: “The right of the people to be secure in their persons, houses, papers, and effects, against unreasonable searches and seizures, shall not be violated.”12 The Warrant Clause reads: “no Warrants shall issue, but upon probable cause, supported by Oath or affirmation, and particularly describing the place to be searched, and the persons or things to be seized.”13 The relationship between these two clauses is open to dispute, because they are connected by the ambiguous word, “and.”14

However, for most of this century, the Court has opted to resolve the ambiguity by defining the reasonableness of government activity by how closely it comports with the restrictions laid out in the Warrant Clause.15 The Warrant Clause’s central role in defining reasonableness was perhaps best expressed over a half-century ago by Justice Felix Frankfurter. Justice Frankfurter explained:

9 See id. at 1303.
10 See id. at 1302.
11 See generally U.S. CONST. amend. IV.
12 Id.
13 Id.
14 See id.
15 See Agnello v. United States, 269 U.S. 20, 32 (1925) (holding that the warrantless search of a dwelling is abhorrent to the laws of the United States and therefore, per se unreasonable).
[S]earches are "unreasonable" unless authorized by a warrant and a warrant hedged about by adequate safeguards. "Unreasonable" is not to be determined with reference to a particular search and seizure considered in isolation. The "reason" by which search and seizure is to be tested is the "reason" that was written out of historic experience into the Fourth Amendment. This means that, with minor and severely confined exceptions, inferentially a part of the Amendment, every search and seizure is unreasonable when made without a magistrate's authority expressed through a validly issued warrant.\(^\text{16}\)

The Justices who joined the majority opinion in Carroll, the seminal case establishing the automobile exception, were keenly aware of the traditional preference for warrants.\(^\text{17}\) Chief Justice Taft, who authored Carroll, devoted nearly seventeen of the opinion's twenty pages to justifying the Court's dispensing with a warrant requirement in only certain narrow circumstances involving searches of automobiles.\(^\text{18}\)

In Carroll, defendants George Carroll and John Kiro were convicted of transporting in an automobile 68 quarts of whiskey and gin "in violation of the National Prohibition Act,"\(^\text{19}\) passed by Congress to enforce the Eighteenth Amendment.\(^\text{20}\) This case began with an unsuccessful undercover buy by federal prohibition agents Cronenwett and Scully.\(^\text{21}\) Although Carroll and Kiro, along with another bootlegger, had agreed to sell the officers whiskey at $130 a case, they ultimately failed to close the deal.\(^\text{22}\)

About one week later, officer Cronenwett was on his regular patrol of the road from Detroit, "one of the most active centers for introducing illegally into this country spirituous liquors for distribution into the interior," to Grand Rapids—the city of the previous unsuc-

\(^{16}\) Harris v. United States, 331 U.S. 145, 161-162 (1946) (Frankfurter, J., dissenting).
\(^{17}\) See Carroll v. United States, 267 U.S. 132 (1925).
\(^{18}\) See id. at 143-59 (requiring probable cause if a police officer is to search a vehicle without a warrant).
\(^{19}\) Id. at 134.
\(^{20}\) The Eighteenth Amendment provides in part:
Section 1. After one year from the ratification of this article the manufacture, sale, or transportation of intoxicating liquors within, the importation thereof into, or the exportation thereof from the United States and all territory subject to the jurisdiction thereof for beverage purposes is hereby prohibited.
Section 2. The Congress and the several states shall have concurrent power to enforce this article by appropriate legislation.
U.S. CONST. amend. XVIII.
\(^{21}\) See Carroll, 267 U.S. at 134-35.
\(^{22}\) See id.
cessful undercover buy. At this time, Cronenwett saw “the Carroll boys” driving down the road in the same Oldsmobile Roadster that the defendants had driven when they had agreed to sell whiskey to Cronenwett and Scully. Some two months after, the agents, while on their prohibition patrol, again spotted Carroll’s Roadster driving on the same road going from the source city of Detroit to Grand Rapids. They stopped and searched the car, finding that the seat’s upholstery had been replaced with 68 bottles of whiskey and gin.

Police arrested Carroll and Kiro, seized the liquor, and impounded the Roadster. Before trial, Carroll unsuccessfully moved to suppress the evidence gathered as a result of the search of his Oldsmobile. His conviction thus ultimately presented a Fourth Amendment issue to the Court.

Chief Justice Taft began his analysis in Carroll with a full review not only of the National Prohibition Act itself, but also with an in-depth discussion of its legislative history. For example, the Chief Justice noted that the conference report from the two houses of Congress provided for punishment of officers for warrantless searches of “private dwelling(s),” while punishment for warrantless searches of other forms of “property” was justified only when done “maliciously and without probable cause.” Chief Justice Taft interpreted such distinctions as congressional intent to establish a boundary for the warrant requirement between houses and cars. The Carroll Court then concluded that Congress’ distinction for warrant purposes between homes and vehicles was consistent with the Fourth Amendment. Carroll’s concern with abiding by the Warrant Clause’s mandate was also evidenced in its review of earlier Congressional enactments:

23 See id. at 134, 160.
24 See id. at 135.
25 See id. at 135-36.
26 See id. at 136.
27 See id.
28 Consistent with the interpretation of search and seizure rights at the time, Carroll actually moved for a return to him of the liquor seized. See id. at 134.
29 See id. at 143.
30 See id. at 143-47.
31 Id. at 146.
32 The Chief Justice opined:
   The intent of Congress to make a distinction between the necessity for a search warrant in the searching of private dwellings and in that of automobiles and other road vehicles is [sic] the enforcement of the Prohibition Act is thus clearly established by the legislative history of the Stanley amendment.
Id. at 147.
33 See id. (“The Fourth Amendment does not denounce all searches or seizures, but only such as are reasonable.”).
Thus contemporaneously with the adoption of the Fourth Amendment we find in the first Congress, and in the following Second and Fourth Congresses, a difference made as to the necessity for a search warrant between goods subject to forfeiture, when concealed in a dwelling house or similar place, and like goods in course of transportation and concealed in a movable vessel where they readily could be put out of reach of a search warrant.  

Thus, at this early stage in automobile exception jurisprudence, the Court had not yet considered the ultimate scope of the police search power in automobile exception cases. It instead concentrated on the issue at bar—whether any such search could be lawfully executed without a search warrant.

The narrowness of the Court’s focus on warrant compliance was demonstrated by the Court’s own conclusion after its review of precedent: “In none of the cases cited is there any ruling as to the validity under the Fourth Amendment of a seizure without a warrant of contraband goods in the course of transportation and subject to forfeiture or destruction.” Likewise, the Court’s tilt toward the Warrant Clause was referred to in the statement of its rule:

On reason and authority the true rule is that if the search and seizure without a warrant are made upon probable cause, that is, upon a belief, reasonably arising out of circumstances known to the seizing officer, that an automobile or other vehicle contains that which by law is subject to seizure and destruction, the search and seizure are valid.

When the Carroll Court turned to the issue of probable cause, it demonstrated the same patience and caution it employed when deciding whether automobile searches fell within the Court’s warrant preference. Chief Justice Taft began Carroll’s probable cause assessment with a detailed consideration of the geography of Officers Cronnenwett’s and Scully’s stop of Carroll and Kiro.

The Carroll Court relied upon The Apollon as authority for considering the place of search as relevant to the formation of probable cause:

Finally, was there probable cause? In The Apollon, the question was whether the seizure of a French vessel at a particular place was upon probable cause that she was there for the purpose of smuggling. In this discussion Mr. Justice Story, who delivered the judgment of the Court, said:

[T]he Court is bound to take notice of public facts and geographical positions; and . . . this remote part of the country has been infested, at dif-

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34 Id. at 151.
35 Id. at 149.
36 Id.
37 The Carroll Court relied upon The Apollon as authority for considering the place of search as relevant to the formation of probable cause:
that “Detroit and its neighborhood along the Detroit River” were located at “the International Boundary,” which was “one of the most active centers for introducing illegally into this country spirituous liquors for distribution into the interior.”

Grand Rapids, the site of the aborted undercover buy, was “about 152 miles from Detroit.”

The attempted purchase of liquor from Carroll and Kiro provided officers with reason to believe that “the Carroll Boys” were “bootleggers” who sold their illegal beverages in Grand Rapids. Just over a week after their liquor purchase negotiations with the defendants, the prohibition agents, who regularly patrolled the “important highways” from Detroit to Grand Rapids, saw and attempted to follow the Carroll Boys on these roads. Two months later, the officers observed the defendants on the same route, this time presumably coming from Detroit. Still more facts went to support probable cause: “The partners in the original combination to sell liquor in Grand Rapids were together in the same automobile they had been in the night when they tried to furnish the whiskey to the officers which was thus identified as part of the firm equipment.”

Chief Justice Taft was even alert to the direction of Carroll’s vehicle, for he noted that Carroll and Kiro were “coming from the direction of the great source of supply for their stock to Grand Rapids where they plied their trade.” This analysis of the totality of the circumstances enabled the Carroll Court to conclude: “the facts and circumstances within [the officers’] knowledge and of which they had reasonably trustworthy information were sufficient in themselves to warrant a man of reasonable caution in the belief that intoxicating liquor was being transported in the automobile which they stopped and searched.”

When the Court returned to the automobile exception six years later in Husty v. United States, it retained Carroll’s narrow statement of police search authority as well as a full commitment to assessing probable cause in the individual case. Justice Stone, who authored the Court’s opinion, limited Carroll’s holding to its bootlegging circumstances in stating that “[t]he Fourth Amendment does not

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Id. at 159-60 (quoting The Apollon, 22 U.S. 362, 375 (9 Wheat.) (1824)).

Id. at 160.

Id.

See id.

See id.

See id.

Id.

Id.

Id. at 162.

282 U.S. 694 (1931).
prohibit the search, without warrant, of an automobile, for liquor illegally transported or possessed, if the search is upon probable cause."47 Further, the Court's discussion of the case's exigencies in upholding the propriety of the search in the individual case demonstrated that the Court had yet to consider the automobile exception as a valid warrant exception in every automobile search. Accordingly, Justice Stone rationalized the failure of these officers to obtain a warrant as follows:

The search was not unreasonable because, as petitioners argue, sufficient time elapsed between the receipt by the officer of the information and the search of the car to have enabled him to procure a search warrant. He could not know when Husty would come to the car or how soon it would be removed. In such circumstances, we do not think the officers should be required to speculate upon the chances of successfully carrying out the search, after the delay and withdrawal from the scene... which would have been necessary to procure a warrant.48

Here, Husty explicitly stated that the Court considered the propriety of obtaining a warrant based on the circumstances present in the individual case. Such a focus on case-specific facts demonstrated that the Court had not yet reached the point where it felt comfortable dispensing with a warrant requirement in every search of an automobile based merely upon its mobile nature.

Husty showed the same kind of analytical restraint in its weighing of the officers' probable cause. Like Carroll, Husty involved federal prohibition agents searching a car of a known "bootlegger."49 In fact, one of the officers executing the current search had twice previously arrested Husty.50 Each of these arrests resulted in convictions under the National Prohibition Act.51 On the day of arrest, one of the agents had received a telephone tip that "Husty had two loads of liquor in automobiles of a particular make and description, parked in particular places on named streets."52 The officer knew this telephone informant well for he had previously supplied the agent with "similar information [that] had always been found to be reliable."53 Much of the tip's information was corroborated when agents found one of the described cars at the indicated place and "in the control of Husty," a

47 Id. at 700.
48 Id. at 701.
49 See id. at 700.
50 See id.
51 See id.
52 Id.
53 Id.
known bootlegger. Moreover, the probable cause of the officers was further strengthened by "the prompt attempt of [Husty's] two companions to escape when hailed by the officers." Thus, as in Carroll, the Husty Court based its probable cause determination on all of the facts surrounding the case, rather than a single circumstance or factor.

Over twenty years after creating the automobile exception, the Court not only maintained, but indeed deepened its probable cause analysis. In Brinegar v. United States, the Court faced yet another search of a car for illegally transported liquor. In Brinegar, Justice Rutledge, writing for the majority noted that "the basic facts held to constitute probable cause in the Carroll case were very similar to the basic facts here." Brinegar summarized these "ultimate facts" as follows:

In each case the search was of an automobile moving on a public highway and was made without a warrant by federal officers charged with enforcing federal statutes outlawing the transportation of intoxicating liquors . . . . In each instance the officers were patrolling the highway in the discharge of their duty. And in each before stopping the car or starting to pursue it they recognized both the driver and the car, from recent personal contact and observation, as having been lately

\[54\] See id. at 700-01.

\[55\] Id. at 701.

\[56\] Husty's detailed analysis was not exceptional. Seven years later in Scher v. United States, when it was again called upon to weigh probable cause in support of the automobile exception, the Court articulated a wealth of particulars:

Federal officers received confidential information thought to be reliable that about midnight, December 30, 1935, a Dodge automobile with specified license plate would transport "phony" whiskey from a specified dwelling in Cleveland, Ohio. About nine-thirty, officers posted nearby saw the described automobile stop in front of the house and remain there for an hour. A man with three women and a package, then entered the car and drove away. It returned shortly before midnight, stopped at the rear of the house and remained for half an hour. The headlights were extinguished; the officers heard what seemed to be heavy paper packages passing over wood. Doors slammed; petitioner drove the car away, apparently heavily loaded. The officers followed in another car. After going a few blocks petitioner stopped briefly at a filling station; then he drove towards his own residence two or three blocks further along. The officers followed. He turned into a garage a few feet back of his residence and within the curtilage.

305 U.S. 251, 253 (1938).

Acting upon these facts, officers approached and searched the car without a warrant, finding "eighty-eight bottles of distilled spirits in unstamped containers" in violation of the federal Liquor Taxing Act of 1934. Id. at 251, 253-54. As in Carroll and Husty, the Court in Scher weighed the totality of the circumstances in reaching a decision upholding probable cause. Id. at 254-55 (stating "the officers did nothing either unreasonable or oppressive").

\[57\] 338 U.S. 160 (1949).

\[58\] See id. at 161-162.

\[59\] Id. at 165.
engaged in illicit liquor dealings. Finally, each driver was proceeding in his identified car in a direction from a known source of liquor supply toward a probable illegal market, under circumstances indicating no other probable purpose than to carry on his illegal adventure.\(^6\)

However, the *Brinegar* Court was not content to base its probable cause determination merely on the broad similarities between the two searches. Instead, Justice Rutledge delved into a second layer of analysis where he weighed the “subordinate facts” to determine if differences in any details caused the outcomes of the two cases to differ.\(^6\) For instance, *Brinegar* compared the significance of the geographical settings in each case. While *Carroll* took judicial notice of Detroit’s role as an “active center” for entry of illicit liquor from Canada, *Brinegar* relied upon “[Officer] Malsed’s personal knowledge derived from direct observation” that Joplin, Missouri was the defendant’s liquor source.\(^6\) Likewise, Justice Rutledge dissected the details regarding the differences in destination or the defendant’s “probable place of market,” in *Brinegar* and *Carroll*.\(^6\) *Carroll* involved the illegal transportation of alcohol from Canada into the then-dry United States, where *Brinegar* dealt with illegal importation from Missouri, a “wet state,” into Oklahoma, a “dry state.”\(^6\) After seriously considering all the particulars, the Court in *Brinegar* concluded:

> Notwithstanding the variations in detail . . . we think the proof in this case furnishes support quite as strong as that made in the *Carroll* case, indeed stronger in some respects, to sustain the ultimate facts there held in the aggregate to constitute probable cause for a search identical in all substantial and material respects with the one made here.\(^6\)

*Brinegar’s* serious efforts to assess probable cause demonstrated the importance the Court attached to this Fourth Amendment requirement. A person who has given officers substantial grounds for probable cause is not immune from police seizure and search.\(^6\) In contrast, “the citizen who has given no good cause for believing he is engaged in [transportation of contraband] is entitled to proceed on his

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\(^6\) Id. at 165-66 (footnotes omitted).
\(^6\) See id. at 166.
\(^6\) See id. at 167-68.
\(^6\) See id. at 168.
\(^6\) Id. at 168-69.
\(^6\) Id. at 170.
\(^6\) See id. at 176-77.
way without interference." At this juncture, the Court offered still another word of caution:

This does not mean, as seems to be assumed, that every traveler along the public highways may be stopped and searched at the officers’ whim, caprice or mere suspicion. The question presented in the *Carroll* case lay on the border between suspicion and probable cause. But the Court carefully considered that problem and resolved it by concluding that the facts within the officers’ knowledge when they intercepted the *Carroll* defendants amounted to more than mere suspicion and constituted probable cause for their action.

The Court maintained its reverence for the Warrant Clause and its strict adherence to the probable cause standard into and throughout the 1960s. Granted, the Court in *Preston v. United States* conceded: “Common sense dictates, of course, that questions involving searches of motorcars or other things readily moved cannot be treated as identical to questions arising out of searches of fixed structures like houses.” Despite this minimal departure from precedent, however, *Preston* still defined Fourth Amendment reasonableness with respect to the Court’s preference for warrants:

> [E]ven in the case of motorcars, the test still is, was the search unreasonable. Therefore we must inquire whether the facts of this case are such as to fall within any of the exceptions to the constitutional rule that a search warrant must be had before a search may be made.

*Preston* found no magical force in the automobile exception itself. Although the case involved the arrest of three men while they were “seated in a motorcar” for a crime they were then committing *in the car* (vagrancy), the automobile exception did not save the unlawful search of the glove compartment and trunk. Indeed, in a later case, *Cooper v. California*, the Court viewed *Preston* as primarily a case

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67 *Id.* at 177.
68 *Id.* (footnote omitted).
70 *Id.* at 366.
71 *Id.* at 367.
72 See *id.* at 365.
73 See *id.* at 368 (“We think that the search was too remote in time or place to have been made as incidental to the arrest and conclude, therefore, that the search of the car without a warrant failed to meet the test of reasonableness under the Fourth Amendment . . . .”).
74 386 U.S. 58 (1967).
involving an invalid search incident to arrest.\textsuperscript{75} Further, in \textit{Cooper}, the Court took another opportunity to hammer away at the "totality of the circumstances" notion that reasonableness "depends upon the facts and circumstances of each case."\textsuperscript{76}

Near the close of the decade, the Court decided another automobile exception case, \textit{Dyke v. Taylor Implement Mfg. Co., Inc.}\textsuperscript{77} In \textit{Dyke}, Justice White, who delivered the Court's opinion, reiterated that the automobile exception cases "have . . . always insisted that the officers conducting the search have 'reasonable or probable cause' to believe that they will find the instrumentality of a crime or evidence pertaining to a crime before they begin their warrantless search."\textsuperscript{78} In \textit{Dyke}, victims to a shooting testified in court that they "recognized the car from which shots were fired as a two-tone 1960 or 1961 Dodge" and that one of the victims had returned fire, hitting the Dodge in the trunk.\textsuperscript{79} Further evidence indicated that the car police searched was a 1960 Dodge "with a fresh bullet hole through the trunk lid" and with an air rifle under the seat.\textsuperscript{80} Despite all of the facts connecting the defendant's car to the shooting, Justice White found probable cause to search lacking in the case.\textsuperscript{81} This was because no officer performing the search had any knowledge of the details supporting probable cause; no one had communicated these particulars to the officers at the time they actually searched the car.\textsuperscript{82} Sheriff Powers' testimony was illustrative of this point. He related: "All I got is just that it would be an old make model car. Kinda old make model car."\textsuperscript{83} Thus, as late as 1968, the Court showed no hesitation in invalidating a search where the officers failed to gather sufficient information to give rise to probable cause, justifying their search of an automobile.

In 1970 the Court firmly established the probable cause requirement for its automobile exception. In \textit{Chambers v. Maroney},\textsuperscript{84} Justice White, writing for the majority, took care to fully discuss the wealth of detailed facts in support of probable cause.\textsuperscript{85} The Court in \textit{Chambers} provided details that two men robbed, at gunpoint, a service sta-

\textsuperscript{75} See \textit{id.} at 59 ("In \textit{Preston} the search was sought to be justified primarily on the ground that it was incidental and part of a lawful arrest.").
\textsuperscript{76} \textit{id.}
\textsuperscript{77} 391 U.S. 216 (1968).
\textsuperscript{78} See \textit{id.} at 221.
\textsuperscript{79} \textit{id.} at 219.
\textsuperscript{80} See \textit{id.}
\textsuperscript{81} See \textit{id.} at 221-22.
\textsuperscript{82} See \textit{id.} ("The record before us does not contain evidence that [any searching officer] had reasonable or probable cause to believe that evidence would be found in petitioners' car.").
\textsuperscript{83} \textit{id.} at 222.
\textsuperscript{84} 399 U.S. 42 (1970).
\textsuperscript{85} See \textit{id.} at 44-45, 52 (1970).
tion attendant of currency and coins. Further, a blue compact station wagon, circling the block around the gas station and then later speeding away around the time of the robbery, was seen to be holding four men, one of whom was wearing a green sweater. The service station employee told police that one robber wore a green sweater while the other wore a trench coat. Within an hour, police stopped four men in a light blue compact station wagon answering the radio broadcast description of the getaway car. The defendant, who was in the stopped car, was wearing a green sweater. Moreover, there was a trench coat in the car. These facts led Justice White to conclude:

[T]he police had probable cause to believe that the robbers, carrying guns and the fruits of the crime, had fled the scene in a light blue compact station wagon which would be carrying four men, one wearing a green sweater and another wearing a trench coat. . . . [T]here was probable cause to arrest the occupants of the station wagon that the officers stopped; just as obviously was there probable cause to search the car for guns and stolen money.

Not only did Chambers fully consider the circumstances supporting probable cause, it also reinforced the Court’s allegiance to the Warrant Clause. Notably, over four decades after the creation of the automobile exception, the Court still demonstrated its wariness of relying solely upon an officer’s judgment in forming probable cause. In Fourth Amendment jurisprudence, probable cause was only a “minimum requirement,” for the “general rule” also necessitated “the judgment of a magistrate on the probable-cause issue and the issuance of a warrant before a search is made.” Further, the exigent circumstances, which can excuse a lack of a warrant, will not always flow from the mere existence of a car. Justice White so indicated by stating that “[n]either Carrol . . . nor other cases in this Court require or suggest that in every conceivable circumstance the search of an auto even with probable cause may be made without the extra protection for privacy that a warrant affords.”

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86 See id. at 44.  
87 See id.  
88 See id.  
89 See id.  
90 See id.  
91 Id. at 47-48.  
92 See id. at 50-52 (“As a general rule, [the Fourth Amendment] has . . . required the judgment of a magistrate on the probable-cause issue and the issuance of a warrant before a search is made.”).  
93 Id. at 51.  
94 Id. at 50.
Yet, the most striking development in *Chambers* was its change in focus. Justice White moved beyond the Court's firmly rooted probable cause analysis to consider the automobile exception's scope. The temporal and spatial boundaries of the automobile exception became an issue because of the officer's particular actions in the case. At the scene of the stop, even though armed with probable cause to both arrest and search, the officers chose only to arrest the occupants, and merely drove the car to the station.\textsuperscript{95} Therefore, the search of the car did not occur immediately on the street, but later at the station, after the occupants were safely in custody.\textsuperscript{96} The search recovered two .38 caliber revolvers (one of which was loaded with dumdum bullets),\textsuperscript{97} along with change from the gas station robbery and still other evidence linking the car's occupants to yet another robbery.\textsuperscript{98} 

*Chambers* ultimately upheld the search by expanding the scope of the automobile exception. Justice White accomplished this expansion by the creation of a rough—and dubious—equation. *Chambers* began its scope analysis by recognizing that a seizure alone is less intrusive than a seizure and accompanying search.\textsuperscript{99} In this vein, Justice White acknowledged: "Arguably, because of the preference for a magistrate's judgment, only immobilization of the car should be permitted until a search warrant is obtained; arguably, only the 'lesser' intrusion is permissible until the magistrate authorizes the 'greater.'"\textsuperscript{100} Yet, in the very next sentence, Justice White contradicted himself, stating that determining "which is the 'greater' and which is 'lesser' intrusion is itself a debatable question and the answer may depend on a variety of circumstances."\textsuperscript{101} The Court failed to indicate, however, what circumstances would make a seizure \textit{and} search less an intrusion than a simple seizure. It would seem that common sense points to a seizure without intrusion into privacy as the lesser government invasion. Further, if a motorist wished to forgo the wait for a search warrant, he or she could simply consent to a search.

*Chambers*, however, was oblivious to any such distinction. Justice White opined:

For constitutional purposes, we see no difference between on the one hand seizing and holding a car before presenting the probable cause issue to a magistrate and on the other hand

\textsuperscript{95} See id. at 44.
\textsuperscript{96} See id.
\textsuperscript{97} A dumdum bullet is a type of armor-piercing bullet.
\textsuperscript{98} See id.
\textsuperscript{99} See id. at 51-52.
\textsuperscript{100} Id.
\textsuperscript{101} Id. at 51-52.
carrying out an immediate search without a warrant. Given probable cause to search, either course is reasonable under the Fourth Amendment.\textsuperscript{102}

\textit{Chambers} thus allowed police to perform an automobile exception search not only on the street, but at the station house.\textsuperscript{103}

In advancing such an argument, Justice White appeared curiously forgetful of \textit{Chambers'} own emphasis on the importance of the magistrate's role in weighing probable cause. The very assumption that an officer's probable cause determination is sufficient, even absent the exigency that exists during a vehicle stop on the road, could undermine the rationale for a warrant requirement itself. If an officer need not obtain a warrant when an arrestee is securely in custody and his or her car is safely immobilized, why require prior judicial approval in any event? Thus, in its first attempt at explicitly defining the scope of the automobile exception, the Court cast a shadow over the fundamental Fourth Amendment protection of the warrant preference.

The extension of the automobile exception search necessitated the Court to reassess, and likewise expand, the rationale underlying this exception to the warrant requirement. As part of this effort, the Court identified another distinction between vehicles and fixed structures. In \textit{Cady v. Dombrowski},\textsuperscript{104} the Court noted that vehicles and traffic fell under "extensive regulation," mandating that drivers be licensed and their vehicles be registered, maintained in a proper condition, and operated in a safe manner.\textsuperscript{105} Due to breakdowns and accidents, cars caused "substantially greater . . . police-citizen contact" than did homes or offices.\textsuperscript{106} Although some of these interactions involved the enforcement of criminal laws, frequently officers merely performed "community caretaking functions" with no eye to pursuing a criminal investigation.\textsuperscript{107}

These multiple contacts with the community enabled the \textit{Cady} Court to note:

Although the original justification advanced for treating automobiles differently from houses, insofar as warrantless searches of automobiles by federal officers was concerned, was the vagrant and mobile nature of the former, warrantless

\textsuperscript{102} \textit{Id.} at 52.
\textsuperscript{103} \textit{See id.} ("The blue station wagon could have been searched on the spot when it was stopped since there was probable cause to search and it was a fleeting target for search. The probable-cause factor still obtained at the station house and so did the mobility of the car . . . ").
\textsuperscript{104} 413 U.S. 433 (1973).
\textsuperscript{105} \textit{See id.} at 441.
\textsuperscript{106} \textit{See id.}
\textsuperscript{107} \textit{See id.}
searches of vehicles by state officers have been sustained in cases in which the possibilities of the vehicle’s being removed or evidence in it destroyed were remote, if not non-existent. The constitutional difference between searches of and seizures from houses and similar structures and from vehicles stems both from the ambulatory character of the latter and from the fact that extensive, and often noncriminal contact with automobiles will bring local official in “plain view” of evidence, fruits, or instrumentalities of a crime, or contraband.\(^{108}\)

The Court expanded on its theme that cars, by their public use, provide less privacy than homes or other effects in *Cardwell v. Lewis*.\(^{109}\) Justice Blackmun, authoring the Court’s opinion in *Lewis*, saw the simple purpose of a car as significant: “One has a lesser expectation of privacy in a motor vehicle because its function is transportation and it seldom serves as one’s residence or as the repository of personal effects.”\(^{110}\) Moreover, of particular importance to the future *Houghton* decision, Justice Blackmun indicated a hierarchy of privacy expectation within a car itself. In downplaying the government’s intrusion on Arthur Lewis’ car as involving only “the examination of the tire on the wheel and the taking of paint scrapings from the exterior of the vehicle,” Justice Blackmun signaled that other vehicle invasions could impact more deeply on Fourth Amendment interests.\(^{111}\) Specifically, Justice Blackmun noted: “In the present case, nothing from the interior of the car and no personal effects, which the Fourth Amendment traditionally has been deemed to protect, were searched or seized and introduced in evidence.”\(^{112}\) Here, the Court alluded to another issue that created consternation and contradiction among the justices: searches of containers.

### B. Container Searches

If a car may be searched without a warrant due to the exigencies caused by its mobility, logic would seem to dictate that so may any movable container.\(^{113}\) The Court, however, “squarely rejected” such

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\(^{108}\) Id. at 441-42 (citations omitted).


\(^{110}\) Id.

\(^{111}\) See id. at 591.

\(^{112}\) Id.

\(^{113}\) The argument likening cars to containers was offered in *United States v. Chadwick*, 433 U.S. 1, 11-12 (1977). There, the Court characterized the government’s contention as follows: The Government [argues] that the rationale of our automobile search cases demonstrates the reasonableness of permitting warrantless searches of luggage; the Government views such luggage as analogous to motor vehicles for Fourth Amendment purposes. It is true that, like the footlocker in issue here, automobiles are “effects”
an argument in United States v. Chadwick.\textsuperscript{114} In Chadwick, Amtrak railroad officials in San Diego became suspicious when they observed two men, one of which matched a drug trafficker profile, load a trunk onto a train bound for Boston.\textsuperscript{115} The footlocker was "unusually heavy" and leaking talcum powder, a substance "often used to mask the odor of marihuana or hashish."\textsuperscript{116} In Boston, federal narcotics agents, alerted by their counterparts in San Diego, met the train with a trained police dog who ultimately signaled the presence of a controlled substance inside the trunk.\textsuperscript{117} The defendants loaded the footlocker in the trunk of a car, and "while the trunk of the car was still open and before the car engine had been started," the agents arrested the defendants and transported the footlocker to the Federal Building.\textsuperscript{118} Ninety minutes later, the agents performed a warrantless search of the footlocker.\textsuperscript{119}

The Court in Chadwick, characterizing the footlocker's presence in an automobile trunk as merely "brief contact" with the car, might have previously signaled to the litigants a reluctance to consider this as an automobile exception case.\textsuperscript{120} Thus, the government instead defended the search by contending that history indicated the Warrant Clause protected only "homes, offices, and private communications" which "lie at the core of the Fourth Amendment."\textsuperscript{121} Chief Justice Burger, who authored the Court's opinion in Chadwick, deemed it a "mistake to conclude, as the Government contended, that the Warrant Clause was . . . intended to guard only against intrusions into the home."\textsuperscript{122} The Chief Justice then reaffirmed the primacy of the Warrant Clause:

First, the Warrant Clause does not in terms distinguish between searches conducted in private homes and other searches. There is also a strong historical connection between the Warrant Clause and the initial clause of the Fourth Amendment, which draws no distinctions among "persons,
houses, papers, and effects” in safeguarding against unreasonable searches and seizures.\textsuperscript{123}

Thus, the government was left with the fallback argument that since containers shared the automobile’s mobility, they should likewise be open to warrantless searches based on probable cause.\textsuperscript{124} Chadwick refused to equate cars and containers, emphasizing that “a person’s expectations of privacy in personal luggage are substantially greater than in an automobile.”\textsuperscript{125} The Court therefore found the agents’ warrantless search of the footlocker unjustified.\textsuperscript{126} In so doing, Chadwick “reaffirmed the general principle that closed packages and containers may not be searched without a warrant.”\textsuperscript{127}

The Court extended Chadwick with Arkansas v. Sanders, another drug trafficking case.\textsuperscript{128} In Sanders, Little Rock police learned from a reliable informant that Sanders would arrive at the municipal airport in the afternoon on a particular flight, at a specified gate, carrying a green suitcase containing marijuana.\textsuperscript{129} Officers at the airport observed details corroborating the informant’s tip, including the existence of a green suitcase.\textsuperscript{130} Sanders handed the suitcase to a companion, who put it in the trunk of a taxi.\textsuperscript{131} When Sanders and his companion rode away in the cab, police pursued, stopped the taxi, opened the trunk, recovered and opened the suitcase, and found marijuana.\textsuperscript{132}

In considering the validity of the search of the green suitcase under the Fourth Amendment, Justice Powell, writing for the Court in Sanders, emphasized the “prominent place [of] the warrant requirement.”\textsuperscript{133} Powell noted, “normally searches of private property [must] be performed pursuant to a search warrant issued in compliance with the Warrant Clause.”\textsuperscript{134}

Thus, validity turned upon whether the search fell into an exception to the warrant requirement, namely the automobile exception.\textsuperscript{135}

\textsuperscript{123} Id.
\textsuperscript{124} See id. at 11-12.
\textsuperscript{125} Id. at 13.
\textsuperscript{126} See id. at 15.
\textsuperscript{129} See id. at 755.
\textsuperscript{130} See id.
\textsuperscript{131} See id.
\textsuperscript{132} See id.
\textsuperscript{133} Id. at 759.
\textsuperscript{134} Id. at 758.
\textsuperscript{135} Justice Powell characterized the government’s contention as follows: “The State argues, nevertheless, that the warrantless search of respondent’s suitcase was proper, not because the
The Court in Sanders seemed alarmed at the effect such an argument could have on the scope of the automobile exception. Justice Powell worried: “In effect, the State would have us extend Carroll to allow warrantless searches of everything found within an automobile, as well as the vehicle itself.”

Sanders saw the search of the suitcase recovered from the trunk of a car not as an automobile exception case, but as a container case. The Court adhered to this view despite the fact that Sanders, unlike Chadwick, involved the stopping of a vehicle after it was already moving. Justice Powell concluded that, “as a general rule there is no greater need for warrantless searches of luggage taken from automobiles than of luggage taken from other places.” Indeed, the Sanders Court went out of its way to discount the importance of the automobile’s impact in this case. The Sanders opinion concluded: “Our decision in this case means only that a warrant generally is required before personal luggage can be searched that and the extent to which the Fourth Amendment applies to containers and other parcels depends not at all upon whether they are seized from an automobile.”

C. Searches of Containers in Vehicles

As established above, Carroll and its progeny gave police—possessing probable cause—the authority to search automobiles without a warrant. Chadwick and Sanders, however, prohibited those same officers from searching containers without prior judicial approval, even if the containers were ultimately placed in cars. The Court’s distinction between automobiles and containers thus created two lines of conflicting precedent which ultimately collided in United States v. Ross.

In Ross, a reliable informant told Detective Marcum that a person known as “Bandit” was selling narcotics out of the trunk of a “purplish maroon” Chevrolet Malibu parked at 439 Ridge Street. The informant had also stated that “he had just observed ‘Bandit’ complete a sale and that ‘Bandit’ had told him that additional narcot-

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136 Id.
137 See id. at 755; see also California v. Acevedo, 500 U.S. 565, 571 (1990) (noting that “[i]n Arkansas v. Sanders... the Court extended Chadwick’s rule to apply to a suitcase actually being transported in the trunk of a car”).
139 Id. at 764-65 n.13.
141 See id. at 800.
ics were in the trunk.142 Police responded to 439 Ridge Street, finding an unoccupied car matching the description provided by the informant.143 When the officers ran the car’s plates, they learned it was registered to an “Albert Ross” who used the alias “Bandit.”144 Seeing no one in the car, police left the scene to return five minutes later.145 At this time, officers saw the Malibu being driven by a person matching the suspect’s description.146 Officers stopped and arrested Ross.147 During a search of the car’s trunk at the scene, police found a closed brown paper bag.148 One of the officers at the arrest, Detective Cassidy, opened the bag and found “glassine bags containing a white powder” later determined to be heroin.149 At a more thorough search at the station, Detective Cassidy found in the trunk a “zippered red leather pouch” containing $3,200 in cash.150 None of the searches were supported by a warrant.151

With the recovery and search of containers found in Bandit’s Malibu, Ross directly presented the Court with an issue regarding the scope of the automobile exception. Justice Stevens, writing for the Court in Ross, phrased the question as follows:

In this case, we consider the extent to which police officers—who have legitimately stopped an automobile and who have probable cause to believe that contraband is concealed somewhere within it—may conduct a probing search of compartments and containers within the vehicle whose contents are not in plain view.152

Justice Stevens began Ross’s analysis by returning to the automobile exception’s origin; Carroll. This in-depth approach prevented the Court from missing Carroll’s emphasis on “the importance of the requirement that officers have probable cause to believe the vehicle contains contraband.”153 Ross cautioned that probable cause had to be “based on objective facts that could justify the issuance of a warrant

142 Id.
143 See id.
144 See id.
145 See id. at 800-01.
146 See id. at 801.
147 See id.
148 See id.
149 See id.
150 See id.
151 See id.
152 Id. at 800.
153 Id. at 807-08.
by a magistrate and not merely on the subjective good faith of the
police officers."154

Indeed, probable cause was so important that it not only formed
the justification for a search under the automobile exception, it also
defined the boundaries of that search. Justice Stevens explained:

The scope of a warrantless search of an automobile . . . is not
defined by the nature of the container in which the contra-
band is secreted. Rather, it is defined by the object of the
search and the places in which there is probable cause to be-
lieve it may be found. Just as probable cause to believe a
stolen lawnmower may be found in a garage will not support
a warrant to search an upstairs bedroom, probable cause to
believe that undocumented aliens are being transported in a
van will not justify a warrantless search of a suitcase. Prob-
able cause to believe that a container placed in the trunk of a
taxi contains contraband or evidence does not justify a search
of the entire cab.155

Thus, Ross assessed probable cause in the automobile exception
case exactly as it would in a search based on a warrant. Justice
Stevens therefore noted that "[t]he scope of a warrantless search
based on probable cause is no narrower—and no broader—than the
scope of a search authorized by a warrant supported by probable
cause. Only the prior approval of the magistrate is waived; the search
otherwise is as the magistrate could authorize."156

The automobile exception under Ross thus became a return to the
basics. When the parties quarreled over whether the automobile ex-
ception extended to containers, they were asking the wrong question.
Instead, the inquiry should have been where in the vehicle was there
probable cause to search, whether inside or outside of a container or
compartment of a car.

Once formed in terms of probable cause, the scope issue became
straightforward. In Carroll, the Fourth Amendment authorized agents
to tear open upholstery because the facts in the case would have led a
magistrate to issue a warrant to search for liquor secreted under the
rumble seat.157 The officers in Chambers lawfully looked in "a com-
partment under the dashboard" because probable cause in that case
would support a warrant to search in that area of the car.158

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154 Id. at 808.
155 Id. at 824.
156 See id. at 823.
157 See id. at 817-18.
158 Id. at 818.
the Court upheld the search of containers ("whiskey bags") in a car while *Scher* allowed the search of brown paper packages tied with twine.\footnote{159 See id. at 818-19.} In fact, since probable cause was the relevant yardstick in these automobile exception cases, it appears no one even thought to contest the scope of the official action as container-in-car searches.\footnote{160 See id. at 819.}

*Ross* should have stopped with the creation of its probable-cause-determines-the-scope rule. However, Justice Stevens was aware of one glaring flaw; *Ross*’ reasoning was inconsistent with *Sanders* and therefore risked offending the doctrine of stare decisis. The two distinct doctrines resulting from the cases of *Chadwick* and *Ross* were perhaps best explained by Justice Blackmun:

In *Ross*, the Court endeavored to distinguish between *Carroll*, which governed the *Ross* automobile search, and *Chadwick*, which governed the *Sanders* automobile search. It held that the *Carroll* doctrine covered searches of automobiles when police had probable cause to search an entire vehicle, but that the *Chadwick* doctrine governed searches of luggage when the officers had probable cause to search only a container within the vehicle. Thus, in a *Ross* situation, the police could conduct a reasonable search under the Fourth Amendment without obtaining a warrant, whereas in a *Sanders* situation, the police had to obtain a warrant before they searched.\footnote{161 See *California v. Acevedo*, 500 U.S. 565, 572 (1991).}

The Court, however, was not yet ready to recognize the practical difficulties arising from these two lines of cases. As a fig leaf, Justice Stevens maintained that *Ross* adhered to the *Sanders* holding, if not its rationale.\footnote{162 See *Ross*, 456 U.S. at 824.} However, the differences between the *Carroll/Ross* and *Chadwick/Sanders* lines of precedent could not be so easily papered over. Troubles flowing from the fault line between automobiles and closed containers surfaced only three years later in *United States v. Johns*.\footnote{163 See *469 U.S. 478* (1984).}

In *Johns*, a United States Customs officer, pursuant to an investigation of a "suspected drug smuggling operation," alerted other officers to conduct ground and air surveillance of two pickup trucks as they drove 100 miles to a remote private airstrip some 50 miles from the Mexican border.\footnote{164 See id. at 480.} Soon after the trucks reached the airstrip, a
small aircraft landed. Customs Officers in the air reported to those on the ground that one of the pickups had approached the plane. Soon, the aircraft departed, followed by a second plane, which landed later, and then departed.

When two ground officers approached, one saw a person covering the contents of one of the trucks with a blanket. Both officers then smelled the odor of marijuana and saw in the back of the trucks "packages wrapped in dark green plastic and sealed with tape." The officers knew from prior experience that smuggled marijuana was commonly packaged in this manner. Therefore, the Customs officials arrested the smugglers and took the trucks back to the Drug Enforcement Administration (DEA) headquarters in Tucson. Agents took the packages from the trucks and placed them in a DEA warehouse, apparently not performing a search of these containers until three days after they were initially seized. No search warrant was obtained to support the searches.

Relying on Ross, the defendants sought suppression of the marijuana found in the packages. Since the officers never had probable cause that contraband was somewhere in the vehicle, but instead specifically knew that it was the packages that held the marijuana, Ross' automobile exception was inapplicable. Instead, officers faced a Chadwick situation where they needed to obtain a warrant before searching a closed container.

Countering this contention required some finesse. Justice O'Connor, writing for the Court, asserted that although the officers "no doubt suspected that the scent was emanating from the packages," they had formed probable cause as to the vehicles themselves. Justice O'Connor offered:

The events surrounding the rendezvous of the aircraft and the pickup trucks at the isolated desert strip indicated that the vehicles were involved in smuggling activity. The Customs officers on the ground were unable to observe the airplanes af-

\begin{footnotes}
\item[165] See id.
\item[166] See id.
\item[167] See id.
\item[168] See id.
\item[169] Id. at 480-81.
\item[170] See id. at 481.
\item[171] See id.
\item[172] See id.
\item[173] See id.
\item[174] See id. at 482.
\item[175] See id.
\item[176] See id.
\item[177] See id.
\end{footnotes}
ter they landed, and consequently did not see the packages loaded into the pickup trucks. After the officers came closer and detected the distinct odor of marihuana, they had probable cause to believe that the vehicles contained contraband.\textsuperscript{178}

In contrast, O'Connor reasoned for the \textit{Johns} Court, that in \textit{Chadwick}, police “had probable cause to believe that a footlocker contained contraband,” and therefore it only provided precedent for containers.\textsuperscript{179} Justice O'Connor reiterated that \textit{Chadwick} was not an automobile exception case: “\textit{Chadwick} . . . did not involve the exception to the warrant requirement in \textit{Carroll v. United States} . . . because the police had no probable cause to believe that the automobile, as contrasted to the footlocker, contained contraband."\textsuperscript{180} Thus, \textit{Johns} reaffirmed the distinction first offered in \textit{Ross} between \textit{Carroll's} probable cause in vehicles generally and \textit{Chadwick's} probable cause in containers that happened to be placed in vehicles.

The Court finally acknowledged \textit{Ross'} strain on logic in \textit{California v. Acevedo}.	extsuperscript{181} In \textit{Acevedo}, Santa Ana police officer Coleman received a package of marijuana from a federal drug enforcement agent in Hawaii.\textsuperscript{182} Officer Coleman learned that federal agents had seized the package, originally bound for a J.R. Daza in Santa Ana via Federal Express.\textsuperscript{183} Officer Coleman took the package, after verifying its contents, to the Federal Express Office, where Jamie Daza arrived to claim and accept the package at about 10:30 a.m.\textsuperscript{184} Daza then took the package back to his apartment.\textsuperscript{185} When, at 11:45 a.m., officers saw Daza leave his apartment and drop the box and paper that had held the marijuana into the trash, Officer Coleman left to get a search warrant.\textsuperscript{186} At 12:05 p.m., officers saw and stopped Richard St. George, who was leaving Daza’s apartment with a half-full knapsack.\textsuperscript{187} Officers then recovered one and a half pounds of marijuana from the knapsack.\textsuperscript{188} At 12:30, Charles Acevedo entered Daza’s apartment, coming back out about ten minutes later carrying “a brown paper bag that looked full."\textsuperscript{189} Acevedo placed the bag, which officers

\textsuperscript{178} Id.
\textsuperscript{179} See id.
\textsuperscript{180} Id. at 482-83 (citations omitted).
\textsuperscript{182} See id. at 566-67.
\textsuperscript{183} See id. at 567.
\textsuperscript{184} See id.
\textsuperscript{185} See id.
\textsuperscript{186} See id.
\textsuperscript{187} See id.
\textsuperscript{188} See id.
\textsuperscript{189} Id.
noticed "was the size of one of the wrapped marijuana packages sent from Hawaii," in the trunk of his car and started to drive away. Officers then stopped Acevedo's car, opened the trunk and the bag, and found marijuana.

Faced with a warrantless search of a closed container about which police had formed probable cause before it ever entered the car, the Acevedo Court now directly faced the issue it side-stepped in Johns. In resolving the conflict between Carroll-Ross (an automobile search which comes across a container) and Chadwick-Sanders (a search of a container which was placed in a car), the Court once again turned to the Fourth Amendment, and its fundamental principle, probable cause. Justice Blackmun, the author of Acevedo, reiterated Ross' holding that "a warrantless search of an automobile under the Carroll doctrine could include a search of a container or package found inside the car when such a search was supported by probable cause." Thus, the probable cause, which supported the search in the first place, also determined its ultimate scope. A search could even be a "probing" one, "so long as the search is supported by probable cause."

Thus, probable cause became a leveler creating equal treatment for containers whether police had formed their probable cause in the container before or after it was placed in a car. Justice Blackmun was even more specific:

We now agree that a container found after a general search of the automobile and a container found in a car after a limited search for the container are equally easy for the police to store and for the suspect to hide or destroy. In fact, we see no principled distinction in terms of either the privacy expectation or the exigent circumstances between the paper bag found by the police in Ross and the paper bag found by the police here.

The Acevedo Court took care to note that its probable cause-based rule was more protective of Fourth Amendment privacy than the Ross decision. Under Ross:

If police know that they may open a bag only if they are actually searching the entire car, they may search more exten-

\[190 \text{See id.} \]
\[191 \text{See id.} \]
\[192 \text{Id. at 570.} \]
\[193 \text{Id.} \]
\[194 \text{Id. at 574.} \]
sively than they otherwise would in order to establish the
general probable cause required by *Ross*. . . . We cannot see
the benefit of a rule that requires law enforcement officers to
conduct a more intrusive search in order to justify a less in-
trusive one.195

The *Acevedo* Court instead held that "the Fourth Amendment
does not compel separate treatment for an automobile search that ex-
tends to a container within the vehicle" due to the "minimal protec-
tion to privacy afforded by the *Chadwick-Sanders* rule, and our seri-
ous doubt whether that rule substantially serves privacy interests"196

Thus, in the 1990s, the Court reasserted the important role prob-
able cause played in *Carroll*’s automobile exception. In clarifying the
rule in *Ross*, the *Acevedo* Court reiterated that probable cause is the
compass for the automobile exception. This is demonstrated by the
words of Justice Blackmun in *Acevedo*: "[T]he police may search
without a warrant if their search is supported by probable cause."197

II. WYOMING V. HOUGHTON

A. Factual Background

In the "early morning hours" of July 23, 1995, Wyoming High-
way Patrol Officer Delane Baldwin stopped a 1977 Cadillac traveling
east on Interstate 25 in Natrona County.198 Officer Baldwin had pulled
the automobile over for speeding and a burned out brake light.199
Soon after this stop, two other law enforcement officers joined Offi-
cer Baldwin at the scene.200 The car held three occupants, all in its
front seat: the driver, David Young, Young’s girlfriend, and Sandra
Houghton.201 Ms. Sandra Houghton was seated farthest from the
driver.202 When Officer Baldwin asked Young for his driver’s license,
registration, and insurance certificate, he “noticed a hypodermic sy-
ringe plainly visible in Mr. Young’s left front shirt pocket.”203 In re-
response, Officer Baldwin retrieved gloves from his patrol car and in-

195 Id. at 574-75.
196 Id. at 576.
197 Id. at 579.
198 See Brief for Petitioner at 2, Wyoming v. Houghton, 119 S. Ct. 1297 (1999) (No. 98-
184) [hereinafter Petitioner’s Brief].
199 See id.
201 See id.
202 “All the occupants [sic] were on the front seat, with respondent Houghton located at the
end next to the passenger door.” Petitioner’s Brief at 2.
203 Id.
structured Young to exit the vehicle and place the syringe on the car’s hood. When Officer Baldwin asked Young why he had a syringe, Young replied, “with refreshing candor,” that he used it to take drugs.

The back-up officers then ordered the two passengers to exit the Cadillac and provide identification. Houghton identified herself as either “Sandra Jones” or “Sandra James” and further claimed not to have identification. The officers then patted down all the occupants, “to see if there were any weapons or anything.” When these pat downs “yielded no weapons or contraband, the officers searched the car for drugs.”

Officer Baldwin based his search of the car on “the syringe and Mr. Young’s statement that he used the syringe to take drugs.” During this search, Officer Baldwin found a “closed lady’s cloth purse on the middle of the back seat.” Later, at a suppression hearing, Officer Baldwin would admit “he had no probable cause to search Ms. Houghton and that men do not usually carry purses.” Nonetheless, at the scene, Officer Baldwin opened and searched the purse, removing from it a wallet, which he also searched. The wallet contained Houghton’s photo driver’s license, identifying her as “Sandra K. Houghton.” Confronted with this evidence, Houghton admitted the purse was hers and explained her false name was “in case things went bad.”

With no further comment, Officer Baldwin continued his search of the purse, recovering and opening a brown “wallet bag” containing drug paraphernalia, a syringe filled with about 60 ccs of liquid that proved to be methamphetamine, a black wallet holding more drug paraphernalia, a vial, and another syringe with some 10 ccs of liquid methamphetamine. During Officer Baldwin’s search, although

204 See id.
205 See id.
208 See Houghton, 956 P.2d at 365.
209 Petitioner’s Brief at 2.
210 See id.
211 Houghton, 956 P.2d at 365 (internal quotation marks omitted).
212 Id.
213 Petitioner’s Brief at 3.
214 Id.
215 Respondent’s Brief at 1.
216 See Houghton, 956 P.2d at 365.
217 See Petitioner’s Brief at 3.
218 Id. (internal quotation marks omitted).
219 See id.; Houghton, 956 P.2d at 365.
Houghton had claimed ownership of the purse, she "selectively denied ownership of some of the items pulled from the purse." After taking the evidence into custody and finding fresh "needle track marks" on Houghton's arms, Officer Baldwin arrested Houghton and released Young and his girlfriend.

B. The Lower Court Rulings

The State of Wyoming charged Houghton with felony possession of methamphetamine in a liquid amount greater than three-tenths of a gram. Before trial, Houghton moved to suppress the evidence found during Officer Baldwin's warrantless search, arguing that it violated the Fourth and Fourteenth Amendments of the Constitution. The district judge issued a decision letter denying the motion to suppress, finding, "that the officer had probable cause to search the car for contraband and, therefore, any containers within the car which could hold the contraband were subject to search." A jury found Houghton guilty of one count of felony possession of a controlled substance. Houghton, sentenced to two to three years incarceration, appealed to the Wyoming Supreme Court.

Chief Justice Taylor authored the opinion of the Wyoming Supreme Court in *Houghton v. State*. In framing the issue, the Chief Justice demonstrated a keen awareness of the central role probable cause plays in the automobile exception. Chief Justice Taylor declared: "The issue before us is whether the personal belongings of a passenger may be searched under the 'automobile exception' when probable cause exists to search the automobile, but there is no probable cause to believe the passenger is involved in criminal activity."

Further, this formulation of the issue was a natural consequence of how the litigants themselves drew their battle lines around probable cause. Houghton asserted: "in the absence of probable cause to believe she possessed contraband, the search of her purse violated her justifiable expectation of privacy." Likewise, the State of Wyoming itself spoke in terms of probable cause. The Chief Justice saw the

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220 Petitioner's Brief at 3.
221 See id.; *Houghton*, 956 P.2d at 365.
222 See *Wyoming v. Houghton*, 119 S. Ct. 1297, 1299-00 (1999); see also WYO. STAT. ANN. § 35-7-1031(c)(iii) (Lexis 1999) (providing the statutory language under which Houghton was charged).
223 See Petitioner's Brief at 4.
224 *Houghton*, 956 P.2d at 365.
225 See id.
226 See id.
227 See id. at 364.
228 Id. at 366.
229 Id.
government position as follows: "The State counters that the officers had no duty to determine probable cause as to each container within the car, and consequently, the permissible scope of the search included the search of all containers, including a passenger’s purse."\(^{230}\)

For the State Supreme Court, Wyoming’s assertion of power over all containers came too close to a general search. The Chief Justice reminded the government that: "General seizures are prohibited; all searches must be supported by probable cause to believe evidence of a crime will be found."\(^{231}\) The Wyoming Supreme Court reasoned that the Fourth Amendment forbade general searches whether with or without a warrant.\(^{232}\) Certainly there existed a particularity requirement for warrants.\(^{233}\) Warrant exceptions must be equally limited, because "[t]he scope of a search is defined by the probable cause upon which that search is predicated, not whether that search is conducted pursuant to a warrant or pursuant to a recognized exception to the warrant requirement."\(^{234}\)

In *Houghton v. State*, the Wyoming Supreme Court therefore had to determine if a magistrate, had she been consulted, would find probable cause to search Houghton’s purse. The probable cause yardstick enabled Chief Justice Taylor to accurately measure the scope of Officer Baldwin’s power:

> [A]s *Ross* and *Acevedo* make clear, the permissible scope of the warrantless search of [the driver’s] car under the automobile exception is identical to a search conducted pursuant to a warrant. The problem in this case is that while Houghton’s purse could physically contain the object of the search, there was no probable cause to believe that contraband would be found in her personal belongings.\(^{235}\)

The Wyoming Supreme Court reversed Houghton’s conviction, finding that the officers did not have probable cause to search her personal effects and had "no reason to believe that contraband had been placed within the purse."\(^{236}\)

\(^{230}\) Id.

\(^{231}\) Id.

\(^{232}\) See id.

\(^{233}\) See id.

\(^{234}\) Id. (emphasis in original) (relying on *Ross*, where the Wyoming Supreme court noted: "The Supreme Court of the United States has unequivocally held that '[t]he scope of a warrantless search based on probable cause is no narrower—and no broader—than the scope of a search authorized by a warrant supported by probable cause’") (quoting United States v. Ross, 456 U.S. 798, 823 (1982)).


\(^{236}\) Id. at 372.
C. The U.S. Supreme Court’s Ruling in Houghton

Justice Scalia, who authored the Court’s opinion in Wyoming v. Houghton, structured his analysis into two sections. The first analytical route ostensibly considered the historical evidence of the Fourth Amendment: “In determining whether a particular governmental action violates this provision, we inquire first whether the action was regarded as an unlawful search or seizure under the common law when the Amendment was framed.” The Court’s analysis next shifted to employing a balancing approach to reasonableness:

Where [the historical] inquiry yields no answer, we must evaluate the search or seizure under traditional standards of reasonableness by assessing, on the one hand, the degree to which it intrudes upon an individual’s privacy and, on the other, the degree to which it is needed for the promotion of legitimate governmental interests.

In Houghton, Justice Scalia began his historical analysis with a review of Carroll, which he asserted “similarly involved the warrantless search of a car that law enforcement officials had probable cause to believe contained contraband.” The Houghton Court correctly noted that Carroll went back to the time of the framers to explore the reasonableness of the automobile exception. However, no where in its analysis is there even a brief mention of Carroll’s elaborate efforts to adhere to the fundamentals of the warrant preference and probable cause. After his brief summary of the Carroll opinion, Justice Scalia offered a mere sentence fragment from Carroll as that case’s holding: “[T]he [Carroll] Court held that ‘contraband goods concealed and illegally transported in an automobile or other vehicle may be searched for without a warrant’ where probable cause exists.” Here, crucial language was omitted from the end of Houghton’s quotation of Carroll. The language as it originally appeared in Carroll was as follows: “Having thus established that contraband goods concealed and illegally transported in an automobile or other vehicle may be for searched for without a warrant, we come now to consider under what circumstances such a search may be made.”

238 See id. at 1300-04 (1999).
239 Id. at 1300.
240 Id.
241 Id.
242 See id.
243 Id. (quoting Carroll v. United States, 267 U.S. 132, 153 (1925)).
244 Carroll v. United States, 267 U.S. 132, 153 (1925) (emphasis added).
The “circumstances” wording, omitted from *Houghton*, is critical, for it speaks against a per se rule and in favor of case-by-case analysis of facts for probable cause. Indeed, *Carroll* would deem an automatic right to search, reaching beyond the probable cause limit, inexcusable: “It would be intolerable and unreasonable if a prohibition agent were authorized to stop every automobile on the chance of finding liquor and thus subject all persons lawfully using the highways to the inconvenience and indignity of such a search.”

Similarly, *Houghton* may have taken artistic license with *Ross*. Justice Scalia found the following language supportive: “If probable cause justifies the search of a lawfully stopped vehicle, it justifies the search of every part of the vehicle and its contents that may conceal the object of the search.” Interestingly, and perhaps tellingly, *Houghton* did not sense a need to italicize the limiting portion of *Ross*’ phrase, “that may conceal the object of the search.”

The *Houghton* Court next aimed to strengthen its own position by contrasting it with a non-argument. Rather than consider the actual lack of probable cause to intrude into Houghton’s purse (regardless of ownership as to the purse), the Court argued that the automobile exception should apply equally to the driver’s and passenger’s articles. Here, *Houghton* bolstered its reasoning with the dog that didn’t bark. Justice Scalia noted that, “our later cases describing *Ross* have characterized it as applying broadly to all containers within a car, without qualification as to ownership.” The Court did acknowledge as true that “there was no passenger in *Ross*, and it was not claimed that the package in the trunk belonged to anyone other than the driver.” Still, Justice Scalia found it curious that any such “substantial limitation” as restricting the search to only those items belonging to the driver was not expressed. Here, the absence of language is grasped at in order to support the expansion of official powers.

In arguing against the red herring that there should be a difference in treatment between the driver’s and the passenger’s belongings, *Houghton* seemed to unknowingly stumble across crucial language from the *Ross* opinion. Justice Scalia noted: “*Ross* concluded from the historical evidence that the permissible scope of a warrantless car search ‘is defined by the object of the search and the places in

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245 Id. at 153-54.
247 Id. (quoting *Ross*, 456 U.S. at 825).
248 Id. (emphasis in original).
249 Id.
250 See id.
which there is probable cause to believe that it may be found."\(^2^{51}\) Of course, this is the key; the search should extend to only those places where probable cause to believe the item will be found actually exists.

Proof that the *Houghton* Court conveniently missed the significance of *Ross*’ limiting language came in *Houghton*’s next paragraph. There, Justice Scalia stated *Houghton*’s rule defining the scope of the automobile exception: "When there is probable cause to search for contraband in a car, it is reasonable for police officers—like customs officials in the Founding era—to examine packages and containers without a showing of individualized probable cause for each one.\(^2^{52}\)

This statement of a per se right to search all containers regardless of probable cause as to each container was directly contrary to the language *Houghton* had just quoted from *Ross*. Thus, the Court’s view of the automobile exception’s history seemed to suffer some blind spots.

Even though the *Houghton* Court was convinced that the "historical evidence" unequivocally supported the government’s search, the Court still proceeded to balance the interests in the case. Here, Justice Scalia pronounced passengers’ privacy expectations as "reduced" due to the following factors: (1) the car’s traveling in "public thoroughfares;" (2) the "pervasive governmental controls" over vehicles; (3) the failure of passengers to use cars as "the repository of personal effects;" and (4) the exposure to the possibility of "traffic accidents," which might "render all their contents open to public scrutiny."\(^2^{53}\)

While the passenger’s privacy expectations were thus "considerably diminished," the government’s interests remained "substantial."\(^2^{54}\) Much of the state interest turned upon the passenger’s guilt by association with the driver. Justice Scalia worried that, "a car passenger . . . will often be engaged in a common enterprise with the driver, and have the same interest in concealing the fruits or the evidence of their wrongdoing."\(^2^{55}\) After all, a passenger’s mere "presence in the car with the driver provided more, rather than less, reason to believe that the two were in league."\(^2^{56}\) Passengers also ran the risk of being dupes: "A criminal might be able to hide contraband in a passenger’s belongings as readily as in other containers in the car . . . perhaps

\(^{251}\) *Id.* (quoting *Ross*, 456 U.S. at 824).

\(^{252}\) *Id.*

\(^{253}\) *See id.* at 1302 (internal quotation marks omitted).

\(^{254}\) *See id.*

\(^{255}\) *Id.*

\(^{256}\) *Id.* at 1303.
even surreptitiously, without the passenger's knowledge or permission.\textsuperscript{257}

Such scenarios led the Court to conclude that the interests balanced "[in] favor of the needs of law enforcement, and against a personal-privacy interest that is ordinarily weak."\textsuperscript{258} Both its tailored view of history and its assumptions about the relative interests in the case led the *Houghton* Court's to its final conclusion: "We hold that police officers with probable cause to search a car may inspect passengers' belongings found in the car that are capable of concealing the object of the search."\textsuperscript{259}

### III. The Implications of *Houghton*'s Expansion of the Automobile Exception

Justice Scalia's opinion in *Houghton* is a study in selective citation. At the outset of the Court's analysis, *Houghton* quoted only the reasonableness clause of the Fourth Amendment. The Court began: "The Fourth Amendment protects '[t]he right of the people to be secure in their persons, houses, papers, and effects, against unreasonable searches and seizures.'\textsuperscript{260} The omission of any mention of the Warrant Clause was significant, for it demonstrated the Court's underlying resistance to employ the Clause's restrictions on law enforcement.

Justice Scalia's intentional neglect of the Warrant Clause may be shown by contrasting *Houghton*'s opening analysis with that of another Fourth Amendment case of the Court's, *Maryland v. Dyson*.\textsuperscript{261} *Dyson* is particularly revealing for it not only came out during the same term as *Houghton*, but also dealt with the same privacy concern: the automobile exception.\textsuperscript{262} *Dyson* begins with a discussion that mirrors the Court's Fourth Amendment analysis for the last three-quarters of the century.\textsuperscript{263} In *Dyson*, the Court noted: "The Fourth Amendment generally requires police to secure a warrant before conducting a search."\textsuperscript{264}

In contrast to *Dyson* and its other automobile exception cases stretching back to *Carroll*, the Court in *Houghton* failed to acknowledge the warrant requirement. Instead, Justice Scalia tried to pass off,
as business as usual, a novel two-pronged approach to Fourth Amendment cases. To declare a violation, the Court must first decide whether the government intrusion would have been “regarded as an unlawful search or seizure under the common law” at the time of framing.\textsuperscript{265} Of course, this portion of Justice Scalia’s test, which explores original intent, is far from revolutionary. Indeed, if performed properly, it would lead the Court back to Carroll’s review of the laws of the original Congresses.\textsuperscript{266} Yet, as we shall see below, when performed improperly, it can undo decades of precedent, creating confusion and uncertainty.

Moreover, the Court’s second avenue of analysis represented a truly new, and dangerous, innovation. Should Justice Scalia’s review of the common law fail to adequately inform the Court on the Fourth Amendment, he declared: “[W]e must evaluate the search or seizure under traditional standards of reasonableness by assessing, on the one hand, the degree to which it intrudes upon an individual’s privacy and, on the other, the degree to which it is needed for the promotion of legitimate governmental interests.”\textsuperscript{267} Thus, Houghton created a new backdrop for every Fourth Amendment case; if the Justices find the text and history unsatisfactory, they may proceed with their own balancing of interests in the individual case.

A. Houghton’s Unique View of History and Court Precedent

Close examination reveals that Justice Scalia’s investigation of the “historical evidence”\textsuperscript{268} is less objective fact than it is personal viewpoint. Examples of this subjectivity appear immediately in the Court’s opinion. In the first sentence reviewing the Court’s precedent, Justice Scalia announced, “It is uncontested in the present case that the police officers had probable cause to believe there were illegal drugs in the car.”\textsuperscript{269} With this concession going in the government’s favor, Justice Scalia was quick to rely on the defendant’s failure to argue the point as creating probable cause in fact.

However, Justice Scalia has not always rushed to embrace the factual record established by conceded contentions. In California v. Hodari,\textsuperscript{269} it was the government that failed to present an argument by conceding that the officer who stopped the defendant in that case “did not have the ‘reasonable suspicion’ required to justify stopping Ho-

\textsuperscript{265} Houghton, 119 S. Ct. at 1300.
\textsuperscript{266} See Carroll v. United States, 267 U.S. 132, 149-53 (1925) (discussing statutes passed by the First, Second, and Fourth Congress, among others).
\textsuperscript{267} Houghton, 119 S. Ct. at 1300.
\textsuperscript{268} See id.
\textsuperscript{269} Id.
Despite the concession, Justice Scalia could not resist delving into the facts on the issue: "That it would be unreasonable to stop, for brief inquiry, young men who scatter in panic upon the mere sighting of the police is not self-evident, and arguably contradicts proverbial common sense." He then went on to quote the relevant proverb: "The wicked flee when no man pursueth." 

Further, in arguing that Houghton conceded probable cause in the car, the Court avoided the true battleground: the lack of probable cause in Houghton's purse. It is the disparity between the scope of the justification to search (as based on probable cause), and the scope of the search actually conducted that needs to be addressed. Yet, the Court, by quickly seizing upon a concession about the car, glossed over the true issue presented by Officer Baldwin's intrusion of Houghton's purse.

If, as Justice Scalia determined, deciding the Fourth Amendment issue in this case required a review of the "historical evidence," then such an examination arguably should include all of the pertinent historical evidence. Neither any case nor any fact should be overlooked. However, in discussing probable cause to search the car, Houghton never offered a definition of probable cause itself. Perhaps, in light of the definitions offered in such seminal cases as *Carroll* and *Illinois v. Gates*, the Court in *Houghton* felt no need to revisit the meaning of this fundamental level of certainty.

This is unfortunate, because a brief refresher of the *Gates* test might have led the Court to a more careful analysis of the facts in *Houghton*. In *Gates*, the Court repeatedly concluded that probable

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271 *Id.*
272 *Id.* (quoting Proverbs 28:1).
273 *Houghton*, 119 S. Ct. at 1300.
274 In *Carroll*, the Court defined probable cause as follows: "If the facts and circumstances before the officer are such as to warrant a man of prudence and caution in believing that the offense has been committed, it is sufficient." *Carroll v. United States*, 267 U.S. 132, 161 (1925) (quoting *Stacey v. Emery*, 97 U.S. 642, 645 (1878)). In applying its automobile exception, the *Carroll* Court decided a further reference to the test of probable cause was in order:

[J]t is clear that the officers here had justification for the search and seizure. This is to say that the facts and circumstances within their knowledge and of which they had reasonably trustworthy information were sufficient in themselves to warrant a man of reasonable caution in the belief that intoxicating liquor was being transported in the automobile which they stopped and searched.

*Id.* at 162.
276 *Gates* involved the assessment of probable cause in the warrant context. *See id.* at 235 (discussing the non-technical nature of the issuing of most search warrants). However, as previously noted, *Ross* equated the scope of a search pursuant to a warrant and a search pursuant to the automobile exception: "*Carroll* 'merely relaxed the requirements for a warrant on grounds of practicability.' It neither broadened nor limited the scope of a lawful search based on probable cause." *United States v. Ross*, 456 U.S. 798, 820 (1982).
cause was an exercise in weighing the “totality of the circumstances.” Further, as shown in the review of the Court’s automobile exception precedent in Part II above, the Court has backed its “totality of circumstances” words with deeds. Over the decades, from Carroll to Acevedo, the Court consistently adhered to considering all the facts surrounding the probable cause issue by probing the myriad details involved in probable cause determinations.

Further, Gates' totality of the circumstances approach is not to be applied in blanket fashion to an entire area. Instead, the Court in Gates took care to focus its inquiry to the narrow question of “whether there is ‘probable cause’ to believe that contraband or evidence is located in a particular place.”

If, in Houghton, the trouble were taken to follow Gates’ mandate of considering all the facts surrounding the search, and further care was exercised in clearly identifying the precise location of the search, the details would have pointed to a different conclusion regarding the existence of probable cause in Houghton's purse. Justice Scalia noted that, while questioning the driver, the Highway Patrol officer “noticed a hypodermic syringe in Young's shirt pocket.” Additionally, when asked why he had the syringe, the driver, “with refreshing candor,” answered that “he used it to take drugs.” The Houghton Court seemingly would base probable cause on these two facts alone, for without criticism, it then related that, “in light of Young's admission,” the officers proceeded to search the passenger compartment of the car and open the purse found in the back seat.

Yet, the recitation of these few facts should be only the beginning of the probable cause “totality of the circumstances” analysis. A full consideration of all of Houghton’s facts presents less justification of even a search of the car’s passenger compartment than in previous cases. For instance, merely possessing paraphernalia for drug use is quite different from the detailed evidence of the transportation for sale of contraband liquor in Carroll.

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277 The Gates Court followed the “totality of the circumstances” rule. See, e.g., Gates, 462 U.S. at 230 (“This totality-of-the-circumstances approach is far more consistent with our prior treatment of probable cause . . . .”); id. at 233 (discussing the “totality-of-the-circumstances analysis that traditionally has guided probable cause determinations”); id. at 234 (arguing that “a totality-of-the-circumstances analysis . . . permits a balanced assessment of the relative weights of all the various indicia of reliability”); id. at 238 (“[w]e reaffirm the totality-of-the-circumstances analysis that has traditionally informed probable-cause determinations.”).

278 See supra Part II (discussing the evolution of probable cause in the context of the automobile exception).

279 Gates, 462 U.S. at 230 (emphasis added).


281 Id.

282 Id.
Probable cause existed in *Carroll* due to a wealth of convincing details. First, police recognized the car they stopped as being the one driven by known bootleggers ("the Carroll boys") who had previously entered into an agreement to sell illicit liquor to agents in an undercover operation.\(^{283}\) At this previous meeting, the defendants had agreed to sell three cases of illegal whiskey at a specified price of $130 a case.\(^{284}\) Only one week after the attempted undercover buy, while patrolling a road frequently used by bootleggers, the officers saw Carroll's Oldsmobile Roadster driving and followed the Carroll boys until they "lost trace of them."\(^{285}\) This road was a favorite of the rumrunners because it ran from the neighborhood of Detroit, which was near the international boundary and therefore a source city for alcohol.\(^{286}\) Police could surmise that, since it was driven to a negotiation for sale and seen on the route from Detroit, Carroll's car was itself an instrumentality used to carry illegal liquor. About two months after the previous encounter, the officers again saw the Roadster, this time heading from Detroit to Grand Rapids.\(^{287}\) Since alcohol was smuggled from Detroit, and officers knew, due to their undercover meeting with Carroll, that his market was Grand Rapids, they could reasonably conclude that the car was presently filled with illicit liquor.\(^{288}\) All of these facts combined together to establish that at the moment the car was stopped, there was a substantial likelihood that contraband would be found in the car.

Furthermore, as noted above, the Court had previously established a consistent track record of discipline in looking at the totality of circumstances in each case. In precedent such as *Brinegar, Chambers, Ross,* and *Acevedo,* the Court never shirked from its duty of weighing all the facts to establish whether probable cause existed to support the search.

In comparison to the Court's earlier automobile exception jurisprudence, *Houghton* stands out as an ugly aberration. There is simply a dearth of factual analysis in *Houghton*; Young was found with a syringe and openly admitted his personal drug use. Before jumping to the conclusion that drugs were present in the car, the Court should...

\(^{283}\) See Carroll v. United States, 267 U.S. 132, 134-35 (1925) (describing prior efforts of undercover agents to buy liquor from the bootleggers); id. at 160 (pointing out that "the Carroll boys" were known by the agents to be bootleggers).

\(^{284}\) See id. at 134-35 (describing details of agent's attempt to buy illegal whiskey from the bootleggers).

\(^{285}\) Id. at 135.

\(^{286}\) See id. at 160 (describing Detroit as "one of the most active centers for introduction illegally into [the U.S.] spirituous liquors for distribution into the interior").

\(^{287}\) See id. at 135 (describing details of the *Carroll* search).

\(^{288}\) See id. at 162 (concluding that the search was reasonable in light of the facts known to the agents at the time).
have taken the trouble to weigh the import of the facts. For instance, unlike bootlegging, the car of a person who uses drugs has no special relationship to the crime of drug possession. A person holding contraband for personal use may inject his or her drugs in virtually any location, whether it is at home, in a car, or in a park. Further, many users possess only so much of a drug for one dose, and thus run out after only one use. This fact enables officers, trained to know the typical habits of use and sale of controlled substances, to testify whether a particular amount of a drug is being held for personal use or for sale. Therefore, the mere existence of paraphernalia might not necessarily lead a person of reasonable caution to believe drugs are in the car.

Moreover, one of the facts relied upon by Houghton could actually point away from probable cause to believe drugs were in the car. Justice Scalia wryly characterized Young’s admission as given with “refreshing candor.” Additionally, Young allowed his syringe to be “plainly visible” in his left front shirt pocket. Such open behavior is hardly the norm for the typical trafficker carrying drugs in his car. Perhaps a complete review of all Houghton’s circumstances would still point to probable cause in the car. However, the discussion of the few facts relied on in Houghton provided a much less credible conclusion than those existing in Carroll and its progeny. Indeed, the Court has decided several cases where one of the facts indicating the presence of contraband is the evasion or nervousness of the suspect. If Houghton would argue that people have been known to unaccountably admit guilt to officers, it would still seem inconsistent to both advertise one’s drug use with an open display of a syringe and a candid admission of use, while at the same time conceal drug use by hiding the drugs in another’s purse.

290 See Petitioner’s Brief at 2.
291 For instance, the Court has previously noted that: “Contraband goods rarely are strewn across the trunk or floor of a car; since by their very nature such goods must be withheld from public view, they rarely can be placed in an automobile unless they are enclosed within some form of container.” United States v. Ross, 456 U.S. 798, 820 (1982). Thus, the typical behavior of one holding drugs is to conceal the signs of their existence, not to flaunt them.
292 See, e.g., Florida v. Rodriguez, 469 U.S. 1, 6 (1984) (per curiam), in which the Court found the following evasive behavior relevant to the justification for an official intrusion: Before the officers even spoke to the three confederates, one by one they had sighted the plainclothes officers and had spoken furtively to one another. One was twice overheard urging the others to “get out of here.” Respondent’s strange movements in his attempts to evade the officers aroused further justifiable suspicion .... Id.

Similarly, the Court relied upon the suspect’s nervousness in supporting official action in United States v. Mendenhall, 446 U.S. 544, 548 (1979) (“[T]he respondent ‘became quite shaken, extremely nervous. She has a hard time speaking.’”).
This, of course, is the largest leap required in *Houghton*. Even with probable cause in the car conceded, probable cause to believe that the purse contained contraband could not be established. Officer Baldwin himself recognized as much. He testified during the suppression hearing that he had “no probable cause to search Ms. Houghton.” Further, a purse is a uniquely gender-based container typically possessed only by women. The driver was a male, making the likely owner of the purse one of the two female passengers. To find probable cause in the purse itself would either require a willing blindness to these particular facts or to the precedent mandating probable cause support the entire reach of the search.

*Houghton* perhaps chose a bit if both. Certainly the Court demonstrated blissful ignorance of automobile exception precedent. The distorted view of this doctrine’s history began with Justice Scalia’s reference to *Carroll* itself. In the Court’s opinion, he attempted to equate *Houghton* with the original automobile exception case: “*Carroll v. United States* . . . similarly involved the warrantless search of a car that law enforcement officials had probable cause to believe contained contraband—in that case, bootleg liquor.” In reality, the similarity ends upon Officer Baldwin’s opening of Houghton’s purse, for, unlike the Wyoming Highway Patrol officer, the federal agents in *Carroll* not only had probable cause to search the Carroll Boy’s car, but also to tear up its upholstery. Carroll and his confederate were experienced bootleggers travelling under cover of night on a route frequented by smugglers from a source city to their usual market. As noted in *Ross*, rarely is contraband “strewn across the trunk or floor of a car.” Such open exposure would be even less likely when the contraband in question is being transported by seasoned traffickers aware they were being watched by police. Thus, quite unlike *Houghton*, *Carroll* presents a case where law enforcement had probable cause to perform a more probing search of the car and its containers.

The gap between *Houghton’s* reading of the historical evidence and the Court’s actual precedents only widened with the discussion of *Ross*. Justice Scalia cited *Ross* for support, asserting, “we upheld as reasonable the warrantless search of a paper bag and leather pouch found in the trunk of the defendant’s car by officers who had probable cause to believe that the trunk contained drugs.” What *Houghton* here conveniently overlooked was that *Ross* upheld the search of the

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293 Respondent’s Brief at 1.
294 The officer himself acknowledged that “[M]en do not usually carry purses.” *Id.*
295 *Houghton*, 119 S. Ct. at 1300 (citation omitted).
296 *Ross*, 456 U.S. at 820.
297 *Houghton*, 119 S. Ct. at 1300.
bag and pouch because the officers also had probable cause to search these very containers. Otherwise, the Ross Court would not have committed itself to the following rule: "The scope of a warrantless search of an automobile... is defined by the object of the search and the places in which there is probable cause to believe that it may be found."\(^{298}\)

Apparently, the Houghton Court would have us believe that the language "the places in which there is probable cause to believe that it may be found" in Ross refers simply to a qualification that the sought contraband or evidence could *physically fit* in the searched container. Hence Houghton's holding that officers possessing probable cause to search a car may search belongings within the car which "are capable of concealing the object of the search."\(^{299}\) This strained reading of the scope rule in Ross breaks down when the rest of the paragraph is considered, for Ross continued:

Just as probable cause to believe that a stolen lawnmower may be found in a garage will not support a warrant to search an upstairs bedroom, probable cause to believe that undocumented aliens are being transported in a van will not justify a warrantless search of a suitcase. Probable cause to believe that a container placed in the trunk of a taxi contains contraband or evidence does not justify a search of the entire cab.\(^{300}\)

Certainly, Young's drugs could physically fit within Houghton's purse. However, this fact alone would not satisfy Ross. The automobile exception under Ross extended only so far as an officer had probable cause. Officer Baldwin, faced with a male driver openly admitting he possessed a syringe for drug use, had no more facts to connect this illegal activity to a female's purse.

Justice Scalia's historical record became curiously quiet when considering the Court's most recent decision delineating the scope of the automobile exception, Acevedo. The majority opinion contained only one mention of Acevedo, and this was in reference to what that case did not say.\(^{301}\) Houghton offered the Acevedo case as an example of how the Court's "later cases describing Ross have characterized it as applying broadly to all containers within a car, without qualification as to ownership."\(^{302}\) The Court made a peculiar choice in focus-

\(^{298}\) Ross, 456 U.S. at 824.
\(^{299}\) Houghton, 119 S. Ct. at 1304.
\(^{300}\) Ross, 456 U.S. at 824.
\(^{301}\) Houghton, 119 S. Ct. at 1301 (citing for support, California v. Acevedo, 500 U.S. 565, 572 (1991)).
\(^{302}\) Id.
ing its attention on this portion of Acevedo. As previously discussed, drawing any inferences from the Court's earlier failure to indulge in dicta is unwise at best. Discussing the scope of a search of a passenger's container in Acevedo made about as much sense as discussing any irrelevant point, such as consent to search or electronic surveillance.

Yet, even more importantly, choosing only this one reference to Acevedo meant ignoring other, more pertinent portions of that case. If Houghton wished to detect in Acevedo a meaningful characterization of Ross, it could have noted this statement of Ross' holding: "In United States v. Ross . . . we held that a warrantless search of an automobile under the Carroll doctrine could include a search of a container or package found inside the car when such a search was supported by probable cause."\(^{303}\)

Thus, when the automobile exception precedent is properly reviewed, by filling in the crucial portions omitted by Justice Scalia, it becomes clear that Houghton's new rule represents a dramatic expansion of official search power under the automobile exception. First, the Court held: "that police officers with probable cause to search a car may inspect passengers' belongings found in the car that are capable of concealing the object of the search."\(^{304}\) Next, it applied this rule to enable an officer to search a container in which he had no probable cause.

Despite Justice Scalia's assurances to the contrary, the formation and application of Houghton's new rule does indeed do violence to history. Unfortunately, this unnecessary break with the historical evidence could undermine the protection provided by probable cause.

B. Houghton's Expansion and Distortion of the Fourth Amendment's Balancing Analysis

The most curious portion of Houghton's Fourth Amendment discussion involved the Court's balancing of the competing interests of the government and the individual. Perhaps doubting the persuasive force of his own review of history,\(^{305}\) Justice Scalia offered a fallback argument: "Even if the historical evidence . . . were thought to be equivocal, we would find that the balancing of the relative interests weighs decidedly in favor of allowing searches of a passenger's be-

\(^{303}\) Acevedo, 500 U.S. at 570 (citation omitted) (emphasis added).

\(^{304}\) Houghton, 119 S. Ct. at 1304.

\(^{305}\) At the outset of his discussion in Houghton, Justice Scalia seemed to indicate that balancing would be used only when the historical inquiry "yields no answer." See id. at 1300. Therefore, the mere presence of the Court's subsequent balancing analysis itself calls into question the validity of Justice Scalia's historical analysis.
longings. What is radical about this argument is its very existence in the case.

The balancing analysis, which Justice Scalia strained to characterize as among the "traditional standards of reasonableness," is an aberration of basic doctrine formed during the activist Warren Court. Indeed, it is ironic that the very Justice who has consistently prided himself on divining the meaning of the Fourth Amendment by studying the common law at the time of framing should find himself grasping at an analytical straw which is at most only three decades old.

Realizing the uniqueness of the balance-of-interests approach, the Court has traditionally taken great care to limit its use to cases involving "special needs," in other words, governmental action outside the traditional context of criminal investigation. The limited application of the "special needs" doctrine was best explained by Justice Blackmun:

[W]e have used such a balancing test, rather than strictly applying the Fourth Amendment's Warrant and Probable-Cause Clause, only when we were confronted with "a special law enforcement need for greater flexibility."

Justice Blackmun then referred to his opinion in *U.S. v. Place*, 462 U.S. 696 (1983), where he stated:

"While the Fourth Amendment speaks in terms of freedom from unreasonable [searches], the Amendment does not leave the reasonableness of most [searches] to the judgment

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306 Id. at 1302.
307 See id. at 1300.
308 See, e.g., *Terry v. Ohio*, 392 U.S. 1, 20-25 (1968), in which the Court abandoned the probable cause requirement in the setting of investigatory detentions by weighing the government's interests in making such stops against individual interests of privacy; see also *Camara v. Municipal Court*, 387 U.S. 523, 538-39 (1967), wherein the Court restructured the probable cause analysis for administrative warrants from a probability inquiry to a balancing test.
309 Justice Scalia has repeatedly sought to focus the Court's Fourth Amendment analysis on common law definitions and doctrines used at the time of framing. In *Houghton*, for example, Justice Scalia stated: "In determining whether a particular governmental action violates this provision, we inquire first whether the action was regarded as an unlawful search or seizure under the common law when the Amendment was framed."

310 See New Jersey v. T.L.O., 469 U.S. 325, 351 (1985) (Blackmun, J., dissenting)).
of courts or government officers; the Framers of the Amendment balanced the interests involved and decided that a [search] is reasonable only if supported by a judicial warrant based on probable cause.\textsuperscript{312}

Justice Scalia himself knew that his balancing analysis was to be restricted to only cases involving special needs. This is apparent by his citation in support of his use of the balancing approach.\textsuperscript{313} In it, he specifically mentioned \textit{Vernonia School District 47J v. Acton},\textsuperscript{314} a case involving the special needs of maintaining a safe school environment for students.\textsuperscript{315} Justice Scalia had to be aware of the limits of \textit{Vernonia}'s analysis for he wrote the majority opinion in the case.\textsuperscript{316}

Despite special needs' limits, Justice Scalia employed this unique analysis in a case having nothing to do with special needs. \textit{Houghton} was a traditional case involving Fourth Amendment constraints upon an investigation seeking evidence of criminality.\textsuperscript{317} Thus, \textit{Houghton}'s use of special needs balancing represents a dramatic expansion of police search powers in criminal investigations. Justice Scalia, the Court's self-appointed strict constructionist, extended the reach of a novel doctrine which has no textual basis in the Fourth Amendment and no track record in the common law at the time of framing. Further, this dangerous innovation was, according to Justice Scalia, unnecessary, for the Court had already disposed of the issue in \textit{Houghton} by sifting through historical evidence.\textsuperscript{318}

Further, even if we were to accept the leap in logic that special needs balancing should apply in \textit{Houghton}, the Court's balancing analysis failed on its own terms. In weighing individual interests, Justice Scalia argued that passengers "possess a reduced expectation of privacy with regard to the property that they transport in cars."\textsuperscript{319} This is due to a variety of factors. Cars travel "public thoroughfares,"

\begin{footnotesize}
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\item \textsuperscript{312} \textit{Id.} (quoting United States v. Place, 462 U.S. 696 (1983)).
\item \textsuperscript{313} \textit{See Houghton}, 119 S. Ct. at 1300.
\item \textsuperscript{314} 515 U.S. 646 (1995).
\item \textsuperscript{315} \textit{Houghton}, 119 S. Ct. at 1300; \textit{see also} \textit{Vernonia}, 515 U.S. at 653 (finding that: Where a search is undertaken by law enforcement officials to discover evidence of criminal wrongdoing, this Court has said that reasonableness generally requires the obtaining of a judicial warrant. But a warrant is not required to establish the reasonableness of all government searches . . . . A search unsupported by probable cause can be constitutional, we have said, "when special needs, beyond the normal need for law enforcement, make the warrant and probable cause requirement impracticable") (citations omitted).
\item \textsuperscript{316} \textit{See id.} at 648.
\item \textsuperscript{317} As previously discussed, \textit{Houghton} involved an officer searching an automobile for illegal drugs and ultimately arresting the passenger for drug possession. \textit{See Houghton}, 119 S. Ct. at 1299.
\item \textsuperscript{318} \textit{See id.} at 1302.
\item \textsuperscript{319} \textit{Id.}
\end{itemize}
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“seldom serve as . . . the repository of personal effects,” are subjected to “pervasive” governmental controls,” and “are exposed to traffic accidents that may render all their contents open to public scrutiny.”

Yet, perhaps a passenger’s interests are not as minor as Houghton would deem. The idea that cars seldom act as repositories of personal effects might be dated. It comes from South Dakota v. Opperman, a 1976 case. Today, with minivans carrying diaper bags, patients picking up prescriptions at drive through pharmacies, and professionals bringing sensitive documents home for work in the evenings, many people rely on their vehicles to hold personal effects.

What may be more troubling is the privacy-lessening factor newly crafted by the Houghton Court. Now, the risk of a traffic collision which could expose “all” of a car’s contents “to public scrutiny” erodes privacy expectations to such a degree that police can invade a purse found in a car. The Court could not be talking about the typical fender-bender; it would seem that in only the most violent traffic accidents would a purse actually fly out of a car and empty its contents. It is curious that daily privacy expectations can be so effectively shrunk by a worse case scenario. Imagine if the same logic applied to the most private of possessions, the home. Conceivably, a house is exposed to all sorts of disasters: fires, floods, hurricanes, tornadoes, and earthquakes. This does not include human intrusions from looting, peeping, or burglary. Such worse case scenarios do not lessen the expectation of privacy traditionally accorded homes.

If the Court has discounted the interests of the individual, it has certainly inflated any interest of the government. Whereas Houghton deemed the passenger’s privacy expectations as “considerably diminished,” it labeled the state’s interests as “substantial.” Justice Scalia premised this government interest in Houghton’s purse on a need to search Young’s car. He asserted: “Effective law enforcement would be appreciably impaired without the ability to search a passenger’s personal belongings when there is reason to believe contraband or evidence of criminal wrongdoing is hidden in the car.” This turns the Fourth Amendment on its head. Instead of maintaining a particularity requirement where an officer may intrude only where he or

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320 Id. (citations omitted).
322 See Houghton, 119 S. Ct. at 1302.
323 See id.
324 Id.
325 The Fourth Amendment provides that warrants be issued only when “particularly describing the place to be searched, and the persons or things to be seized.” U.S. CONST. amend. IV. Again, the Court’s declaration in Ross that an automobile exception search be neither
she has justification to search, *Houghton* has expanded official search powers once probable cause in a general place, such as a vehicle, is established.

*Houghton* feared still more obstacles to effective law enforcement. Due to a car’s “ready mobility,” evidence might be permanently lost while police pursue a warrant. The driver and passenger might be in cahoots, and therefore the driver “might be able to hide contraband in a passenger’s belongings as readily as in other containers in the car.” In what seems to be a self-conscious moment, Justice Scalia realized that he might be substituting the worst possible situation for the typical one. He wrote, “To be sure, these factors favoring a search will not always be present, but the balancing of interests must be conducted with an eye to the generality of cases.” The admission that the Court has focused its attention on the “generality of cases” vividly shows the dangers of special needs balancing. The Fourth Amendment, by its own terms, is meant to protect each individual from every government search or seizure. This is evident by the Amendment’s reference to requirements designed to be applied in the individual case, such as probable cause and particularity. The more the Court performs its balancing analysis according to its own notion of reasonableness, the farther it strays from protecting the citizen in every case.

All of the talk about mobile vehicles and conspiracies between occupants in cars seemingly multiplied the magnitude of the government’s interests. The problem with this reasoning was that there was no governmental interest in the first place upon which to heap the parade of horribles. The government simply had no legitimate interest in searching a purse in which it lacks probable cause.

Blankety checking every purse in each automobile exception search is reminiscent of an official action already prohibited by the Court. In *Delaware v. Prouse*, the Court was presented with an officer’s stop of a motorist in order to check the driver’s license and registration. Justice White, writing the opinion for the *Prouse* Court,

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broader nor narrower than a search pursuant to a warrant causes this portion of the Amendment, defining the limitations on the scope of a warrant search, to be relevant. *See* United States v. Ross, 456 U.S. 798, 820 (1982) (stating that the decision in *Carroll v. United States* “neither broadened nor limited the scope of a lawful search based on probable cause”).

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326 *See Houghton*, 119 S. Ct. at 1302.
327 *Id.* at 1303. Curiously, the case cited by the Court to support this assertion, *Rawlings v. Kentucky*, 448 U.S. 98 (1980), took place not between a driver and passenger, but between two occupants of a house. *See id.* at 102. The connection of a discussion of passengers in a car with a case involving only persons in a home itself demonstrates that the *Houghton* Court put forth a contention that stretched too far.

328 *Houghton*, 119 S. Ct. at 1303.
noted that, “prior to stopping the vehicle [the officer] had observed neither traffic or equipment violations nor any suspicious activity.”

Prouse held that this suspicionless seizure violated Fourth Amendment reasonableness. This was in spite of an asserted government interest in promoting roadway safety by “ensuring that only those qualified to do so are permitted to operate motor vehicles.”
Prouse doubted whether the “discretionary spot check” was “a sufficiently productive mechanism to justify the intrusion upon Fourth Amendment interests which such stops entail.”

Regarding efficacy, the Court noted that, “[T]he foremost method of enforcing traffic and vehicle safety regulations . . . is acting upon observed violations.”

Moreover, Justice White worried about the impact such suspicionless intrusions would have on innocent citizens. He noted: “It seems common sense that the percentage of all drivers on the road who are driving without a license is very small and that the number of licensed drivers who will be stopped in order to find one unlicensed operator will be large indeed.”

In contrast to the common sense demonstrated by Justice White, Justice Scalia in Houghton seemed seized by a bout of paranoia. Without citing any factual support, he asserted that a car passenger “will often be engaged in a common enterprise with the driver, and have the same interest in concealing the fruits or the evidence of their wrongdoing.” This haunting fear of conspiring motorists caused Houghton to miss the bigger picture, which was painted by Prouse. Admittedly, searching every purse in a car regardless of probable cause will expose illegality which otherwise would have been missed. This boost to law enforcement, however, comes at a terrible cost. As the Prouse Court would have noted, the number of purses in which suspicionless searches will find contraband would be “very small” while the entire number of purses searched will be “large indeed.”

Even more damning is the fact that the passenger’s guilt-by-association analysis has already been squarely rejected by the Court itself. In United States v. Di Re, the Court was faced with a search concerning a car passenger. On the homefront during World War

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330 Id. at 650.
331 See id. at 663 (requiring reasonable suspicion that a driver is unlicensed, a vehicle is unregistered, or an occupant is otherwise subject to search and seizure to stop a vehicle and detain its driver).
332 Id. at 658.
333 Id. at 659.
334 Id.
335 Id. at 660.
338 See id. at 583.
II, an informant, Reed, tipped off an investigator for the Office of Price Administration that "he was to buy counterfeit gasoline ration coupons from a certain Buttitta." Officers "trailed Buttitta’s car and finally came upon it parked at the appointed place. When they approached, officers found Reed in the back seat of Buttitta’s car, holding what later proved to be two counterfeit gasoline coupons. Reed explained that he had obtained the coupons from Buttitta, who was sitting in the driver’s seat. Reed said nothing to implicate Di Re, the front seat passenger next to Buttitta. Yet, all three men were placed in custody, frisked for weapons, and taken to the police station. When Di Re complied with an order to put the contents of his pockets on a table, "[t]wo gasoline and several fuel oil ration coupons were laid out." Later, during Di Re’s booking, a more thorough search recovered one hundred coupons in an envelope "concealed between his shirt and underwear."

As a fallback argument, the government advanced the notion that, incidental to an automobile exception search, it “may search any occupant of such car when the contraband sought is of a character that might be concealed on the person.” In Di Re, the government aimed to bolster this contention with a rationale based on necessity. It offered: “common sense demands that such right exist in a case such as this where the contraband sought is a small article which could easily be concealed on the person.” Notably, this language eerily foreshadows Justice Scalia’s own worries in Houghton. As discussed above, in Houghton, Justice Scalia saw the government needs as “substantial,” because he wrung his hands over the danger that car passengers could be “concealing the fruits or the evidence of their wrongdoing.” He further lamented, “[a] criminal might be able to hide contraband in a passenger’s belongings as readily as in other containers in the car.” However, unlike the members of the Houghton majority, the justices of the Di Re Court did not perceive

339 Id.
340 Id.
341 See id.
342 See id.
343 See id.
344 See id.
345 See id.
346 See id.
347 The government advanced as its first contention the theory that the search of Di Re fell within a search incident to arrest. See id. at 583-84.
348 Id. at 584.
349 See id. at 587.
350 Id. at 586.
352 Id. at 1303.
law enforcement as terribly vulnerable to perils stemming from Fourth Amendment rights.

Justice Jackson, writing for the *Di Re* Court, deflated the government's "necessity" contention for searches of persons in cars by drawing a comparison with searches of persons in houses. He noted that the prosecution had refused to go out on the "necessity" limb with homes: "The Government says it would not contend that, armed with a search warrant for a residence only, it could search all persons found in it." Yet, Justice Jackson also noted that any dangers facing the government in a car would likewise exist in the home:

> [A]n occupant of a house could be used to conceal this contraband on his person quite as readily as can an occupant of a car. Necessity, an argument advanced in support of this search, would seem as strong a reason for searching guests of a house for which a search warrant had issued as for search of guests in a car for which none had been issued.

He then applied the limits of a house search to a car search. In the process, he also reaffirmed the Court's preference in searches supported by a warrant. Justice Jackson continued:

> By a parity of reasoning with that on which the Government disclaims the right to search occupants of a house, we suppose the Government would not contend that if it had a valid search warrant for the car only it could search the occupants as an incident to its execution. How then could we say that the right to search a car without a warrant confers greater latitude to search occupants than a search by warrant would permit?

The *Di Re* Court concluded, "[w]e are not convinced that a person, by mere presence in a suspected car, loses immunities from search of his person to which he would otherwise be entitled."

In demonstrating the fallacies in an argument supporting a search of persons present during the execution of a warrant of a fixed structure, *Di Re* saw some three decades into the future, for this very issue came to the Court in 1979. In *Ybarra v. Illinois*, State Bureau of Investigation officers executed a search warrant authorizing the
search of Aurora Tap Tavern and its bartender.\textsuperscript{358} Pursuant to a state statute authorizing the search of "any person in the place at the time," officers frisked a bar patron, Ventura Ybarra, as he stood next to a pinball machine.\textsuperscript{359} This search resulted in the recovery of heroin from Ybarra's pants pocket.\textsuperscript{360} The Court concluded that this search violated the Fourth Amendment.\textsuperscript{361}

Justice Stewart, writing for the \textit{Ybarra} Court, refused to allow law enforcement, in executing a search warrant for a particular location, the automatic right to search every individual present at the location.\textsuperscript{362} The government had simply failed to establish the requisite need for such a search, for no probable cause existed to search \textit{Ybarra}, either at the time of issuing or at the time of executing the warrant. True, Ybarra happened to be in the bar at the time it was searched. "But," Justice Stewart noted, "a person's mere propinquity to others independently suspected of criminal activity does not, without more, give rise to probable cause to search that person."\textsuperscript{363}

In \textit{Houghton}, Justice Scalia dismissed \textit{Ybarra} as involving the distinct issue of search of the \textit{person} rather than property.\textsuperscript{364} However, the fundamental logic of \textit{Ybarra} applies equally to searches of persons or places, for it states a basic requirement for probable cause recognized in the automobile exception cases themselves. This is shown in the following passage:

Where the standard is probable cause, a search or seizure of a person must be supported by probable cause particularized with respect to that person. This requirement cannot be undercut or avoided by simply pointing to the fact that coincidentally there exists probable cause to search or seize another or to search the premises where the person may happen to be.\textsuperscript{365}

To say that \textit{Ybarra}'s understanding of probable cause is not novel is to speak in understatement. As Justice Stewart's reference to particularity suggests, the idea that probable cause must be specified to a particular person derives from the text of the Amendment itself. Quite simply, the Warrant Clause includes a mandate for particularity: "no

\textsuperscript{358} See id. at 87-88.
\textsuperscript{359} See id. at 87 n.1, 89.
\textsuperscript{360} See id.
\textsuperscript{361} See id. at 96.
\textsuperscript{362} See id at 91.
\textsuperscript{363} Id.
\textsuperscript{364} Justice Scalia likewise distinguished Di Re. See Wyoming v. Houghton, 119 S. Ct. 1297, 1302 (1999).
\textsuperscript{365} \textit{Ybarra}, 444 U.S. at 91.
Warrants shall issue, but . . . particularly describing the place to be searched, and the persons or things to be seized."

To follow Justice Scalia’s logic, the operation of the distinction between searching the person in *Ybarra* and the search of a person’s purse in *Houghton* would create the following double standard: an officer would need probable cause particularized as to a fanny pack being worn by a person, yet would need no suspicion at all to search the same fanny pack on the car seat next to a person.

*Houghton*’s reasoning regarding passenger privacy suffered yet another flaw. It committed the cardinal sin of assessing Fourth Amendment rights by lumping individuals together. The Amendment, however, provides “individualized protection,” for each person is “clothed with constitutional protection against an unreasonable search or an unreasonable seizure.”

The Court itself has previously rejected the kind of sloppiness shown in *Houghton*, ironically, in a case involving none other than a passenger contesting a search which included the recovery of evidence from a container found within the passenger compartment of a vehicle. In *Rakas v. Illinois*, it was the defendant who attempted to fit more than one individual under the personal Fourth Amendment umbrella. When the expansion of the Fourth Amendment over more than one person would have benefited the defense, the Court in *Rakas* was adamant in its rejection of such an application. Justice Rehnquist, writing for the Court, declared: “Fourth Amendment rights are personal rights which, like some other constitutional rights, may not be vicariously asserted.”

However, the *Houghton* Court, in allowing the invasion of a passenger’s purse merely because of suspicion pointing at the driver, failed to respect Sandra Houghton’s personal Fourth Amendment rights.

**IV. CONCLUSION**

In its pursuit of defining the automobile exception, the Court has traveled down a long road; it has passed by nearly three-quarters of a century since handing down *Carroll*. Throughout this lengthy line of precedent, the Court has consistently considered all the facts when

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366 U.S. CONST. amend. IV.
367 *Ybarra*, 444 U.S. at 91.
369 See *id.* at 132-33 (addressing defendant’s argument that he had standing to challenge the search of a third person’s property, which yielded evidence used against the defendant).
370 *Id.* at 133-34.
determining probable cause to search. Now, however, the Court has
suddenly taken a wrong turn in *Houghton v. Wyoming*.

Further, this change in direction does not seem to be an accident.
In its selective treatment of the historical record and its unprecedented
application of special needs balancing to a traditional criminal inves-
tigation, the Court has strained its reasoning to gloss over the lack of
probable cause to support Officer Baldwin’s search of Houghton’s
personal effects. It seems as if the Court has intentionally avoided the
issue of probable cause as if it were a pothole in the Fourth Amend-
ment road. Probable cause, a fundamental threaded through all of the
automobile exception cases, and indeed, written in the text of the
Fourth Amendment itself, is now not so much a needed protection,
but an obstacle to maneuver clear of.

Without the common sense limit of probable cause, the scope of
the automobile exception becomes nonsensical. If an officer suspects
a driver of a crime, he or she may now search inside anyone else’s
personal articles found in the car which are large enough to hold the
illegal contraband. All containers are vulnerable to government intru-
sion, regardless of facts pointing away from probable cause to search
a particular container.

If a male driver admits to drug use, the Court now enables an of-
ficer to search a seemingly innocent female passenger’s purse. With
such a careless containment of scope, be forewarned: the government
now has reason to believe that stolen lawnmowers may lurk in your
upstairs bedroom.