Bailey v. United States: Another Win for that "Doggone Fourth Amendment"

*Daniel Epps**

More than 30 years ago, *Michigan v. Summers* established a bright-line rule that police, when executing a search warrant for contraband at a home, may detain occupants of the residence for the duration of the search.[1] That rule is a categorical exception to the Fourth Amendment's general prohibition on detentions—or "seizures" of the person—that are not based on probable cause. This year, in *Bailey v. United States*, the Supreme Court refused to extend the *Summers* rule further, holding that police have no categorical power to detain occupants who have left the immediate vicinity of the premises being searched.[2]

Bailey got the bottom-line result right. The probable-cause requirement is a well-established component of the reasonableness mandated by the Fourth Amendment. The government could point to no legitimate interest that would justify a limited exception from that requirement without swallowing it entirely. By declining to extend the *Summers* rule in *Bailey*, the Court reaffirmed the probable-cause requirement and made clear that it cannot be discarded simply because it poses inconvenience to police efforts to investigate crime.

Bailey is in one sense disappointing: Both the majority and Justice Antonin Scalia (who filed a separate concurrence) declined to criticize the *Summers* rule itself, which is broader than necessary in light of its legitimate justifications—even though both appeared to recognize the flaws in *Summers*'s reasoning. More important, however, is what *Bailey* demonstrates about the current state of search-and-seizure doctrine as a whole. The Court has in recent years become

* Climenko Fellow and Lecturer on Law, Harvard Law School. Thanks to Danielle D'Onfro, Garrett Epps, and Matt Owen for helpful feedback.

[1] 452 U.S. 692, 702 (1981).

[2] 133 S. Ct. 1031 (2013).

more careful in its analysis of Fourth Amendment issues, requiring a tighter fit between exceptions to rules like the probable-cause requirement and their justifications. It now takes the Fourth Amendment more seriously as a source of determinate legal rules, rather than as an open-ended invitation to declare what is reasonable under all the circumstances of each case. Those who believe that the Fourth Amendment should impose meaningful constraints on police action should see that as a good development. It guards against the risk that judges will effectively render Fourth Amendment protections meaningless by discarding them whenever they become inconvenient for police.

Legal Background

The Fourth Amendment provides that "[t]he right of the people to be secure in their persons, houses, papers, and effects, against unreasonable searches and seizures, shall not be violated, and no Warrants shall issue, but upon probable cause." The Supreme Court has made clear that the ban on "unreasonable . . . seizures" means that, as a general matter, police may not forcibly detain a person without probable cause to believe that he has committed or is committing a crime.[3] That rule "has roots that are deep in our history."[4] Under English common law, peace officers could make warrantless arrests only when they had "reasonable grounds to believe" the arrestee had committed a felony, and that rule has been incorporated into Fourth Amendment doctrine.[5]

Despite its historical pedigree, however, the probable-cause requirement—like most other Fourth Amendment rules[6]—has significant exceptions. Most notably, *Terry v. Ohio*[7] and its progeny provide

[3] See, e.g., Dunaway v. New York, 442 U.S. 200 (1979); United States v. Watson, 423 U.S. 411, 416–19 (1976); see also Devenpeck v. Alford, 543 U.S. 146, 152 (2004).

[4] Henry v. United States, 361 U.S. 98, 100 (1959).

[5] See, e.g., Wayne R. LaFave, Search and Seizure: A Treatise on the Fourth Amendment § 5.1(b), at 15 (2012). There is some historical disagreement over whether warrantless *misdemeanor* arrests were permissible only for breaches of the peace. See Atwater v. City of Lago Vista, 532 U.S. 318 (2001).

[6] See, e.g., Phyllis T. Bookspan, Reworking the Warrant Requirement: Resuscitating the Fourth Amendment, 44 Vand. L. Rev. 473, 481 (1991) ("Today, the warrant requirement is notable more for its exceptions than its enforcement.").

[7] 392 U.S. 1 (1968).

that when police have “reasonable, articulable suspicion” of criminal activity, they may briefly detain an individual for the purpose of questioning the individual.[8] The Court’s stated rationale for such exceptions to the “general rule requiring probable cause” is that some seizures are “so substantially less intrusive than arrests” that they may be justified under a “balancing test” where strong law-enforcement interests are present.[9]

At issue in *Bailey* was the scope of one such exception: the rule, established in *Michigan v. Summers*, that police may detain “an occupant of premises being searched for contraband pursuant to a valid warrant” during the search.[10] In *Summers*, the police had a warrant to search a home for drugs. As they approached the home, they found the home’s owner, George Summers, descending the front steps, and immediately detained him. After finding narcotics in the basement, police arrested Summers. Summers had heroin on his person and was charged with drug possession as a result. Because police would not have had the chance immediately to arrest Summers had they not detained him during the search, the validity of the search of Summers’s person depended on the validity of the original detention. Given that the detention was surely a seizure, and given that it was clear that police lacked probable cause to arrest Summers at the time he was initially detained, the Court found it necessary to consider whether a special exception to the normal probable-cause requirement was justified.

In an opinion by Justice John Paul Stevens, and over the dissent of Justice Potter Stewart (joined by Justices William Brennan and Thurgood Marshall), the Court concluded that such an exception was appropriate as a categorical matter.[11] Justice Stevens reached that conclusion after assessing the interests at stake and conducting a balancing test.

On the one hand, the Court concluded that detention incident to a search warrant was only a minimal intrusion on the liberty and privacy of the detained person.[12] First, it was of “prime importance”

[8] See Illinois v. Wardlow, 528 U.S. 119, 123 (2000); see also, e.g., Florida v. Royer, 460 U.S. 491, 498–99 (1983).

[9] Dunaway, 442 U.S. at 210.

[10] 452 U.S. 692, 702 (1981).

[11] *Id.* at 705.

[12] *Id.* at 701–02.

that police had obtained a warrant to search for contraband.[13] A "neutral and detached magistrate had found probable cause to believe that the law was being violated in [the residence] and had authorized a substantial invasion of the privacy of the persons who resided there"; Summers's detention was "admittedly a significant restraint on his liberty," but it "was surely less intrusive than the search itself."[14] Second, the Court reasoned that a detention during a search "is not likely to be exploited by the officer or unduly prolonged in order to gain more information, because the information the officers seek normally will be obtained through the search and not through the detention."[15] And finally, the Court determined that a detention in the detainee's "own residence . . . could add only minimally to the public stigma associated with the search itself and would involve neither the inconvenience nor the indignity associated with a compelled visit to the police station."[16]

The *Summers* Court identified three "legitimate law enforcement interest[s]" weighing heavily in favor of permitting detention.[17] First and "most obvious" was the "interest in preventing flight in the event that incriminating evidence is found."[18] Second was the interest in "minimizing the risk of harm to the officers"; because "the execution of a warrant to search for narcotics is the kind of transaction that may give rise to sudden violence or frantic efforts to conceal or destroy evidence," the Court reasoned that "[t]he risk of harm to both the police and the occupants is minimized if the officers routinely exercise unquestioned command of the situation."[19] Finally, the Court thought that allowing detention would facilitate "the orderly completion of the search," because occupants' "self-interest may induce them to open locked doors or locked containers to avoid the use of force that is not only damaging to property but may also delay the completion of the task at hand."[20]

[13] *Id.* at 701.

[14] *Id.*

[15] *Id.*

[16] *Id.* at 702.

[17] *Id.*

[18] *Id.*

[19] *Id.* at 703.

[20] *Id.* at 702–03.

In addition, the Court stressed that the "connection of an occupant to th[e] home" being searched pursuant to a warrant gave rise to legitimate "suspicion of criminal activity," thereby providing "an objective justification for the detention."[21] Weighing all the relevant considerations, the Court held that "a warrant to search for contraband founded on probable cause implicitly carries with it the limited authority to detain the occupants of the premises while a proper search is conducted."[22]

Summers was short on the specifics of permissible detention. Justice Potter Stewart, in dissent, warned that the majority's rule would permit "a detention of several hours" allowing police to "make the person a prisoner in his own home for a potentially very long period of time."[23] That prediction proved true when, more than two decades later, the Court clarified the reach of the *Summers* rule in *Muehler v. Mena*.[24] There, the Court held that "[i]nherent in *Summers'* authorization to detain an occupant of the place to be searched is the authority to use reasonable force to effectuate the detention."[25] Applying that rule, the Court concluded that it was permissible for police to keep a home's occupant in handcuffs for several hours during the course of a search (although the Court left open the possibility that the detention could have been unreasonable if it extended longer than the duration of the search).[26] Several years later, in *Los Angeles County v. Rettele*, the Court ruled that police searching a home pursuant to a warrant have the authority, under *Summers*, to hold the home's occupants at gunpoint while securing the premises.[27]

Summers was also unclear about precisely which "occupants" it allowed police to detain. The Court's opinion used the term loosely. Did it mean to refer only to residents, or did it mean anyone who was currently occupying the premises at the time of the search? The opinion can be read both ways. A number of the Court's arguments appear premised on the fact that Summers was detained at

[21] *Id.* at 703–04.

[22] *Id.* at 705 (footnote omitted).

[23] Summers, 452 U.S. at 711 (Stewart, J., dissenting).

[24] 544 U.S. 93 (2005).

[25] *Id.* at 98–99.

[26] *Id.* at 100–02.

[27] 550 U.S. 609, 613–16 (2007).

his own home,[28] but some of the opinion's offered rationales for the detention—such as minimizing harm to officers—do not necessarily turn on whether the detained person actually lives at the home being searched. There is some disagreement on this question.[29] It is unlikely, however, that *Summers* detentions could remain limited to owners in practice. Police will not necessarily know whether someone is an owner or a mere visitor at the time of detention.[30]

A related, but distinct, area of uncertainty—and here's where we come to the issue in *Bailey*—is whether someone can be an "occupant" under *Summers* after he has left the premises. Here, too, *Summers* is ambiguous. The term "occupant" can be plausibly read as meaning someone who is presently "occupying" the residence; and the Court noted that its rule allowed police to require an occupant "to remain" in his home during a search.[31] But it also could refer to someone who simply *lives* at the residence. Supporting that reading is the fact that Summers himself was seized not while he was inside his home, but rather while he was in the process of leaving. Indeed, the Court explicitly observed that it did not "view the fact that [Summers] was leaving his house when the officers arrived to be of constitutional significance."[32]

Lower courts predictably divided on this question. A number held that police could choose to detain a departing occupant so long as they did so "as soon as practicable" after his departure.[33] Others concluded that the power to detain under *Summers* did not extend

[28] See, e.g., Summers, 452 U.S. at 702 ("[B]ecause the detention in this case was in respondent's own residence, it could add only minimally to the public stigma associated with the search itself . . . .").

[29] See Amir Hatem Ali, Note, Following the Bright Line of *Michigan v. Summers*: A Cause for Concern for Advocates of Bright-Line Fourth Amendment Rules, 45 Harv. C.R.-C.L. L. Rev. 483, 497–500 (2010) (noting disagreement in lower courts); LaFave, *supra* note 5, § 4.9(e) at pp. 924–26 & nn.142–44 (same).

[30] In *Bailey* itself, police detained Bailey's passenger even though he claimed to be a friend whom Bailey was driving home. 133 S. Ct. at 1036. And police did not end Bailey's detention once he denied living at the apartment being searched. *Id.*

[31] Summers, 452 U.S. at 705; see also Brief for Petitioner at 18–19, Bailey v. United States, 133 S. Ct. 1031 (2013) (No. 11-770).

[32] Summers, 452 U.S. at 702 n.16.

[33] See, e.g., United States v. Montieth, 662 F.3d 660 (4th Cir. 2011) (collecting cases).

beyond the premises themselves.[34] *Bailey* presented an ideal vehicle for the resolution of the split.

Case Background

Like so many other Fourth Amendment cases in recent decades, *Bailey* arose out of a narcotics investigation. Police received a tip from an informant who claimed that "a heavy set black male with short hair known as Polo" was selling drugs out of a basement apartment in Wyandanch, New York.[35] Police obtained a warrant to search for a handgun. While the search team was preparing to execute the warrant, detectives observed two men leaving the residence, both of whom fit the vague description of "Polo." The men got in a vehicle and drove away; after they had traveled for several hundred feet, the detectives began pursuing them while other officers began the search.

Once the two men were approximately one mile away from the home, the detectives pulled the vehicle over, ordered the men out, frisked them, and handcuffed them. One of the men, Chunon Bailey, initially admitted to residing at the basement apartment. When told that he was being detained incident to a search warrant for that residence, Bailey said "I don't live there. Anything you find there ain't mine, and I'm not cooperating with your investigation."[36] One of the keys that was found on Bailey's person turned out to open the basement apartment.

Bailey was subsequently charged with federal gun and drug offenses; at trial, he sought to suppress his incriminatory statements and the apartment key, arguing that his seizure was unreasonable and not authorized by *Summers*.[37] The district court denied the motion, and the Second Circuit affirmed. In an opinion by Judge José Cabranes, the court concluded that "the very interests at stake in *Summers* . . . permit detention of an occupant nearby, but outside of, the premises" being searched.[38] According to the Second Circuit, refusing to extend *Summers* to detentions like Bailey's "would put police officers executing a warrant in an impossible position: when

[34] See, e.g., Commonwealth v. Charros, 824 N.E.2d 809 (Mass. 2005).

[35] Bailey, 133 S. Ct. at 1036 (internal quotation marks omitted).

[36] *Id.*

[37] *Id.*

[38] United States v. Bailey, 652 F.3d 197, 205 (2d Cir. 2011).

they observe a person of interest leaving a residence for which they have a search warrant, they would be required either to detain him immediately (risking officer safety and the destruction of evidence) or to permit him to leave the scene (risking the inability to detain him if incriminating evidence was discovered)."[39]

The Second Circuit did not, however, see the *Summers* power as limitless; it cautioned that "*Summers* is not a license for law enforcement to detain 'occupants' of premises subject to a search warrant anywhere they may be found incident to that search."[40] Instead, in the court's view, *Summers* established "a duty based on both geographic and temporal proximity; police must identify an individual *in the process of leaving* the premises subject to search and detain him *as soon as practicable* during the execution of the search."[41] "Because the officers acted as soon as reasonably practicable in detaining Bailey once he drove off the premises subject to search . . . his detention during the valid search of the house did not violate the Fourth Amendment."[42]

The Supreme Court granted Bailey's petition for certiorari. At the merits stage, Bailey placed great emphasis on the Court's recent decision in *Arizona v. Gant*.[43] *Gant* was not directly on point as a legal matter; the case concerned police authority to search incident to an arrest, rather than the power, at issue in *Bailey*, to detain incident to a search.

The specific issue in *Gant* was when police can search vehicles incident to an arrest of the driver. Typically, police cannot search a vehicle absent probable cause to believe that it contains contraband (or the driver's consent).[44] But the Court's decision in *New York v. Belton*[45] had been understood as creating a blanket exception to that rule, under which police were permitted to search a vehicle incident to arrest whenever the driver was arrested. The *Belton* rule was ostensibly founded upon the rationales of officer safety and preservation

[39] *Id.*

[40] *Id.* at 208.

[41] *Id.* at 206.

[42] *Id.* at 207.

[43] 556 U.S. 332 (2009).

[44] See United States v. Ross, 456 U.S. 798, 808–09 (1982); Carroll v. United States, 267 U.S. 132, 155–56 (1925).

[45] 453 U.S. 454 (1981).

of evidence,[46] but neither seemed applicable to situations in which the police search a vehicle while the arrested driver is handcuffed and locked in the back of a squad car. For that reason, *Belton* became subject to serious criticism.[47] In *Gant*, a narrow majority of the Court (Justice Stevens, joined by Justices Scalia, David Souter, Clarence Thomas, and Ruth Bader Ginsburg) effectively overruled the case, holding that a search of an automobile incident to arrest is permissible "only if the arrestee is within reaching distance of the passenger compartment at the time of the search or it is reasonable to believe the vehicle contains evidence of the offense of arrest."[48]

Seeking to build a similar coalition, Bailey invoked *Gant* at every turn. Just as *Gant* recognized that the *Belton* rule could not be "untether[ed]" from its underlying justifications (preservation of evidence and safety of officers), so too should the Court refuse to extend *Summers* beyond the "immediate vicinity" of a home, where its rationales no longer apply, Bailey argued.[49] Thus, although *Gant* did not deal with the precise issue in *Bailey*, it nonetheless provided a helpful analogy.

The government, for its part, did not take the bait; its brief never cited *Gant*. Instead, the government challenged the premise of Bailey's argument: Although Bailey had cast the *Summers* rule as Fourth Amendment doctrine's only categorical rule "that supports the detention of an individual, solely for ordinary law-enforcement purposes, without any degree of individualized suspicion,"[50] the government stressed language in *Summers* suggesting that the existence of a search warrant gave police "an identifiable and individualized basis to detain" a departing occupant of a home to be searched.[51] The government strongly contested Bailey's argument that the "legitimate

[46] The *Belton* rule was derived from the general search-incident-to-arrest exception to the warrant requirement recognized in *Chimel v. California*, 395 U.S. 752 (1969), which was premised on those two rationales, see *id.* at 763.

[47] See, e.g., Thornton v. United States, 541 U.S. 615, 626–29 (2004) (Scalia, J., concurring in the judgment).

[48] Gant, 556 U.S. at 351.

[49] Brief for Petitioner, *supra* note 31, at 21 (quoting Gant, 556 U.S. at 343) (brackets omitted).

[50] *Id.* at 15.

[51] Brief for the United States at 24, Bailey v. United States, 133 S. Ct. 1031 (2013) (No. 11-770) (emphasis omitted).

law enforcement interest[s]" recognized by *Summers* were inapplicable beyond the "immediate vicinity" of the premises being searched; it gave special emphasis to the safety rationale, warning that departing occupants could return to the scene of a search and assault the officers present.[52]

At oral argument, Bailey appeared to have the wind at his back. Several justices appeared skeptical of the government's position. Justice Anthony Kennedy wondered why the government's arguments would not justify detention of any person with a connection to the premises being searched, even if not nearby when the search began.[53] Chief Justice John Roberts questioned whether *Summers* was right to suggest that "you can detain the people because they might want to give the officers assistance. Well, if they want to give them assistance, they don't have to be detained."[54] Nothing better summed up the day the government was having, however, than Justice Scalia's response to one of the government's arguments about law-enforcement interests: "All law enforcement would be a lot easier if we didn't have the doggone Fourth Amendment. I mean, the Fourth Amendment is an impediment to law enforcement. Of course it is. There—there's no doubt about that."[55] No one in attendance that day left the courtroom with any doubt about Justice Scalia's view of the case.

The Decision

Predictably, in light of the oral argument, the Supreme Court reversed. The Court rejected the Second Circuit's "as soon as reasonably practicable" rule and instead held that authority to detain under *Summers* extends no further than "the immediate vicinity of the premises to be searched."[56] The vote was 6–3. Justice Kennedy wrote for the majority, joined by Chief Justice Roberts and Justices Scalia, Ginsburg, Sonia Sotomayor, and Elena Kagan; Justice Stephen Breyer dissented, joined by Justices Thomas and Samuel Alito.[57]

[52] See *id.* at 35–42.

[53] See, e.g., Transcript of Oral Argument at 50, Bailey v. United States, 133 S. Ct. 1031 (2013) (No. 11-770).

[54] *Id.* at 48.

[55] *Id.* at 57.

[56] Bailey, 133 S. Ct. at 1041.

[57] Interestingly, despite Bailey's efforts to analogize the case to *Gant*, not all of the justices saw the two cases as similar. Chief Justice Roberts and Justice Kennedy both

Justice Kennedy's majority opinion reached its holding after analyzing each of the interests identified by *Summers* and concluding that none of them applied with the same force to individuals who have left the premises being searched. Regarding safety to officers, the Court acknowledged the possibility that, as the government had warned,[58] a home's occupant might return to the premises while a search was ongoing.[59] The Court's response, however, was that "[o]fficers can and do mitigate that risk, however, by taking routine precautions, for instance by erecting barricades or posting someone on the perimeter or at the door."[60] Moreover, the government's argument proved too much; "[t]he risk . . . that someone could return home during the execution of a search warrant is not limited to occupants who depart shortly before the start of a search."[61]

The Court quickly dispensed with the Second Circuit's argument that Bailey's proposed rule would put police in an "impossible position."[62] As the Court saw it:

> Although the danger of alerting occupants who remain inside may be of real concern in some instances . . . this safety rationale rests on the false premise that a detention must take place. If the officers find that it would be dangerous to detain a departing individual in front of a residence, they are not required to stop him.[63]

Here, Justice Kennedy's opinion channeled Justice Scalia's concurrence in the judgment in *Thornton v. United States*,[64] a pre-*Gant* case in which cracks in the *Belton* rule began to show. Responding to the argument that "since the officer could have conducted the search at the time of arrest (when the suspect was still near the car), he should

dissented in *Gant*, but sided with Bailey; Justice Thomas joined the *Gant* majority but dissented in *Bailey*.

[58] See Brief for the United States, *supra* note 51, at 35–42.

[59] Bailey, 133 S. Ct. at 1039.

[60] *Id.*

[61] *Id.*

[62] United States v. Bailey, 652 F.3d 197, 205 (2d Cir. 2011).

[63] Bailey, 133 S. Ct. at 1031.

[64] 541 U.S. 615 (2004).

not be penalized for having taken the sensible precaution of securing the suspect in the squad car first,"[65] Justice Scalia explained:

> The weakness of this argument is that it assumes that, one way or another, the search must take place. But conducting a . . . search is not the Government's right; it is an exception—justified by necessity—to a rule that would otherwise render the search unlawful. If sensible police procedures require that suspects be handcuffed and put in squad cars, then police should handcuff suspects, put them in squad cars, and not conduct the search.[66]

Justice Kennedy did not cite this concurrence; having dissented in *Gant,* Justice Kennedy may be disinclined to endorse the reasoning that led to that decision. But the concurrence's echoes are unmistakable.

The majority then explained that the interest in "the orderly completion of the search" is tied to "the vicinity of the premises to be searched."[67] "If occupants are permitted to wander around the premises," they could actively interfere with the search; but "[t]hose risks are not presented by an occupant who departs beforehand."[68] As for *Summers*'s suggestion that detained occupants could be persuaded to open locked containers, "it would have no limiting principle were it to be applied to persons beyond the premises of the search."[69]

Next was the interest in preventing flight. This interest, one might think, would be *stronger* under facts like those in *Bailey* than where the occupant is found at the premises. If the need to prevent flight justifies detaining those who are still present when the search commences, it surely should justify detaining those who have recently left (and thus are possibly fleeing) the premises. For this reason, Justice Kennedy's majority opinion found it necessary essentially to redefine the flight interest out of existence. Taking the lead from Bailey,[70] the Court explained that the prevention-of-flight interest

[65] *Id.* at 627 (Scalia, J., concurring in the judgment).

[66] *Id.*

[67] Bailey, 133 S. Ct. at 1040.

[68] *Id.*

[69] *Id.*

[70] See Brief for Petitioner, *supra* note 31, at 17–18 ("[*Summers*] did not suggest that, standing alone, the interest in preventing flight would serve as a sufficient basis for a

was subordinate to the other two interests recognized in *Summers*: It "serves to preserve the integrity of the search by controlling those persons who are on the scene," but it "does not independently justify detention of an occupant beyond the immediate vicinity of the premises to be searched."[71]

Having concluded that *Summers*'s law-enforcement interests were weaker when applied to detentions of recent occupants, the Court turned to the interests of the detained individual. Detentions outside the home involve "an additional level of intrusiveness," because such public detentions often involve "the additional indignity of a compelled transfer back to the premises, giving all the appearances of an arrest."[72] In light of its assessment of the balance of interests, the Court concluded that "[a] spatial constraint defined by the immediate vicinity of the premises" was a necessary limitation on the *Summers* rule.[73] Because Bailey's detention occurred nowhere near the premises, the Court declined to elaborate on how courts should define "immediate vicinity," suggesting only that "[i]n closer cases courts can consider a number of factors . . . including the lawful limits of the premises, whether the occupant was within the line of sight of his dwelling, the ease of reentry from the occupant's location, and other relevant factors."[74]

Justice Scalia, joined by Justices Sotomayor and Kagan, filed a concurring opinion. He found the case easy: "[*Summers*] applies only to seizures of 'occupants'—that is, persons within 'the immediate vicinity of the premises to be searched.' Bailey was seized a mile away. Ergo, *Summers* cannot sanction Bailey's detention. It really is that simple."[75] He criticized the Second Circuit and the dissenting justices for seeking to "replace [*Summers*'s] straightforward, binary inquiry with open-ended balancing."[76] While seeming to defend the *Summers* rule, however, he acknowledged that the Court's opinion in

---

detention. . . . Instead, the interest in preventing flight is better understood as overlapping with, and thereby reinforcing, the other interests supporting the *Summers* rule.").

[71] Bailey, 133 S. Ct. at 1040–41.

[72] *Id.*

[73] *Id.* at 1042.

[74] *Id.*

[75] *Id.* at 1043 (Scalia, J., concurring) (citation omitted).

[76] *Id.*

that case was too "expansive," "setting forth a smorgasbord of law-enforcement interests assertedly justifying its holding."[77] Because, in his view, the interests in preventing flight and in opening locked containers were "nothing more than the ordinary interest in investigating crime," he concluded that "[t]he *Summers* exception is appropriately predicated only on law enforcement's interest in carrying out the search unimpeded by violence or other disruptions."[78]

In dissent, Justice Breyer argued that all of the *Summers* law-enforcement interests applied with full force to situations like the one in *Bailey*.[79] He focused on two main points. First, he argued that the majority failed to provide an "easily administered bright line" but would instead "invite[] case-by-case litigation."[80] Second, he contended that allowing police to wait to detain departing occupants was the better rule, because departing occupants may be armed or may see the police and notify persons inside the home of the impending search.[81] Although acknowledging the majority's argument that police are not required to detain a departing person, Justice Breyer opined that police may feel compelled to detain anyone emerging from a home prior to the execution of a warrant because they will not know if that person has spotted them.[82]

Analysis

The Need to Ensure That Exceptions Don't Swallow the Rules

Rights have costs. Enshrining a command into constitutional text takes certain options off the table—even where adherence to that rule seems inconsistent with some other attractive value. The Confrontation Clause forbids the use of testimonial hearsay at a criminal trial if the defendant has no opportunity to confront the declarant—even if the testimony has all the indicia of reliability.[83] The Double Jeopardy Clause bars appeal of an acquittal—even one that is

[77] *Id.* at 1044.

[78] *Id.* at 1044–45.

[79] *Id.* at 1046–47 (Breyer, J., dissenting).

[80] *Id.* at 1047.

[81] *Id.* at 1047–48.

[82] *Id.* at 1048.

[83] Crawford v. Washington, 541 U.S. 36 (2004).

obviously erroneous.[84] The Sixth Amendment insists that juries, not judges, determine whether the government has proven the elements of an offense beyond a reasonable doubt—even if there is little doubt what a properly instructed jury would decide.[85] Such commands are the product of a constitutional settlement in which it was resolved that the overall benefits of adhering to these guarantees are worth the costs they produce.

The Fourth Amendment is no different. By barring "unreasonable" searches and seizures, the amendment does not merely require reasonableness in the abstract but enshrines, at least to some extent, a particular vision of reasonable police practices into law. An important part of that vision, even though not explicit in the constitutional text, is the requirement that arrests must be based on probable cause.[86] That rule has strong historical support and has been repeatedly reaffirmed by the Court. And it's a rule that makes good sense; if the ban on unreasonable seizures means anything, it should, under normal circumstances, prevent police from depriving a person of his liberty without at least some reason to think he has committed a crime. That requirement, by its nature, makes law enforcement more difficult. But our society decided, when it enshrined the amendment

[84] Fong Foo v. United States, 369 U.S. 141 (1962).

[85] Sullivan v. Louisiana, 508 U.S. 275, 280–81 (1993). But see Neder v. United States, 527 U.S. 1, 8–15 (1999) (holding that trial court's failure to instruct jury on element of materiality is susceptible to harmless-error analysis on appeal from conviction).

[86] There is significant disagreement over whether the Fourth Amendment's reasonableness requirement simply constitutionalizes the search-and-seizure rules existing in 1791 or instead invites judges to engage in common-law reasoning, with the power to fashion rules in light of changed circumstances. Justice Scalia has forcefully advocated the first position. See, e.g., County of Riverside v. McLaughlin, 500 U.S. 44, 60–66 (1991) (Scalia, J., dissenting). For opposing views, see, e.g., David A. Sklansky, The Fourth Amendment and Common Law, 100 Colum. L. Rev. 1739 (2000); Carol S. Steiker, Second Thoughts About First Principles, 107 Harv. L. Rev. 820 (1997). That debate has significant implications about many areas of Fourth Amendment doctrine, such as the warrant requirement. See, e.g., Akhil Reed Amar, Fourth Amendment First Principles, 107 Harv. L. Rev. 757, 762–81 (1994) (arguing that the warrant requirement lacks a historical basis). However one comes down on that dispute, it is of no moment here. The rule that arrests require probable cause has strong historical roots, see *supra* notes 4 & 5 and accompanying text, but also has strong support in modern practice and precedent, see, e.g., Sklansky, *supra*, at 1764 (noting that the Supreme Court reaffirmed the probable-cause requirement "when the ahistoric approach to the Fourth Amendment was at its apogee").

into law, that those costs were worth the benefits of personal liberty and security.

Precisely because the Fourth Amendment is worded so vaguely, however, it poses special difficulties in judicial application. The language of reasonableness can make the Fourth Amendment seem like an open-ended invitation to figure out what seems reasonable on the unique facts of each case. And even where there is agreement that the amendment envisions some baseline rules, it's also widely understood that those rules must bend under some circumstances.

There's a risk, then, that judges will come to view rules like the probable-cause requirement as little more than weak suggestions, capable of being trumped whenever, in a judge's view, they seem like more trouble than they are worth. If so, it becomes all too easy for judges to throw up their hands, unwilling to second-guess the judgments of police officers. That's especially true given that most Fourth Amendment litigation occurs in the context of suppression rulings. In such situations, police actually found evidence of crime; to a reviewing court, police choices will often appear sensible in retrospect.[87]

Yet to the extent that the Fourth Amendment actually imposes meaningful constraints on police officers, requirements like the probable-cause rule must have bite. That is, they must prevent police from doing things that they would otherwise do—things that, in a world without a Fourth Amendment, might even seem to a judge like *reasonable* things to do. That means judges must not ignore the amendment's commands simply because they make it harder for police to catch criminals. Judges who do so inappropriately substitute their own preferences for the choices made in the Constitution.[88]

Avoiding that possibility requires clear rules governing how courts should fashion Fourth Amendment doctrine itself—specifically, principles governing when courts can and should recognize exceptions to commands like the probable-cause requirement. By way of analogy, consider the First Amendment. America today has almost certainly the most speech-protective laws on the planet.

[87] See William J. Stuntz, Warrants and Fourth Amendment Remedies, 77 Va. L. Rev. 881, 911–13 (1991).

[88] Cf. John F. Manning, Separation of Powers as Ordinary Interpretation, 124 Harv. L. Rev. 1939, 1946 (2011) ("An interpreter . . . must not invoke background purpose as a way to convert rules into standards or standards into rules.").

That fact is usually attributed to the First Amendment. But the First Amendment itself has not done the work. A key element in shaping America's vibrant free-speech culture is the fact that the Supreme Court has developed, and continues to refine, legal doctrines that preclude courts from deciding what speech merits protection based on "an ad hoc balancing of relative social costs and benefits."[89] The doctrine not only limits when and why government can restrict speech, but also largely prohibits the possibility that courts could recognize exceptions to those protections.[90]

A similar approach for the Fourth Amendment would seek to ensure that judicial decisionmaking doesn't just boil down to ad hoc judgments about what seem like reasonable police practices, all things considered. What's necessary are principled and objective norms about when, exactly, exceptions to baseline rules like the probable-cause requirement are permissible. Those norms must create some flexibility, but they cannot allow the exceptions to swallow the rules themselves and replace them with fact-specific interest balancing in each case.

Such principles governing proper Fourth Amendment analysis are important not merely because they constrain lower courts vis-à-vis the Supreme Court (although they do);[91] as important, over time, is their effect in limiting the types of arguments the Supreme Court will consider in a given context. In that sense, I submit that such rules are critical to taking the Fourth Amendment seriously as *law*—that is, as a source of rules that has objective, discernible content distinct from a particular judge's assessments of costs and benefits in a specific case.

When it comes to the probable-cause requirement for seizures of the person, taking that rule seriously means that judges need to have guidance about what kinds of arguments are in bounds and what kinds of governmental interests should count as legitimate reasons for an exception. If the probable-cause rule—which, by definition,

[89] United States v. Stevens, 130 S. Ct. 1577, 1585 (2010); see also Brown v. Entertainment Merchants Ass'n, 131 S. Ct. 2729, 2734 (2011).

[90] See, e.g., Brown, 131 S. Ct. at 2734 (rejecting the possibility of "new categories of unprotected speech" beyond those previously recognized).

[91] See, e.g., Toby J. Heytens, Doctrine Formulation and Distrust, 83 Notre Dame L. Rev. 2045, 2057–59 (2008) (explaining how appellate courts use clear rules to constrain lower courts).

makes the job of police harder—doesn't apply whenever it makes policing more difficult, it is no rule at all.

Under Justice Scalia's view, an exception "is only permissible where . . . 'some governmental interest independent of the ordinary interest in investigating crime and apprehending suspects'" is at stake.[92] This assertion seems not quite right as a descriptive matter (which may explain why its only cited support is Justice Stewart's dissent in *Summers*). The *Terry* doctrine, the most significant exception to the probable-cause requirement, gives police authority briefly to detain and question individuals based only on articulable suspicion, a lower standard than probable cause. And the doctrine's justification for those detentions is the ordinary interest in detecting and preventing crime.[93] (Perhaps *Terry* is best thought of as less of an exception to and more of an application of the probable-cause rule—when police have a little bit less than probable cause, they can effect a brief detention that is much less intrusive than a real arrest. One can accept *Terry* while still largely accepting Justice Scalia's approach.[94])

Putting *Terry* to one side, however, Justice Scalia's approach has much to recommend it. The Fourth Amendment's probable-cause requirement reflects a tradeoff between liberty and privacy on the one hand and the government's interest in fighting crime on the other. To allow the rule to give way simply because it gets in the way of law enforcement would miss the whole point of the rule—it would fail to respect the rule *as a rule*.

[92] Bailey, 133 S. Ct. at 1044 (quoting Summers, 452 U.S. at 707 (Stewart, J., dissenting)).

[93] To be sure, *Terry* noted that "more than the governmental interest in investigating crime" was present when it analyzed the *search* (the frisk for weapons) at issue in that case, recognizing "the more immediate interest of the police officer in taking steps to assure himself that the person with whom he is dealing is not armed." Terry v. Ohio, 392 U.S. 1, 23 (1968). That interest, however, comes into play only once police have detained the person to be questioned. In most instances, it provides no justification for the initial *seizure*, which will typically be motivated solely by the desire to investigate potential criminal activity.

[94] Justice Scalia's rationale for permitting *Terry* stops is that, on his reading of the common law, "it had long been considered reasonable to detain suspicious persons for the purpose of demanding that they give an account of themselves." Minnesota v. Dickerson, 508 U.S. 366, 380 (1993) (Scalia, J., concurring in the judgment). He has, however, expressed skepticism that frisks authorized by *Terry* have a historical analogue. See *id.* at 381 ("I frankly doubt . . . whether the fiercely proud men who adopted our Fourth Amendment would have allowed themselves to be subjected, on mere *suspicion* of being armed and dangerous, to such indignity.").

By contrast, permitting exceptions only where the government can point to a legitimate reason separate from its ordinary law-enforcement interests—a reason that explains why an exception is justified here, but not everywhere—helps prevent the doctrine from sliding down that slippery slope. Acknowledging that some strong government interest *other than* the ordinary interest in law enforcement might justify a limited exception does not question the balance struck by the Fourth Amendment between investigative needs and personal liberty and privacy—it does not effectively "revise the judgment [of] the American people . . . that the benefits of [the Fourth Amendment's] restrictions on the Government outweigh the costs."[95]

Of course, Justice Scalia's approach does not take all discretion out of judges' hands. Even where legitimate law-enforcement interests potentially justifying an exception exist, courts must balance those interests against the intrusions on privacy and liberty that an exception would create. Fourth Amendment analysis cannot be entirely mechanized. Nonetheless, requiring the government to articulate a special interest justifying an exception provides a significant constraint on judges' ability to disregard the probable-cause requirement whenever it seems inconvenient. And to the extent that the probable-cause requirement is a rule worthy of respect, some constraint is better than none at all.

The Right Result

In light of the foregoing analysis, *Bailey* reached the right bottom line. As Justice Scalia correctly concluded in his concurrence, the *only* legitimate interest at stake—the only one that was distinct from ordinary law enforcement—was the government's interest in effectuating the search without interference.[96] And that interest essentially disappeared as soon as Bailey left the vicinity of his apartment. Accordingly, the normal probable-cause requirement applied with full force.

The majority was not so explicit, but its opinion seemed to recognize that the sweeping array of interests recognized in *Summers* was too broad. Given that the majority acknowledged that both the

[95] Cf. Brown, 131 S. Ct. at 2734 (internal quotation marks omitted; first alteration in original).

[96] Bailey, 133 S. Ct. at 1044–45 (Scalia, J., concurring).

flight rationale and the government interest in opening locked doors and containers would have "no limiting principle" if extended outside the immediate vicinity of the home,[97] and instead emphasized "the law enforcement interests in conducting a safe and efficient search,"[98] it appeared, more or less, to track Justice Scalia's analysis.

By contrast, the reasoning of the many lower courts that relied on *Summers* to uphold detentions of departing occupants demonstrates why principled constraints like Justice Scalia's are needed. Without them, judges may be irresistibly tempted to water down probable-cause requirements whenever they pose an obstacle to police. Take the Second Circuit's assertion that police would be in an "impossible position" if they lacked authority to detain occupants who had left the premises.[99] Certainly, police executing search warrants after *Bailey* may sometimes face a difficult choice between detaining an occupant before he leaves the premises or letting the occupant leave and waiting to begin the search. But the choice between those two alternatives is not a "Hobson's choice" simply because the government finds both imperfect.[100] Police will inevitably face such choices because the Fourth Amendment takes certain options off the table.

The Fourth Circuit's recent decision in *United States v. Montieth*[101] provides another good example of similarly problematic reasoning. In that case, police had a warrant to search a home where the defendant, a suspected drug dealer, resided. "In an effort to minimize both the trauma to family as well as the safety risks of a search," police officers planned to detain the defendant away from the home and then "secure his cooperation to execute the warrant."[102] The plan worked; Montieth, once detained, agreed to cooperate with the search "to avoid an abrupt or forcible entry into the house while his wife and children were inside."[103] Police asked Montieth's wife

[97] *Id.* at 1040.

[98] *Id.* at 1042.

[99] United States v. Bailey, 652 F.3d 197, 205 (2d Cir. 2011).

[100] *Id.* at 206. Indeed, this is not even a proper use of the idiom. A "Hobson's choice" is not a choice between two imperfect alternatives, but is instead "the option of taking the one thing offered or nothing." See "choice, n.," Oxford English Dictionary Online, http://www.oed.com/view/Entry/32111 (accessed Aug. 1, 2013).

[101] 662 F.3d 660 (4th Cir. 2011).

[102] *Id.* at 663.

[103] *Id.*

to leave the home with her children; once the family had departed, police brought Montieth into the home and he showed them where his drugs were located.[104] The Fourth Circuit found this technique permissible: "To require officers to bypass less dangerous and disruptive methods of executing a search warrant and push them to harsher and more forcible modes of entry would be at odds with the Fourth Amendment's ultimate command of reasonableness."[105]

The Fourth Circuit seemed strangely untroubled by the way police so obviously wielded their authority under *Summers* as a cudgel to coerce the defendant into revealing the location of his drugs. Why was either Montieth's detention or his consent necessary to avoid an "abrupt or forcible entry,"[106] given that police could simply have asked the family members to leave after Montieth departed? The most plausible interpretation, at least to this reader, seems to be that police detained Montieth away from the residence precisely so they could threaten him with an unnecessarily violent entry into the home, with its ensuing trauma to his wife and children (perhaps the police would even have placed them in handcuffs too), in order to get him to agree to cooperate with their investigation. *Montieth*, then, is an especially stark example of how courts sometimes decline to follow the probable-cause requirement when police show that adhering to it would make their jobs more difficult.

Justice Breyer's dissent, for the most part, added little to the arguments previously made by the Second Circuit and other courts that adopted the "as soon as reasonably practicable" rule. He endorsed all of the interests recognized in *Summers*, including the flight interest, without seriously engaging Justice Scalia's arguments or explaining why, in his view, those interests were legitimate.[107] The best justification he could muster for his rule was that it was possible an emerging occupant might notice officers preparing to execute the warrant and then notify those inside the house, who in turn could flee with or destroy the evidence or prepare to attack officers as they enter the home.[108] This particular argument, at least, relies on law-

[104] *Id.*

[105] *Id.* at 667.

[106] *Id.*

[107] Bailey, 133 S. Ct. at 1046–47 (Breyer, J., dissenting).

[108] *Id.* at 1047–48.

enforcement interests that are distinct from "ordinary" ones. But it is nonetheless unpersuasive.

First of all, the argument relies on a sequence of speculative possibilities: "[T]hose emerging occupants might have seen the officers outside the house. And they might have alerted others inside the house. . . . Suppose that an individual inside the house (perhaps under the influence of drugs) had grabbed the gun and begun to fire through the window."[109] Simply because a judge can concoct a hypothetical scenario in which adhering to a Fourth Amendment rule could conceivably fail to prevent harm cannot be enough, in and of itself, to justify an exception to that rule. The situation must be at least somewhat likely to occur in order to justify a blanket exception from a general Fourth Amendment rule, and Justice Breyer's elaborate hypothetical was anything but.

Putting that objection to one side, however, there's an even more basic problem: It's not at all clear how allowing police to detain a recent occupant *a mile away from the premises* would prevent the harm Justice Breyer postulated. If, indeed, Bailey had noticed police outside his apartment—he didn't—and if there had been a confederate of Bailey's inside the apartment—there wasn't—and if Bailey had intended to alert that person as to an imminent search so that he could destroy evidence or arm himself—why on earth would Bailey have waited until he was nearly a mile away from his apartment to phone or text a warning? Wouldn't he (or his passenger) have done so almost immediately, in which case detaining Bailey after he had driven for several minutes would have done nothing to prevent the sequence of events Justice Breyer worried about? That this was Justice Breyer's strongest argument is perhaps all the evidence needed to show that his position was wrong on the merits.

A Missed Opportunity

Although the Court reached the correct result in *Bailey*, both the majority opinion and Justice Scalia's concurrence are, in one way, frustrating: The reasoning in each, if followed to its conclusion, would require narrowing the *Summers* rule itself. Yet neither the majority nor the concurrence was willing even to suggest that possibility.

[109] *Id.*

Take the majority opinion first. In purporting to apply the *Summers* interests, the Court subtly modified them. It emphasized that police have an interest in maintaining their own safety during the search, but recognized that occupants who are not inside the home during the search pose much less risk.[110] It cited the interest in "the orderly completion of the search" but emphasized that "[i]f occupants are permitted to wander around the premises, there is the potential for interference with the execution of the search warrant" while largely dismissing *Summers*'s acknowledged interest in opening locked doors and containers.[111] And it reduced the flight interest to one that "serves to preserve the integrity of the search by controlling those persons who are on the scene. If police officers are concerned about flight, and have to keep close supervision of occupants who are not restrained, they might rush the search, causing unnecessary damage to property or compromising its careful execution."[112]

Yet if *Bailey* is correct about which government interests are properly relevant, it's difficult to understand why the *Summers* rule is as broad as it is. Why, if the legitimate law-enforcement justifications boil down to the interest in maintaining control over the site of the search, shouldn't police have to give an occupant the choice between leaving freely (in which case the occupant, like Bailey, would not be in a position to wander through the home, harm officers, destroy evidence, or otherwise interfere with the search) or remaining in the home but being detained (which would preclude any interference)? Indeed, Summers himself was detained outside his home, while he was in the process of leaving; given that fact, it's far from clear that the legitimate interests *Bailey* relied on actually shake out differently on the facts of the two cases.

The Court took the position that there was something magical about the line demarcating the "immediate vicinity" of the premises. But it seems like the more sensible line, for purposes of the detention power, would be between those who choose to remain present at the site of the search and those who do not. Of course, there's a possibility that a person who chooses to leave the site of a search might later return and harm police. But as *Bailey* explained, police

[110] Bailey, 133 S. Ct. at 1039.

[111] *Id.* at 1040.

[112] *Id.*

could "mitigate that risk . . . by taking routine precautions, for instance by erecting barricades or posting someone on the perimeter or at the door."[113]

Drawing the constitutional line between occupants who choose to remain and those who do not has two key virtues. First, it's easier to administer than the majority's line. There is no need to evaluate "the lawful limits of the premises, whether the occupant was within the line of sight of his dwelling," or "the ease of reentry from the occupant's location."[114] Second, and more importantly, it avoids intrusions on liberty that—as the Court's opinion in *Bailey* tells us—are justified by *no* government interest that should legitimately trump the Fourth Amendment's presumptive requirements.

Justice Scalia can usually be relied upon for candor, especially when writing separately; he is more willing than most justices are to criticize precedent.[115] Yet he too declined to question the *Summers* rule despite implicitly recognizing its flaws. He criticized the Court's opinion in *Summers* for setting forth a "smorgasbord" of interests, only one of which ("carrying out the search unimpeded by violence or other disruptions") he deemed legitimate.[116] But he accepted the substance of the original *Summers* rule and the majority's "immediate vicinity" limitation without qualification. And he did so even though, as explained above, the interest in executing the search free of disruptions would seem to justify only a narrower power to detain those who *choose* to remain on premises. More's the pity; an opinion by Justice Scalia questioning the *Summers* rule could have laid the groundwork for its rollback in a later case.[117]

There are times, of course, when it is not worth revisiting past decisions. Perhaps we should be grateful that the Court declined to extend a dubious precedent into new territory and leave it at that. *Summers*, however, seems especially deserving of reconsideration. The intrusions on liberty that it authorizes are significant. Although *Summers* asserted that detentions pursuant to search warrants are

[113] 133 S. Ct. at 1039.

[114] *Id.* at 1042.

[115] See, e.g., Thornton v. United States, 541 U.S. 615, 630–32 (2004) (Scalia, J., concurring in the judgment) (criticizing *Belton*).

[116] Bailey, 133 S. Ct. at 1044 (Scalia, J., concurring).

[117] Cf. Arizona v. Gant, 556 U.S. 332, 344–43 (2009) (limiting *Belton* and endorsing Justice Scalia's separate opinion in *Thornton v. United States*, 541 U.S. 615 (2004)).

less intrusive than arrests, it's clear today that that isn't so. Why should the government have a categorical power to keep an occupant of a home in handcuffs for hours during a search—like in *Muehler v. Mena*—simply because she had the bad luck to be within the "immediate vicinity" of her home when police showed up to perform the search? Why couldn't police ensure the integrity of the search scene and their own safety by giving her the opportunity to leave before starting the search?

Second, the moment seems especially ripe for the Court to do more than it has to rein in, or at least question, aggressive police search tactics. As journalist Radley Balko has ably demonstrated, violent, military-style SWAT team raids are becoming the norm when police execute search warrants—even for minor crimes.[118] Such tactics lead to trauma, injuries, and sometimes death for residents of the homes being searched—many of whom turn out to be innocent of any crime. Although *Bailey* did not deal with such a fact pattern, now might have been as good a time as any to suggest to police that their need to "exercise unquestioned command"[119] during a search must be balanced against the constitutional rights of those present at homes being searched.

Despite the foregoing criticism of *Bailey*'s specifics, however, I don't mean to lose sight of all that is good about *Bailey*—for there is much to like. *Bailey* got the correct result, and in doing so both the majority and the concurrence approached the case the right way, focusing attention on what made the search-warrant context special, rather than relying on reasoning that could undercut the probable-cause requirement across the board. And although the Court didn't say anything explicitly to undermine the breadth of the *Summers* rule, it's possible someday that *Bailey*'s reasoning—which, as noted, significantly undermines *Summers* itself—will eventually lead to the Court's narrowing the *Summers* rule. Perhaps, as Justice Scalia recently predicted in a dissent in a different Fourth Amendment case, "At the end of the day, *logic will out*."[120] We can only hope.

[118] See generally Radley Balko, Rise of the Warrior Cop: The Militarization of America's Police Forces (2013).

[119] Summers, 452 U.S. at 703.

[120] Maryland v. King, 133 S. Ct. 1958, 1989 (2013) (Scalia, J., dissenting) (emphasis in original).

Conclusion: The Bigger Picture

Much more important than the result in *Bailey* itself is what the case demonstrates about the current state of Fourth Amendment doctrine. Consider the difference between *Summers* and *Bailey*. *Summers* relied on an incoherent mishmash of government interests to justify the detention in that case. And it suggested no limiting principle to ensure that exceptions can't swallow the probable-cause requirement entirely. In *Bailey*, by contrast, six justices recognized, implicitly or explicitly, the need for principled limits for exceptions to Fourth Amendment rules.

And *Bailey* is no isolated example. Just four years ago, *Gant* significantly narrowed the *Belton* rule. And consider some of the decisions from just the last two terms. In *United States v. Jones*, the Court unanimously concluded that police installation of a GPS device on a vehicle constituted a search.[121] So is the use of a drug-sniffing dog on the porch of a house, according to *Florida v. Jardines*.[122] *Missouri v. McNeely* rejected a per se rule that nonconsensual blood tests in drunken-driving cases always constitute exigent circumstances making a warrant unnecessary.[123]

At least part of the credit for these results belongs to a renewed interest on the Court in looking to the Fourth Amendment for clear principles that can be applied to individual cases—what I call taking the amendment seriously as law. *Gant* insisted that exceptions to the probable-cause requirement for searches cannot become untethered from their legitimate justifications. Rather than conducting fuzzy balancing tests, *Jones* and *Jardines* both rested on property-law rationales. A "property-rights baseline" doesn't let the scope of the Fourth Amendment's protection depend on judges' assessments of societal interests in privacy but instead "keeps easy cases easy."[124] A plurality in *McNeely* hewed to previously recognized Fourth Amendment principles, rejecting a "modified *per se* rule" in favor of the traditional exigent circumstances doctrine.[125]

[121] 132 S. Ct. 945, 949 (2012).

[122] 133 S. Ct. 1409, 1417–18 (2013).

[123] 133 S. Ct. 1552, 1563 (2013).

[124] Jardines, 133 S. Ct. at 1417.

[125] 133 S. Ct. at 1563 (plurality op.).

And while *Maryland v. King* declared that DNA testing of all those arrested for serious offenses is reasonable,[126] perhaps what's surprising about that case is that the vote was so close. Many people have gut reactions that the government's crime-solving interest strongly outweighs the privacy intrusion to arrestees of having their cheeks swabbed. Yet Justice Scalia's dissent was one vote away from declaring such searches impermissible. What's more, the majority felt compelled to argue the case on the dissent's terms. Thirty years ago, the Court might simply have balanced the interests and declared the swabs reasonable in light of the government's strong interest in solving crimes, notwithstanding the lack of articulable suspicion. Today, however, the Court had to at least try to come up with justifications (such as "identifying arrestees"[127]) distinct from the ordinary interest in solving crime (although its attempt to do so was not particularly persuasive).[128]

The Fourth Amendment developments highlighted here should be seen as part of a broader effort on the Court in recent years, led by Justice Scalia, to be more rigorous about identifying and consistently enforcing the specific rights protected by constitutional provisions governing the criminal process. The Court has recognized that what the Confrontation Clause protects is not "reliability" writ large, but instead the specific right to confront those who bear testimony against you.[129] The right to a criminal jury means that all findings necessary to increase the maximum sentence authorized by law must be made by a jury, regardless of whether those findings are labeled "elements" or "sentencing factors."[130] Violations of the Sixth Amendment right to one's chosen counsel cannot be declared harmless whenever the defendant receives a fair trial, for "[t]he right to counsel of choice . . . commands not that a trial be fair, but that *a particular guarantee of fairness be provided*—to wit, that the accused be

[126] 133 S. Ct. 1958, 1980 (2013).

[127] *Id.* at 1976.

[128] Similarly, *Florence v. Board of Chosen Freeholders of County of Burlington* upheld the right of prison officials to conduct strip searches of arrestees who enter into a jail's general population based on the government's prison-specific security interests. 132 S. Ct. 1510, 1520 (2012).

[129] Crawford v. Washington, 541 U.S. 36, 61–62 (2004) (overruling Ohio v. Roberts, 448 U.S. 56 (1980)).

[130] Apprendi v. New Jersey, 530 U.S. 466, 494 (2000).

defended by the counsel he believes to be best."[131] As *Bailey* demonstrates, that movement has made great inroads into Fourth Amendment doctrine. Although one can certainly argue about some of the specifics,[132] as a general matter that development is welcome—at least for those who believe that the Fourth Amendment should impose real constraints on police action.

This isn't to say that defenders of a robust Fourth Amendment have no reason to worry. Recent cases may conceal underlying disagreement over remedial questions; although Justice Scalia has forged a coalition with Justices Ginsburg, Sotomayor, and Kagan, he almost certainly disagrees with them on the scope—perhaps even the legitimacy—of the exclusionary rule.[133] Moreover, Justice Scalia will not be on the Court forever, and the next generation of conservative justices seems to have less interest in a principled approach to Fourth Amendment analysis. That's especially true of Justice Alito, who has yet to demonstrate that he believes that the Fourth Amendment imposes meaningful constraints on police. Nor is the liberal bloc solid; Justice Breyer's pragmatic methodology has seemed recently to be leading him to favor the government on Fourth Amendment issues.[134] The pendulum could certainly swing back.

That uncertain future aside, however, *Bailey* shows how much the Court's approach has changed since the days of *Belton*, *Summers*, and similar cases. Freeform, all-things-considered reasonableness assessments are out of fashion. The Court is taking that "doggone Fourth Amendment"[135] seriously as a source of binding rules.

[131] United States v. Gonzalez-Lopez, 548 U.S. 140, 146 (2006) (emphasis added).

[132] See *supra* note 86 (discussing disagreement over whether Fourth Amendment doctrine incorporates common-law rules).

[133] See, e.g., Hudson v. Michigan, 547 U.S. 586 (2006) (Scalia, J.) (holding, over four dissenting votes, including that of Justice Ginsburg, that violations of knock-and-announce requirement do not require suppression).

[134] This past term, Justice Breyer sided with the prosecution in every divided Fourth Amendment case: *Bailey*, *King*, *McNeely*, and *Jardines*; earlier, he had also dissented in *Gant*.

[135] Transcript of Oral Argument, *supra* note 53, at 57.