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Don't Accept Rides from Strangers: The Supreme Court Hastens the Demise of Passenger Privacy in American Automobiles

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DON'T ACCEPT RIDES FROM STRANGERS: THE SUPREME COURT HASTENS THE DEMISE OF PASSENGER PRIVACY IN AMERICAN AUTOMOBILES

Wyoming v. Houghton, 119 S. Ct. 1297 (1999)

I. INTRODUCTION

In *Wyoming v. Houghton*,¹ the United States Supreme Court held that a police officer who has probable cause to search a car may search any container within the car that might contain the object of the search, including the belongings of a passenger unsuspected of any criminal behavior. In so holding, the Court rejected the lower court's assertion that the personal effects of a passenger unsuspected of criminal activity are outside of the scope of a lawful automobile search.² The Court based its holding primarily on the notion that the common law existing during the framing of the Constitution would not have differentiated among items to be included in a valid search based upon ownership.³ In addition, the Court believed that the need to protect the privacy interests of a passenger did not justify the excessive difficulties such protections would create for police officers in the field.⁴

This Note reviews both the genesis and interpretation of the warrantless automobile search, as well as the other legal principles implicated in the search of a passenger's effects. This Note argues that the Court erred by condoning a search conducted without individualized suspicion, because the facts of this case did not meet the requirements of previously allowed suspicionless searches. This Note further argues that the Court's denial of any meaningful expectation of privacy for passengers is inconsistent with Fourth Amendment jurisprudence. Finally, this

¹ 119 S. Ct. 1297 (1999).

² *Id.* at 1300.

³ *Id.* at 1300-01.

⁴ *Id.* at 1303.

Note argues that the Court overstated the potential problems of the Wyoming Supreme Court's "passenger's property rule."⁵ This Note concludes that the passenger's property rule offers a workable standard for police officers in the field, while adhering to the traditional notions of individualized suspicion and individual privacy.

II. BACKGROUND

The Fourth Amendment to the United States Constitution protects "[t]he right of the people to be secure in their persons, houses, papers, and effects, against unreasonable searches and seizures" and ensures that "no Warrants shall issue, but upon probable cause."⁶ While it would be a gross oversimplification to declare that there is any one purpose for the Amendment,⁷ the Supreme Court has declared that the "basic purpose of this Amendment, as recognized in countless decisions of this Court, is to safeguard the privacy and security of individuals against arbitrary invasions by government officials."⁸ When a government action is suspected of violating the Fourth Amendment, the Court will often peer back through history to see if the framers would have approved of an analogous action.⁹ In addition (or often instead), the Court will evaluate the action's "reasonableness" by "balancing its intrusion on the individual's Fourth Amendment interests against its promotion of legitimate governmental interests."¹⁰

⁵ *Id.* at 1303.

⁶ U.S. CONST. amend. IV.

⁷ See, e.g., *New Jersey v. T.L.O.*, 469 U.S. 325, 335 (1985) (Fourth Amendment originally intended to prohibit the "pre-Revolutionary practice of using general warrants or 'writs of assistance' to authorize searches for contraband by officers of the crown"); *United States v. Chadwick*, 433 U.S. 1, 8-9 (1977) ("[T]he Framers were men who focused on the wrongs of the day but who intended the Fourth Amendment to safeguard fundamental values which would far outlast the specifics which gave it birth."); *Terry v. Ohio*, 392 U.S. 1, 8 (1968) (Amendment protects the "inestimable right of personal security").

⁸ *Camara v. Municipal Court of the City and County of San Francisco*, 387 U.S. 523, 528 (1967).

⁹ See, e.g., *Vernonia Sch. Dist. v. Acton*, 515 U.S. 646, 652 (1995); *Carroll v. United States*, 267 U.S. 132, 149 (1925).

¹⁰ *Delaware v. Prouse*, 440 U.S. 648, 654 (1979). See also *Brown v. Texas*, 443 U.S. 47, 50-51 (1979); *Pennsylvania v. Mimms*, 434 U.S. 106, 108-09 (1977); *United States v. Brignoni-Ponce*, 422 U.S. 873, 878 (1975).

A. INDIVIDUALIZED SUSPICION

The phrase "individualized suspicion" does not appear in the text of the Fourth Amendment, but the concept—that the suspicion of criminal activity underlying a government intrusion into a person's privacy should be calibrated toward the actions of that person—has played a significant role in the development of search and seizure jurisprudence.¹¹ Indeed, Professor Thomas Clancy¹² has argued that individualized suspicion was an assumed element of a reasonable search or seizure at the time of the framing of the Constitution.¹³ Professor Clancy explained,

[G]iven the historical background, characterized by suspicionless searches and seizures pursuant to general warrants, the litigation and outcry concerning those abuses, the antecedent colonial constitutional efforts to prevent general warrants, the importance attached to the necessity of establishing individualized suspicion to issue a common-law search warrant, and the drafting process of the [Fourth] Amendment itself, it takes little deductive reasoning to conclude that a *chief goal of the framers was to prevent the historical abuses associated with suspicionless searches and seizures* predating the Amendment. The framers believed individualized suspicion to be an inherent component of the concept of reasonableness.¹⁴

The Supreme Court has long considered individualized suspicion to be a threshold requirement for most permissible searches and seizures.¹⁵ This requirement has endured throughout the twentieth century, even as the Court has lowered the level of suspicion needed to sustain the reasonableness of a search. First, when the Court created certain exceptions to the warrant requirement and permitted police officers in some circumstances to conduct warrantless searches based on probable cause, it reiterated that the lower standards were to be used

¹¹ See generally Thomas K. Clancy, *The Role of Individualized Suspicion in Assessing the Reasonableness of Searches and Seizures*, 25 U. MEM. L. REV. 483 (1995).

¹² Assistant Attorney General, State of Maryland; Adjunct Faculty, University of Maryland School of Law.

¹³ See Clancy, *supra* note 11.

¹⁴ Clancy, *supra* note 11, at 530 (emphasis added).

¹⁵ See, e.g., *Chandler v. Miller*, 520 U.S. 305, 313 (1997) ("To be reasonable under the Fourth Amendment, a search ordinarily must be based on individualized suspicion of wrongdoing."); *Brown v. Texas*, 443 U.S. 47, 51 (1979) ("[T]he Fourth Amendment requires that a seizure must be based on specific, objective facts indicating that society's legitimate interests require the seizure of the particular individual. . .").

only on an individual basis.¹⁶ Second, in *Terry v. Ohio*,¹⁷ when the Court held that a police officer could conduct a limited pat-down search of an individual with only reasonable suspicion to believe the person was armed, the Court reaffirmed the importance of specificity of suspicion. After outlining this new police power, the Court restricted this power strictly to "the individual whose suspicious behavior [the officer] is investigating at close range."¹⁸

Despite the historical importance afforded the concept of individualized suspicion, it does not stand as an absolute prerequisite for a reasonable search or seizure.¹⁹ In certain situations, the Court has ruled that "special needs, beyond the normal need for law enforcement"²⁰ will necessitate departure from the traditional requirement. To determine whether a particular search fits within this "closely guarded category of constitutionally permissible suspicionless searches,"²¹ the Court will balance the private and public interests involved.²² Specifically, the Court will decide whether this is one of the "limited circumstances, where the privacy interests implicated by the search are minimal, and where an important governmental interest furthered by the intrusion would be placed in jeopardy by a requirement of individualized suspicion."²³

In the context of automobile searches and seizures, the Court has used this balancing test to approve suspicionless seizures at fixed border checkpoints²⁴ and sobriety checkpoints.²⁵ In *United States v. Martinez-Fuerte*, the Court assessed the constitu-

¹⁶ See, e.g., *Carroll v. United States*, 267 U.S. 132, 154 (1925) (new ability to conduct warrantless searches of automobiles should not be used to stop all of the drivers on the highway, but only those who officers have probable cause to believe are carrying contraband).

¹⁷ 392 U.S. 1 (1968).

¹⁸ *Id.* at 24.

¹⁹ See, e.g., *United States v. Martinez-Fuerte*, 428 U.S. 543, 560-61 (1976). The Court stated that while "some quantum of individualized suspicion is usually a prerequisite to a constitutional search or seizure . . . the Fourth Amendment imposes no irreducible requirement of such suspicion." *Id.*

²⁰ *Griffin v. Wisconsin*, 483 U.S. 868, 873 (1987) (quoting *New Jersey v. TLO*, 469 U.S. 325, 351 (1985) (Blackmun, J., concurring)).

²¹ *Chandler v. Miller*, 520 U.S. 305, 309 (1997).

²² *Id.*

²³ *Skinner v. Railway Labor Executives' Ass'n*, 489 U.S. 602, 624 (1989).

²⁴ See *Martinez-Fuerte*, 428 U.S. 543.

²⁵ See *Michigan Dep't of State Police v. Sitz*, 496 U.S. 444 (1990).

tionality of briefly stopping a vehicle for questioning at fixed border checkpoints when there was no reason to believe the particular car contained illegal aliens.²⁶ The Court held that such seizures²⁷ do not violate the Fourth Amendment.²⁸ After detailing the extent of the problem of illegal immigration,²⁹ the Court found a brief vehicle stop followed by a border official's request that a motorist answer one or two questions or possibly produce a document relating to citizenship to be a minimal intrusion of privacy.³⁰ The stop at a fixed checkpoint is certainly less intrusive than the stops conducted by roving patrols, the Court reasoned, because the fixed stop would be less surprising, frightening, or annoying to drivers.³¹ Furthermore, the fixed checkpoint stops are less susceptible to "discretionary enforcement activity."³² Finally, the Court believed the procedure served a valid government interest.³³

In *Michigan Department of State Police v. Sitz*, the Court confronted the constitutionality of stopping vehicles at sobriety checkpoints.³⁴ After finding that such stops were "seizures,"³⁵ the Court held that they do not violate the Fourth Amendment.³⁶ In balancing the public and private interests involved in the case, the Court was influenced, first, by the extent of the problem of drunk driving and, thus, the state's interest in eradicating it.³⁷ Second, the Court condoned the "effectiveness" of this particular sobriety checkpoint, which it defined as "the extent to which this system can reasonably be said to advance [the

²⁶ *Martinez-Fuerte*, 428 U.S. at 545.

²⁷ *Id.* at 556. The Court stated, "It is agreed that checkpoint stops are 'seizures' within the meaning of the Fourth Amendment." *Id.* See also *Brower v. County of Inyo*, 489 U.S. 593, 597 (1989) (seizure occurs whenever "there is a governmental termination of freedom of movement through means intentionally applied" (emphasis in original)).

²⁸ *Martinez-Fuerte*, 428 U.S. at 545.

²⁹ *Id.* at 551.

³⁰ *Id.* at 557-58.

³¹ *Id.* at 558-59.

³² *Id.*

³³ *Id.* at 562.

³⁴ 496 U.S. 444, 451 (1990).

³⁵ *Id.* at 450.

³⁶ *Id.* at 455.

³⁷ *Id.* at 451.

interest of preventing drunken driving].”³⁸ Finally, the Court found the privacy intrusion of the brief stop involved to be “slight.”³⁹

As may already be apparent from the Court’s reasoning in *Martinez-Fuerte* and *Sitz*, the Court has allowed suspicionless police intrusions to proceed once it is satisfied that the searches are a necessary and effective means of addressing a compelling government interest. In such situations, the Court feels comfortable relying on “other safeguards . . . to assure that the individual’s reasonable expectation of privacy is not subject to the discretion of the official in the field.”⁴⁰ However, when the interest proffered by the police seems less than compelling, the Court will draw the line. Thus, in *Delaware v. Prouse*, where the stopping of motorists was not part of an organized sobriety dragnet or established border checkpoint but rather the random stopping of motorists to check the validity of their licenses and registration, the Court found the practice unreasonable.⁴¹ In the Court’s opinion, the stops were made in too arbitrary a fashion⁴² and subject to the “standardless and unconstrained discretion” of the officers.⁴³ Without evidence to the efficacy of these random stops, the Court would not allow them.⁴⁴ In other words, the Court hinted that it might have looked more favorably upon the actions of the officers in *Prouse* if police statistics showed that unauthorized driving were a rampant, dangerous problem and random stops the cure. This is a farfetched scenario to be sure, but indicative of the Court’s approach to the issue.

³⁸ *Id.* at 455. The Saginaw County checkpoint in question detained 126 vehicles during its 75-minute tenure. During that time, two drivers were arrested for driving under the influence, or 1.6% of the drivers passing through the checkpoint. In assessing “effectiveness” of drunken driving reduction techniques, the Court does not evaluate the techniques against a bright-line efficacy level. Rather, the Court measures a particular practice against alternative practices available. Thus, the Court noted how the 1.6% arrest rate of the Saginaw County checkpoint coincided with testimony given at trial that sobriety checkpoints nationwide yielded arrest rates approximating 1% of all motorists stopped. *Id.*

³⁹ *Id.* at 451.

⁴⁰ *Delaware v. Prouse*, 440 U.S. 648, 655 (1979) (internal quotation marks omitted).

⁴¹ *Id.* at 663.

⁴² *Id.* at 661-63.

⁴³ *Id.* at 661.

⁴⁴ *Id.* at 659-60.

B. EXPECTATION OF PRIVACY ANALYSIS

Before a person can evoke the protections of the Fourth Amendment, he must demonstrate a reasonable expectation of privacy in the area or in the item unreasonably searched.⁴⁵ Proving that such an expectation exists is a two-step process.⁴⁶ First, the "person [must] have exhibited an actual (subjective) expectation of privacy," and, second, the expectation must "be one that society is prepared to recognize as 'reasonable.'"⁴⁷

The first step of this process is almost always satisfied. All a person must do is demonstrate that "he seeks to preserve [the area or item] as private."⁴⁸ The second step is much harder to satisfy.⁴⁹ Sometimes, the Court does not simply determine whether the expectation is objectively reasonable or not. It may deem a particular expectation objectively reasonable, but go on to assign the expectation a relative strength to be used later when balancing the privacy interests of the individual against the public interests involved in the case.⁵⁰

Certain identifiable factors have emerged from the case law that influence the Court's findings regarding a person's expectation of privacy. One such factor is the person's relationship with the state. When the state has any sort of custodial or supervisory responsibility toward the person, the person's expectations of privacy are lessened. For example, the Court has ruled that children have less of an expectation of privacy in their persons while at school,⁵¹ that probationers have a reduced expecta-

⁴⁵ *Katz v. United States*, 389 U.S. 347, 361 (1967) (Harlan, J., concurring).

⁴⁶ *Id.* (Harlan, J., concurring).

⁴⁷ *Id.* (Harlan, J., concurring).

⁴⁸ *Id.* at 351. See, e.g., *California v. Greenwood*, 486 U.S. 35, 39 (1988) (subjective expectation of privacy demonstrated by placing garbage in opaque trash bags); *Rakas v. Illinois*, 439 U.S. 128, 143 n.12 (1978) (surmising that even "a burglar plying his trade in a summer cabin during the off season may have a thoroughly justified subjective expectation of privacy"). But see *Smith v. Maryland*, 442 U.S. 735, 743 (1979) (holding no subjective expectation of privacy exhibited in phone numbers conveyed to the phone company for the purposes of dialing).

⁴⁹ See *Greenwood*, 486 U.S. at 40 (subjective, but not objective expectation of privacy); *Rakas*, 439 U.S. at 139-40 (subjective, but not objective, expectation of privacy).

⁵⁰ See *New Jersey v. T.L.O.*, 469 U.S. 325 (1985) (holding that schoolchildren have some legitimate expectation of privacy in the items they bring to school, but the weight of their expectation of privacy is lessened by the school administrators' needs to maintain discipline).

⁵¹ See *id.*

tion in the privacy of their homes,⁵² and that prisoners have no expectation of privacy in their person.⁵³

A second factor important to courts, generally, is the extent to which the person had prior notice of the possibility of a privacy intrusion. Where a person has been explicitly notified of a potential search or seizure before suffering the intrusion, the Court is less likely to find a valid or strong expectation of privacy.⁵⁴ For example, where employees of the United States Customs Service were notified beforehand that promotion to certain positions required passing a drug test, the Court found the employees' expectation of privacy to be diminished.⁵⁵ Similarly, the Second Circuit found an airline passenger's privacy interests to be reduced, generally, where a sign in the boarding area read, "PASSENGERS AND BAGGAGE SUBJECT TO SEARCH."⁵⁶

When a person voluntarily exposes an activity or object to public view, the Supreme Court has hesitated to find any objective expectation of privacy, even where the person made a minimal attempt to conceal the activity or object. Thus, a person has no objective expectation of privacy in the trash he puts on the curb,⁵⁷ the marijuana he cultivates in a partially covered greenhouse,⁵⁸ or the phone numbers he "convey[s]" to the telephone company by dialing them.⁵⁹

Finally, the Court will find a diminished the expectation of privacy for any person who voluntarily engages in a heavily regulated industry.⁶⁰ For example, in the railroad industry, the Court reasoned that the employees should have realized that those responsible for such a potentially dangerous and hazardous occupation might be especially inquisitive about employees' health, fitness, and judgment.⁶¹

⁵² See *Griffin v. Wisconsin*, 483 U.S. 868 (1987).

⁵³ See *Bell v. Wolfish*, 441 U.S. 520, 558-60 (1979).

⁵⁴ See, e.g., *National Treasury Employees Union v. Von Raab*, 489 U.S. 656 (1989); *United States v. Edwards*, 498 F.2d 496 (2d Cir. 1974).

⁵⁵ See *Von Raab*, 489 U.S. at 672 n.2.

⁵⁶ See *Edwards*, 498 F.2d at 501.

⁵⁷ See *California v. Greenwood*, 486 U.S. 35 (1988).

⁵⁸ See *Florida v. Riley*, 488 U.S. 445 (1989).

⁵⁹ See *Smith v. Maryland*, 442 U.S. 735, 743 (1979).

⁶⁰ See, e.g., *Von Raab*, 489 U.S. at 672; *Skinner v. Railway Labor Executives' Ass'n*, 489 U.S. 602, 627 (1989).

⁶¹ *Skinner*, 489 U.S. at 627.

In the context of vehicle searches, the Court has held that a person has a lesser expectation of privacy in an automobile.⁶² Consistent with the factors just discussed, the Court has justified this reduction of privacy for automobiles by noting that automobiles are exposed to public view,⁶³ that automobiles seldom serve "as one's residence or as the repository of personal effects,"⁶⁴ and that automobiles are subject to extensive government regulation.⁶⁵

C. AUTOMOBILE SEARCHES

1. *Creation of the Automobile Exception*

While the Fourth Amendment speaks of the process of issuing warrants, it does not specify when warrants are required. The Court, however, has historically favored the warrant process and has proclaimed that all searches "conducted outside of the judicial process, without prior approval by judge or magistrate, are per se unreasonable . . . subject only to a few specifically established and well-delineated exceptions."⁶⁶ The Court first recognized one such exception, the automobile exception, seventy-five years ago in *Carroll v. United States*.⁶⁷

In *Carroll*, federal prohibition agents stopped a car they believed to be carrying bootleg liquor.⁶⁸ They searched the car, found bottles of whiskey within the upholstery of the seats, and arrested the occupants.⁶⁹ The Court upheld the constitutionality of the search and proclaimed that an automobile or other vehicle may be searched without a warrant, provided that a competent, authorized officer performed the search with probable cause to believe that the vehicle contained contraband.⁷⁰

⁶² See *Cardwell v. Lewis*, 417 U.S. 583, 590 (1974). See also James A. Adams, *The Supreme Court's Improbable Justifications for Restriction of Citizens' Fourth Amendment Privacy Expectations in Automobiles*, 47 *DRAKE L. REV.* 833, 841-42 (1999) (arguing that the rationales of public exposure and pervasive regulation do not logically support the reduction of privacy people experience in automobiles).

⁶³ *Cardwell*, 417 U.S. at 590.

⁶⁴ *Id.*

⁶⁵ See *South Dakota v. Opperman*, 428 U.S. 364, 368 (1976).

⁶⁶ *Katz v. United States*, 389 U.S. 347, 357 (1967).

⁶⁷ 267 U.S. 132 (1925).

⁶⁸ *Id.* at 135.

⁶⁹ *Id.* at 136.

⁷⁰ *Id.* at 147-55.

The Court justified this exception by recognizing the difference between searches of fixed premises and searches of vehicles, the latter capable of being “quickly moved out of the locality or jurisdiction in which the warrant must be sought.”⁷¹ Considering this mobility, the Court concluded that to require officers to secure warrants before searching vehicles would risk the loss of potential evidence.⁷²

2. *Early Protection for Containers Found Within the Automobile*

Five decades after *Carroll*, the Court began to refine the scope of the automobile exception.⁷³ First, in *United States v. Chadwick*,⁷⁴ the Court held that a footlocker was unlike an automobile and could not be searched without a warrant. Federal narcotics agents with probable cause to believe it contained marijuana lawfully seized the footlocker only seconds after it was placed in the trunk of the defendant’s car.⁷⁵ At first blush, the footlocker would seem to have the same “mobility” as a vehicle (and thus, trigger the same fears which led the Court to create the automobile exception), but the Court differentiated the two by stating that a “diminished expectation of privacy . . . surrounds the automobile.”⁷⁶ The expectation of privacy is lessened, the Court explained, because the automobile travels public thoroughfares and is subject to extensive government regulation.⁷⁷

Two years later, in *Arkansas v. Sanders*,⁷⁸ the Court again faced the search of personal luggage that happened to be recovered from a vehicle. In *Sanders*, the police recovered a suitcase, which they had probable cause to believe contained

⁷¹ *Id.* at 153.

⁷² *Id.* To satisfy the automobile exception today, probable cause must exist to believe the car contains contraband or other evidence of a crime and is “readily mobile.” See *Maryland v. Dyson*, 119 S. Ct. 2013, 2014 (1999). No separate finding of exigency is required. *Id.* “Readily mobile” does not mean currently mobile, only potentially mobile. See *California v. Carney*, 471 U.S. 386, 393 (1985) (motor home susceptible to automobile exception because it was potentially mobile, licensed to operate on public streets, and situated in an area not used for residential purposes).

⁷³ *Arkansas v. Sanders*, 442 U.S. 753 (1979); *United States v. Chadwick*, 433 U.S. 1 (1977).

⁷⁴ 433 U.S. 1 (1977).

⁷⁵ *Id.* at 15.

⁷⁶ *Id.* at 12-13.

⁷⁷ *Id.*

⁷⁸ 442 U.S. 753 (1979).

marijuana, from the trunk of a taxi after following the taxi for a few blocks from the airport.⁷⁹ Despite finding that the suitcase was properly seized, the Court held that the search of the suitcase was illegal, and commented that, "there is no greater need for warrantless searches of luggage taken from automobiles than of luggage taken from other places."⁸⁰

The Court faced a different, though related question in *Robbins v. California*.⁸¹ In *Robbins*, police officers stopped the petitioner for driving erratically.⁸² Based on petitioner's clumsy behavior following the stop and a noticeable odor of marijuana coming from the car, the officers searched the passenger compartment, discovering marijuana and drug paraphernalia.⁸³ The officers then searched the tailgate area of the station wagon, discovering 30 pounds of marijuana packed in two opaque, green packages.⁸⁴ While the probable cause present in *Chadwick* and *Sanders* had extended only to the footlocker and the suitcase, respectively, the probable cause in *Robbins* extended to the car as a whole.⁸⁵ Forced to determine the exact parameters of a general automobile search, the Court held that, in such a situation, any opaque container discovered during a lawful automobile search, whether considered a "personal" or "impersonal" container, could not be opened without a warrant.⁸⁶

3. *The Bright Line Rule of Ross*

The protection afforded to containers by *Chadwick*, *Sanders*, and *Robbins* was short-lived. *Robbins* was overruled less than a year after it was decided by the Court's decision in *United States v. Ross*.⁸⁷ In *Ross*, the Court worried that the exclusion allowed by *Robbins* would largely negate the intended effect of the automobile exception.⁸⁸ Since contraband was usually concealed within a package of some sort, precluding all closed packages

⁷⁹ *Id.* at 755.

⁸⁰ *Id.* at 763-64.

⁸¹ 453 U.S. 420 (1981).

⁸² *Id.* at 422.

⁸³ *Id.*

⁸⁴ *Id.*

⁸⁵ *Id.*

⁸⁶ *Id.* at 428-29.

⁸⁷ 456 U.S. 798 (1982).

⁸⁸ *Id.* at 820.

from the search of a vehicle would thwart the goal of the Court in *Carroll*.⁸⁹ To avoid that outcome, the Court in *Ross* decided that the scope of a warrantless search allowed by the automobile exception should be of the exact magnitude as the search would have been if a warrant had been secured.⁹⁰ The Court explained:

the scope of a warrantless search of an automobile thus is not defined by the nature of the container in which the contraband is secreted. Rather it is defined by the object of the search and the places in which there is probable cause to believe that it may be found.⁹¹

Thus, the Court held that probable cause to search a lawfully stopped vehicle empowered the officer to search "every part of the vehicle and its contents" that might hold the contraband sought.⁹²

Following *Ross*, it quickly became evident that two parallel rules controlled the area of automobile searches. If an automobile search was based upon probable cause as to the car, generally, then *Ross* controlled. Thus, any closed containers found within the car that might contain the object of the search could be opened during the search. If, however, probable cause for an automobile search extended only to a particular package in the car, then *Chadwick-Sanders* controlled. Any package other than the one suspected by probable cause could not be opened without a warrant.

4. *The Refinement of Ross in Acevedo*

This dichotomy of search rules was unified by the Court's decision in *California v. Acevedo*.⁹³ The Court noted that any privacy being offered by *Chadwick-Sanders* was certainly minimal, because any package that officials could not open on the spot, they could seize and hold until they had secured a warrant.⁹⁴ The Court also noted that allowing officers to look inside con-

⁸⁹ *Carroll v. United States*, 267 U.S. 132, 153 (1925). The Court wanted to provide a practical way to seize "contraband goods concealed and illegally transported in an automobile." *Id.*

⁹⁰ *Ross*, 456 U.S. at 825.

⁹¹ *Id.* at 824.

⁹² *Id.* at 825.

⁹³ 500 U.S. 565 (1991).

⁹⁴ *Id.* at 575.

tainers seemed like a minimal intrusion, considering officers with broader probable cause are permitted to tear up upholstery.⁹⁵ To put an end to the confusion caused by the two competing standards, the Court held that *Ross* should apply to "all searches of containers found in an automobile," regardless of the scope of the probable cause.⁹⁶

Justice Stevens dissented in *Acevedo*, arguing that a distinction should be maintained between cases like *Chadwick-Sanders*, where probable cause is container-specific, and cases like *Ross*, where probable cause is general to the vehicle.⁹⁷ Claiming first that the majority had expanded the scope of the automobile exception, Justice Stevens restated one of the points established in *Chadwick*, that people possess a greater expectation of privacy in their luggage than their automobiles.⁹⁸ Next, he pointed out how the rationale behind the *Ross* rule—that the loss of evidence and the practical necessity of being able to open the container where the contraband is likely hidden—are not applicable to *Chadwick-Sanders* cases, because the suspected container can be legally seized and held by the police until a warrant is obtained.⁹⁹ While this ready "seizability" led the majority to conclude that no harm would be committed by simply allowing the officer to open the container on the spot, Justice Stevens disagreed.¹⁰⁰ He argued that the warrant requirement served the important function of injecting impartiality into the law enforcement process.¹⁰¹ It should not, therefore, be brushed aside as an inconsequential hurdle.¹⁰²

Justice Stevens concluded by disputing the majority's three primary justifications for the expansion of the *Ross* rule.¹⁰³ First, he challenged the notion that lower courts were floundering in confusion over these two standards.¹⁰⁴ Next, he argued that the protections afforded by *Chadwick-Sanders* are anything but

⁹⁵ *Id.* at 576.

⁹⁶ *Id.* at 579.

⁹⁷ *Id.* at 585-602 (Stevens, J., dissenting).

⁹⁸ *Id.* at 588 (Stevens, J., dissenting).

⁹⁹ *Id.* at 592 (Stevens, J., dissenting).

¹⁰⁰ *Id.* at 585-88 (Stevens, J., dissenting).

¹⁰¹ *Id.* at 586-87 (Stevens, J., dissenting).

¹⁰² *Id.* at 585-88 (Stevens, J., dissenting).

¹⁰³ *Id.* at 593-602 (Stevens, J., dissenting).

¹⁰⁴ *Id.* at 594 (Stevens, J., dissenting).

minimal.¹⁰⁵ Finally, he disputed the accuracy and the relevancy of the claim that the dual rules had hampered law enforcement.¹⁰⁶

D. SEARCHES OF PERSONS/PROPERTY OTHER THAN THE ORIGINAL TARGET OF THE SEARCH

1. *Visitors to Premises Searched*

The Supreme Court has never commented directly on the search of an unsuspected visitor's belongings during the search of fixed premises.¹⁰⁷ However, various lower courts have adopted three separate tests to deal with this issue: the "physical proximity" test, the "relationship" test, and the "notice" test.¹⁰⁸ The "physical proximity" test, adopted by a minority of courts, examines the physical connection between the person and the item searched, to ascertain whether the item will be treated as an extension of the person's body, and thus, will be protected from a search.¹⁰⁹ The "relationship" test evaluates the connection between the person, the item searched and the location.¹¹⁰

¹⁰⁵ *Id.* at 598-99 (Stevens, J., dissenting).

¹⁰⁶ *Id.* at 600-02 (Stevens, J., dissenting).

¹⁰⁷ The Court confronted a similar but distinguishable situation in *Rawlings v. Kentucky*, 448 U.S. 98 (1980). In that case, police officers went to the house of Lawrence Marquess, armed with a warrant for his arrest. *Id.* at 100. While searching for Marquess, the officers noticed the odor of marijuana in the house and saw marijuana seeds on the mantel in one of the rooms. *Id.* Only then did the officers detain the four occupants of the house. *Id.* During the ensuing search, the officers searched the purse of one of the visitors, Vanessa Cox. *Id.* at 101. That search differs from the cases contemplated by the text above, because the probable cause triggered by the marijuana smoke and seeds led the officers to suspect all of the people present. Therefore, this is not a case where officers with a warrant to search a house happen upon an unexpected visitor while searching the premises.

¹⁰⁸ See generally 2 WAYNE R. LAFAVE, SEARCH AND SEIZURE: A TREATISE ON THE FOURTH AMENDMENT § 4.10(b) (3d ed. 1996).

¹⁰⁹ See, e.g., *United States v. Johnson*, 475 F.2d 977, 979 (D.C. Cir. 1973) (holding that purse of visitor to premises searched under warrant could be searched because it was found "resting separately from the person of its owner"); *State v. Andrews*, 549 N.W.2d 210, 218 (Wis. 1996) (holding that police could search for object of search in all possible containers except those physically possessed by persons not mentioned in the warrant).

¹¹⁰ See, e.g., *United States v. Young*, 909 F.2d 442, 445 (11th Cir. 1990) (stating that the court "must consider the relationship between the object, the person and the place being searched"); *United States v. Gray*, 814 F.2d 49, 51 (1st Cir. 1987) (holding that jacket of visitor to house searched for narcotics could be searched when visitor was there late at night while drug sale occurred outside).

If the item searched, or its owner, have more than a transient, ephemeral relationship with the location, then they are subject to search.¹¹¹ Finally, the "notice" test relies on what the officers should objectively know about certain items prior to searching them.¹¹²

While it has never ruled on the search of a visitor's belongings during the execution of a warrant, the Court addressed the issue of the search of a visitor's person in *Ybarra v. Illinois*.¹¹³ In *Ybarra*, officers were executing a search warrant upon a tavern they suspected was being used for heroin sales by a particular bartender named "Greg."¹¹⁴ The search warrant authorized the police to search "[t]he Aurora Tap Tavern . . . [and] the person of 'Greg,' the bartender . . . [for] evidence of the offense of possession of a controlled substance."¹¹⁵ During the search, one of the officers patted down the patrons of the bar.¹¹⁶ After patting down Mr. Ventura Ybarra for the second time, the officer removed from Ybarra's pocket a cigarette pack, and, from within the pack, six foil packets containing what later turned out to be heroin.¹¹⁷ The trial court denied Ybarra's motion to suppress the foil packets; he was convicted; and the state appellate court affirmed his conviction.¹¹⁸

The Supreme Court reversed, however, holding that the search of Ybarra's pockets violated his Fourth and Fourteenth Amendment rights.¹¹⁹ Swayed by the fact that no individualized probable cause existed toward Ybarra when the warrant was executed, the Court rejected the conclusion of the state appellate court that, in such a small bar, Ybarra must have had a connection to the suspected heroin trafficking.¹²⁰ The Court asserted that "a person's mere propinquity to others independ-

¹¹¹ *Young*, 909 F.2d at 445.

¹¹² *See, e.g., State v. Thomas*, 818 S.W.2d 350, 359-60 (Tenn. Crim. App. 1991) (holding that police may not search items they "knew or should have known" belonged to a "mere visitor").

¹¹³ 444 U.S. 85 (1979).

¹¹⁴ *Id.* at 87-88.

¹¹⁵ *Id.* at 88.

¹¹⁶ *Id.*

¹¹⁷ *Id.* at 89.

¹¹⁸ *Id.* at 89-90.

¹¹⁹ *Id.* at 96.

¹²⁰ *Id.* at 91.

ently suspected of criminal activity does not, without more, give rise to probable cause to search that person."¹²¹

2. *Passengers in Automobiles*

Only one previous Supreme Court case, *United States v. DiRe*,¹²² has assessed the constitutionality of a search based on probable cause of the person or property of an automobile passenger-defendant. *DiRe* arose out of an investigation by the Office of Price Administration into alleged possession of counterfeit gasoline ration coupons.¹²³ Tipped by an informant regarding an impending coupon transaction, an investigator trailed a car to a designated location in Buffalo, New York, where he approached the car and found three people inside: the informer, Mr. Buttitta (the alleged seller), and Mr. DiRe.¹²⁴ The informer claimed to have just purchased the coupons in his possession from Mr. Buttitta, and the investigator took all three occupants of the car into custody and transported them to the local police station.¹²⁵ Once there, the investigator asked Mr. DiRe to empty his pockets, in which he had two gasoline and numerous fuel oil ration coupons.¹²⁶ Subsequently, Mr. DiRe was "booked" and thoroughly searched.¹²⁷ In an envelope concealed between his shirt and underwear were found one hundred gasoline ration coupons.¹²⁸ All of the coupons recovered were determined later to be counterfeit.¹²⁹ The District Court held the search illegal and the Court of Appeals for the Second Circuit affirmed.¹³⁰

The Supreme Court affirmed, rejecting the Government's proposal that the right to search a car without a warrant be extended to authorize the search of the person of any occupants.¹³¹ In addition, the Court pondered how the Government could advocate such a holding while refusing to argue that the

¹²¹ *Id.*

¹²² 332 U.S. 581 (1948).

¹²³ *Id.* at 583.

¹²⁴ *Id.*

¹²⁵ *Id.*

¹²⁶ *Id.*

¹²⁷ *Id.*

¹²⁸ *Id.*

¹²⁹ *Id.*

¹³⁰ *Id.*

¹³¹ *Id.* at 587.

search warrant for a dwelling includes the right to search all of the occupants of the dwelling.¹³² The Court concluded that it was "not convinced that a person, by mere presence in a suspected car, loses immunities from search of his person to which he would otherwise be entitled."¹³³

3. Consensual Searches

As just noted, before *Houghton*, the Supreme Court had never before confronted a case where a contested search based on probable cause involved the belongings of an automobile passenger-defendant. This issue has arisen, however, in the case law surrounding consensual automobile searches. Consensual search law draws a sharp distinction between passengers and drivers with regards to expectations of privacy. In consensual search cases, generally, federal and state courts have held that a driver may consent to a search of the vehicle without the passenger's consent or knowledge, but the scope of the permitted search will not include the belongings of the passenger, unless the searching officer could reasonably believe the belongings to be under the actual or constructive authority of the driver.¹³⁴ One recent case, *State v. Friedel*,¹³⁵ is extremely similar to *Houghton*. In *Friedel*, after a male driver consented to a search of his van during a traffic stop, the police ordered the driver, his female passenger, and her child out of the vehicle.¹³⁶ When the officer came across a purse in the back seat, he opened it and found methamphetamine and marijuana.¹³⁷ The Court of Appeals of Indiana first concluded that the passenger had a legitimate expectation of privacy in her purse.¹³⁸ Since the driver had neither actual or constructive authority over the purse, the court held that the driver's consent to search his automobile did

¹³² *Id.*

¹³³ *Id.*

¹³⁴ See, e.g., *United States v. Jaras*, 86 F.3d 383 (5th Cir. 1996); *United States v. Infante-Ruiz*, 13 F.3d 498 (1st Cir. 1994); *United States v. French*, 974 F.2d 687 (6th Cir. 1992); cf. *Illinois v. Rodriguez*, 497 U.S. 177, 181 (1990) (stating that third-party consent can lead to valid warrantless search of apartment, if police have reasonable belief that third-party has common-authority over the apartment).

¹³⁵ 714 N.E.2d 1231 (Ind. Ct. App. 1999).

¹³⁶ *Id.* at 1235.

¹³⁷ *Id.*

¹³⁸ *Id.* at 1236-37.

not include consent to search a passenger's purse left behind on the back seat when the passengers were ordered from the car.¹³⁹

III. FACTUAL AND PROCEDURAL BACKGROUND

In the early hours of July 23, 1995, Wyoming Highway Patrol Officer Delane Baldwin stopped a 1977 Cadillac for speeding and driving with a faulty brake light.¹⁴⁰ In the front seat of the vehicle were three people: David Young (the driver), his girlfriend (a minor), and Sandra Houghton.¹⁴¹ Shortly thereafter, two other officers joined Officer Baldwin.¹⁴² When Officer Baldwin approached the vehicle and asked Young for his driver's license, registration, and insurance information, he noticed a hypodermic syringe in Young's left front shirt pocket.¹⁴³ Leaving the three occupants of the car under the supervision of the other officers, Officer Baldwin retrieved gloves from his patrol car.¹⁴⁴ He then ordered Young to exit the vehicle and to place the hypodermic syringe on the hood of the car.¹⁴⁵ When Officer Baldwin asked Young the purpose of the syringe, Young responded that he used it to take drugs.¹⁴⁶

Next, the other officers ordered the two female passengers out of the vehicle and asked them for identification.¹⁴⁷ Houghton falsely identified herself as "Sandra James" and claimed to have no identification.¹⁴⁸ All three occupants were then patted to check for weapons.¹⁴⁹ When no weapons or contraband were found on the occupants, Officer Baldwin began a search of the passenger compartment of the car.¹⁵⁰ In the middle of the back

¹³⁹ *Id.* at 1240.

¹⁴⁰ Brief for Petitioner at 2, *Wyoming v. Houghton*, 119 S. Ct. 1297 (1999) (No. 98-184).

¹⁴¹ *Wyoming v. Houghton*, 119 S. Ct. 1297, 1299 (1999).

¹⁴² Respondent's Brief at 1, *Houghton* (No. 98-184).

¹⁴³ Petitioner's Brief at 2, *Houghton* (No. 98-184).

¹⁴⁴ *Id.*

¹⁴⁵ *Id.*

¹⁴⁶ *Id.*

¹⁴⁷ *Houghton*, 119 S. Ct. at 1299. Though not contested by Respondent in this case, the Court has previously ruled that a police officer may order a passenger to exit a vehicle pending the completion of a traffic stop without illegally "seizing" the passenger. See *Maryland v. Wilson*, 519 U.S. 408, 415 (1997).

¹⁴⁸ *Houghton*, 119 S. Ct. at 1299.

¹⁴⁹ *Houghton v. State*, 956 P.2d 363, 365 (Wyo. 1998).

¹⁵⁰ *Id.*

seat, Officer Baldwin found a closed lady's purse, to which Houghton claimed ownership.¹⁵¹ Officer Baldwin opened the purse and found a wallet containing a photo driver's license correctly identifying respondent as Sandra Houghton.¹⁵² When asked why she had provided false information, Houghton replied, "in case things went bad."¹⁵³ Officer Baldwin then removed from the purse a brown bag, to which Houghton denied ownership or knowledge of how it came to be in her purse.¹⁵⁴ In the brown bag, Officer Baldwin found a syringe containing 60 ccs of methamphetamine and other drug paraphernalia.¹⁵⁵ After finding fresh needle marks on Houghton's arms, Officer Baldwin placed her under arrest.¹⁵⁶ Searching the purse further, Officer Baldwin discovered a black bag containing more drug paraphernalia and a syringe containing 10 ccs of methamphetamine, of which Houghton admitted ownership.¹⁵⁷ Young and the other female passenger were released.¹⁵⁸

Houghton was charged with possession of methamphetamine in a liquid amount greater than three-tenths of a gram,¹⁵⁹ a felony in the State of Wyoming.¹⁶⁰ Prior to trial, she filed a motion to suppress all evidence obtained from the search of her purse as fruit of a search conducted in violation of her rights under the Fourth and Fourteenth Amendments.¹⁶¹ In denying

¹⁵¹ Petitioner's Brief at 3, *Houghton* (No. 98-184).

¹⁵² *Id.*

¹⁵³ *Id.*

¹⁵⁴ *Houghton*, 119 S. Ct. at 1299.

¹⁵⁵ *Id.*

¹⁵⁶ Petitioner's Brief at 3, *Houghton* (No. 98-184).

¹⁵⁷ *Id.*

¹⁵⁸ *Houghton v. State*, 956 P.2d 363, 365 (Wyo. 1998).

¹⁵⁹ WYO. STAT. ANN. § 35-7-1031(c)(iii) (Michie Supp. 1996).

¹⁶⁰ Petitioner's Brief at 4, *Houghton* (No. 98-184).

¹⁶¹ *Id.* Houghton also claimed violation of her rights under Art. 1, § 4 of the Wyoming State Constitution. Respondent's Brief at 12a, *Houghton* (No. 98-184). (The only textual difference between Art. 1, § 4 of the Wyoming State Constitution and the Fourth Amendment is that the Wyoming section requires that an "affidavit," rather than an "Oath or affirmation" support the probable cause underlying a warrant.) However, counsel for Houghton did not differentiate between the federal and state protections at the hearing for the motion to suppress. *Id.* at 15a-25a. In turn, the trial judge mentioned only the federal right and Supreme Court case law in his Decision Letter. *Id.* at 27a-28a. Similarly, the Wyoming Supreme Court declined to undertake any separate analysis of Houghton's rights under the state constitution. *Houghton*, 956 P.2d at 366 n.2. The court had previously stated that it would interpret the federal and state constitutions as providing the same scope of protection against

the motion, the trial court relied on *Acevedo*¹⁶² and held that once the officer had probable cause to search a vehicle for contraband, he was entitled to search all containers therein that could hold the contraband.¹⁶³ Houghton was subsequently convicted and appealed the denial of her motion to suppress to the Wyoming Supreme Court.¹⁶⁴

By a divided vote, the Wyoming Supreme Court reversed the conviction.¹⁶⁵ The court began its analysis by analogizing the situation at bar to one where a visitor is present at searched premises.¹⁶⁶ The court discussed the three approaches taken by various state courts when faced with this issue¹⁶⁷ and then adopted the "notice" test, which the court felt offered the "best balance between the legitimate interests of both the individual and law enforcement."¹⁶⁸ Tailoring the "notice" test to the context of automobile searches, the court advanced the following rule: while searching an automobile based on probable cause, a police officer may search all containers within the vehicle which may contain the object of the search, unless the officer knows or should know that the container belongs to a passenger not suspected of criminal activity, and no one had the opportunity, prior to the search, to place the object of the search in the container.¹⁶⁹

unreasonable searches and seizures, unless the party claiming that the state constitution provided more protection presented appropriate state constitutional analysis. *Gronski v. State*, 910 P.2d 561, 566 (Wyo. 1996). Thus, since Houghton did not "distinguish the protection afforded by the Wyoming Constitution from that of its federal counterpart" in presenting her appeal, the court would analyze her claim under federal constitutional protection only. *Houghton*, 956 P.2d at 366 n.2. However, since the Respondent's case came before the Wyoming Supreme Court, that court has reconsidered when it will undertake an independent state constitutional analysis. See *Vasquez v. State*, 990 P.2d 476, 482-84 (Wyo. 1999). In *Vasquez*, the court declared that "a state constitutional analysis is required unless a party desires to have an issue decided solely under the Federal Constitution." *Id.* at 485. Therefore, if Houghton brought her appeal today, the Wyoming Supreme Court would have to analyze her claim through the lens of the state constitution.

¹⁶² *California v. Acevedo*, 500 U.S. 565 (1991).

¹⁶³ *Houghton*, 956 P.2d at 365.

¹⁶⁴ *Id.*

¹⁶⁵ *Id.* at 372.

¹⁶⁶ *Id.* at 367-70.

¹⁶⁷ See *supra* notes 107-12 and accompanying text for discussion of the three tests.

¹⁶⁸ *Houghton*, 956 P.2d at 369-70.

¹⁶⁹ *Id.* at 372.

The State of Wyoming filed a timely petition for rehearing which the court denied on April 28, 1998.¹⁷⁰ The United States Supreme Court granted certiorari on September 29, 1998.¹⁷¹

IV. SUMMARY OF THE OPINIONS

A. THE MAJORITY OPINION

Writing for the majority,¹⁷² Justice Scalia reversed the Wyoming Supreme Court's decision and held that a police officer with probable cause to search a vehicle may search all containers within the vehicle that might contain the object of the search, including any passengers' belongings.¹⁷³ Thus, according to the majority, the search of respondent's purse by Officer Baldwin was not an unreasonable search in violation of her Fourth Amendment rights.¹⁷⁴

The Court began its analysis by framing the Fourth Amendment inquiry as a two-step process.¹⁷⁵ First, a court must ask whether the action in question would have been an unlawful search under the common law existing at the time of the framing of the Constitution.¹⁷⁶ Second, should this primary inquiry yield no clear answer, a court must evaluate the action under the traditional reasonableness standard of Fourth Amendment jurisprudence: the balancing of the individual's privacy interest against any legitimate government interests served by the action.¹⁷⁷

¹⁷⁰ *Id.* at 363.

¹⁷¹ Wyoming v. Houghton, 119 S. Ct. 31 (1998).

¹⁷² Chief Justice Rehnquist and Justices O'Connor, Kennedy, Thomas and Breyer joined Justice Scalia.

¹⁷³ Wyoming v. Houghton, 119 S. Ct. 1297, 1304 (1999).

¹⁷⁴ *Id.*

¹⁷⁵ *Id.* at 1300. Both Justice Breyer's concurrence and Justice Stevens' dissent questioned the propriety of this formal bifurcation of the Fourth Amendment inquiry and, specifically, the majority's apparent readiness to rely on historical information alone to render its decision. *Id.* at 1304-06. However, in this case, at least, the issue was largely moot, because while the majority claimed to reach its decision upon historical principle alone, it nonetheless proceeded with the second step of the inquiry. *Id.* at 1302-04. Regardless of the correctness of Justice Scalia's formulation, this two-step inquiry has since been adopted by various lower courts. See, e.g., State v. Friedel, 714 N.E.2d 1231, 1237 (Ind. Ct. App. 1999).

¹⁷⁶ *Houghton*, 119 S. Ct. at 1300.

¹⁷⁷ *Id.*

In answering the first question, the Court noted that both *Carroll* and *Ross* discussed how the common law existing at the time of the framing might have approached the search of an automobile.¹⁷⁸ In *Carroll*, the Court concluded that the common law of the time would have approved of the warrantless search of an automobile based on probable cause to believe that the car contained contraband.¹⁷⁹ This conclusion was based on legislation enacted by Congress between 1789¹⁸⁰ and 1799 that allowed customs officials to conduct warrantless searches of vessels they believed to be carrying goods subject to duty.¹⁸¹ Similarly, in *Ross*, the Court, relying in part on *Carroll* and the legislation discussed therein, deduced that any customs officials allowed to search a vessel would surely be allowed to pierce the containers in which those goods were secured.¹⁸² Thus, the *Ross* Court held that a police officer with probable cause to search a vehicle can search any part of the vehicle and any containers therein which may hold the object of the search.¹⁸³ Finally, Justice Scalia concluded that the historical evidence discussed in *Carroll* and *Ross* made no distinction between packages based on ownership.¹⁸⁴ In sum, the Court found the historical evidence to support the rule they announced in the instant case.¹⁸⁵

Nevertheless, the Court undertook the second question of its Fourth Amendment inquiry and concluded that the government's interest in effective law enforcement outweighed Houghton's privacy interests.¹⁸⁶ With regards to the interests of the generic passenger, the Court first noted that a passenger, like a driver, has a diminished expectation of privacy in any property transported by car.¹⁸⁷ The Court next distinguished *DiRe* and *Ybarra* as cases where the subject of the search in ques-

¹⁷⁸ *Id.*

¹⁷⁹ *Carroll v. United States*, 267 U.S. 132, 149-50 (1925).

¹⁸⁰ Section 24 of the Act of 1789 states, in relevant part, "[t]hat every collector . . . shall have full power and authority, to enter any ship or vessel, in which they shall have reason to suspect any goods . . . subject to duty shall be concealed." Act of July 31, 1789, § 24, 1 Stat. 43 (1790).

¹⁸¹ *Carroll*, 267 U.S. at 149-51.

¹⁸² *United States v. Ross*, 456 U.S. 798, 820 (1982).

¹⁸³ *Id.* at 821.

¹⁸⁴ *Wyoming v. Houghton*, 119 S. Ct. 1297, 1301 (1999).

¹⁸⁵ *Id.*

¹⁸⁶ *Id.* at 1302-04.

¹⁸⁷ *Id.* at 1302.

tion was not the property of an unsuspected party, but the party's person.¹⁸⁸ The majority added that searches of one's person, unlike the search here, would trigger a "significantly heightened protection."¹⁸⁹

Turning to the government interests at stake, the Court cited three aspects of the Wyoming Supreme Court's "passenger's property" rule that would hinder effective law enforcement.¹⁹⁰ First, the Court recalled the original rationale for the automobile exception to the warrant requirement, namely, that the "ready mobility" of a car made it impractical to require a law enforcement officer to seek a warrant to search the car without risking the loss of potential evidence.¹⁹¹ In the opinion of the Court, excluding any belongings of a passenger from an officer's search increased that risk of lost contraband.¹⁹² Second, based on an assumption of common enterprise between the passenger and driver of a car, the Court argued that criminals who were aware of the "passenger's property" rule would hide contraband in passenger's belongings, with or without the passenger's permission or knowledge.¹⁹³ Third, the Court surmised that the "passenger's property" rule would encourage passengers to claim ownership of every container within a vehicle.¹⁹⁴ From such a rule would flow a "bog of litigation," where various courts would wrestle with questions of whether ownership had been established and whether an opportunity to hide contraband in a passenger's things actually existed.¹⁹⁵

The Court concluded its opinion with a consideration of the general practicality of the Wyoming Supreme Court's rule.¹⁹⁶ It pointed out that, should the logic behind the arguments of Justice Stevens' dissent and the Wyoming Supreme Court be accepted, protection against searches in situations similar to the one here would have to be extended beyond a passenger's belongings to anything that did not belong to the driver.¹⁹⁷ This

¹⁸⁸ *Id.*

¹⁸⁹ *Id.*

¹⁹⁰ *Id.* at 1302-03.

¹⁹¹ *Id.* at 1302.

¹⁹² *Id.*

¹⁹³ *Id.* at 1302-03.

¹⁹⁴ *Id.* at 1303.

¹⁹⁵ *Id.*

¹⁹⁶ *Id.* at 1303-04.

¹⁹⁷ *Id.* at 1303.

would further complicate the task of identification, whether performed by an officer in the field or a judge.¹⁹⁸ In the majority's opinion, the more practical and sensible ruling would be to reject this proposed exception to the rule of *Ross* in favor of a simpler approach which gives no importance to the ownership of any package or the presence of the alleged owner.¹⁹⁹

B. JUSTICE BREYER'S CONCURRENCE

Justice Breyer wrote separately to comment on the majority's reasoning process and on the scope of the majority's holding.²⁰⁰ First, Justice Breyer argued that while analysis of historical interpretation should inform a Fourth Amendment question, it should not be determinative of the inquiry.²⁰¹ Next, Justice Breyer agreed with the majority's adoption of the bright-line rule of *Ross* and noted that it is a rare automobile search where the officer does not have probable cause to suspect all passengers.²⁰² Thus, the extension of *Ross* here will permit an otherwise illegal search in only a small fraction of cases.²⁰³

Nevertheless, Justice Breyer proposed a number of limitations for the majority's holding.²⁰⁴ First, Justice Breyer warned that the majority's rule applied only to automobiles and only to containers within the automobile.²⁰⁵ Moreover, Justice Breyer said explicitly what the majority only implied, that the majority rule does not extend to searches of a passenger's person.²⁰⁶ Second, Justice Breyer seemed tempted, if only for a moment, to recognize a purse as an extension of the person, due to the "especially personal" nature of the items carried in a purse, and thus, to generally exempt purses from a *Ross* search.²⁰⁷ However, an admonition from the Court in *Ross* not to draw distinctions based on the nature of the container, coupled with the seeming indifference Sandra Houghton exhibited toward her purse, pre-

¹⁹⁸ *Id.*

¹⁹⁹ *Id.* at 1303-04.

²⁰⁰ *Id.* at 1304 (Breyer, J., concurring).

²⁰¹ *Id.* (Breyer, J., concurring).

²⁰² *Id.* (Breyer, J., concurring).

²⁰³ *Id.* (Breyer, J., concurring).

²⁰⁴ *Id.* (Breyer, J., concurring).

²⁰⁵ *Id.* (Breyer, J., concurring).

²⁰⁶ *Id.* (Breyer, J., concurring).

²⁰⁷ *Id.* (Breyer, J., concurring).

vented Justice Breyer from succumbing to that temptation.²⁰⁸ Finally, Justice Breyer admitted that he would be inclined to give increased protection to a purse, if the owner was wearing the purse at the time of search.²⁰⁹

C. JUSTICE STEVENS' DISSENT

Justice Stevens dissented²¹⁰ from the majority, arguing that the enduring requirement of either a warrant or individualized suspicion prior to the commission of a legal search demanded affirming the Wyoming Supreme Court.²¹¹ In Justice Stevens' opinion, the distinction in this case should be drawn, as it was in *DiRe*, between the suspected driver and the unsuspected passenger, not, as the majority would have it, between the passenger's person, including the contents of his pockets, and the property unattached to the passenger.²¹² Justice Stevens further argued that any search involving a person's briefcase or purse might be just as intrusive as the search in *DiRe*.²¹³

Next, Justice Stevens challenged the majority's conclusion regarding the pertinent message of *Ross*.²¹⁴ While the majority read *Ross* as eschewing any distinctions based on the type of container involved in the warrantless search of a vehicle, Justice Stevens argued that this directive was intended only for containers which were themselves already the subject of probable cause.²¹⁵ To wit, he quoted from *Ross*, that the scope of the search "is defined by the object of the search and the places in which there is probable cause to believe it may be found."²¹⁶ In addition, Justice Stevens categorically rejected the majority's assumption of common enterprise between the passenger and driver of a car based simply on physical proximity.²¹⁷ In Justice Stevens' opinion, Officer Delane Baldwin should have had to

²⁰⁸ *Id.* (Breyer, J., concurring).

²⁰⁹ *Id.* (Breyer, J., concurring).

²¹⁰ Justices Souter and Ginsburg joined Justice Stevens in dissent. *Id.* at 1304.

²¹¹ *Id.* at 1305 (Stevens, J., dissenting).

²¹² *Id.* (Stevens, J., dissenting).

²¹³ *Id.* (Stevens, J., dissenting).

²¹⁴ *Id.* (Stevens, J., dissenting).

²¹⁵ *Id.* (Stevens, J., dissenting).

²¹⁶ *Id.* (Stevens, J., dissenting) (quoting *United States v. Ross*, 456 U.S. 798, 824 (1982)).

²¹⁷ *Id.* at 1305-06 (Stevens, J., dissenting).

have probable cause to believe Houghton's purse contained contraband before being permitted to search it.²¹⁸

Turning to the balancing of individual and government interests, Justice Stevens concluded that the interest of effective law enforcement did not outweigh the privacy interests involved.²¹⁹ On one hand, Justice Stevens felt the intrusion in the instant case could have been just as intrusive as the search of Michael DiRe's outer clothing.²²⁰ Against that backdrop, Justice Stevens felt the individual privacy interests involved here were not worth sacrificing for the "ostensible clarity" of the majority's rule.²²¹ Justice Stevens expressed confidence that the police could operate under the Wyoming Supreme Court rule, at least as well as criminals could manipulate it.²²² Finally, Justice Stevens asserted that "a rule requiring a warrant or individualized probable cause to search passenger belongings is every bit as simple as the Court's rule; it simply protects more privacy."²²³

V. ANALYSIS

In *Houghton*, the Court had before it a novel situation whose resolution required a choice between two overlapping case lines. Both *DiRe-Ybarra* and *Ross-Acevedo* cast a shadow over the search of Sandra Houghton's purse. *DiRe-Ybarra* suggested that while this purse might be the extension of a random person in the wrong place at the proverbial wrong time, it and its owner were still, "clothed with constitutional protection against an unreasonable search."²²⁴ Thus, the *DiRe-Ybarra* case line would prompt a finding that Houghton's purse could not have been searched without probable cause to believe that it contained evidence of a crime committed by Houghton. *Ross-Acevedo*, on the other hand, would recommend allowing the search of the purse. The *Acevedo* Court wanted no "nice distinctions" based on the type of container to tarnish the clarity of its new reading of *Ross*: that a police officer with probable cause to believe a vehicle contains evidence of a crime may search all containers

²¹⁸ *Id.* at 1306 (Stevens, J., dissenting).

²¹⁹ *Id.* (Stevens, J., dissenting).

²²⁰ *Id.* at 1305 (Stevens, J., dissenting).

²²¹ *Id.* at 1306 (Stevens, J., dissenting).

²²² *Id.* (Stevens, J., dissenting).

²²³ *Id.* (Stevens, J., dissenting).

²²⁴ *Ybarra v. Illinois*, 444 U.S. 85, 91 (1979).

found therein.²²⁵ In *Houghton*, the Court chose *Ross-Acevedo*, and chose incorrectly.

The injustice inflicted upon Sandra Houghton by the Court's ruling is unfortunate, but the effect this case will have on Fourth Amendment jurisdiction, as a whole, is even more alarming.²²⁶ First, by allowing a search of the belongings of a person unsuspected of any crime, the Court added unnecessarily to the "closely guarded category of constitutionally permissible suspicionless searches."²²⁷ Second, by brushing aside the notion that a passenger in an automobile has any meaningful expectation of privacy in her belongings, the Court opened the door to many potential intrusions.²²⁸

A. THE COURT ERRED BY ALLOWING A SUSPICIONLESS SEARCH IN THIS CASE

Officer Baldwin testified that when he initiated his search of Sandra Houghton's purse, he had no probable cause to believe she was engaged in any criminal activity.²²⁹ Instead, he based his search of her purse upon the actions of David Young, specifically Young's concession that he used the syringe in his shirt pocket to use drugs.²³⁰ Therefore, the search was not based on any level of individualized suspicion of Houghton.

The Supreme Court has held that a search or seizure conducted without at least "some quantum of individualized suspi-

²²⁵ *United States v. Ross*, 456 U.S. 798, 822 (1982).

²²⁶ As Justice Stevens eloquently concluded his dissent in *Acevedo*, "It is too early to know how much freedom America has lost today. The magnitude of the loss is, however, not nearly as significant as the Court's willingness to inflict it without even a colorable basis for its rejection of prior law." *California v. Acevedo*, 500 U.S. 565, 602 (1991) (Stevens, J., dissenting).

²²⁷ *Chandler v. Miller*, 520 U.S. 305, 309 (1997).

²²⁸ Based on the rule in this case, numerous searches would be permitted that directly violate the Fourth Amendment's goal of eradicating general, arbitrary searches. For example, anyone riding in a taxicab to the airport would be vulnerable to having his or her luggage removed from the trunk and searched should the driver have a joint behind his ear. All of the executives riding downtown in their daily carpool would have to give up the contents of their briefcases if the driver's breath smells like vodka. And the hapless hitchhiker would be helpless when a police officer notices a hypodermic needle sticking out of the pocket of the complete stranger kind enough to give the hitchhiker a ride.

²²⁹ Brief for Respondent at 21a, *Wyoming v. Houghton*, 119 S. Ct. 1297 (1999) (No. 98-184).

²³⁰ *Id.*

cion”²³¹ will be considered unreasonable unless it “serves special governmental needs, beyond the normal need for law enforcement.”²³² In *Houghton*, however, the Court failed to heed this principle. The Court neither addressed the absence of individual suspicion here, nor mentioned any special governmental need served by the search. Instead, the Court simply mentioned the lower expectation of privacy people have in their automobiles and curtly applied the same lowered expectation to passengers.²³³ Then, the Court proclaimed that a “car passenger—unlike the unwitting tavern patron in *Ybarra*—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.”²³⁴ Without any foundation for its assertion, the Court abandoned the proposition that Sandra Houghton deserved any status as an individual in that car. It saw her only as an extension of the suspect, David Young. This branding of Houghton as an obvious co-conspirator, simply because she was a passenger in Young’s car, directly contradicts the weight of precedent. In *Ybarra* the Court spoke directly against making this type of assumption:

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 and seize another or to search the premises where the person may happen to be . . .* [E]ach person who walked into the Aurora Tap Tavern on March 1, 1976, was clothed with constitutional protection against an unreasonable search or an unreasonable seizure. That individualized protection was separate and distinct from the Fourth and Fourteenth Amendment protection possessed by the proprietor of the tavern or by “Greg” [the premises and person described in the warrant].²³⁵

²³¹ *United States v. Martinez-Fuerte*, 428 U.S. 543, 560 (1976).

²³² *Treasury Employees v. Von Raab*, 489 U.S. 656, 665 (1989).

²³³ *See Wyoming v. Houghton*, 119 S. Ct. 1297, 1302 (1999).

²³⁴ *Id.*

²³⁵ *Ybarra v. Illinois*, 444 U.S. 85, 91-92 (1979) (emphasis added). Justice Rehnquist dissented in *Ybarra*, commenting that it was “reasonable to assume that any one or more of the persons at the bar could have been involved in drug-trafficking.” *Id.* at 106. However, he went on to add: “This assumption, by itself, might not have justified a full-scale search of all the individuals in the tavern.” *Id.* Apparently, he does not qualify his assumption of Sandra Houghton’s criminality in the same fashion.

Apparently, the Court in *Houghton* ignored this warning, because it felt that a car, more than a small bar, was an intimate setting where common enterprise could be safely inferred.²³⁶ However, the Court in *DiRe* concluded otherwise and was "not convinced that a person, by mere presence in a suspected car, loses immunities from search of his person"²³⁷ to which he would otherwise be entitled."²³⁸ It is clear that the majority in *Houghton* unfairly tainted the respondent with suspicion based on her proximity to a suspected criminal.

Had the Court recognized that they were being asked to approve a suspicionless search and undertaken the appropriate inquiry, they would have found several reasons to find this search illegal. Compared to previous contexts where the Court has condoned suspicionless intrusions, the search of Houghton's purse was at once more intrusive and less justifiable. It was clearly not one of those "limited circumstances, where the pri-

²³⁶ See *Houghton*, 119 S. Ct. at 1302.

²³⁷ This quote refers to a passenger's person, including his outer clothing, rather than his belongings. The majority distinguished *DiRe* from the instant case as a search of a passenger's person, which deserved "significantly heightened protection . . . against searches." *Id.* at 1302. The Court may be implying that it would have found differently if Houghton had removed her purse from the car. Justice Breyer, in his concurrence, made a similar insinuation. See *id.* at 1304 (Breyer, J., concurring). However, any confidence that this decision would have come down differently if Sandra Houghton had taken her purse with her when she exited the vehicle is deflated by three practical considerations. First, should the Court rule differently in that slightly different context, it will have adopted the "physical proximity" test, described in its opinion by the Wyoming Supreme Court as one of the approaches adopted by States to evaluate the privacy rights of a visitor to a searched premises. See *Houghton v. State*, 956 P.2d 363, 367-68 (Wyo. 1998). This particular test has been adopted by a small minority of states and has been criticized for the erratic results it yields. See *id.* at 368. Second, when ordered from a vehicle for an apparent search, citizens do not think to gather their belongings, perhaps acting on the assumption that their separation from the car will be brief. Cf. *State v. Friedel*, 714 N.E.2d 1231, 1241 (Ind. Ct. App. 1999) (holding that by leaving purse in van during consensual search, passenger had not "relinquished her property with no intention of reclaiming it"). Third, a police officer, especially one concerned about the possibility that the occupants of a car are armed, will likely be alarmed if he or she sees a passenger grabbing a bag on their way out of the car. Cf. *State v. Pallone*, 596 N.W.2d 882 (Wis. Ct. App. 1999). In *Pallone*, as an officer began to search the vehicle incident to the arrest of the driver, the passenger reached into the car to grab a duffel bag. The officer ordered the passenger to leave it where it was and testified later that he was worried the bag might contain alcohol or a gun. *Id.* at 884. See also *State v. Parker*, 987 P.2d 73 (Wash. 1999) (en banc). All of these considerations diminish the chances that the *Houghton* rule will soon be clarified in a manner favorable to passengers.

²³⁸ *United States v. DiRe*, 332 U.S. 581, 587 (1948).

vacy interests implicated by the search are minimal, and where an important governmental interest furthered by the intrusion would be placed in jeopardy by a requirement of individualized suspicion.²³⁹ The search in *Houghton* had very little in common with either the fixed border checkpoint in *Martinez-Fuerte* or the sobriety checkpoint in *Sitz*. First, the *Houghton* search was a search of personal belongings, not a momentary stop coupled with brief questioning.²⁴⁰ The former is certainly more of an invasion into personal privacy. The Court in *Sitz* conceded as much when it limited its ruling only to a motorist's initial stop at a sobriety checkpoint. While it called the intrusion of the stop "slight,"²⁴¹ it opined that "[d]etention of particular motorists for more extensive field sobriety testing may require satisfaction of an individualized suspicion standard."²⁴² A second difference between *Houghton* and *Sitz* or *Martinez-Fuerte* is that no evidence has been presented in *Houghton* to suggest that Officer Baldwin's search was made in response to a compelling government interest akin to preventing illegal immigration or eradicating drunken driving. Consequently, the Court cannot evaluate the efficacy of Officer Baldwin's actions in "advanc[ing] the public interest"²⁴³ involved, as was done by the Court in *Sitz* and *Martinez-Fuerte*. Finally, this was not a search conducted at a fixed point but rather by a roving patrolman. Thus, according to the Court in *Martinez-Fuerte*, the practice is more susceptible to "discretionary enforcement activity," and the subjective invasion of a person's privacy is "appreciably" higher.²⁴⁴ In sum, viewed through the lens of precedent, the suspicionless search conducted in this case was completely unreasonable.

B. THE COURT ERRED IN ITS ANALYSIS OF HOUGHTON'S EXPECTATION OF PRIVACY

In *Houghton*, the majority spent exactly six sentences dismissing Sandra Houghton's expectation of privacy in her

²³⁹ *Skinner v. Railway Labor Executives' Ass'n*, 489 U.S. 602, 624 (1988).

²⁴⁰ *See Houghton*, 119 S. Ct. at 1299.

²⁴¹ *Michigan Dept. of State Police v. Sitz*, 496 U.S. 444, 451 (1990).

²⁴² *Id.*

²⁴³ *Id.* at 453.

²⁴⁴ *United States v. Martinez-Fuerte*, 428 U.S. 543, 558-59 (1976).

purse.²⁴⁵ Unfortunately, the Court's discussion was as misguided as it was brief. Houghton's expectation of privacy in her purse deserved more complete analysis and more deference from the Court.

1. *The Court Ignored the Implicit Importance of Self-Determination*

a. The Three (Secret)²⁴⁶ Principles of Privacy Expectation Analysis

An examination of the factors that have traditionally influenced the Supreme Court's determinations of expectations of privacy in various contexts reveals that a common thread runs throughout. In almost every situation, the common denominator of expected privacy analysis is the self-determination of the person involved.²⁴⁷ Three principles, all related to self-determination, become evident. All three function, like secret rules, to sway the recognition of legitimate privacy. First, when the person in question has exercised choice or free will in placing themselves in the path of a foreseeable intrusion, the Court is less likely to validate their expectation of privacy. An example of the first principle comes from the context of airport searches. In *United States v. Edwards*,²⁴⁸ a Second Circuit case cited with approval in *Von Raab*, an airline passenger's expectation of privacy in her baggage was lessened by two things: the posted notice of the possibility of search and the passenger's decision to remain in line for the metal detector.²⁴⁹ In other words, an intrusion was foreseeable, but the person chose to proceed through the metal detector and decline alternatives, such as stepping out of

²⁴⁵ See *Houghton*, 119 S. Ct. at 1302-03. See *supra* notes 186-89 and accompanying text.

²⁴⁶ This Note calls these principles "secret," because while the Court has been comfortable for thirty-four years now determining what expectations of privacy society would recognize as reasonable, it has never bothered to explain to society its methods for so determining.

²⁴⁷ See Michael D. Granston, Note, *From Private Places to Private Activities: Toward a New Fourth Amendment House for the Shelterless*, 101 YALE L.J. 1305 (1992). Granston makes a similar critique of expectation of privacy analysis. This Note argues that the lack of choice people have in not being passengers in a car should not be held against them when it comes to Fourth Amendment protections. Similarly, Granston argues that the homeless have no opportunity to secure their privacy within a house. Therefore, they should enjoy Fourth Amendment protections in public places.

²⁴⁸ 498 F.2d 496 (2d Cir. 1974).

²⁴⁹ *Id.* at 501.

line and traveling by train.²⁵⁰ Therefore, that person could not reasonably expect absolute privacy in his or her baggage.²⁵¹

The second discernable principle holds that where the self-determination of the person has been precluded by a special relationship with the government, the Court will also consider their expectation of privacy to be unfounded. The second principle emerges when the Court addresses closely-regulated industries, like railroads, and custodial relationships, like schoolchildren, prisoners, and probationers.²⁵²

The third principle predicts that the Court is most likely to find a valid expectation of privacy where an average citizen, who has no special connection to the state, is attempting to make relatively minor life choices about everyday activities, while carrying routine personal items, runs haphazardly into an invasion of their privacy.²⁵³ For instance, in *Minnesota v. Olson*, the Court held that an overnight guest has a legitimate expectation of privacy in his host's home.²⁵⁴ The Court first noted how staying overnight with others was a "long-standing social custom."²⁵⁵ Then, the Court emphasized how a person could go wherever he pleased during the day, but when he needed to sleep, he

²⁵⁰ *Id.*

²⁵¹ *Id.* at 501; see also *Florida v. Riley*, 488 U.S. 445 (1989) (holding no expectation of privacy in marijuana plants spotted by police helicopter growing in partially-covered greenhouse because helicopter flights at that altitude were common enough to be foreseeable and home owner left the roof open); *California v. Greenwood*, 486 U.S. 35 (1988) (holding no expectation of privacy in trash placed on curb for collection because trash bags voluntarily placed in a position where numerous other parties might open the bags); cf. *Minnesota v. Dickerson*, 508 U.S. 366, 375 (1993) ("The rationale of the plain view doctrine is that if contraband is left in open view and is observed by a police officer from a lawful vantage point, there has been no invasion of a legitimate expectation of privacy.") (emphasis added).

²⁵² See, e.g., *Skinner v. Railway Labor Executives Ass'n*, 489 U.S. 602, 627 (1988) (holding that privacy interests diminished by participation in a heavily-regulated industry); *New Jersey v. TLO*, 469 U.S. 325 (1985) (holding that while schoolchildren can expect some reasonable expectation of privacy in their belongings, it is reduced by the needs of school officials to maintain order).

²⁵³ See, e.g., *Minnesota v. Olson*, 495 U.S. 91 (1990); *O'Connor v. Ortega*, 480 U.S. 709 (1987) (holding that doctor had legitimate expectation of privacy in desk he had used for 17 years, had never shared with anyone, and contained only personal items); *TLO*, 469 U.S. at 339 (holding that schoolchildren have some legitimate expectation of privacy in their belongings, because students must bring to school, not only their school supplies, but also their personal effects).

²⁵⁴ *Olson*, 495 U.S. 91.

²⁵⁵ *Id.* at 98.

would seek a place of privacy.²⁵⁶ The Court believed its ruling “merely recognized the every day expectations of privacy that we all share.”²⁵⁷

b. The Three Principles and Automobile Drivers

The Court evokes all three principles when assessing the privacy expectations of automobile drivers. It has ruled repeatedly that people possess a lower expectation of privacy in their automobiles, because cars “trave[l] public thoroughfares,” “seldom serv[e] as . . . the repository for personal effects,” and are subject to “pervasive” government regulation.²⁵⁸ The justification that cars “trave[l] public thoroughfares” evokes the first principle, because the Court feels the drivers are voluntarily placing themselves in the path of a possible intrusion.²⁵⁹ Similarly, the justification that cars are subject to “pervasive” government regulation, evokes the second principle, by lumping automobile operators with those who choose to be railroad workers and customs agents.²⁶⁰ At this point, even though the first two principles have gone against the privacy rights of the automobile driver, the Court might still have recognized the driver’s expectation of privacy as objectively reasonable if it found that a driver’s experience satisfied the third principle. This might occur, as it did in *O’Connor v. Ortega* and *New Jersey v. T.L.O.*, if the Court felt the driver had no choice but to bring personal items into the automobile. However, when the Court commented that the automobile “seldom serv[es] . . . as the repository for personal effects,”²⁶¹ it foreclosed the applicability of the third principle.

c. The Three Principles and Automobile Passengers

Some have been critical of the Court’s justifications for lowering the expectation of privacy for American drivers.²⁶² Nevertheless, for the purposes of this Note, the propriety of the Court’s actions toward drivers is irrelevant. However correct the

²⁵⁶ *Id.* at 98-99.

²⁵⁷ *Id.* at 98.

²⁵⁸ *Wyoming v. Houghton*, 119 S. Ct. 1297, 1302 (1999) (citations omitted).

²⁵⁹ *Id.*

²⁶⁰ *See id.*

²⁶¹ *See id.*

²⁶² *See generally* Adams, *supra* note 62, at 841-42.

Court may have traditionally been regarding a driver's expectation of privacy, the Court in *Houghton* erred when it blindly shifted the same reduced expectation onto a passenger.²⁶³

The experience of passengers is different from that of drivers. And it is sufficiently different that all three principles identified above favor a respected expectation of privacy for passengers. Regarding the first principle, people have little choice but to be passengers as part of their daily lives, and, thus, they are not placing themselves voluntarily in the path of a foreseeable search. In 1990, 96.9% of Americans rode to work in a car, light truck, or some form of public transportation.²⁶⁴ In that same year, 43 million people were revenue-paying passengers in cabs and 15.4 million people carpooled to work everyday.²⁶⁵ If staying overnight at another's house is a "long-standing social custom," riding in automobiles cannot be far behind. Passengers do not voluntarily wander onto public highways.²⁶⁶ They have no choice. And furthermore, while riding in an automobile, a passenger has almost no control over the foreseeable intrusions the car will encounter. For similar reasons, the second principle of privacy analysis favors a legitimate expectation of privacy for passengers. Since it is not the passengers who are purchasing and maintaining a possession subject to pervasive government regulation, why should that regulation be used to undermine their Fourth Amendment rights?

Finally, a passenger in a car is likely to have his personal belongings with him, and those belongings will likely be consoli-

²⁶³ See *Houghton*, 119 S. Ct. at 1302 ("Passengers, no less than drivers, possess a reduced expectation of privacy with regard to the property that they transport in cars."). The Court's refusal to view a passenger's expectation of privacy as distinct from that of the driver contradicts at least one area of automobile search law. The jurisprudence of consensual searches maintains that individual actions of the driver to encourage a search may not, in fact, affect the privacy rights of the passenger. See *supra* notes 134-39 and accompanying text for a discussion of consensual automobile searches.

²⁶⁴ BUREAU OF THE CENSUS, U.S. DEPARTMENT OF COMMERCE, STATISTICAL ABSTRACT OF THE UNITED STATES: 1998, at 636 (118th ed. 1998).

²⁶⁵ *Id.* at 635, 646.

²⁶⁶ An astute reader might wonder why the passenger is not expected to find another way. Why is the automobile passenger any different from the airline passenger in *U.S. v. Edwards* who was expected to find another mode of transportation if unhappy with the possibility of search? The answer is that car travel is so much more common than airline travel that it is much less reasonable to ask an American to go without cars than without planes.

dated in closed containers. In this way, a passenger better approximates the people covered by the third principle of privacy expectation analysis, people who are going through their lives, doing what they cannot avoid, carrying with them what they must.²⁶⁷ In sum, passengers' general lack of self-determination and control of their situation should have led the Court to respect their reasonable expectations of privacy.²⁶⁸

2. *The Court Exacerbated the Damage done to Ross by Acevedo*

In one respect, the Court in *Houghton* cannot be blamed for its myopic approach to passenger privacy. The Court was simply following the precedent of *Ross-Acevedo*.²⁶⁹ While the Court mentioned *Ross* throughout its opinion, and cited *Acevedo* only once,²⁷⁰ *Ross*, properly read, protects the privacy interests of passengers. It is only *Ross* as modified in *Acevedo* that provided any foundation for the majority's holding.

The opinion in *Ross* served both the interests of law enforcement and the privacy interests of individuals. Police officers with generalized probable cause to believe a vehicle contained contraband would not have to stop if they came across a container that possibly held the contraband.²⁷¹ And if probable cause happened to be specific to a particular container, occupants would still enjoy the privacy interest they expected for the suspected piece and other pieces of luggage.²⁷² *Ross* remained committed to the notion that privacy interests in luggage were "substantially greater than in an automobile."²⁷³

Nine years later, however, the Court in *Acevedo* altered this sound piece of judicial reasoning.²⁷⁴ *Acevedo* removed the war-

²⁶⁷ See *Delaware v. Prouse*, 440 U.S. 648, 662 (1979) ("Automobile travel is a basic, pervasive, and often necessary mode of transportation to and from one's home, workplace, and leisure activities. Many people spend more hours each day traveling in cars than walking on the streets.").

²⁶⁸ Cf. *State v. Parker*, 987 P.2d 73, 79 (Wash. 1999) (en banc) ("[V]ehicle passengers hold an independent, constitutionally protected privacy interest. This interest is not diminished merely upon stepping into an automobile with others.").

²⁶⁹ *Wyoming v. Houghton*, 119 S. Ct. 1297, 1301 (1999). In addition, the trial court relied exclusively on *Acevedo* in denying defendants motion to suppress. Brief for Respondent at 21a, *Houghton* (No. 98-184).

²⁷⁰ *Houghton*, 119 S. Ct. at 1300-04.

²⁷¹ See *United States v. Ross*, 456 U.S. 778, 823 (1982).

²⁷² See *id.* at 824-25.

²⁷³ *United States v. Chadwick*, 433 U.S. 1, 13 (1976).

²⁷⁴ See *California v. Acevedo*, 500 U.S. 565 (1991).

rant hurdle for searches where probable cause for an automobile search was specific to a container. In doing so, the opinion in *Acevedo* violated the clear edict of *Ross*: "that the scope of the warrantless search authorized by [the automobile exception] is no broader and no narrower than a magistrate could legitimately authorize by warrant."²⁷⁵

If an analogy is drawn casting the three passengers in *Houghton* as three separate "containers," then it is clear how the transgression of *Acevedo* led to the decision in *Houghton*. Analyzed this way, Officer Baldwin had container-specific probable cause based on his knowledge of one container, David Young. He had probable cause to suspect that container of containing contraband, but not the two other containers, Sandra Houghton and Young's girlfriend. Therefore, according to *Ross*, the limit of Officer Baldwin's search would have ended there, with David Young, because he had no other containers in which "there [was] probable cause to believe that [the object of the search] may be found."²⁷⁶ If, on the other hand, he had probable cause based on information about the car generally, then he could search all three containers inside.

²⁷⁵ *Ross*, 456 U.S. at 825.

²⁷⁶ *Id.* at 824. The Court and the dissent quote the same passage from *Ross*, that the scope of a warrantless car search "is defined by the object of the search and the places where there is probable cause to believe that it may be found." *Id.* However, the dissent focused much more on the last phrase. The dissent's reading of *Ross* deserves special deference, if for no other reason, than for the fact that Justice Stevens authored the opinion in *Ross*. One should be inclined to believe that he has special understanding of the intended meaning of the opinion. In the majority opinion, Justice Scalia disputed the dissent's reading of *Ross*. See *Wyoming v. Houghton*, 119 S. Ct. 1297, 1301 (1999). He theorized that the Court in *Ross* would have mentioned if the rule were limited to drivers. *Id.* But considering that, prior to *Ross*, no case had yet emerged calling into question the search of an unsuspected passenger's property, it seems hardly realistic to have expected the Court in *Ross* to have contemplated every possible set of circumstances to which the rule could be applied. Further, perhaps the Court in *Ross* felt their admonition about probable cause was clear enough not to be misread. As a final response to Justice Scalia's query, is it not just as plausible—and perhaps more plausible—that the Court in *Ross* would have mentioned that their rule allowed officers to dismiss any need for probable cause toward the passengers before ransacking their belongings?

C. THE PASSENGER'S PROPERTY RULE ADOPTED BY THE LOWER COURT IS SUPERIOR

In a number of respects, the ruling of the Wyoming Supreme Court²⁷⁷ is superior to the Supreme Court's decision in *Houghton*. First of all, the lower court's ruling did not diverge from precedent as egregiously as did the majority of the Court in *Houghton*.²⁷⁸ Instead, the lower opinion respected the traditional requirement of individualized suspicion.²⁷⁹ It properly recognized the scope of an automobile search, as authorized by *Ross*, to be only as wide as a search based on a warrant would be in similar situation.²⁸⁰ And it recognized that a passenger may have a meaningful expectation of privacy in her belongings by analogizing Officer Baldwin's search to the search of the belongings of a visitor to a searched building.²⁸¹

In addition, despite the concerns of the majority, the Wyoming Supreme Court's passenger's property rule is workable. The Court's fear that such a rule would drop the courts into a "bog of litigation"²⁸² is overstated. As Justice Breyer recognized,²⁸³ the passenger's property rule would apply to only a small fraction of the total automobile searches conducted daily. In most cases, a police officer's probable cause to search the car extends to all of the occupants.

For example, if, during a routine traffic stop, an officer smelled marijuana in the passenger compartment, or saw pills or empty beer bottles strewn on the floor, he would have probable cause to suspect any and all of the occupants of criminal activity. As a result, the passenger's property rule would not apply. Therefore, it is unlikely that courts applying this rule would find themselves frantically interpreting issues involving establishment of ownership.

Similarly, the Court feared that once the passenger's property rule was widely promulgated, passengers involved in automobile searches would begin to claim that everything in the vehicle was theirs in order to protect otherwise discoverable

²⁷⁷ *Houghton v. State*, 956 P.2d 363 (Wyo. 1998).

²⁷⁸ See *supra* Parts V.A-B.

²⁷⁹ See *Houghton*, 956 P.2d at 366.

²⁸⁰ See *id.* at 367.

²⁸¹ See *id.* at 367-70.

²⁸² *Wyoming v. Houghton*, 119 S. Ct. 1297, 1303 (1999).

²⁸³ *Id.* at 1304 (Breyer, J., concurring).

contraband. This fear is also unsubstantiated.²⁸⁴ Many rules regulate automobile searches that arguably favor the occupants of the car. However, automobile occupants could hardly be said to abuse such rules. Instead, they often seem unaware of the protections at their disposal, or they succumb to the intrinsic authority of the officer. For example, few drivers realize that they are free to decline or limit an officer's request to search their vehicle.²⁸⁵

Moreover, should this logic not placate the judges and police who will have to put the rule into action, a number of measures could be taken to simplify the inquiry, whether on the road or the bench. For example, the courts could interpret the establishment of ownership by a passenger to require more than a simple identification of the item purportedly owned by the passenger. Passengers could be required to provide some sort of reasonably objective confirmation of ownership. The passenger could be forced, in the presence of the police officer, to remove something from the bag with his name on it. Or, if no identifying article was contained in the container, the passenger could tell the officer the first thing the officer will see should he open the container.

²⁸⁴ Perhaps the best response to the majority's speculation about exploitation of the passenger's property rule comes from Justice Scalia himself. In *National Treasury Employees Union v. Von Raab*, 489 U.S. 656 (1989), Scalia dissented from the majority opinion which upheld the constitutionality of urine testing for certain Customs Service. *Id.* at 678. Since the case asked the Court to approve a suspicionless search, the Court was required to find that keeping Customs agents drug-free was a "special governmental need[.]" *Id.* at 665. The Court believed this requirement was satisfied by the fact that the agents came in frequent contact with drugs and drug traffickers. *Id.* at 666-70.

Scalia, however, was not convinced. He considered the reasoning of the majority "supported by nothing but speculation, and not very plausible speculation at that." *Id.* at 682 (Scalia, J., dissenting). He continued: "What is absent in the Government's justifications—notably absent, revealingly absent, and as far as I am concerned dispositively absent—is the recitation of *even a single instance* in which any of the speculated horrors actually occurred." *Id.* at 683 (Scalia, J., dissenting). Concededly, the fact patterns involved in these two cases are vastly different, but the question naturally presents itself. If Scalia was so uncomfortable with speculation over the existence of a threat to law enforcement in *Von Raab*, why is he so eager to speculate about the ramifications of affirming the lower court in *Houghton*?

²⁸⁵ See, e.g., *Schneckloth v. Bustamonte*, 412 U.S. 218, 289 (1973) (Marshall, J., dissenting) ("[C]onsent is ordinarily given as acquiescence in an implicit claim of authority to search.").

If the passenger could satisfy either of these requirements, then the police officer would exempt the container from any further searching. If the policeman noticed anything incriminating while conducting a test to determine if a passenger truly was the owner of a container, it could be seized under the plain view doctrine.²⁸⁶ This type of inquiry should not be foreign to police officers.²⁸⁷ They already make this sort of determination on a routine basis in the context of consensual stops.²⁸⁸ Specifically, police officers determine that a driver can consent to the search of a third party's belongings only if the officers can reasonably conclude that the driver has common authority over the belongings.²⁸⁹

All of these suggestions aside, at some point, consideration of the difficulties a constitutionally mandated procedure will impose on the police must cease. As Justice Stevens declared in *Acevedo*:

[T]he mere fact that law enforcement may be made more efficient can never by itself justify disregard of the Fourth Amendment . . . [T]he Fourth Amendment reflects the view of those who wrote the Bill of Rights that the privacy of a person's home and property may not be totally sacrificed in the name of maximum simplicity in enforcement of the criminal law.²⁹⁰

Considering the manner to which the majority of the Court denigrated Sandra Houghton's privacy interests in this case, the

²⁸⁶ The ruling of the Wyoming Supreme Court permitted a police officer with probable cause to search a vehicle to search any container therein, until he knew or should have known that the container belonged to an unsuspected passenger. *Houghton v. State*, 956 P.2d 363, 372 (Wyo. 1998). In other words, his right to search was assumed until proven otherwise.

The plain view doctrine allows a police officer with the right to be in a particular position the ability to seize contraband viewed from that position. See, e.g., *Coolidge v. New Hampshire*, 403 U.S. 443 (1971). Therefore, the plain view doctrine would apply to anything the police officer observed in a Houghton-type search, until he learned the container belonged to an unsuspected passenger.

²⁸⁷ See *State v. Parker*, 987 P.2d 73, 83 (Wash. 1999) (en banc) ("Officers in the field routinely make, often subtle, factual determinations of probable cause, articulable suspicion, and the like . . . [I]t is not overly difficult to determine to whom a personal effect belongs.").

²⁸⁸ See, e.g., *State v. Friedel*, 714 N.E.2d 1231, 1239 (Ind. Ct. App. 1999).

²⁸⁹ *Id.*

²⁹⁰ *California v. Acevedo*, 500 U.S. 565, 601 (Stevens, J., dissenting). Cf. *Parker*, 987 P.2d at 83 ("The need for a 'bright line' rule, as urged by the State, does not overcome a nonarrested individual's privacy interest.").

time has come to stop worrying about minor inconveniences for police officers and start worrying about the burdens imposed on the other side of the scale.

VI. CONCLUSION

In an attempt to bring cohesion to an area of law referred to by some as a "doctrinal mess,"²⁹¹ the Supreme Court in *Houghton* stretched the rule set forth in *Ross*²⁹² by holding that probable cause to search a vehicle justified searching every container within the vehicle which may contain the object of the search regardless of ownership. In the Court's opinion, the common law in place at the time of the framing of the Fourth Amendment, the goals of effective law enforcement, and the minimal privacy interests of passengers justified the extension of the rule put forward in *Ross*.

However, in its haste to simplify the field, the Court unnecessarily undermined basic principles of Fourth Amendment jurisprudence and stripped passengers in vehicles of many of the protections they previously possessed. The Court disregarded the established importance of individualized suspicion and created a new exception to that requirement without properly justifying its actions.

Meanwhile, the Court neglected the expectation of privacy a passenger might reasonably possess in the integrity of her belongings while riding in someone else's vehicle. At the same time, the Court wrongly rejected as impractical a lower court rule, which respected both the privacy of passengers and the interests of law enforcement.

Before the Court can reestablish the proper safeguards for automobile passengers' privacy, it must realize that its decisions in *Houghton*²⁹³ and in *Acevedo*²⁹⁴ constitute an improper step away from the principles of *Ross* and the Fourth Amendment, generally. Until the Court recognizes that it has strayed, passengers

²⁹¹ See Akhil Reed Amar, *Fourth Amendment First Principles*, 107 HARV. L. REV. 757, 759 (1994).

²⁹² *United States v. Ross*, 456 U.S. 798 (1982).

²⁹³ *Wyoming v. Houghton*, 119 S. Ct. 1297 (1999).

²⁹⁴ *California v. Acevedo*, 500 U.S. 565 (1991).

on American roads are afforded a shockingly low level of Fourth Amendment protection.²⁹⁵

Daniel J. Hewitt

²⁹⁵ Passengers may be saved the vulnerability condoned by *Houghton* if their state courts grant them greater protections under their state constitutions. For an example of a state court refusing to follow *Houghton* on state grounds, see *State v. Parker*, 987 P.2d 73 (Wash. 1999) (en banc).