



2005

Hints of the Future?: John Roberts, Jr.'s Fourth Amendment Cases as an Appellate Judge

Thomas K. Clancy
University of Mississippi School of Law

Follow this and additional works at: <http://scholarworks.law.ubalt.edu/ublr>



Part of the [Fourth Amendment Commons](#)

Recommended Citation

Clancy, Thomas K. (2005) "Hints of the Future?: John Roberts, Jr.'s Fourth Amendment Cases as an Appellate Judge," *University of Baltimore Law Review*: Vol. 35: Iss. 2, Article 4.

Available at: <http://scholarworks.law.ubalt.edu/ublr/vol35/iss2/4>

This Article is brought to you for free and open access by ScholarWorks@University of Baltimore School of Law. It has been accepted for inclusion in University of Baltimore Law Review by an authorized administrator of ScholarWorks@University of Baltimore School of Law. For more information, please contact snolan@ubalt.edu.

HINTS OF THE FUTURE?: JOHN ROBERTS, JR.'S FOURTH AMENDMENT CASES AS AN APPELLATE JUDGE

Thomas K. Clancy†

Chief Justice John Roberts, Jr. had a thin paper trail prior to his appointment to the Supreme Court. He has, however, more of a record in Fourth Amendment¹ jurisprudence from his brief time as a judge on the United States Court of Appeals for the District of Columbia. How a Supreme Court Justice interprets the Fourth Amendment is perhaps one of the most important tasks of the position, given the countless times that the Amendment is implicated each day² and the large number of Fourth Amendment cases that reach the Supreme Court each year.³ The docket of the D.C. Circuit has a significant number of criminal cases because of its location in the nation's capital and the substantial number of criminal cases pursued in its federal courts.⁴ As a D.C. Circuit judge, Judge Roberts sat on eight cases involving Fourth Amendment issues that resulted in published opinions.⁵ Of those cases, he authored four for the court and issued one

† Director, National Center for Justice and the Rule of Law, and Visiting Professor, University of Mississippi School of Law. Copyright © 2005, Thomas K. Clancy.

1. The Fourth Amendment to the United States Constitution provides:

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

U.S. CONST. amend. IV.

2. For example, there are approximately 20 million vehicle stops each year. See Lawrence A. Greenfield, *Foreword* to U.S. DEP'T OF JUSTICE, BUREAU OF JUSTICE STATISTICS, CHARACTERISTICS OF DRIVERS STOPPED BY POLICE, 1999, at iii (2002), available at <http://www.ojp.usdoj.gov/bjs/abstract/cdsp99.htm>. Similarly, there are millions of airport screenings each year, each of which must be justified as reasonable under the Fourth Amendment. See BUREAU OF TRANSP. STATISTICS, NATIONAL TRANSPORTATION STATISTICS 2005 tbl.2-16a (2005), available at <http://www.bts.gov/>.
3. See *The Supreme Court, 2003 Term—The Statistics*, 118 HARV. L. REV. 497, 507-09 (2004). See generally SUPREME COURT OF THE UNITED STATES, 2003 YEAR-END REPORT ON THE FEDERAL JUDICIARY, (2004), <http://www.supremecourt.us.gov/>.
4. *Special Report, Report of the Special Committee on Race and Ethnicity to the D.C. Circuit Task Force on Gender, Race, and Ethnic Bias*, 64 GEO. WASH. L. REV. 189, 193-94 (1996).
5. See *infra* Part I.

notable dissent.⁶ He joined the opinion of the court in the three remaining cases without authoring an opinion.⁷ This essay examines those opinions and, in the manner of reading tea-leaves, seeks to reach some conclusions on his views of the Fourth Amendment.

I. THE CASES

A. *United States v. Lawson*

Writing for the court in *United States v. Lawson*,⁸ in an appeal from convictions of aggravated bank robbery and brandishing a firearm during a crime of violence, Judge Roberts concluded that the search of an automobile that yielded incriminating evidence against Lawson was proper.⁹ The district court had rejected Lawson's claim on the ground that Lawson did not have a reasonable expectation of privacy.¹⁰ Judge Roberts, for the court of appeals, chose to "affirm on a different ground—that the search of the Oldsmobile was supported by probable cause."¹¹ This was despite the fact that the government had not argued that probable cause justified the search in the lower court;¹² instead, the government raised the issue for the first time in its appellate brief. In finding probable cause for the seizure and for conducting the subsequent search, Judge Roberts asserted that the vehicle matched the physical description of the getaway car in a bank robbery that the police were investigating: "Four out of five numbers on the temporary license plate matched a witness account of the getaway car's tags. Further, prior to seizing the car, agents 'saw some latex gloves laying in the right front passenger area.'"¹³ Based on those circumstances, he concluded, "it was reasonable for agents to believe the vehicle contained contraband or instrumentalities of crime."¹⁴

B. *United States v. Jackson*

Judge Roberts's only dissent came in *United States v. Jackson*,¹⁵ decided July 22, 2005, which was three days after Judge Roberts's nomination to the U.S. Supreme Court. The sole basis for Judge Roberts's dissent was purportedly factual: he believed that the information available to the police constituted probable cause to search the trunk,¹⁶

6. See *infra* Parts I.A.-I.C., I.E.-I.F.

7. See *infra* Part I.D.

8. 410 F.3d 735 (D.C. Cir. 2005).

9. *Id.* at 740-41.

10. *Id.* at 740.

11. *Id.*

12. *Id.* at 740 n.4.

13. *Id.* at 741 (citation omitted).

14. *Id.*

15. 415 F.3d 88 (D.C. Cir. 2005).

16. *Id.* at 105-06 (Roberts, J., dissenting).

although the majority concluded there was insufficient justification for the search.¹⁷ However, underlying the majority's and dissent's approaches were fundamental disagreements on how a court should approach probable cause determinations.

The facts were as follows:

- 1) "At approximately 1:00 a.m. on May 4, 2002, United States Park Police Officers Jeffrey Garboe and Wayne Johnson observed a 1988 Mercury Marquis without a functioning tag light."¹⁸
- 2) The officers stopped the vehicle because of the absence of the tag light.¹⁹
- 3) Prior to approaching the car, the police conducted a records check, which indicated that the car's temporary license tags had been reported stolen.²⁰
- 4) The officers arrested the driver, Tarry M. Jackson, for the stolen tag offense.²¹
- 5) Because Jackson was unable to produce registration or a driver's license, the officers conducted a more thorough records check, which indicated that his driving privileges were suspended in Virginia.²²
- 6) "The officers also checked the vehicle identification number in a computer database, and it yielded an 'old listing' from Virginia, meaning that the car had once been registered there but that it was not currently registered."²³
- 7) "There was no report that the car had been stolen."²⁴
- 8) The officers searched the passenger compartment of the car for documentation of ownership, but "did not find any documentation, contraband, or evidence of criminal activity."²⁵
- 9) One of the officers, Officer Garboe, testified that, on approximately ten previous occasions relating to vehicle stops involving stolen tags, he had found the vehicle's real tags in the trunk six or seven times.²⁶
- 10) After securing the driver, the officers searched the trunk and recovered a loaded .25 caliber pistol and ammunition.²⁷
- 11) At some point, Jackson claimed that the car belonged to his girlfriend and that she had bought it at an auction a month earlier.²⁸

17. *Id.* at 89-90.

18. *Id.* at 94-95.

19. *Id.* at 90.

20. *Id.*

21. *Id.*

22. *Id.*

23. *Id.*

24. *Id.*

25. *Id.*

26. *Id.* at 102.

27. *Id.* at 90.

28. *Id.*

Supreme Court precedent has established that, although the passenger compartment of a vehicle can be searched incident to the driver's arrest,²⁹ a trunk in the vehicle cannot be searched. On the other hand, the Supreme Court has also established that such a trunk search is permitted, without a warrant, when the police have probable cause to believe that the trunk has evidence of the crime.³⁰

A three-judge panel heard the appeal in *Jackson*: Judge Judith W. Rogers wrote the opinion for the court; Judge Harry T. Edwards wrote a concurring opinion, which seemed to comprehensively address the case and had significantly different reasoning than Rogers's opinion, making the "majority" opinion a curious one; and Judge Roberts dissented.³¹ Rogers's opinion set forth the traditional standard for probable cause and correctly observed that, given that this was a warrantless search, the government had the burden of proof.³² Rogers then proceeded to reject the various governmental theories justifying the search, before settling in on the question upon which she believed the case turned: Whether there was probable cause to believe "that documentation demonstrating that the driver was not authorized to drive the car would be in the trunk."³³ Rogers believed that the circumstances known to the police at the time of the trunk search did not support the view that Jackson was an unauthorized driver.³⁴ She serially rejected the computer record checks, the fruitless search of the passenger compartment, the suspended driver's license, the driving late at night, the broken tag light, and the lack of registration as affecting the probability that Jackson was an unauthorized user.³⁵ She believed that the stolen tags were the "critical feature" of the traffic stop.³⁶ Rejecting that feature, Rogers stated that there were only three reasons why the stolen tags would be on the car:

First, stolen tags may be placed on an otherwise lawfully used car without tags to give the appearance of legitimate tags and therefore to reduce the risk that the police will initiate a traffic stop for lack of tags. Second, stolen tags may be used to replace expired tags on an otherwise lawfully used vehicle, again in the hope of avoiding immediate detection. The lack of registration and the absence of a report that the car was

29. See, e.g., *New York v. Belton*, 453 U.S. 454, 460-61 n.4 (1981) (holding that incident to an arrest of an automobile occupant, police may search only the interior passenger compartment of the automobile).

30. See, e.g., *California v. Acevedo*, 500 U.S. 565, 579-80 (1991) (interpreting *Carroll v. United States*, 267 U.S. 132, 153-54 (1925), to provide that police may search an automobile and its containers if they have probable cause to believe that contraband or evidence is contained therein).

31. *Jackson*, 415 F.3d at 88, 98-101.

32. *Id.* at 91-92.

33. *Id.* at 92-93.

34. *Id.* at 94.

35. *Id.* at 93-94.

36. *Id.* at 94.

stolen are consistent with these first two rationales, which suggest that the driver was an authorized user of the car. Third, stolen tags may be used to conceal the fact that a vehicle is stolen by replacing the stolen vehicle's "real tags." . . . Because the officers here were confronted with three possible explanations for the presence of the stolen tags on the car, two of which suggested authorized use and were consistent with the lack of registration and the absence of a report that the car was stolen, and only one of which supported an inference of unauthorized use, the officers lacked probable cause to search the trunk for documentation that the driver was an unauthorized user of the car.

While the existence of probable cause does not depend on the elimination of all innocent explanations for a situation, our dissenting colleague . . . posits the most incriminating interpretation of the circumstances, as though the existence of countervailing probabilities was irrelevant. Were that the law, then the government's burden would be considerably eased, for the particular circumstances causing the police to make a traffic stop could often be viewed most negatively without regard to a citizen's *Fourth Amendment* protections.

. . .

Our dissenting colleague emphasizes that Officer Garboe also testified that on six or seven occasions he had encountered vehicles with stolen tags that had "real tags" or other identifying information in the trunk Even if there was probable cause to believe that the trunk would contain the car's expired "real tags," these tags, like a tool kit, are neither contraband nor evidence of a crime because there is nothing illegal about having such tags in the trunk of an unregistered car. In overlooking this point, our dissenting colleague posits an evidentiary inference based on finding "real tags" in the trunk that is irrelevant in the absence of probable cause to believe that the trunk contained contraband or evidence of a crime. Further, the record does not indicate that the car's expired "real tags" would provide the officers with any additional information regarding the ownership of the car because a records check based on the vehicle identification number indicated only an "old listing." In any event, even if "real tags" or identifying information could in some instances constitute contraband or evidence of a crime, the officer's prior experience of finding such information in a vehicle trunk, while relevant, is unhelpful here because his testimony is devoid of the critical circumstances of those searches, including whether the identifying information revealed that the vehicle was stolen.³⁷

37. *Id.* at 94-95 (citation omitted).

Judge Rogers added some advice for the police: Instead of searching the truck, she opined, the police should have continued their investigation by questioning Jackson "to determine whether it would be reasonable to conclude that documentation of the driver's unauthorized use of the car would be in the trunk."³⁸ She opined that Jackson had been cooperative.³⁹

Judge Edwards, in his concurring opinion, rejected the contention that the police had reason to believe that the car was stolen "because the police officers *knew that the car was unregistered* and that it had not been reported stolen."⁴⁰ He reasoned:

If a car is not registered, then it has no legitimate tags. The most reasonable inference to be drawn in this situation is that the owner has placed stolen tags on the car to avoid being stopped for driving without tags, while avoiding the expense attendant to registering the car and obtaining legitimate tags. In other words, if a car has no legitimate tags because it is unregistered, then police officers have no good reason to assume that the stolen tags are intended to conceal the true identity of the vehicle.⁴¹

Edwards's opinion also discussed the importance of the Fourth Amendment's guarantees and the duties of judges to jealously guard the rights of individuals.⁴² Judge Roberts, dissenting, replied:

I wholeheartedly subscribe to the sentiments expressed in the concurring opinion about the *Fourth Amendment's* place among our most prized freedoms. But sentiments do not decide cases; facts and the law do. There is no dispute here on the law: if the officers had probable cause, they did not need a warrant; if they did not have probable cause, no warrant would issue in any event. As for the facts, the officers encountered at 1:00 a.m. an unlicensed driver operating an unregistered car with a broken tag light and stolen tags. The experienced district court judge concluded—and I agree—that "the circumstances were suspicious enough to amount to probable cause to search the trunk." Right or wrong, nothing about that determination reflected insensitivity to constitutional values, any more than a contrary determination would have reflected insensitivity to the needs of law enforcement.⁴³

Earlier in his opinion, Judge Roberts demonstrated that he not only disputed the importance of the facts but that his view of the tools to

38. *Id.* at 96.

39. *Id.* at 97.

40. *Id.* at 100 (Edwards, J., concurring).

41. *Id.*

42. *Id.* at 100-01 (quoting *Mapp v. Ohio*, 367 U.S. 643, 647 (1961)).

43. *Id.* at 105-06 (Roberts, J., dissenting) (citation omitted).

measure probable cause differed markedly from the majority. Judge Roberts viewed the facts together:

It was late at night and the tag light was out—suggesting from the beginning of the encounter that Jackson was attempting to obscure the car’s license plates. Once Jackson was pulled over, the officers learned there was indeed something to hide: the temporary tags affixed to the car had been stolen and altered to match the car’s make, model, and vehicle identification number.⁴⁴

He made inferences from those facts, based on prior case law⁴⁵ and the experience of the officers:⁴⁶

Stolen tags often accompany stolen cars. The reason is obvious: by replacing the real tags with stolen tags, the thief makes it impossible for police to identify a stolen vehicle by sight. A stolen vehicle will normally be described by its make, model, and license plate number. An officer cruising the streets cannot readily identify a particular Mercury Marquis as the *stolen* Mercury Marquis if the original tags have been replaced. So the stolen tags raised a suspicion that the car may have been stolen as well.⁴⁷

Judge Roberts believed that the records check added to the police’s suspicion:

To the officers on the scene, . . . the failure of the records check to resolve ownership of the vehicle was unusual. The fact that Jackson was not listed on the car’s last registration could reasonably have heightened the officers’ suspicion: now they were dealing not only with a car with stolen tags, but with a car that had no recorded connection to Jackson.⁴⁸

Turning specifically to why the search of the trunk was reasonable, Judge Roberts observed:

One of the officers at the scene would later testify that he had made about ten previous vehicle stops involving stolen tags. On six or seven of those occasions, he had found the vehicle’s real tags in the trunk. This is not especially surprising: the trunk is certainly a convenient place to stash the real

44. *Id.* at 101.

45. *Id.* See, e.g., *United States v. Rhind*, 289 F.3d 690, 692 (11th Cir. 2002) (stating that the defendants traveled in a stolen car with stolen plates).

46. *Jackson*, 415 F.3d at 101. See, e.g., *Turner v. United States*, 623 A.2d 1170, 1172 (D.C. 1993) (referring to police officer’s comment that stolen plates often accompany stolen vehicles).

47. *Jackson*, 415 F.3d at 101 (citation omitted).

48. *Id.* at 101-02 (citing to Officer Garboe’s statement: “Normally if you run [a registration check] having already run the operator, it’ll tell you that it comes back with an expired listing *to that operator*. And that was not the case in this case.”) (citation omitted).

tags once they have been removed from the back of the vehicle. Real tags in the trunk would clearly be probative evidence suggesting the car was stolen, for the reason just noted: car thieves replace the real tags with stolen ones to help avoid detection.⁴⁹

Judge Roberts noted that there could have been other evidence in the trunk tending to show who the real owner was or supporting the view that Jackson stole the vehicle.⁵⁰ Finally, Judge Roberts viewed the permissible inferences from the facts known to the police much differently than his colleagues. First, because the car was unregistered did not mean that the vehicle's license plates disappeared once its registration lapsed.⁵¹ He asserted that many people receive tickets for expired registrations "but they are usually able to show that they are the owner listed on the expired registration."⁵² Because Jackson was not able to demonstrate ownership, it "heighten[ed] the suspicion that he had no legitimate connection to the car."⁵³ Moreover, Judge Roberts believed:

[F]inding the expired "real tags" would have provided police with additional evidence of criminal activity. . . . [T]he real tags would have ruled out the possibility the stolen tags were being used only to drive a vehicle that otherwise had no tags, making it more likely that the vehicle had been stolen.⁵⁴

Second, asserting that "'a page of history is worth a volume of logic,'"⁵⁵ Judge Roberts believed that Officer Garboe's history with stolen tags, which "confirmed that they, more often than not, led to real tags in the trunk," and the reported cases, which "confirm that criminals often use stolen tags on stolen cars," were "enough to support the officers' inferring from the stolen tags *and* the lack of any registration (current or expired) linking Jackson to the car that the car might well have been stolen."⁵⁶ He added that "replacing a stolen vehicle's original tags makes sense: it prevents the vehicle from being readily identified as stolen by a passing police cruiser."⁵⁷ Although a police officer could run those tags, "busy" police officers were unlikely to do so each time a Mercury Marquis was observed, "and people are likely to be much less diligent about reporting stolen tags—particularly temporary ones—than stolen cars."⁵⁸

49. *Id.* at 102.

50. *Id.*

51. *Id.* at 102-03.

52. *Id.* at 103.

53. *Id.*

54. *Id.*

55. *Id.* (quoting *N.Y. Trust Co. v. Eisner*, 256 U.S. 345, 349 (1921)).

56. *Id.*

57. *Id.*

58. *Id.*

Third, as to the majority's claims that the officers lacked probable cause because only one of the majority's three possible explanations for the presence of the stolen tags on the car supported an inference of unauthorized use, Judge Roberts initially disagreed with the assumption "that someone would run so great a risk [of putting a stolen tag on a vehicle] merely to avoid getting stopped for an expired registration."⁵⁹ "The more serious problem" with the majority's approach, Judge Roberts believed:

[I]s that probable cause does not depend on eliminating other innocent (or, here, less incriminating) explanations for a suspicious set of facts. Of course, considering alternative explanations is "often helpful," but the officers were not required, before searching the trunk, to negate the possibility that the stolen tags were used only to drive an unregistered car. This is particularly so here, where any plausible explanation for the circumstances of Jackson's stop—the broken tag light, the stolen tags, Jackson's lack of registration, and the failure of the records check to connect Jackson with the vehicle—suggested that Jackson was deliberately trying to conceal unlawful activity involving the car itself.⁶⁰

Fourth, Judge Roberts viewed the majority's suggestion that the police should have asked Jackson about the vehicle's ownership as "a hazardous approach to assessing probable cause."⁶¹ He believed that it "assumes that the officers had nothing better to do while on night patrol than linger roadside, tracking down exculpatory leads for suspects."⁶² Instead, Judge Roberts believed that "[t]he officers could have reasonably concluded that further questioning would have yielded nothing more than the usual story any suspect in Jackson's situation would be expected to deliver," that is, his girlfriend owned the car.⁶³ Judge Roberts asserted: "Sometimes a car being driven by an unlicensed driver, with no registration and stolen tags, really does belong to the driver's friend, and sometimes dogs do eat homework, but in neither case is it reasonable to insist on checking out the story before taking other appropriate action."⁶⁴ Even if the police had contacted Jackson's girlfriend, Judge Roberts could not "see any conceivable value in the over-the-phone testimony of a suspect's apparent girlfriend—someone unknown to the officers, whose number was given to them by the suspect himself—that an unregistered car with stolen tags, driven by an unlicensed driver, was indeed hers and was

59. *Id.*

60. *Id.* at 103-04 (quoting *United States v. Funches*, 327 F.3d 582, 587 (7th Cir. 2003)) (citation omitted).

61. *Id.* at 104.

62. *Id.*

63. *Id.* at 105.

64. *Id.*

being used with her permission.”⁶⁵ Finally, Judge Roberts maintained that the court had “neither the authority nor the expertise” to prescribe “preferred investigative procedures for law enforcement” and that he “would leave the judgment as to what lines of inquiry ought to be pursued to the officer himself, and judge probable cause on the facts as they are, rather than on what they might have been had the officer pursued a different course.”⁶⁶

C. United States v. Holmes

In *United States v. Holmes*,⁶⁷ Judge Roberts wrote an opinion for the court affirming the denial of a motion to suppress, based on a stop and frisk.⁶⁸ Holmes’s vehicle was speeding and police officers following the vehicle observed Holmes “continually dipping his right shoulder, as if he were reaching under the driver’s seat.”⁶⁹ Upon observing this, one of the police officers, Dereck Phillip, concluded that Holmes was either retrieving or placing a weapon under his seat.⁷⁰ As the officers approached the vehicle on foot after Holmes had stopped, Holmes was nervously looking over his shoulder, moving around in the vehicle, and reaching under his seat and toward his waist.⁷¹ Upon making contact with Holmes, the police detected “a strong odor of alcohol,” and Holmes admitted that he had been drinking.⁷² After Holmes got out of the car, he reached several times toward the rear pocket of his pants, even after being directed by one of the officers not to do so.⁷³ The police believed he was armed.⁷⁴

Holmes was frisked and during the course of the pat-down, a “‘hard,’ ‘square object’” was detected in the front pocket of the huge jacket he was wearing.⁷⁵ Holmes told Phillip that it was a scale, and Phillip later testified that he thought it was a scale and not a firearm.⁷⁶ Nonetheless, Phillip removed the object, confirmed that it was a scale, and “noticed a white residue on the scale.”⁷⁷ After Phillip resumed the pat-down, Holmes struck Phillip and “[a] melee ensued.”⁷⁸ Holmes was eventually restrained and arrested.⁷⁹ Holmes, as well as his vehicle, was then searched, with a gun and cocaine among the

65. *Id.*

66. *Id.*

67. 385 F.3d 786 (D.C. Cir. 2004), *cert. denied*, 125 S. Ct. 1388 (2005).

68. *Id.* at 787.

69. *Id.*

70. *Id.*

71. *Id.* at 787-88.

72. *Id.* at 788.

73. *Id.*

74. *Id.*

75. *Id.*

76. *Id.*

77. *Id.*

78. *Id.*

79. *Id.*

incriminating evidence recovered; the gun was located under the driver's seat.⁸⁰

Holmes challenged the removal of the scale from his pocket as exceeding the scope of a permissible frisk and the recovery of the other evidence as a fruit of that alleged illegality.⁸¹ Recognizing that "[t]he propriety of a search . . . depends on 'an objective assessment of the officer's actions in light of the facts and circumstances confronting [Phillip] at the time,' and not on the officer's own subjective intent," Judge Roberts viewed the fact that Phillip believed that the item was a scale as not determining the inquiry.⁸² Instead, Judge Roberts reasoned, "[t]he only relevant question [was] whether a reasonable officer, knowing what Phillip knew at the moment of seizure, would have been justified in removing the scale."⁸³ Concluding that the circumstances justified the removal of the object, Judge Roberts asserted that "the Fourth Amendment does not require the officer to gamble his safety and that of those around him on the accuracy of . . . assumptions."⁸⁴ Specifically, Phillip "did not have to take Holmes at his word that the object was a scale, and proceed with the frisk solely on that basis."⁸⁵ He concluded: "We cannot fault the officer for taking the simple step of checking to ensure that the hard object was not something more threatening before continuing. The object did not feel like a firearm, but it could have been another type of weapon—a box cutter, for example."⁸⁶ Because the permissible "scope of a *Terry* frisk is not limited to weapons, but rather to 'concealed objects which *might* be used as instruments of assault,'" Judge Roberts believed that the "hard, 'square' object" that Phillip felt "would seem to fit that description well."⁸⁷

D. *The No Opinion Cases: Riley, Moore, and Brown*

Two of the three cases that Judge Roberts joined without an opinion were unremarkable applications of established case law to the facts. *United States v. Riley*⁸⁸ was an appeal following a conviction for possession with intent to distribute cocaine.⁸⁹ The court of appeals, in an opinion by Stephen F. Williams, Senior Circuit Judge, held that the police had probable cause to arrest Riley, based on a combination of a reliable informant's tip and the police's confirmation of innocent details, and that the search of Riley was valid as a search incident to his

80. *Id.*

81. *Id.* at 789.

82. *Id.* at 790 (quoting *Scott v. United States*, 436 U.S. 128, 136 (1978)).

83. *Id.*

84. *Id.*

85. *Id.*

86. *Id.* at 790-91.

87. *Id.* (quoting *Sibron v. New York*, 392 U.S. 40, 65 (1968)).

88. 351 F.3d 1265 (D.C. Cir. 2003).

89. *Id.* at 1266.

arrest.⁹⁰ *United States v. Moore*⁹¹ involved the appeal of the denial of a motion to suppress after conviction of Moore for being a felon in possession of a firearm.⁹² In an opinion by Chief Judge Douglas H. Ginsburg, the court of appeals held that, given the taxi's location and its erratic movements, there was reasonable suspicion that the driver was being robbed and this justified a stop of the taxicab in which Moore was a passenger.⁹³

The third case that Judge Roberts joined without opinion, *United States v. Brown*,⁹⁴ involved a government appeal from the granting of a motion to suppress physical evidence found in a trunk of a vehicle.⁹⁵ *Brown* started as a valid traffic stop for speeding, but after it was established that Brown did not have a valid District of Columbia driver's license, he was arrested.⁹⁶ The officer then searched the passenger compartment incident to that arrest.⁹⁷ During that search, several documents that the appellate court believed would have led an objective observer to conclude were fraudulent were found: driver's licenses, an American Express card, and a personal check.⁹⁸ The officer then searched the trunk, believing that he could do so "incident to Brown's arrest."⁹⁹ A firearm was recovered, which was the basis for Brown's prosecution for "possession of a firearm by a convicted felon."¹⁰⁰

The lower court properly recognized that the arrest did not authorize the search of the trunk; it granted suppression of the evidence in the trunk because the officer did not provide any testimony as to why he believed that there was probable cause to search the trunk.¹⁰¹ In an opinion by Judge A. Raymond Randolph, the appellate court agreed that the police officer "misunderstood the requirements of the Fourth Amendment."¹⁰² But it also believed that the lower court erred in suppressing the evidence.¹⁰³ Relying on precedent, Judge Randolph observed that the issue of whether an officer has probable cause to search a trunk is a purely objective standard, turning on whether "a 'prudent, reasonable, cautious police officer'" under the circumstances presented, would have "believe[d] that there was a rea-

90. *Id.* at 1266-69.

91. 394 F.3d 925 (D.C. Cir. 2005).

92. *Id.* at 926.

93. *Id.* at 926-27, 930.

94. 374 F.3d 1326 (D.C. Cir. 2004), *cert. denied*, 125 S. Ct. 1369 (2005).

95. *Id.* at 1326.

96. *Id.* at 1326-27.

97. *Id.* at 1327.

98. *Id.* at 1327-28.

99. *Id.* at 1327.

100. *Id.*

101. *Id.*

102. *Id.*

103. *Id.* at 1327-28.

sonable likelihood the trunk contained contraband.”¹⁰⁴ Applying that standard to the facts, Judge Randolph concluded that there was probable cause to believe that the documents found in the passenger compartment were for the purpose of making fraudulent purchases.¹⁰⁵ Further, Randolph found “it is reasonable to assume that [Brown] had successfully accomplished his objective, which brings us to the trunk of the car.”¹⁰⁶ Trunks are designed to store or conceal items; hence, Randolph believed that there was a “distinct possibility that the trunk contained earlier purchases.”¹⁰⁷ He therefore concluded that the search of the trunk was proper.¹⁰⁸

E. *Hedgepeth v. Washington Metropolitan Area Transit Authority*

In popular culture, it is perhaps the “french-fry” case for which Judge Roberts will be remembered based on his brief tenure on the court of appeals. In *Hedgepeth v. Washington Metropolitan Area Transit Authority*,¹⁰⁹ 12-year-old Anshe Hedgepeth was arrested for eating a french fry in a Metrorail station.¹¹⁰ Writing for the court, Judge Roberts’s opening lines properly framed the situation:

No one is very happy about the events that led to this litigation. A twelve-year-old girl was arrested, searched, and handcuffed. Her shoelaces were removed, and she was transported in the windowless rear compartment of a police vehicle to a juvenile processing center, where she was booked, fingerprinted, and detained until released to her mother some three hours later—all for eating a single french fry in a Metrorail station. The child was frightened, embarrassed, and crying throughout the ordeal. The district court described the policies that led to her arrest as “foolish,” and indeed the policies were changed after those responsible endured the sort of publicity reserved for adults who make young girls cry. The question before us, however, is not whether these policies were a bad idea, but whether they violated the Fourth and Fifth Amendments to the Constitution. Like the district court, we conclude that they did not, and accordingly we affirm.¹¹¹

Putting aside the Fifth Amendment claim, which is beyond the purpose of this discussion, Judge Roberts quickly turned to the recent

104. *Id.* at 1328 (quoting *United States v. Davis*, 458 F.2d 819, 821 (D.C. Cir. 1972)).

105. *Id.* at 1328-29.

106. *Id.* at 1329.

107. *Id.*

108. *Id.*

109. 386 F.3d 1148 (D.C. Cir. 2004).

110. *Id.* at 1150-51.

111. *Id.* at 1150.

Supreme Court opinion in *Atwater v. City of Lago Vista*,¹¹² where the Court held that the Fourth Amendment was not violated when an officer arrested a woman for violating a state statute that required all motorists and front-seat passengers to wear seatbelts.¹¹³ In *Atwater*, it was a given that the officer had probable cause to arrest. *Atwater*, however, sought to restrict the ability of the police to arrest for minor offenses, such as seatbelt violations, and require that they instead issue citations in lieu of a custodial arrest.¹¹⁴ The *Atwater* majority engaged in an extensive analysis of the history and policies underlying the Fourth Amendment. It ultimately concluded that the existence of probable cause was the core protection afforded by the Amendment in such circumstances and suggested that it was up to politically accountable officials to impose limitations, if any, on the discretion of the police to arrest for minor crimes.¹¹⁵

After summarizing the *Atwater* Court's analysis, Judge Roberts in *Hedgepeth* easily concluded that *Atwater* precluded the court from engaging "in an evaluation of the reasonableness of the decision to arrest Anshe, given the existence of probable cause."¹¹⁶ That was undoubtedly an accurate interpretation of *Atwater*, which was dispositive of the claim before the court. Judge Roberts could have ended his opinion at that point. Instead, he went on and assumed that *Atwater* was "not controlling" and asserted:

[Hedgepeth's] claim that a policy of mandatory arrest for certain minor offenses is unconstitutional boils down to an assertion that officer discretion is a necessary element of a valid seizure under the Fourth Amendment, at least for some minor offenses. She has not made an effort to defend that assertion under the usual first step of any analysis of whether particular government action violates the Fourth Amendment—asking "whether the action was regarded as an unlawful search or seizure under the common law when the Amendment was framed." Moreover, insisting on the exercise of discretion by an arresting officer would be an unfamiliar imperative under the Fourth Amendment. "The essential purpose of the proscriptions in the Fourth Amendment is to impose a standard of 'reasonableness' upon the exercise of discretion by government officials . . ." It is the high office of the Fourth Amendment to constrain law enforcement discretion; we see no basis for turning the usual Fourth Amendment approach on its head and finding a government

112. 532 U.S. 318 (2001); *Hedgepeth*, 386 F.3d at 1157.

113. *Atwater*, 532 U.S. at 323.

114. *See id.* at 346-49.

115. *Id.* at 352, 354.

116. *Hedgepeth*, 386 F.3d at 1157-58.

practice unconstitutional solely because it *lacks* a sufficient role for discretionary judgment.¹¹⁷

F. *Stewart v. Evans*

In *Stewart v. Evans*, Stewart, a federal employee, sued the Secretary of Commerce and two departmental employees, alleging discrimination.¹¹⁸ Stewart claimed that the two employees, who were employed in the department's Office of General Counsel (OGC), had illegally searched her private documents pertaining to the discrimination complaint, in violation of the Fourth Amendment.¹¹⁹ The documents had been turned over to other departmental officials to insure compliance with an unrelated Freedom of Information Act request and a later request from a United States Senator.¹²⁰ In turning the documents over, Stewart obtained an agreement that OGC employees would not be allowed to view them.¹²¹ The documents were kept in a locked safe in another employee's office in the Special Matters Unit (SMU), which handled Congressional requests.¹²² Nonetheless, an employee of the OGC, acting at the direction of another OGC employee, opened the safe and reviewed the documents.¹²³ The documents were later found responsive to the Congressional request and turned over to Congress.¹²⁴ After her suit had been dismissed by the district court,¹²⁵ the court of appeals, in an opinion written by Judge Roberts, held that Stewart did not have reasonable expectation of privacy in the documents nor in the locked safe containing them.¹²⁶

Judge Roberts reasoned that Stewart "had no control whatever over access to the office containing the safe or to the safe itself."¹²⁷ As to the documents, Judge Roberts reasoned that Stewart lost her expectation of privacy in them "because she had voluntarily relinquished control of them" when she "gave the documents to third parties."¹²⁸ Judge Roberts added:

The *reason* Stewart transferred the documents is highly pertinent. In each instance her transfer was the first step in a process that could—and, in the case of the SMU review, did—result in broader disclosure of the documents, beyond even the third parties to whom Stewart conveyed them.

117. *Id.* at 1159 (citation omitted).

118. 351 F.3d 1239, 1240-41 (D.C. Cir. 2003).

119. *Id.* at 1241-42.

120. *Id.* at 1241.

121. *Id.*

122. *Id.*

123. *Id.* at 1242.

124. *Id.*

125. *Id.*

126. *Id.* at 1244.

127. *Id.* at 1243.

128. *Id.*

When the threat of mandatory disclosure accompanies the transfer of documents to a third party, little reasonable expectation of privacy exists.¹²⁹

Finally, Judge Roberts rejected Stewart's argument that the agreement she brokered, restricting access to the documents, preserved her expectation of privacy. Judge Roberts observed that the agreement was to allow for the review of the documents and "not to preserve their privacy more generally."¹³⁰ He therefore concluded: "The *Fourth Amendment* protects privacy; it does not constitutionalize non-disclosure agreements."¹³¹ Thus, he rejected Stewart's claim, relying on Supreme Court precedent that has established that "the *Fourth Amendment* does not prohibit the obtaining of information revealed to a third party . . . even if the information is revealed on the assumption that it will be used only for a limited purpose and the confidence placed in the third party will not be betrayed."¹³²

II. OBSERVATIONS

A. *Probable Cause and Articulable Suspicion Determinations*

Judge Roberts has sat on four cases involving probable cause determinations, ruling each time against the person seeking to suppress

129. *Id.* at 1244 (citing *Couch v. United States*, 409 U.S. 322, 335 (1973) ("[T]here can be little expectation of privacy where records are [transferred] . . . knowing that mandatory disclosure of much of the information therein is required. . . .")).

130. *Id.*

131. *Id.*

132. *Id.* (quoting *United States v. Miller*, 425 U.S. 435, 443 (1976)). There is a burgeoning amount of information held by third parties and used by law enforcement. See Daniel J. Solove, *Digital Dossiers and the Dissipation of Fourth Amendment Privacy*, 75 S. CAL. L. REV. 1083, 1089-1101 (2002) (cataloguing this development). Numerous commentators have argued for Fourth Amendment protections extending to information held by third parties. See, e.g., Patricia L. Bellia, *Surveillance Law Through Cyberlaw's Lens*, 72 GEO. WASH. L. REV. 1375, 1403-12 (2004) (arguing that there is a reasonable expectation of privacy in communications held by internet service providers). Some, as has Professor LaFave, distinguish between the type of information given to the third party and the purposes for which the third party has been given the information and conclude that a person may retain a reasonable expectation of privacy in some circumstances. 1 WAYNE R. LAFAVE, SEARCH AND SEIZURE § 2.6(f) (4th ed. 2004). There is a recent case, which is perhaps a mere aberration, that indicates that the Court may adopt a similar analysis. See *Ferguson v. City of Charleston*, 532 U.S. 67, 78 (2001) (finding a reasonable expectation of privacy by a patient in information conveyed to medical personnel and stating: "The reasonable expectation of privacy enjoyed by the typical patient undergoing diagnostic tests in a hospital is that the results of those tests will not be shared with nonmedical personnel without her consent."). Roberts, however, relied on *Couch* and *Miller*, which represent the Court's otherwise consistent view that persons who disclose information to third parties lose their expectation of privacy in that information. *Stewart*, 351 F.3d at 1224; see *Miller*, 425 U.S. at 442; *Couch*, 409 U.S. at 335-36.

evidence.¹³³ He sided with the court, without opinion, in *Riley and Brown*;¹³⁴ he authored the opinion for a unanimous court in *Lawson*,¹³⁵ and he dissented in *Jackson*.¹³⁶ Clearly, Judge Roberts does not have a high standard for finding probable cause. Nor does his view of articulable suspicion, as evidenced by *Moore* and *Holmes*, appear to be particularly demanding.¹³⁷ Individualized suspicion,¹³⁸ be it reasonable suspicion or probable cause, requires, based on the whole picture, that the detaining officers have a particularized and objective basis for suspecting the particular person stopped or arrested of criminal activity.¹³⁹ The concept of probable cause is a familiar but fluid standard for a court to apply.¹⁴⁰ "In dealing with probable cause . . . , as the name implies, we deal with probabilities. These are not technical; they are the factual and practical considerations of everyday life on which reasonable and prudent men, not legal technicians, act."¹⁴¹ The totality of the circumstances is taken into account to determine whether there is a "fair probability that contraband or evidence of a crime will be found in a particular place."¹⁴² The divide in *Jackson* demonstrates that lower court judges continue to bring different perspectives to the analysis of probable cause.¹⁴³ Indeed, many judges and legal scholars undoubtedly believe that Judge Roberts's probable

133. See *supra* Parts I.A.-B., I.D.

134. See *supra* Part I.D.

135. See *supra* Part I.A.

136. See *supra* Part I.B.

137. See *supra* Parts I.C.-D.

138. For the role that individualized suspicion plays in Fourth Amendment analysis, see Thomas K. Clancy, *the Fourth Amendment's Concept of Reasonableness*, 2004 UTAH L. REV. 977 (2004); Thomas K. Clancy, *The Role of Individualized Suspicion in Assessing the Reasonableness of Searches and Seizures*, 25 U. MEM. L. REV. 483 (1995).

139. See, e.g., *United States v. Sokolow*, 490 U.S. 1, 9 (1989) (all of the factors justifying a stop, examined separately, can be "quite consistent" with innocent behavior but, when examined together, can still "amount to reasonable suspicion"); *United States v. Arvizu*, 534 U.S. 266, 277-78 (2002) (stop of vehicle justified based on a combination of factors, all innocuous by themselves, but in combination sufficient to create articulable suspicion of drug smuggling).

140. See generally Ronald J. Bacigal, *Making the Right Gamble: The Odds on Probable Cause*, 74 MISS. L.J. 279 (2004) (comprehensively examining the concept of probable cause).

141. *Brinegar v. United States*, 338 U.S. 160, 175 (1949). *Accord* *Michigan v. DeFillippo*, 443 U.S. 31, 37 (1979). The Supreme Court has rejected assigning a numerical marker for probable cause and, certainly, its conception of it has varied over time. See, e.g., *Illinois v. Gates*, 462 U.S. 213, 235 (1983) (not helpful to fix a "numerically precise degree of certainty" to probable cause determination but it is less than a preponderance standard only the probability); *Gerstein v. Pugh*, 420 U.S. 103, 121 (1975) (probable cause does not require fine tuning of evidence that even the "preponderance standard demands").

142. *Gates*, 462 U.S. at 238.

143. See *supra* Part I.B.

cause threshold, as articulated in *Jackson*, is set too low.¹⁴⁴ However, his methodology and conclusions in *Jackson* are more in tune with the current Supreme Court's analysis than the majority and concurring opinions. Indeed, the Supreme Court repeatedly has examined individualized suspicion cases in recent decades and those opinions—often unanimous—demonstrate that the probable cause¹⁴⁵ and reasonable suspicion standards¹⁴⁶ are not high barriers. This is to say that Judge Roberts's probable cause analysis fits comfortably with the Supreme Court's current collective view.

Courts permit police officers, based on their training and experience, to make logical inferences from the information known and courts give deference to a police officer's evaluation of the circumstances.¹⁴⁷ Judge Rogers in her opinion in *Jackson*, as well as Judge Edwards in his concurring opinion, did not defer to the police's expertise or conclusions; instead, those opinions reflect an intense scrutiny of the facts, with reliance on their own possible innocent explanations to overcome incriminating inferences, serving to defeat the police's conclusions that there was probable cause to search. If that mode of analysis is imposed on the police, they would in many instances be paralyzed; they are investigators, not adjudicators. Judge Roberts, in rejecting the majority's analysis, is more in tune with established Supreme Court precedent, which recognizes that "probable

144. See ALLIANCE FOR JUSTICE, REPORT ON THE NOMINATION OF JOHN G. ROBERTS TO THE UNITED STATES SUPREME COURT, 88 (2005), available at <http://www.supremecourtwatch.org/robertsprehearing.pdf> (last visited Nov. 3, 2005).

145. See, e.g., *Maryland v. Pringle*, 540 U.S. 366, 369, 371-72 (2003) (police had probable cause to arrest all the occupants of a car in which drugs and a roll of cash were found in the passenger compartment after all the occupants denied possession).

146. The reasonable suspicion standard, required for a stop, is less demanding than that for probable cause but the Court has never identified that quantum of suspicion needed with any precision. See, e.g., *United States v. Sokolow*, 490 U.S. 1, 7 (1989). Nonetheless, the Court has repeatedly held that the amount of information available to the officer at the time of a stop need not be great. See, e.g., *Illinois v. Wardlow*, 528 U.S. 119, 124-25 (2000) (unprovoked flight of suspect in high crime area); *United States v. Arvizu*, 534 U.S. 266, 277-78 (2002) (stop of vehicle justified based on a combination of factors, all innocuous by themselves, but in combination sufficient to create articulable suspicion of drug smuggling). But see *Florida v. J.L.*, 529 U.S. 266, 274 (2000) (anonymous tip insufficient to justify stop).

147. See, e.g., *Ornelas v. United States*, 517 U.S. 690, 699 (1996). The *Ornelas* court pointed out that reviewing courts should give deference both to trial courts' and to police officers' inferences drawn from the facts surrounding an encounter by saying:

A trial judge views the facts of a particular case in light of the distinctive features and events of the community; likewise, a police officer views the facts through the lens of his police experience and expertise. The background facts provide a context for the historical facts, and when seen together yield inferences that deserve deference.

Id.

cause requires only a probability or substantial chance of criminal activity, not an actual showing of such activity . . . [and] therefore, innocent behavior frequently will provide the basis for a showing of probable cause."¹⁴⁸

The application of an objective standard¹⁴⁹ to uphold the police actions, as employed in *Brown* and *Holmes*, may appear inconsistent with the principle that courts should defer to the police's evaluation of the circumstances. Indeed, in both of those cases the police had actual beliefs that undermined the rationales for the searches: in *Brown*, the officer mistakenly believed that he could search the trunk incident to arrest;¹⁵⁰ in *Holmes*, the officer believed that the hard object he was touching during the pat-down was a scale and not a weapon.¹⁵¹ However, the officer's mistake in *Brown* was one of law, that is, whether he could permissibly search the trunk incident to Brown's arrest.¹⁵² There was no dispute as to the underlying facts and the appellate court properly applied the correct legal framework to

148. *Illinois v. Gates*, 462 U.S. 213, 243 n.13 (1983). Also consistent with Roberts's view in *Jackson*, the Supreme Court has not dictated the manner in which the police must conduct an investigation. Instead, the police actions are merely measured for their reasonableness. See *United States v. Montoya de Hernandez*, 473 U.S. 531, 541-42 (1985) ("[C]reative judges engaged in *post hoc* evaluations of police conduct can almost always imagine some alternative means by which the objectives of the police might have been accomplished." (quoting *United States v. Sharpe*, 470 U.S. 675, 686-87 (1985))). Cf. *Michigan v. Long*, 463 U.S. 1032, 1052 (1983) (a *Terry* investigation "at close range" requires the officer to make a "quick decision as to how to protect himself and others from possible danger" and there is no requirement "that officers adopt alternative means to ensure their safety in order to avoid the intrusion involved in a *Terry* encounter" (quoting *Terry v. Ohio*, 392 U.S. 1, 24, 28 (1968))).

149. On the level of individual encounters of the police and citizens, one of the main principles of Fourth Amendment analysis focuses on examining the objective aspects of the encounter and not by inquiry into the officer's actual, subjective intent to determine if the police intrusions were justified. See generally *Whren v. United States*, 517 U.S. 806, 812-14 (1996) (collecting cases and rejecting Fourth Amendment challenges based on officers' actual motivations); *Brower v. County of Inyo*, 489 U.S. 593, 598 (1989) (inquiry into subjective intent inappropriate); *Michigan v. Chesternut*, 486 U.S. 567, 575 n.7 (1988) ("[T]he subjective intent of the officers is relevant to an assessment of the Fourth Amendment implications of police conduct only to the extent that intent has been conveyed to the person confronted."); *Maryland v. Macon*, 472 U.S. 463, 470-71 (1985) (Fourth Amendment violation is objective inquiry and does not depend on the officer's state of mind); *Scott v. United States*, 436 U.S. 128, 138 (1978) (emphasizing examination of officers' actions and not their state of mind); *United States v. Robinson*, 414 U.S. 218, 236 (1973) (for search incident to arrest, it does not matter that officer did not subjectively fear suspect or believe that the suspect might be armed).

150. *United States v. Brown*, 374 F.3d 1326, 1327 (D.C. Cir. 2004), *cert. denied*, 125 S. Ct. 1369 (2005).

151. *United States v. Holmes*, 385 F.3d 786, 788, 790 (D.C. Cir. 2004), *cert. denied*, 125 S. Ct. 1388 (2005).

152. *Brown*, 374 F.3d at 1327.

those facts; that is, the search was justified by probable cause to believe that evidence of a crime would be located in the trunk. No deference to the police's evaluation of the law was required or merited.

The situation in *Holmes*, however, was much different. In that case, the appellate court substituted its factual conclusions for those of the police officer. That is not a proper application of an objective analysis of the events—it is a rewriting of the events. In *Holmes*, as a matter of fact, Officer Phillip concluded that the object he was feeling in Holmes' pocket was not a firearm but was a scale.¹⁵³ He had a sound basis for that conclusion: his previous observations of Holmes had led Phillip to conclude that Holmes might be "armed;"¹⁵⁴ Phillip's own tactile examination of Holmes informed him that the object was not a gun but a "'hard,' 'square' object"; and when Holmes said the object was a scale, Phillip's sense of touch led him to conclude that the object was a scale.¹⁵⁵ Judge Roberts, instead of crediting that factual conclusion, essentially rejected it and asserted that a reasonable officer in Phillip's situation would have been justified in removing the object to ascertain what the object was.¹⁵⁶ This mode of analysis is not only inconsistent with Judge Roberts's own position in *Jackson* but also with Supreme Court authority, both of which acknowledge that courts should defer to the factual conclusions of police officers and the logical inferences from those conclusions. Applied to *Holmes*, this mode of analysis means that the court was faced with a situation where the officer actually believed he was touching a scale, not a weapon.

It is difficult to extrapolate from that actual belief of Phillip to an objective analysis that would have justified the removal of the object. One must seriously question Judge Roberts's conclusion that a reasonable police officer in Phillip's position would have believed that the "'hard,' 'square' object" might be a weapon. Phillip was looking for a gun, based on his observations of Holmes's activities prior to and during the stop, and his conclusions about those actions.¹⁵⁷ Phillip *knew* that the object he was touching was not a gun; he had no reason to suspect that Holmes had any other weapons; and he *thought* that the object was a scale.¹⁵⁸ It seems untenable that a reasonable officer under the circumstances would conclude that the object was possibly a weapon.

B. *The Scope of a Permissible Frisk*

There is a second, more fundamental reason to question Judge Roberts's decision in *Holmes*: he misapprehended the permissible

153. *Holmes*, 385 F.3d at 788.

154. *Id.* at 787-88.

155. *Id.* at 788.

156. *Id.* at 790.

157. *Id.* at 787-88.

158. *Id.* at 790.

scope of a *Terry*¹⁵⁹ frisk. A frisk, that is, a protective search of suspects for weapons, is a limited intrusion designed solely to insure the safety of the police officer and others while the officer is conducting a criminal investigation.¹⁶⁰ The Supreme Court has acknowledged that a protective search is “a serious intrusion upon the sanctity of the person, which may inflict great indignity and arouse strong resentment”¹⁶¹ and that such an intrusion is “an annoying, frightening, and perhaps humiliating experience.”¹⁶² On the other hand, the Court has also recognized the importance of the “immediate interest of the police officer in taking steps to assure himself that the person with whom he is dealing is not armed with a weapon that could unexpectedly and fatally be used against him.”¹⁶³

A protective search is justified when an officer has articulable suspicion that the person detained is armed and dangerous.¹⁶⁴ However, “[t]he manner in which [a] . . . search [is] conducted is . . . [just] as vital a part of the inquiry as whether [it is] warranted at all.”¹⁶⁵ A protective search for weapons must be “confined in scope to an intrusion reasonably designed to discover guns, knives, clubs, or other hidden instruments for the assault of the police officer.”¹⁶⁶ “If the protective search goes beyond what is necessary to determine if the suspect is armed, it is no longer valid under *Terry*.”¹⁶⁷

Thus, for example, in *Minnesota v. Dickerson*, a police officer detected no weapon-like objects during the course of a “patdown search” of the front of the suspect’s body.¹⁶⁸ The frisk did reveal, however, “a small lump” in the suspect’s pocket.¹⁶⁹ After “‘squeezing, sliding and otherwise manipulating’” the lump, the officer concluded that it was crack cocaine and retrieved it from the pocket.¹⁷⁰ The Court found the search constitutionally invalid,¹⁷¹ reasoning that, “[a]lthough the officer was lawfully in a position to feel the lump in respondent’s pocket, because *Terry* entitled him to place his hands upon respondent’s jacket,” the officer exceeded the scope of a *Terry* search after concluding that the object was not a weapon.¹⁷²

159. *Terry v. Ohio*, 392 U.S. 1 (1968).

160. *Id.* at 29-30.

161. *Id.* at 17.

162. *Id.* at 24.

163. *Id.* at 23.

164. *Id.* at 24.

165. *Id.* at 28.

166. *Id.* at 29.

167. *Minnesota v. Dickerson*, 508 U.S. 366, 373 (1993).

168. *Id.* at 369.

169. *Id.*

170. *Id.* at 378 (quoting *State v. Dickerson*, 481 N.W.2d 840 (Minn. 1992), *aff’d*, 508 U.S. 366 (1993)).

171. *Id.* at 378-79.

172. *Id.* at 379.

There are several interrelated considerations that measure the proper scope of a protective search.¹⁷³ Two are relevant to the *Holmes* fact pattern. The first is the level of assurance the police may obtain in satisfying themselves that the suspect they are confronting is not armed. As discussed elsewhere, "an officer may be only reasonably assured that the person the officer is confronting is not armed; this is to say that the police must accept some uncertainty when confronting suspects."¹⁷⁴ To permit the officer to obtain certainty or a high degree of confidence that the person is not armed would allow the most intrusive of searches, akin to a search incident to arrest. Such a rule eliminates the structure that *Terry* sought to create: for arrests, based on probable cause, a full search; for stops, based on articulable suspicion, a more limited intrusion to protect the police during their investigation. This two-level structure was designed to correlate the need to intrude with the degree of intrusion, thereby preventing unjustified intrusions into a person's security.

Thus, *Terry* contemplated a more limited intrusion than would be obtained if complete assurance were the goal. The level of justification for an investigatory stop also points to the conclusion that the police may not obtain absolute assurance that the person is not armed. Investigative stops are justified by reasonable suspicion that the person has or is about to commit a crime and a protective search is similarly justified if the officer has reasonable suspicion that the suspect is armed and dangerous. Thus, the State's interest or its need here is not as great as in the search incident to arrest situation. Accordingly, the officer's level of assurance that the person is not armed should be analogous to the justification for the protective search. It follows that an officer must accept some uncertainty whether the person he is confronting is armed; he can be only reasonably assured that the suspect is not armed.¹⁷⁵

A second factor refers to limits on the types of weapons for which a search can be made. Weapons come in a variety of forms and sizes. In a world where technological innovation continues to confound traditional Fourth Amendment principles, the police may in the future be confronted with danger from small but deadly weapons. That is not, however, the situation typically faced by the police today, nor is there any reason to believe that Officer Phillip was faced with that situation. Indeed, the Supreme Court has recognized that, throughout the long tradition of armed violence by American criminals that

173. See Thomas K. Clancy, *Protective Searches, Pat-Downs, or Frisks?: The Scope of a Permissible Intrusion to Ascertain if a Detained Person is Armed*, 82 MARQ. L. REV. 491, 525-32 (1999).

174. *Id.* at 525.

175. *Id.* at 527.

has resulted in the deaths and injuries of many law enforcement officers in the line of duty, “[v]irtually all of these deaths and a substantial portion of the injuries are inflicted with guns and knives.”¹⁷⁶ This raises the question of whether the police should be routinely allowed to satisfy themselves that the person accosted does not have any weapons, even a razor blade. Some courts permit such searches but others do not.¹⁷⁷

Some courts “condone fanciful speculation” on this point. Illustrative are cases holding that an object thought to be a cigarette lighter may be searched for because “it could be used in a doubled up fist as a punch or thrown at the officer or used to burn the officer or the police unit,” that a soft object may be searched for because it might be “a rubber water pistol loaded with carbolic acid or some other liquid, which if used by a suspect could permanently blind an officer,” and that an object thought to be a shotgun shell could be searched for because it could be detonated by a sharp object and the suspect “might want to explode the shell even in a way which might entail considerable personal risk to himself.”¹⁷⁸

Professor LaFave correctly observes that decisions of this type are unsound. He maintains that the correct view “reflects two . . . sensible considerations: (1) To allow a search for anything which could under some circumstances be employed as a weapon would be to permit a search” not dissimilar in intensity from a search incident to arrest;¹⁷⁹ and “(2) [i]n determining what objects might be a weapon, consideration must be given to what types of objects could be employed in the setting of the particular case.”¹⁸⁰ To these considerations a third should be added, that is, the principle that an officer may obtain only reasonable assurance that the person is not armed.

176. *Id.* at 495 (quoting *Terry v. Ohio*, 392 U.S. 1, 23-24 (1968)). Since *Terry* was decided, the danger for police in the line of duty has drastically increased. See *United States v. Michelletti*, 13 F.3d 838, 844 (5th Cir. 1994) (reporting that since *Terry*, the number of police officers killed annually in the line of duty has tripled and the number of those assaulted and wounded have risen by a factor of twenty), *cert. denied*, 513 U.S. 829 (1994). See also *Maryland v. Wilson*, 519 U.S. 408, 413 (1997) (noting that “traffic stops may be dangerous encounters” and that “[i]n 1994 alone, there were 5,762 officer assaults and 11 officers killed during traffic pursuits and stops”).

177. See 4 WAYNE R. LAFAVE, *SEARCH AND SEIZURE* § 9.6(c) (4th ed. 2004).

178. *Id.* at 665 (citations omitted) (referencing situations from California cases regarding these issues).

179. *Id.* See also *United States v. Del Toro*, 464 F.2d 520, 522 n.6 (2d Cir. 1972) (“To take an extreme example, a razor blade could readily be sewn into clothing, and so support a purported limited search for weapons which included shredding a suspect’s clothing or dismantling his shoes.”).

180. LaFave, *supra* note 177, § 9.6(c) at 666.

Thus, on the one hand, when an officer has particular information about the nature of the weapon carried by the suspect but none as to its location, a fairly intrusive search would be permitted if the weapon were small.¹⁸¹ For example, if an officer is confronting a person reasonably suspected of using a razor blade as a weapon, then a careful examination to locate that object is justified.¹⁸² On the other hand, when an officer has no specific information about the possible location of a weapon on the suspect or any information about the type of weapon the suspect may have, the search must be limited to fairly large objects such as guns and knives.¹⁸³ Thus, when an officer, during the course of a protective search, discovers a matchbox, even though such boxes "could hold a razor blade," he has no right to open it absent any information that the suspect is carrying such a weapon.¹⁸⁴ In concluding that an officer exceeded the permissible scope of a protective search when the officer examined the contents of a man's wallet, one judge has reasoned that

in this case there were no circumstances which would support a reasonable belief that what the officer felt with his hand contained a weapon. True, it might, and possibly could, contain a very small but potentially lethal weapon. Nevertheless, it was an innocuous and ordinary size common men's wallet without any bulge or other telltale sign, resting in a commonly located place. The limited authority to intrude . . . in a frisk, when the police do not yet have probable cause, covers objects which may be weapons but not objects which possibly could contain weapons. If that were the law, then an officer could reach in and retrieve any item which felt like a container, including anybody's wallet, because even a very small container could harbor a razor blade.¹⁸⁵

181. *Id.* at 665-68.

182. *Cf.* *State v. Williams*, 544 N.W.2d 350, 351-54 (Neb. 1996) (police officers permitted to force open clinched fist of suspect to determine if she had a razor blade or small knife when investigating report of boy that his mother was being beaten by suspects armed with knives).

183. *See, e.g.*, *United States v. Swann*, 149 F.3d 271, 276-77 (4th Cir. 1998) (permissible to remove object from sock when, during frisk of suspect, officer encountered hard object of "approximately the same size and shape as a box cutter with a sharp blade, which is often used as a weapon"); *State v. Ashbrook*, 586 N.W.2d 503, 508-09 (S.D. 1998) (officer acted within scope of protective search when he examined containers in car that were large enough and heavy enough to hold a weapon but did not look into smaller containers).

184. *But see* *Jackson v. State*, 804 S.W.2d 735, 740 (Ark. Ct. App. 1991) (police officer could seize contraband in matchbox after arrest of suspect based on reasonable cause to believe felony had been committed).

185. *State v. Newton*, 489 S.E.2d 147, 152-53 (Ga. Ct. App. 1997) (Beasley, J., concurring). *See also* *State v. Crook*, 485 N.W.2d 726, 729-30 (Minn. Ct. App. 1992) (removal of hat without first "pat search[ing]" to search for razor blade or other small weapon improper); *People v. Collins*, 463 P.2d 403, 406 (Cal. 1970) (cannot exceed the scope of a lawful pat-down upon

This judge's reasoning reflects an analysis of the proper considerations that govern the scope of a protective search. An officer can only achieve reasonable assurance that the suspect is not armed. Absent information that the suspect utilizes razor blades or another small weapon, the officer must accept some uncertainty that the suspect may be harboring a small weapon. The police cannot search small containers or other areas based on the speculation that it might contain a small or atypical weapon absent any information that the suspect is armed with such a weapon. Otherwise, the balance struck by *Terry* would be eliminated and a protective search would be no different in intensity than a search incident to arrest.

In *Holmes*, it was a given that the police were faced with a suspect that they reasonably believed was armed and dangerous.¹⁸⁶ Under *Terry*, the police officers were entitled to conduct a frisk of Holmes to protect themselves.¹⁸⁷ But accepting that premise does not mean that they could go into Holmes's pocket. At the time that Phillip was about to remove the hard object, Phillip *knew* the following: the "'hard,' 'square' object" was not a gun; he *thought* it was a scale.¹⁸⁸ Judge Roberts reasoned as follows that its removal was within the valid scope of a *Terry* frisk: "The object did not feel like a firearm, but it could have been another type of weapon—a box cutter, for example."¹⁸⁹ Phillip had no reason to believe that Holmes had any such unusual weapon; under the circumstances, the proper scope of the frisk should have been limited to that necessary to locate the usual weapons to assault police officers. Judge Roberts, instead, permitted an intrusion based on observing that the object "*might*" be used as a weapon.¹⁹⁰ Such speculative reasoning is inconsistent with the proper scope of a frisk; to hold otherwise, permits general exploratory searches, effectively obliterating the distinction between the limited intrusion authorized by a *Terry* frisk and a search.

C. Departures from Lower Courts' Legal Analysis to Uphold the Search

Judge Roberts demonstrated a willingness to depart from the lower court's reasoning in *Lawson* and in *Jackson* to uphold the search. Many courts would not engage in such analysis, finding instead that

speculation that object might be a razor blade or other atypical weapon because, to do so, "would render meaningless *Terry's* requirement that pat-downs be limited in scope absent articulable grounds for an additional intrusion.").

186. United States v. Holmes, 385 F.3d 786, 790 (D.C. Cir. 2004), *cert. denied*, 125 S. Ct. 1388 (2005).

187. *Id.*

188. *Id.*

189. *Id.* at 791.

190. *Id.* (quoting *Sibron v. New York*, 392 U.S. 40, 65 (1968)).

the claim is unpreserved.¹⁹¹ Nonetheless, it is within the court's discretion to address unpreserved legal arguments, so long as there is no dispute of the relevant facts.¹⁹² In *Lawson*, the government raised the issue for the first time on appeal and the appellant replied on the merits, asserting that there was no probable cause to search based on the facts developed at the hearing.¹⁹³ Given that the appellant in *Lawson* discussed the merits in his reply brief, it is perhaps less troublesome that Judge Roberts did also. On the other hand, such an approach left the *Jackson* court divided over unclear facts.¹⁹⁴ Although few firm conclusions can be drawn, these cases may signal a willingness by Chief Justice Roberts on the Supreme Court to go beyond the arguments of the parties and the reasoning of lower courts to superimpose his legal reasoning in cases before the Court.

D. *Measuring Reasonableness*

"The fundamental command of the Fourth Amendment is that searches and seizures be reasonable."¹⁹⁵ This term is not self-defin-

191. See, e.g., *Bell v. State*, 334 Md. 178, 187-91, 638 A.2d 107, 112-14 (1994) (collecting cases and discussing waiver of claim at suppression hearing based on State's failure to argue probable cause ground).

192. See *United States v. Garrett*, 720 F.2d 705, 710 (D.C. Cir. 1983) (may affirm on grounds other than those presented and relied on below).

193. *United States v. Lawson*, 410 F.3d 735, 740 n.4 (D.C. Cir. 2005).

194. Because *Jackson* did not argue in the district court that the police should have conducted a more elaborate investigation, the lower court did not make any factual finding as to when the suspect told the officers that the car belonged to his girlfriend. Judge Roberts cited the following sections of the hearing transcript:

Compare Hr'g Tr., June 9, 2003, at 62 ("I don't recall exactly when the conversation took place in which he . . . informed us that his girlfriend had purchased the vehicle at an auction.") (redirect of Officer Garboe) *with id.* at 70 (Q. "Did you have any information regarding this defendant or anyone else's possible ownership of this particular vehicle prior to the search?" A. "No.") (Officer Johnson).

United States v. Jackson, 415 F.3d 88, 105 n.3 (D.C. Cir. 2005) (Roberts, J. dissenting). Roberts concluded from these excerpts that *Jackson's* comments came after the search.

However, Judge Edwards, in his concurring opinion, relied on the explanation *Jackson* gave to the officers that he had borrowed the recently purchased car from his girlfriend as undercutting the justification for the search of the trunk. *Id.* at 100 (Edwards, J., concurring). To have relevance, that explanation had to have occurred prior to the search. Edwards cited no record support for his view. Although it appears that Judge Roberts's conclusion as to when the search occurred had stronger support in the record, the varying opinions of the two judges points to one reason why many courts would remand for factual findings in lieu of reliance on ambiguous records to support a ground not articulated by the lower court.

195. *New Jersey v. T.L.O.*, 469 U.S. 325, 340 (1985).

ing.¹⁹⁶ “The methods by which the courts address this challenge will largely determine how much liberty we have and how much the government can intrude.”¹⁹⁷ As recently observed,¹⁹⁸ in *Wyoming v. Houghton*,¹⁹⁹ the Court articulated a two-step model for measuring reasonableness: first, the Court inquired “whether the action was regarded as an unlawful search or seizure under the common law when the Amendment was framed;” and, second, if “that inquiry yields no answer,” the search or seizure is evaluated “under traditional standards of reasonableness by assessing, on the one hand, the degree to which it intrudes upon an individual’s privacy and, on the other, the degree to which it is needed for the promotion of legitimate governmental interests.”²⁰⁰ The *Houghton* test is an odd combination: if it yields an answer, the common law at the time the Amendment was framed, which was in 1791, is dispositive;²⁰¹ if not, the balancing test is

196. See, e.g., *Delaware v. Prouse*, 440 U.S. 648, 654 (1979) (quoting *United States v. Rabinowitz*, 339 U.S. 56, 83 (1950) (Frankfurter, J., dissenting), overruled by *Chimel v. California*, 395 U.S. 752 (1969):

To say that the search must be reasonable is to require some criterion of reason. It is no guide at all either for a jury or for district judges or the police to say that an ‘unreasonable search’ is forbidden—that the search must be reasonable. What is the test of reason which makes a search reasonable?

197. Thomas K. Clancy, *The Fourth Amendment’s Concept of Reasonableness*, 2004 UTAH L. REV. 977, 1043 (2004).

198. See *id.* at 1014-15.

199. 526 U.S. 295 (1999). See generally Tracey Maclin, *Let Sleeping Dogs Lie: Why the Supreme Court Should Leave Fourth Amendment History Unabridged*, 82 B.U. L. REV. 895 (2002) (discussing *Houghton* and the Court’s inconsistent and selective use of history).

200. *Houghton*, 526 U.S. at 299-300. In *Houghton*, the Court was confronted with the question “whether police officers violate the Fourth Amendment when they search a passenger’s personal belongings inside an automobile that they have probable cause to believe contains contraband.” *Id.* at 297. In answering that question, the Court first turned to the common law inquiry mandated by its new test. Based on founding era authorities, the Court concluded that “the historical evidence [showed] that the Framers would have regarded as reasonable (if there was probable cause) the warrantless search of containers within an automobile.” *Id.* at 300. The Court went on to apply the balancing test as an alternative means of reaching the same result. *Id.* at 303-07. Four Justices rejected the majority’s model of reasonableness. See *id.* at 307 (Breyer, J., concurring) (“I join the Court’s opinion with the understanding that history is meant to inform, but not automatically to determine, the answer to a Fourth Amendment question.”); *id.* at 311 n.3 (Stevens, J., dissenting, joined by Souter, J. and Ginsburg, J., dissenting) (“To my knowledge, we have never restricted ourselves to a two-step Fourth Amendment approach wherein the privacy and governmental interests at stake must be considered only if 18th-century common law ‘yields no answer.’”).

201. The first part of *Houghton* implements Justice Scalia’s strongly held view that bases Fourth Amendment interpretation on the common law. See *California v. Acevedo*, 500 U.S. 565, 583-84 (1991) (Scalia, J., concurring) (proposing that “the ‘reasonableness’ requirement of the Fourth Amendment affords the protection that the common law afforded” but adding “that

used to evaluate the relative weights of contemporary governmental needs and individual interests.

In prior cases, the Supreme Court had often relied on the common law as a guide to ascertain the meaning of Fourth Amendment principles. Exactly how that tool has been used, as with other interpretative techniques, varied with who wrote the opinion.²⁰² However, *Houghton's* dispositive reliance on the common law as defining reasonableness where it yields an answer had never been used before in a Fourth Amendment case.²⁰³ "Also, contrary to *Houghton*, the historical *abuses* that prompted the Amendment were more important to the Framers than the common law search and seizure *requirements*, with the only notable exception being the common law search warrant, which served as the model for the Warrant Clause."²⁰⁴ Moreover, using the common law as the measure of reasonableness is distinct from using the common law as the measure of the Framers' intent. As to the former, the common law rule as of 1791 *defines* what is reasonable. As to the latter, the common law is consulted to ascertain the Framers' intent, which is in turn used to justify reliance on some conception of reasonableness.

Judge Roberts in *Hedgepeth* cited *Houghton* as setting forth the first step in the test for reasonableness. Did he do so because he felt

changes in the surrounding legal rules (for example, elimination of the common law rule that reasonable, good-faith belief was no defense to absolute liability to trespass), may make a warrant indispensable to reasonableness where it once was not") (citation omitted); County of Riverside v. McLaughlin, 500 U.S. 44, 60 (1991) (Scalia, J., dissenting) (arguing that the balancing test applies to "novel questions of search and seizure" but not to "resolving those questions on which a clear answer already existed in 1791 and has been generally adhered to by the traditions of our society ever since").

202. See, e.g., *Atwater v. City of Lago Vista*, 532 U.S. 318, 326 (2001) (the Court is "guided by" common law in ascertaining the meaning of reasonableness); *Oliver v. United States*, 466 U.S. 170, 183-84 (1984) (While "[t]he common law may guide consideration of what areas are protected by the Fourth Amendment," common law rights are not co-incident with the Fourth Amendment); *Payton v. New York*, 445 U.S. 573, 591 (1980) (common law view utilized to shed light on Framers' intent); *Gerstein v. Pugh*, 420 U.S. 103, 114 (1975) (common law acts as a guide to interpret Fourth Amendment). See also Kathryn R. Urbonya, *Rhetorically Reasonable Police Practices: Viewing the Supreme Court's Multiple Discourse Paths*, 40 AM. CRIM. L. REV. 1387, 1397-99 (2003) (observing that the Court's use of "history" is one type of rhetorical argument that the Court has selectively used in its decisions).
203. Cf. *Vernonia Sch. Dist. 47J v. Acton*, 515 U.S. 646, 652-53 (1995) (stating that the balancing test would apply "[a]t least in a case such as this, where there was no clear practice, either approving or disapproving the type of search at issue, at the time the constitutional provision was enacted"); *Miller v. United States*, 357 U.S. 301, 313-14 (1958) (utilizing supervisory powers over the federal courts and reversing conviction based on the police's failure to comply with the common law requirement to announce their purpose for demanding admission).
204. See generally Clancy, *supra* note 197, at 978-90, 1014-15.

bound by it? If so, he ignored many other cases utilizing much different models of “reasonableness” analysis, each of which remain viable.²⁰⁵ Or did he cite it because he accepts it as the proper measure of reasonableness? If the latter is true, then his presence on the Court will significantly shift the grounding of Fourth Amendment jurisprudence. He would join Justices Scalia and Thomas in affording dispositive weight to the common law. Justice O’Connor, albeit not a model of consistency in her Fourth Amendment analysis,²⁰⁶ was generally in the camp that viewed the common law as illuminating the Framers’ intent and not dispositive of an issue; she was an advocate for the central role of individualized suspicion as an element of a search or seizure.²⁰⁷ She also wrote a dissent in *Atwater*, joined by three other justices, wherein she reasoned in part that “history is just one of the tools [the Court] use[s] in conducting the reasonableness inquiry.”²⁰⁸ Thus, if Judge Roberts were in the “common law is dispositive” camp, this would represent a strengthening of the view of the Fourth Amendment that is, in my view, incorrect and, at bottom, unworkable.²⁰⁹ On the other hand, Judge Roberts in *Hedgepeth* did not quote the second part of the *Houghton* test, that is, that if the common law did not yield an answer, the Court would employ a balancing test to assess reasonableness. Instead, Judge Roberts looked to the “essential purpose” of the Fourth Amendment, which is “to impose a standard of ‘reasonableness’ upon the exercise of discretion by government officials.”²¹⁰ Was this language just a balm; it was, after all, pure dicta. Or does it reflect his possible rejection of balancing and, instead, use of other tools to ascertain reasonableness? Perhaps Chief Justice Roberts will view the reasonableness inquiry as neither a divining of the state of the common law as of 1791 nor as an unprincipled balancing of competing interests. Perhaps, in looking for the “essential pur-

205. See generally Clancy, *supra* note 197, at 1022-26 (discussing the Court’s reasonableness models and observing that the Court has failed to establish a hierarchy among them).

206. She joined the majority in *Houghton*, which set forth the common law as the dispositive first step in reasonableness analysis. See *Wyoming v. Houghton*, 526 U.S. 295, 299-300 (1999). But in *Atwater*, as discussed in the text, she asserted that the common law was but one tool in that assessment. See *Atwater*, 532 U.S. at 361 (O’Connor, J. dissenting); *supra* note 202 and accompanying text.

207. See, e.g., *Vernonia Sch. Dist. 47J*, 515 U.S. at 678 (O’Connor, J., dissenting) (noting that “the individualized suspicion requirement has a legal pedigree as old as the Fourth Amendment itself”).

208. *Atwater*, 532 U.S. at 361 (O’Connor, J., dissenting).

209. See David A. Sklansky, *The Fourth Amendment and the Common Law*, 100 COLUM. L. REV. 1739, 1739 (2000) (arguing that the recent cases of the Supreme Court utilizing the common law as the principal criterion for assessing the reasonableness of searches and seizures are “faithful neither to the text of the Amendment nor to what we know of its intent”).

210. *Hedgepeth v. Metro. Area Transit Auth.*, 386 F.3d 1148, 1159 (D.C. Cir. 2004) (quoting *Delaware v. Prouse*, 440 U.S. 648, 653-54 (1979)).

pose” of the Amendment, he will see that process as “a weighted inquiry: one starts with a conception of what reasonableness is[;] [i]t is a search or seizure based on objective criteria.”²¹¹ To find such criteria, history is a vital tool, but it must be properly used to ascertain the Framers’ values and not to enshrine specific common law practices.²¹² Moreover, in seeking to constrain official discretion, Judge Roberts may look to the course of Fourth Amendment jurisprudence, which has demonstrated the need to retain objective standards.²¹³ Indeed, the Court’s other methods of assessing reasonableness have failed to provide meaningful guidance and to protect individuals from ever-expanding governmental intrusions.²¹⁴ “In the end, however, the Court’s judgment should be informed by the fundamental purpose of the Amendment: protecting individual security from unreasonable governmental invasion.”²¹⁵

III. CONCLUSION

So what conclusions can we draw from Judge Roberts’s record? In each case, Judge Roberts sided with the government. In each case, he relied on established precedent to ground his legal analysis. His opinions are tightly reasoned, often steering close to the line set by precedent. This is what intermediate appellate judges should do. Certainly, some will disagree with him, based on the facts, whether a particular action was justified. However, with the notable exception of *Holmes*, Judge Roberts’s view of the law was well grounded in Supreme Court precedent to support it, particularly more recent Supreme Court cases. Judge Roberts’s record discloses a willingness—perhaps even an eagerness—to depart from the reasoning of the lower courts to uphold the governmental actions. The cases give significant insight as to Judge Roberts’s views on probable cause—including how weighty that standard is and what tools should be employed to measure it.

Yet, much is unknown. How will Chief Justice Roberts address the fundamental issues that will come before him about the Fourth Amendment: what is the proper definition of a search, a seizure, or how to measure reasonableness; what impact should technology have on those definitions and, consequently, individual rights; what role does privacy have in defining the scope of the Fourth Amendment’s guarantee of security; and what is the proper scope of the exclusionary rule in enforcing Fourth Amendment protections?

211. Clancy, *supra* note 197, at 1043.

212. See Clancy, *supra* note 197, at 1027-28.

213. Clancy, *supra* note 197, at 1027-28.

214. Clancy, *supra* note 197, at 1027-28.

215. Clancy, *supra* note 197, at 1044.