

Reasonable but Unconstitutional: Racial Profiling and the Radical Objectivity of *Whren v. United States*

Gabriel J. Chin*
and Charles J. Vernon**

ABSTRACT

In Whren v. United States, the Supreme Court held, unanimously, that Fourth Amendment analysis was so radically objective that an otherwise legitimate search or arrest would not be invalidated even if an officer's decision to act was based on race. Although the Court has adhered to the view that the Fourth Amendment is applied objectively, the controversy over Whren's practical legitimation of racial profiling has only grown over time. This Article argues that it has become clear that Whren was wrongly decided, for reasons courts and scholars have not previously articulated. First, the Court never explained why it created a rule making motivation absolutely irrelevant when there was a readily available alternative, namely applying the standard applicable to review of prosecutorial discretion. Prosecution decisions are unsailable, unless they are based on unconstitutional grounds. The Court did not have to approve racial profiling to preserve the broad scope of legitimate law enforcement discretion. Second, since Whren, the Court has elaborated the reasons for an objective approach; these include grounds such as holding officers to objectively high standards and promoting even-handed law enforcement. The Court's aims would be promoted by prohibiting race-based searches whereas they are undermined by allowing them.

Most fundamentally, searches or arrests motivated by race are "unreasonable" under the Fourth Amendment. First, based on the Court's precedents, other provisions of the Constitution inform Fourth Amendment reasonableness. A search based on motives violating other parts of the Constitution is therefore unreasonable. Second, under the fruit of the poisonous tree doctrine, a search is unreasonable if it rests on an antecedent constitutional violation. Unless the Equal Protection Clause is a distinctly unimportant part of the Constitution, a proposition the Court has rejected, its violation should trig-

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** Pro Bono Program Director, Florence Immigrant and Refugee Rights Project, J.D., University of Arizona Rogers College of Law.

ger application of the doctrine, just like violations of other provisions. Application of these principles would minimally affect police discretion, and it would remain difficult to prove that police engaged in illegal racial profiling. But, it would also eliminate Whren's unfortunate and influential statements that racial discrimination is constitutionally reasonable.

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INTRODUCTION

*Whren v. United States*¹ is notorious for its effective legitimization of racial profiling in the United States.² In *Whren*, the Supreme Court, through Justice Scalia, explained that a stop is justified if an officer has probable cause that a traffic violation has occurred, regardless of the officer's actual motivation, because "[s]ubjective intentions play no role in ordinary, probable-cause Fourth Amendment analysis";³ "the Fourth Amendment's concern with 'reasonableness' allows certain actions to be taken in certain circumstances, *whatever* the subjective intent."⁴ Thus, the Court rejected the concept of "pretextual" stops or arrests; there is no Fourth Amendment problem in stopping a driver based on probable cause of a traffic violation in hopes that the

1 *Whren v. United States*, 517 U.S. 806 (1996).

2 The critical literature is large. See, e.g., Albert W. Alschuler, *Racial Profiling and the Constitution*, 2002 U. CHI. LEGAL F. 163, 192–96; Devon W. Carbado, *(E)racing the Fourth Amendment*, 100 MICH. L. REV. 946, 1032–34 (2002); David A. Harris, "Driving While Black" and All Other Traffic Offenses: The Supreme Court and Pretextual Traffic Stops, 87 J. CRIM. L. & CRIMINOLOGY 544, 582 (1997); Kevin R. Johnson, *How Racial Profiling in America Became the Law of the Land*: United States v. Brignoni-Ponce and *Whren v. United States and the Need for Truly Rebellious Lawyering*, 98 GEO. L.J. 1005, 1065–75 (2010); Pamela S. Karlan, *Race, Rights, and Remedies in Criminal Adjudication*, 96 MICH. L. REV. 2001, 2010–11 (1998); Andrew D. Leipold, *Objective Tests and Subjective Bias: Some Problems of Discriminatory Intent in the Criminal Law*, 73 CHI.-KENT L. REV. 559, 566–68 (1998); Tracey Maclin, *Race and the Fourth Amendment*, 51 VAND. L. REV. 333, 344 (1998); Wesley MacNeil Oliver, *With an Evil Eye and an Unequal Hand: Pretextual Stops and Doctrinal Remedies to Racial Profiling*, 74 TUL. L. REV. 1409, 1413–14 (2000); David Rudovsky, *Law Enforcement by Stereotypes and Serendipity: Racial Profiling and Stops and Searches Without Cause*, 3 U. PA. J. CONST. L. 296, 320–22 (2001); David A. Sklansky, *Traffic Stops, Minority Motorists, and the Future of the Fourth Amendment*, 1997 SUP. CT. REV. 271, 274 (suggesting that *Whren* and contemporaneous decisions reflect "a systematic disregard for the distinctive concerns of racial minorities [that] has become embedded in the structure of Fourth Amendment doctrine and constrains the doctrine's growth"); Anthony C. Thompson, *Stopping the Usual Suspects: Race and the Fourth Amendment*, 74 N.Y.U. L. REV. 956, 978–83 (1999).

3 *Whren*, 517 U.S. at 813. Many scholars have addressed the nature of reasonableness. See generally, e.g., Akhil Reed Amar, *Fourth Amendment First Principles*, 107 HARV. L. REV. 757 (1994); Thomas K. Clancy, *The Fourth Amendment's Concept of Reasonableness*, 2004 UTAH L. REV. 977; Sherry F. Colb, *The Qualitative Dimension of Fourth Amendment "Reasonableness"*, 98 COLUM. L. REV. 1642 (1998); George E. Dix, *Subjective "Intent" as a Component of Fourth Amendment Reasonableness*, 76 MISS. L.J. 373 (2006); Tracey Maclin, *The Central Meaning of the Fourth Amendment*, 35 WM. & MARY L. REV. 197 (1993).

4 *Whren*, 517 U.S. at 814.

stop will lead to evidence or a statement about a wholly unrelated crime.

To emphasize the clarity and breadth of the point, the Court explained that an arrest was not unreasonable under the Fourth Amendment even if based on “considerations such as race.”⁵ As the Court later explained, also through Justice Scalia, *Whren* meant that the Court “would not look behind an objectively reasonable traffic stop to determine whether racial profiling . . . was the real motive.”⁶ *Whren’s* immunization of the use of race is remarkable because it was emphatic, even though the question was not raised by the facts of the case. Although there was no claim of actual racial discrimination, the Court reached out to decide it.⁷ Nevertheless, *Whren’s* gratuitous endorsement of racial profiling has been very influential: since it was decided, many courts have upheld stops in the face of substantial evidence of racial discrimination.⁸

Although *Whren* recognized that another provision of the Constitution, the Equal Protection Clause of the Fourteenth Amendment, prohibited racial discrimination, the Court did not mention that successful claims of selective enforcement are vanishingly small.⁹ This is because the Court has made proving freestanding equal protection

⁵ *Id.* at 813.

⁶ *Ashcroft v. al-Kidd*, 131 S. Ct. 2074, 2082 (2011) (Scalia, J.). Coincidentally or not, the clear approval of racial profiling often comes when it is Justice Scalia writing for the Court. See *Florida v. Jardines*, 133 S. Ct. 1409, 1416 (2013) (Scalia, J.) (“[T]he defendant will not be heard to complain that although he was speeding the officer’s real reason for the stop was racial harassment.”).

⁷ See *Whren*, 517 U.S. at 810, 813.

⁸ See, e.g., *United States v. Nichols*, 512 F.3d 789, 794 (6th Cir. 2008), *abrogated on other grounds as recognized by United States v. Buford*, 632 F.3d 264 (6th Cir. 2011); *United States v. Adkins*, 1 F. App’x 850, 851 (10th Cir. 2001); *United States v. Harmon*, 785 F. Supp. 2d 1146, 1168–70 (D.N.M. 2011), *aff’d*, 742 F.3d 451 (10th Cir. 2014) (affirming that officer’s subjective intent plays no role in reasonable suspicion inquiry without explicitly addressing allegation that race was a motivating factor as district court did); *United States v. Foster*, No. 2:07-cr-254-WKW, 2008 WL 1927392, at *5 (M.D. Ala. Apr. 28, 2008); see also David A. Harris, *Addressing Racial Profiling in the States: A Case Study of the “New Federalism” in Constitutional Criminal Procedure*, 3 U. PA. J. CONST. L. 367, 384 (2001) (“By all indications, pretextual traffic stops have increased markedly all over the country since the *Whren* decision.”); Leipold, *supra* note 2, at 568 (“Although *Whren* was nominally about the contours of the Fourth Amendment, the decision undeniably makes it easier for the police to engage in race-based behavior. Just as importantly, there is no reason to think that the reasoning in *Whren* will be limited to traffic stops.” (footnote omitted)). See generally Samuel R. Gross & Katherine Y. Barnes, *Road Work: Racial Profiling and Drug Interdiction on the Highway*, 101 MICH. L. REV. 651 (2002) (examining empirical data about race and traffic stops).

⁹ See Karlan, *supra* note 2, at 2010 & n.45 (noting that only two published cases have suppressed evidence based on discriminatory enforcement).

claims in the criminal context virtually impossible.¹⁰ Racial profiling, the Court held, may be unconstitutional, yet it is reasonable, and therefore provides no basis for suppression of evidence.¹¹

Scholars have been overwhelmingly critical of *Whren*.¹² Reasons include that it puts all motorists at risk of arbitrary police detention,¹³ underestimates the frequency or costs of racial profiling,¹⁴ causes resentment and hostility between the community and the police,¹⁵ ignores the psychological realities of police behavior,¹⁶ overlooks the problem of police perjury,¹⁷ leaves victims of unconstitutional behavior remediless,¹⁸ facilitates the financial self-interest of police agencies through forfeitures,¹⁹ and ignores evidence demonstrating the ineffectiveness of racial profiling.²⁰

¹⁰ See Gabriel J. Chin, *Race, the War on Drugs, and the Collateral Consequences of Criminal Conviction*, 6 J. GENDER RACE & JUST. 253, 266–67, 271–72 (2002) (discussing *United States v. Armstrong*, 517 U.S. 456 (1996)); cf. *Reno v. Am.-Arab Anti-Discrimination Comm.*, 525 U.S. 471, 487–92 (1999) (citing *Armstrong* in holding selective enforcement claims in deportation proceedings unreviewable).

¹¹ See *Whren*, 517 U.S. at 813, 819.

¹² See *supra* note 2; see also Margaret M. Lawton, *The Road to Whren and Beyond: Does the “Would Have” Test Work?*, 57 DEPAUL L. REV. 917, 928–32 (2008) (article, by prosecutor in *Whren*, summarizing scholarly literature).

¹³ Harris, *supra* note 2, at 582 (“Any time we use our cars, we can be stopped by the police virtually at their whim because full compliance with traffic laws is impossible.”).

¹⁴ See, e.g., I. Bennett Capers, *Rethinking the Fourth Amendment: Race, Citizenship, and the Equality Principle*, 46 HARV. C.R.-C.L. L. REV. 1, 13–14 (2011); Kami Chavis Simmons, *Beginning to End Racial Profiling: Definitive Solutions to an Elusive Problem*, 18 WASH. & LEE J. CIVIL RTS. & SOC. JUST. 25, 40–44 (2011); see also Jeffrey Fagan & Mukul Bakhshi, *New Frameworks for Racial Equality in the Criminal Law*, 39 COLUM. HUM. RTS. L. REV. 1, 8–9 (2007) (“The harsher treatment of African Americans and other racial and ethnic minorities cannot be dismissed solely as a matter of racial differentials in crime rates. Modern empirical research shows that these differences persist more as a matter of selective enforcement than crime-rate differences.”).

¹⁵ See Maclin, *supra* note 2, at 386; see also Eric F. Citron, Note, *Right and Responsibility in Fourth Amendment Jurisprudence: The Problem with Pretext*, 116 YALE L.J. 1072, 1104–05 (2007) (arguing that the Fourth Amendment exists in part to foster trust between citizens and law enforcement).

¹⁶ See, e.g., Thompson, *supra* note 2, at 987–91.

¹⁷ See, e.g., Leipold, *supra* note 2, at 562.

¹⁸ See, e.g., Karlan, *supra* note 2, at 2010–14.

¹⁹ See Eric Blumenson & Eva Nilsen, *Policing for Profit: The Drug War’s Hidden Economic Agenda*, 65 U. CHI. L. REV. 35, 83 & n.182 (1998).

²⁰ See Rudovsky, *supra* note 2, at 308–12 (discussing empirical studies undermining the potential benefits of racial profiling). *But see* Bernard E. Harcourt, *Rethinking Racial Profiling: A Critique of the Economics, Civil Liberties, and Constitutional Literature, and of Criminal Profiling More Generally*, 71 U. CHI. L. REV. 1275, 1281–82 (2004) (suggesting that existing data is insufficient to determine whether racial profiling is effective).

This Article proposes that *Whren* is unsound, but not for reasons emphasized by other scholars. It argues that under the Court's own Fourth Amendment and other constitutional criminal procedure jurisprudence, there is no justification for deeming unconstitutional conduct to be reasonable per se.

Whren, a unanimous decision, was decided more than a decade ago, and the objective approach has since become, if anything, more dominant in the Court's Fourth Amendment jurisprudence. Yet, racial discrimination in law enforcement remains a controversial public policy question. The New York City Police Department's stop and frisk policy garnered national attention, as did the lawsuits challenging it.²¹ The Department of Justice announced in January 2014²² that it is expanding its existing regulations on profiling.²³ A lawsuit filed in 2013 alleged that police arrested African American shoppers at upscale stores for no other reason than that they allegedly could not afford luxury items for which they properly paid.²⁴ And the killings of Walter Scott, Eric Garner, Trayvon Martin and Michael Brown, among others, raise the issue of whether people of color are subject to suspicion or violence primarily because of their race.²⁵

Moreover, the rationale for *Whren*'s immunization of racial discrimination has collapsed. The Court has recently offered additional explanations for the objective approach, creating an opportunity to scrutinize the reasons for the rule, and therefore how far it should extend.²⁶ Those reasons, while supporting objectivity in general, do not justify discrimination.

²¹ The New York City cases have taken many procedural turns. Most recently, on remand from the Second Circuit to supervise settlement discussions, the parties reached an agreement regarding the stop and frisk policy, which the Police Union unsuccessfully attempted to intervene to challenge. *See* *Floyd v. City of New York*, 302 F.R.D. 69 (S.D.N.Y.), *aff'd*, 770 F.3d 1051 (2d Cir. 2014).

²² *See* Matt Apuzzo, *U.S. Move Seen to Add Limits over Profiling*, N.Y. TIMES, Jan. 16, 2014, at A1.

²³ *See* CIVIL RIGHTS DIV., U.S. DEP'T OF JUSTICE, GUIDANCE REGARDING THE USE OF RACE BY FEDERAL LAW ENFORCEMENT AGENCIES (2003), available at http://www.justice.gov/crt/about/spl/documents/guidance_on_race.pdf.

²⁴ *See* Jesse Washington, *Barneys and Macy's Racial Discrimination Cases Stir Talk of 'Shopping While Black,'* HUFFPOST BLACKVOICES (Oct. 29, 2013, 12:13 PM), http://www.huffingtonpost.com/2013/10/29/barneys-macys-shopping-while-black-_n_4173929.html.

²⁵ *See* Madeleine Brown, *Mom Wants End to Profiling*, DESERET NEWS (Salt Lake City), Jan. 17, 2014, at B1; Ray Sanchez, *Michael Brown Shooting, Protests Highlight Racial Divide*, CNN JUSTICE, <http://www.cnn.com/2014/08/14/justice/ferguson-missouri-police-community/> (last updated Aug. 15, 2014, 10:14 AM).

²⁶ *See infra* Part II.A.2.

In addition, since *Whren*, six of the Justices participating in the case, including Justice Kennedy, a key swing vote, have suggested discomfort with the case, its consequences, or its broad application.²⁷ Also, in recent affirmative action cases, the Court has been more adamant than ever that race is an unreasonable consideration in government decisionmaking.²⁸ In several decisions, the Court has defined terms and used language which, if applied to the Fourth Amendment, would require the opposite result in *Whren*. Conceivably, the Court may be willing to reevaluate *Whren* in order to make it consistent with its current jurisprudence.

Part I proposes that the outcome in *Whren*—allowing a traffic stop to investigate a drug offense—was not only defensible, but perhaps inevitable.²⁹ Because of the breadth of criminal prohibitions in traffic codes and other criminal laws, many more potential charges exist than can be investigated. Full enforcement would be both undesirable in principle and impossible in practice. Because many individuals will have engaged in essentially identical conduct, but only a fraction of them can be investigated or prosecuted, selectivity is unavoidable. So too, therefore, is pretext; in most cases, the underlying reasons for action are a product of high-level choices about allocation of resources, policies and priorities of various police and civil authorities, the rate of occurrence of other crimes, and the number of other crimes occurring at a particular moment. For low-level offenses, like traffic violations, the defendant's conduct considered in isolation may be a minor or nonexistent factor in determining whether an arrest occurs.

The Court in *Whren* ignored a readily available model for justifying broad enforcement discretion by police, namely, the body of cases dealing with the discretion of prosecutors to bring charges.³⁰ In *Oyler v. Boles*³¹ and other cases, the Court has applied equal protection principles to establish the rule that prosecutors are free to bring charges supported by probable cause for any reason, except that they may not charge based on race, religion, or other unconstitutional considerations. Because a primary purpose and function of investigations and arrests is for the police to be able to bring criminal charges against individuals, it would seem reasonable that the restraints applicable to

²⁷ See *infra* notes 176–90 and accompanying text.

²⁸ See, e.g., *Fisher v. Univ. of Tex. at Austin*, 133 S. Ct. 2411, 2420 (2013).

²⁹ See *infra* notes 69–91 and accompanying text.

³⁰ See *infra* notes 91–93 and accompanying text.

³¹ *Oyler v. Boles*, 368 U.S. 448 (1962).

police criminal investigations and prosecutorial criminal prosecutions should be similar. Application of this rule would have meant that *Whren* would have been decided the same way, but without the unnecessary ruling that race discrimination is not unreasonable under the Fourth Amendment.

Part II explores the reasons the Court has offered in *Whren* and subsequent cases for radical objectivity.³² The Court has never claimed that the decision was based on the text of the Fourth Amendment, its original public meaning, or other controlling considerations. Instead, the Court's primary concerns are based on policy. The Court has now explained that the Fourth Amendment employs objective standards in part to hold law enforcement officers to high standards; the Fourth Amendment is objective because good faith alone is not enough to justify a search or seizure. Another reason the Court has frequently advanced is promotion of even-handed law enforcement. None of the reasons upon which the Court has relied are consistent with racial profiling or support immunizing it; rather, they support the *Oyler* rule.

Part II also notes that objectivity is not the Court's exclusive method of Fourth Amendment analysis. In a number of contexts, the Court's tests consider subjective motivation.³³ Therefore, objectivity is not an inevitable component of Fourth Amendment reasonableness. In particular, in a series of cases neither questioned nor discussed in *Whren*, the Court held that searches based on probable cause may nevertheless be invalid if the officers were subjectively aware of prior illegalities, such as a false statement in an affidavit, that the wrong person had been arrested or the wrong place searched, or if the search was motivated by illegally acquired evidence.³⁴ These cases leave ample room for consideration of unconstitutional discrimination.

Part III proposes that unconstitutional conduct is not "reasonable" under the Fourth Amendment, and therefore subjective motivation can be explored when a defendant properly alleges unconstitutional use of race. One reason is that the Court put great weight on the distinction between the Fourth Amendment, which it held employed an objective reasonableness test, and the subjective Equal Protection Clause of the Fourteenth Amendment.³⁵ The Court's analysis went off track at this initial step, because *Whren* was a

³² See *infra* notes 104–53 and accompanying text.

³³ See *infra* notes 154–68 and accompanying text.

³⁴ See *infra* notes 169–75 and accompanying text.

³⁵ In *Whren*, the Court explained: "But the constitutional basis for objecting to intention-

prosecution in the District of Columbia, not a state, and therefore the Fourteenth Amendment is inapplicable.³⁶

If the analysis of *Whren* had been applied in a state, the Court would have had to confront a difficult problem. In a state prosecution, the Fourth Amendment does not apply directly, but has been incorporated through the Due Process Clause of the Fourteenth Amendment. The Due Process Clause of the Fourteenth Amendment contains its own prohibition on race discrimination. Therefore, the Court would have had to explain why the restrictions of the Due Process Clause should not be considered when the Court construes the Due Process Clause. The Court has read the antidiscrimination principle into the substance of the First, Fifth, Sixth, and Eighth Amendments;³⁷ it is difficult to understand why the Fourth Amendment should stand alone.

The Court also failed to consider whether Fourth Amendment reasonableness should be informed by other provisions of the Constitution.³⁸ Both before and after *Whren*, the Court has construed what is reasonable under the Fourth Amendment in light of other law. For example, the Court has held otherwise valid searches to be unreasonable under the Fourth Amendment because of First Amendment concerns. Based on this line of cases, conduct that is unconstitutional because of some other provision is unreasonable under the Fourth Amendment.

Even if the Fourth Amendment and the antidiscrimination provisions of the Constitution are considered absolutely distinct and unrelated, a search or arrest motivated by racial discrimination would still be impermissible under another doctrine not mentioned by the Court in *Whren*: the fruit of the poisonous tree doctrine, which holds that otherwise permissible searches, seizures, or interrogations are invalid if they rest on a prior violation of a “core” provision of the Constitution.³⁹ The Court has already held that the provisions of the Bill of Rights incorporated through the Due Process Clause are core provisions. There is a perfectly reasonable argument, never considered by the Court, that the constitutional prohibition of race discrimination,

ally discriminatory application of laws is the Equal Protection Clause, not the Fourth Amendment.” *Whren v. United States*, 517 U.S. 806, 813 (1996).

³⁶ “The Fifth Amendment, which is applicable in the District of Columbia, does not contain an equal protection clause as does the Fourteenth Amendment which applies only to the states.” *Bolling v. Sharpe*, 347 U.S. 497, 499 (1954).

³⁷ See *infra* notes 198–225 and accompanying text.

³⁸ See *infra* notes 226–53 and accompanying text.

³⁹ See *infra* notes 254–69 and accompanying text.

the primary and fundamental purpose of the Fourteenth Amendment, is at least as important as the subsidiary rights which it encompasses.

Part IV proposes that the reasons the Court has restricted inquiry into the subjective motivation of prosecutors' charging decisions do not apply to the questions of racial motivation leading to arrests or searches.⁴⁰ The Court has immunized prosecutorial choices as a matter of separation of powers—courts generally have no role in supervising prosecutorial decisions, other than to determine whether an indictment is legally sufficient. But the Warrant Clause of the Fourth Amendment, the judicial power to suppress illegally obtained evidence, and the judicial duty to entertain civil and criminal civil rights actions inevitably and deeply involve the courts in supervising police action and exploring the reasons therefore. In addition, the Supreme Court has held that officers' subjective conclusions, based on their training and experience, must be considered in determining whether probable cause is objectively satisfied.⁴¹ This includes their subjective consideration of the race of a suspect in circumstances where race is legally relevant to reasonable suspicion or probable cause, as it is, for example, in certain immigration contexts. Subjective evidence, including evidence of racial motivation, is admissible when it helps the prosecution. There is no reason that it should not be admissible when it helps vindicate individual constitutional rights.

The Article concludes that the Court should overrule the influential dicta in *Whren* and offer the police an accurate bright line rule that racial discrimination in searches and seizures is unconstitutional.

I. MOSTLY RIGHT FOR THE WRONG REASON: THE INEVITABILITY OF PRETEXTUAL LAW ENFORCEMENT

A. *Whren's Facts and Ruling*

Whren's facts involve a fairly typical traffic stop. Two District of Columbia plainclothes vice squad officers patrolling a "high drug area"⁴² observed a dark Nissan Pathfinder with two African American occupants idling at a stop sign for more than twenty seconds, during which time the driver was looking at the passenger's lap.⁴³ The officers made a U-turn to investigate, and the Pathfinder drove off, and then turned without signaling.⁴⁴ The officers pulled alongside the

⁴⁰ See *infra* notes 270–95 and accompanying text.

⁴¹ See *infra* notes 290–92.

⁴² See *Whren v. United States*, 517 U.S. 806, 808 (1996).

⁴³ See *id.*

⁴⁴ See *id.*

Pathfinder at a traffic light, and as one officer approached, he “immediately observed two large plastic bags of what appeared to be crack cocaine,” creating probable cause to arrest both occupants.⁴⁵ A search incident to arrest revealed more drugs.⁴⁶

The defendants challenged the stop’s legality, arguing that it was pretextual and therefore prohibited by the Fourth Amendment.⁴⁷ On appeal, they conceded the existence of probable cause for the stop,⁴⁸ but proposed that as an antidote to pretext, the question should be “whether a police officer, acting reasonably, *would have* made the stop for the reason given.”⁴⁹ Their rationale was that, without such a constraint on discretion, officers might stop motorists because of “decidedly impermissible factors” such as race.⁵⁰ The District of Columbia Court of Appeals rejected this test, holding that a traffic stop is reasonable as long as an officer *could have* stopped the vehicle—that is, if the officer had probable cause to believe a violation of the traffic code had occurred.⁵¹ Although the Supreme Court did not explain why it granted certiorari, several circuits had embraced the “would have” approach advocated by the *Whren* defendants, creating a split.⁵²

Writing for a unanimous Court, Justice Scalia rejected the “would have” test as inconsistent with the Court’s Fourth Amendment jurisprudence, which, he concluded, dictated an objective-only standard for evaluating reasonableness.⁵³ Although petitioners offered cases

⁴⁵ *Id.* at 808–09.

⁴⁶ *See id.* at 809.

⁴⁷ *See id.*

⁴⁸ *See id.* at 810. Thus, there was no question before the Court about the validity of the search itself, as there often is with traffic stops or searches. *See, e.g.,* Illinois v. Caballes, 543 U.S. 405, 410 (2005) (approving the use of a drug-sniffing dog at a traffic stop without individualized suspicion); New York v. Class, 475 U.S. 106, 107–08 (1986) (upholding an officer’s “inadvertent” discovery of a gun when he reached into a vehicle to remove papers obscuring the VIN number); Adams v. Williams, 407 U.S. 143, 144–45 (1972) (using *Terry v. Ohio*, 392 U.S. 1 (1968), to justify an officer’s action in reaching into an automobile and removing a gun from the defendant).

⁴⁹ *Whren*, 517 U.S. at 810 (emphasis added).

⁵⁰ *See id.*

⁵¹ *See id.* at 809.

⁵² Most courts of appeals had adopted the “could have” test, but the Tenth and Eleventh Circuits had indicated at least some degree of approval of the “would have” test. *See* United States v. Guzman, 864 F.2d 1512, 1517 (10th Cir. 1988); United States v. Smith, 799 F.2d 704, 711 (11th Cir. 1986); *see also* Diana Roberto Donahoe, “*Could Have*,” “*Would Have*,” *What the Supreme Court Should Have Decided in Whren v. United States*, 34 AM. CRIM. L. REV. 1193, 1200–04 (1997) (describing pre-*Whren* approaches of lower courts); Ed Aro, Note, *The Pretext Problem Revisited: A Doctrinal Exploration of Bad Faith in Search and Seizure Cases*, 70 B.U. L. REV. 111, 118 (1990) (arguing, before *Whren* was decided, against the reasonableness of pretext searches).

⁵³ *See Whren*, 517 U.S. at 811–14.

suggesting otherwise, Justice Scalia distinguished them. Some, the Court explained, were dicta, which merely left open the question of whether Fourth Amendment standards could have a subjective element.⁵⁴ Others involved searches conducted in the absence of probable cause, such as inventory or special-needs searches, rather than the “ordinary, probable-cause analysis” the Court concluded applied to the case.⁵⁵

Since precedent precluded *any* subjective component—even with a clear showing of “actual and admitted pretext”—the fact that the petitioners’ proposed test relied upon a “reasonable officer” could not save it, because it was “indisputably driven by subjective considerations.”⁵⁶ According to the Court, the difficulty of establishing subjective intent, while a factor, is not the primary reason for the objective test. Instead, the “principal basis . . . is simply that the Fourth Amendment’s concern with ‘reasonableness’ allows certain actions to be taken in certain circumstances, *whatever* the subjective intent.”⁵⁷

Petitioners pointed to District of Columbia Police Department rules prohibiting plainclothes officers from making traffic stops unless the violation observed posed an immediate threat to public safety.⁵⁸ The petitioners argued that because the arresting officers may have violated that rule, the officers had acted “unreasonably” under the “would have” test.⁵⁹ The Court rejected this argument, concluding that a violation of police rules did not itself breach the Fourth Amendment.⁶⁰

Finally, the Court rejected petitioners’ argument that reasonableness “balancing” precluded plainclothes vice squad officers from enforcing minor traffic violations.⁶¹ Because it is almost impossible to drive without violating one of the traffic code’s myriad provisions, po-

⁵⁴ See *id.* at 812 (discussing *Colorado v. Bannister*, 449 U.S. 1 (1980)).

⁵⁵ See *id.* at 811–13.

⁵⁶ *Id.* at 814 (emphasis omitted).

⁵⁷ *Id.*

⁵⁸ See *id.* at 815.

⁵⁹ See *id.*

⁶⁰ The Court’s refusal to “accept that the search and seizure protections of the Fourth Amendment are so variable,” *id.*, is persuasive only to a point, because, given variation in state laws and local ordinances, what constitutes probable cause varies from jurisdiction to jurisdiction with substantive law. But the Court was right for other reasons. Had the department not had that particular rule, or had the same sort of arrest occurred in another jurisdiction lacking such a rule, the exact same actions would have been reasonable. In addition, had the case turned on the department rule, presumably the next day, police rules all across the country would have been changed to increase discretion. Therefore, it is not clear that such a holding would have protected the liberty of the people.

⁶¹ See *id.* at 817.

lice have nearly unlimited discretion to make stops—a fact in some tension with the idea that individualized suspicion is required for a seizure.⁶² The Court rejected this argument for two reasons. First, reasonableness balancing comes into play only when the government makes seizures without probable cause, or when the nature of the search or seizure is so intrusive that the existence of probable cause alone cannot render it reasonable.⁶³ Because probable cause to make the stop existed in petitioners’ “run-of-the-mine” case, it fit neither category.⁶⁴ Second, no legal or jurisprudential principle existed that would allow the Court to determine “that [the traffic] infraction itself can no longer be the ordinary measure of the lawfulness of enforcement.”⁶⁵

The limited nature of petitioners’ claim is worth emphasizing. Although petitioners raised race discrimination as an issue,⁶⁶ they did not allege that they had actually been racially profiled. Instead, their claim was that stops should be regulated based on the *possibility* of such profiling.⁶⁷ For this reason, the Court could have left for another day⁶⁸ the extent to which racial discrimination was reasonable under the Fourth Amendment; the issue was simply not raised by the case.

B. *Systematic Underenforcement*

Conceivably, the United States or one of the states could have a criminal justice system of full criminal enforcement; it would criminalize only conduct that the jurisdiction was willing and able to investigate, prosecute, and punish on every single occasion that it occurred.⁶⁹

⁶² See *id.* at 817–18.

⁶³ See *id.* at 818.

⁶⁴ See *id.* at 819.

⁶⁵ *Id.* at 818–19.

⁶⁶ See *id.* at 813 (“We of course agree with petitioners that the Constitution prohibits selective enforcement of the law based on considerations such as race.”).

⁶⁷ See *id.* at 810 (summarizing the petitioners’ argument on this point).

⁶⁸ Cf. *Crawford v. Washington*, 541 U.S. 36, 68 (2004) (“We leave for another day any effort to spell out a comprehensive definition of ‘testimonial.’”); *Young v. United States*, 535 U.S. 43, 52 (2002) (“The lower courts have split over this issue; we need not resolve it here.” (citations omitted)); *Coy v. Iowa*, 487 U.S. 1012, 1021 (1988) (“We leave for another day, however, the question whether any exceptions exist.”).

⁶⁹ See Zachary S. Price, *Enforcement Discretion and Executive Duty*, 67 VAND. L. REV. 671, 742 (2014) (surveying early U.S. history and concluding that “there are significant indications that early Presidents and key executive officials focused on achieving complete enforcement of federal laws,” while acknowledging that that is no longer the case); cf. Stephen J. Morse, *Justice, Mercy, and Crazyness*, 36 STAN. L. REV. 1485, 1495 (1984) (reviewing NORVAL MORRIS, *MADNESS AND THE CRIMINAL LAW* (1982)) (“Finally, the exercise of discretion produced by selective enforcement may be an inevitable evil of our criminal justice system, but I see no

No American jurisdiction works like this. Instead, jurisdictions criminalize much more than they are capable of investigating or prosecuting.⁷⁰ As Justice Scalia explained, quoting then-Attorney General Robert Jackson: “[N]o prosecutor can even investigate all of the cases in which he receives complaints. If the Department of Justice were to make even a pretense of reaching every probable violation of federal law, ten times its present staff will be inadequate.”⁷¹ Some crimes are low priorities because they are intrinsically not particularly serious.⁷² Other crimes might be serious in general, but the particular circumstances might make the conduct seem less significant.⁷³ And, of course, many crimes are not prosecuted or even investigated because the likelihood of proving the case seems low, at least on a cost-benefit basis.

Courts⁷⁴ and scholars⁷⁵ recognize that selective enforcement is inevitable. Underenforcement is, at least potentially, a salutary and humane part of criminal justice. Applied fairly and consistently on reasonable criteria,⁷⁶ discretionary enforcement can be desirable,

reason not to avoid it in sentencing. I should try drastically to limit selective enforcement at all levels of the system if the resources are available.”).

⁷⁰ See generally Alexandra Natapoff, *Underenforcement*, 75 *FORDHAM L. REV.* 1715 (2006) (discussing potentially pernicious effects of underenforcement); Peter Swire, *No Cop on the Beat: Underenforcement in E-Commerce and Cybercrime*, 7 *J. ON TELECOMM. & HIGH TECH. L.* 107 (2009) (explaining why underenforcement online is to be expected).

⁷¹ *Morrison v. Olson*, 487 U.S. 654, 727 (1988) (Scalia, J., dissenting) (quoting Robert H. Jackson, U.S. Attorney Gen., *The Federal Prosecutor*, Address at the Second Annual Conference of United States Attorneys (Apr. 1, 1940)).

⁷² These may include what Dean Raymond has called “penumbral crimes.” Margaret Raymond, *Penumbral Crimes*, 39 *AM. CRIM. L. REV.* 1395, 1400–01 (2002).

⁷³ See Natapoff, *supra* note 70, at 1726–27.

⁷⁴ See, e.g., *Ustrak v. Fairman*, 781 F.2d 573, 575 (7th Cir. 1986) (Posner, J.) (“Selective, incomplete enforcement of the law is the norm in this country. This is not only because some violations are not detected, but also because the resources for law enforcement are often radically inadequate to the number of violations.” (internal quotation marks and citations omitted)).

⁷⁵ See, e.g., William D. Araiza, *Irrationality and Animus in Class-of-One Equal Protection Cases*, 34 *ECOLOGY L.Q.* 493, 505 n.70 (2007) (“In the case of unequal, or selective, law enforcement, the public interest being pursued is the equal enforcement of laws within the confines of inevitable resource constraints that make it impossible for law enforcement to respond to every act of law breaking.”); Douglas Husak, *Is the Criminal Law Important?*, 1 *OHIO ST. J. CRIM. L.* 261, 266 (2003) (referring to “the inevitability of selective enforcement in all systems of criminal justice throughout the United States today”); Michael Edmund O’Neill, *When Prosecutors Don’t: Trends in Federal Prosecutorial Declinations*, 79 *NOTRE DAME L. REV.* 221, 288 (2003) (referring to “the inevitable existence of selective prosecution (or non-prosecution)”); Stephen J. Schulhofer, *Harm and Punishment: A Critique of Emphasis on the Results of Conduct in the Criminal Law*, 122 *U. PA. L. REV.* 1497, 1560 (1974) (“Selective enforcement may also be inevitable for some intentional crimes [in addition to negligent crimes].”).

⁷⁶ See, e.g., U.S. DEP’T OF JUSTICE, UNITED STATES ATTORNEYS’ MANUAL § 9-27.220(A) (1997), available at http://www.justice.gov/usao/eousa/foia_reading_room/usam/title9/27mcr.m.

avoiding unnecessary stigmatization of decent people as criminals, while still protecting public safety and sanctioning wrongdoers. As Professor Louis Schwartz put it:

The paradoxical fact is that arrest, conviction, and punishment of every criminal would be a catastrophe. Hardly one of us would escape, for we have all at one time or another committed acts that the law regards as serious offenses. . . . 100% law enforcement would not leave enough people at large to build and man the prisons in which the rest of us would reside.⁷⁷

Of course, discretionary enforcement opens up the possibility of oppression and illegitimate discrimination.⁷⁸ But if the fact that others could be prosecuted but were not constituted a defense, then almost no one could be prosecuted, because the system simply does not have enough resources to seek full enforcement. Given that our system provides for discretionary enforcement—and is not for that reason alone unjust, or at least unconstitutional—the question becomes on what grounds discretion may appropriately be exercised.

Traffic laws represent a paradigmatic class of underenforced offenses.⁷⁹ Whether a particular driver who may have committed a traffic offense is arrested or receives a ticket has almost nothing to do with the existence, or not, of probable cause.⁸⁰ Instead, the potential offender—almost every driver—is an involuntary participant in one or more of several kinds of lotteries; decisions and events substantially unrelated to the offense determine whether she will be stopped. The discussion below puts aside the possibility of selection based on race,

htm#9-27.220 (identifying grounds for commencing or declining prosecution); *see also* NAT'L DIST. ATTORNEYS ASS'N, NATIONAL PROSECUTION STANDARDS §§ 4-1.2–4-1.4 (3d ed. 2009), available at <http://www.ndaa.org/pdf/NDAA%20NPS%203rd%20Ed.%20w%20Revised%20Commentary.pdf> (detailing factors to consider in screening and factors not to consider in screening); *id.* § 4-2.4 (detailing factors to consider in charging); *id.* § 4-3.5 (detailing factors to consider in diversion).

⁷⁷ Louis B. Schwartz, *On Current Proposals to Legalize Wire Tapping*, 103 U. PA. L. REV. 157, 157 (1954).

⁷⁸ *See* Josh Bowers, *Legal Guilt, Normative Innocence, and the Equitable Decision Not to Prosecute*, 110 COLUM. L. REV. 1655, 1681–82 & n.121 (2010).

⁷⁹ *See, e.g.*, Kim Forde-Mazrui, *Ruling Out the Rule of Law*, 60 VAND. L. REV. 1497, 1539 (2007); Lior Jacob Strahilevitz, “*How’s My Driving?*” for Everyone (and Everything?), 81 N.Y.U. L. REV. 1699, 1722–23 (2006); Brad Templeton, *Should Self-Driving Cars Obey Speed Limits?*, SLATE (Oct. 15, 2013, 9:47 AM), http://www.slate.com/articles/technology/future_tense/2013/10/robocars_do_they_need_speed_limits.single.html (“A ticket for going 1 mph over the limit is an extremely rare thing. It usually signals a cop with another agenda or a special day of zero-tolerance enforcement.”).

⁸⁰ *See, e.g.*, Forde-Mazrui, *supra* note 79, at 1512–13.

sex, sexual orientation, or religion; imagine for simplicity that there is no possibility of discrimination.

The first question is whether a police officer will even detect the conduct. This is a function of extrinsic law enforcement funding choices determining the resources of the agencies that have geographical jurisdiction over any given stretch of road—did Congress, the state, or the county allocate money for hospitals, schools, tax cuts, a war, or the police? Another contingency is how many dollars the various law enforcement agencies will put into road patrol as opposed to other possible police functions, such as investigating past or future crimes, or providing static security to important sites such as schools or government facilities.⁸¹ Even if road patrol is a very high priority or a near-exclusive responsibility for the agency, as it might be for a state highway patrol, for example, there are still choices about when and where to deploy officers.⁸²

If an officer is present and sees what appears to be an offense, the officer will not necessarily act. Any time that an officer spends giving a ticket (or doing anything else) is time that cannot be spent on other, potentially more significant activities. Assuming that most officers will want, for example, to do meaningful work, to get good evaluations from superiors, and to avoid discipline, most officers will make strategic choices. Most will not, to use an extreme example, spend ten minutes issuing a ticket for littering, when instead they could report that an apartment building is on fire or intervene in a liquor store robbery. An officer observing a minor offense must make a judgment about whether it represents a worthwhile enforcement action. This turns on such considerations as what other crimes are likely to occur in the officer's area of responsibility—is this a Saturday night in a big city where there are likely to be many calls for 911 service, or Wednesday at 3:00 AM on an isolated interstate, where a barely speeding car may be the only vehicle the officer sees for forty-five minutes? It also depends on whether other officers are close at hand, or if instead the officer is covering a large area alone.

Even assuming the officer is interested in enforcing traffic laws, it does not mean the officer will stop every violator. Instead, the officer may choose, based on unwritten rules or otherwise, to identify the most egregious violations. Thus, of all the apparent speeders, the officer may choose to stop those going more than five or ten miles per

⁸¹ See Nirej S. Sekhon, *Redistributive Policing*, 101 J. CRIM. L. & CRIMINOLOGY 1171, 1187–88 (2012).

⁸² See *id.*

hour over the limit rather than those speeding more slowly. Alternatively, the officer may instead look exclusively for motorists who show signs of driving under the influence of alcohol (“DUI”), or driving recklessly. Perhaps the evidence of DUI or reckless driving will fall short of reasonable suspicion or probable cause.⁸³ Nevertheless, if the officer chooses to act, because the officer is stopping a motorist for a traffic-safety-related offense based on traffic-safety-related considerations, this seems reasonable and not unfair to the motorist.

At the same time, officers may engage in enforcement action based on considerations independent of the suspect’s vehicular conduct. For example, a new officer training with an experienced officer may be asked to stop and ticket the next ten violators regardless of the severity of their conduct. The driver ticketed for going two miles per hour over the limit will be chagrined to have been stopped for something that is usually allowed, but she has not been treated unjustly.⁸⁴ We want police to be well-trained, and we should defer to their reasonable judgments about safe and cost-effective methods.⁸⁵

Police also make determinations for programmatic reasons. If a family of four was recently killed by a driver who went through a stop sign, then it would be unobjectionable to enforce that offense strictly even if some leeway was ordinarily given to rolling stops.

Somewhat more troubling are stops made for personal or political reasons. A sheriff up for reelection might order enhanced enforcement of speed limits around schools, churches, synagogues, or temples as requested by community leaders; a new officer on probation, or one criticized by a superior for not working hard enough, might decide to write more tickets to improve their record. Even here, a factually supported arrest should stand. There is no way to distinguish, perhaps even in the mind of the officer, between craven self-interest and a legitimate response to the demands of public service, lawful superiors, and community welfare. At some point, of course, acting on self-in-

⁸³ See *Navarette v. California*, 134 S. Ct. 1683, 1692 (2014).

⁸⁴ Although it is unconstitutional for the police to authorize a person to do something and then arrest them for it, Gabriel J. Chin et al., *The Mistake of Law Defense and an Unconstitutional Provision of the Model Penal Code*, 93 N.C. L. REV. 139, 178–81 (2014), a mere pattern of nonenforcement does not give rise to a defense, *Commonwealth v. Kratsas*, 764 A.2d 20, 33 (Pa. 2001) (citing *United States v. Hurst*, 951 F.2d 1490, 1499 (6th Cir. 1991)).

⁸⁵ That is, if the police stop minor offenders for training for safety reasons, the interests of low-level offenders should not require officers to stop potentially more dangerous drivers. If the police stop minor offenders for cost reasons, the public as a whole should not be forced to pay more to train officers so that low-level violators can avoid tickets.

terest violates due process.⁸⁶ But the interest in being regarded as a good law enforcement officer or an effective public official is insufficient to undermine an otherwise permissible and reasonable decision.

If police may consider matters that have no relation to the culpability or the conduct of the defendant in determining who to investigate (such as public concerns about particular types of crimes or the officer's own reputation), then it is not clear why they could not also consider potential offenses committed by the motorist in determining who to stop. That is, it should not be objectionable to select from among all speeders those who demonstrate indicia, falling short of reasonable suspicion or probable cause, of drunk driving. The purpose of the prohibition on drunk driving—traffic safety—is the same as the purpose behind most other traffic laws, and the conduct which gives rise to an indication of drunk driving (swaying in the lane, for example) would be a legitimate selection criterion even if drunk driving were not an independent crime.

Basically, the same reasoning applies to selection for stopping based on the possibility that the motorist has committed another type of crime, such as burglary or robbery. Imagine that a residential burglar was seen escaping in a blue 2005 Honda Accord in a particular neighborhood, and the Chief of Police directs that all such cars committing traffic offenses will be stopped even if they normally would not. Of course, it may be that fleeing burglars, robbers, and drug dealers create road hazards, and therefore there is a pure traffic safety rationale for selecting suspected felons for enforcement among those motorists displaying probable cause. But, even assuming felons present no greater *traffic* danger than other motorists, it is hard to see what is unfair or illegitimate about such stops. The question is not whether it is fair and reasonable to allow stops for reasons other than the nature of the conduct, exclusive of all other considerations. That bridge has been crossed; conduct *per se* is not determinative. Instead, the question is what kinds of considerations, beyond the conduct itself, are fair, reasonable, and legitimate to consider in making the inevitable enforcement choices among viable cases.

Of course, if there is reasonable suspicion or probable cause that a speeding motorist has committed a burglary, there can be no objection to a stop motivated in part by that suspicion and in part by the fact that the car was speeding. At bottom, a possibility falling short of reasonable suspicion that the motorist has committed a burglary

⁸⁶ See *Connally v. Georgia*, 429 U.S. 245, 246, 251 (1977) (per curiam) (holding that it is unconstitutional for a justice of the peace to be compensated based on search warrants issued).

should not immunize the motorist from being stopped. First, motorists can protect themselves to a degree, at least, simply by driving within the speed limit and obeying other traffic laws. As Justice O'Connor explained, "[s]earches based on individualized suspicion also afford potential targets considerable control over whether they will, in fact, be searched because a person can avoid such a search by not acting in an objectively suspicious way."⁸⁷ In addition, no less a civil libertarian than Justice Thurgood Marshall explained that a traffic stop is a relatively benign sort of seizure:

First, detention of a motorist pursuant to a traffic stop is presumptively temporary and brief. The vast majority of roadside detentions last only a few minutes Second, circumstances associated with the typical traffic stop are not such that the motorist feels completely at the mercy of the police. . . . Perhaps most importantly, the typical traffic stop is public, at least to some degree.⁸⁸

In terms of the nature of the intrusion, a speeder stopped based on suspicion of being a robber suffers no more or less than a speeder stopped because a police agency won a grant for extra traffic enforcement or because the sheriff ordered stricter enforcement of the speeding law because of a recent accident. The driver herself (if innocent) and the viewing public will not know whether the police acted for some reason other than the traffic offense, and if so, why. Therefore, there will be no increase in stigma or humiliation for a pretextual stop than if the action was taken based on the traffic offense alone.⁸⁹

⁸⁷ *Vernonia Sch. Dist. 47J v. Acton*, 515 U.S. 646, 667 (1995) (O'Connor, J., dissenting) (majority upheld random drug testing of students).

⁸⁸ *Berkemer v. McCarty*, 468 U.S. 420, 437-38 (1984).

⁸⁹ This is not true if the driver is stopped for an impermissible reason, such as race, sex, or religion. In a regime where discrimination is permitted, motorists may well suspect that they were stopped on discriminatory grounds; this has substantial costs. See Andrew E. Taslitz, *Respect and the Fourth Amendment*, 94 J. CRIM. L. & CRIMINOLOGY 15, 24 (2003) ("When an individual is wrongly stopped because of his race, the sense of disrespect he feels may be felt by others in his racial community. When many persons of a certain race are regularly so stopped, the impact on the broader racial community is deeper. Minority communities sense, in a way that the Court does not, that strong Fourth Amendment protections are central to fostering respect for both individuals and their communities." (footnote omitted)); cf. *Roberts v. U.S. Jaycees*, 468 U.S. 609, 625 (1984) ("Thus, in upholding Title II of the Civil Rights Act of 1964, which forbids race discrimination in public accommodations, we emphasized that its 'fundamental object . . . was to vindicate the deprivation of personal dignity that surely accompanies denials of equal access to public establishments.' That stigmatizing injury, and the denial of equal opportunities that accompanies it, is surely felt as strongly by persons suffering discrimination on the basis of their sex as by those treated differently because of their race." (citations omitted) (quoting *Heart of Atlanta Motel, Inc. v. United States*, 379 U.S. 241, 250 (1964))).

In addition, it is hard to contest the idea that police enforcement actions should be efficient, so long as they are consistent with the Constitution. Just as it would be ideal if police could disproportionately stop offenders who would have caused accidents, it is desirable, all other things being equal, that as many traffic stops as possible solve or prevent other crimes.

The chances of any offending motorist being stopped are already legitimately affected by overall financial and deployment decisions, by the individual enforcement choices of the officer, by other crimes committed (or not) in the neighborhood at the time, by any programmatic enforcement decisions by agency supervisors and politicians, and by other legitimate factors independent of the motorist's conduct. As one commentator has argued in opposing a prohibition on pretextual enforcement:

The implication . . . is that in such circumstances police should be allowed to stop only the speeder whom they do not also suspect of some other crime. In other words, to rule in [petitioners'] favor would leave us with a doctrine which says, at least to a point, that the more suspicions you have, the less justification you have to act on them.⁹⁰

None of this is to say that every form of nonracial discrimination or selectivity is desirable in principle, or should not be regulated or prohibited under sub-constitutional law. It is just that selective investigation and arrest, even on grounds which seem questionable at first glance, will often be legitimate.

If this is correct, then *Whren* could not have come out other than as it did. "Pretext" in the sense of consideration of more than simply the offense or offenses for which there is probable cause is pervasive and unavoidable. Petitioners' proposed test based on what a reasonable officer "would have" done is nearly inadministrable, because in most cases, multifarious, changing circumstances and considerations operate to determine whether an officer will make a stop; behavior takes place for many reasons. In some instances, a minor violation will be sufficient in and of itself to induce a police response. In others, even an egregious traffic violation will be overlooked by police in favor of more serious offenses or priorities. Once the broad range of legitimate considerations is recognized, then the best evidence of what a reasonable officer would have done is what they did.

⁹⁰ Daniel Yeager, *Overcoming Hiddenness: The Role of Intentions in Fourth Amendment Analysis*, 74 Miss. L.J. 553, 593 (2004).

C. *An Overlooked Model: Equal Protection and Prosecutorial Discretion*

In his dissent in *Maryland v. Wilson*,⁹¹ Justice Kennedy explained that *Whren* came out as it did because “[w]e could discern no other, workable rule.”⁹² The Justices might well have considered applying the established constitutional principles of discretion applicable to review of prosecutorial choices. In *Oyler*, for example, the Court explained:

[T]he conscious exercise of some selectivity in enforcement is not in itself a federal constitutional violation. Even though the statistics in this case might imply a policy of selective enforcement, it was not stated that the selection was deliberately based upon an unjustifiable standard such as race, religion, or other arbitrary classification. Therefore grounds supporting a finding of a denial of equal protection were not alleged.⁹³

Oyler is but a specific example of the commonplace principle that many decisions are permissible “for any reason, or for no reason at all, but not for an unconstitutional reason.”⁹⁴ The Court could have held that reasonableness determinations under the Fourth Amendment were of the same character. Indeed, many lower courts have applied the principle of *Oyler* to arrests, both before⁹⁵ and after⁹⁶ *Whren*. It is also important to emphasize that *Oyler* makes a difference only in cases when there is probable cause to arrest and proof of guilt beyond

⁹¹ *Maryland v. Wilson*, 519 U.S. 408 (1997).

⁹² *Id.* at 423 (Kennedy, J., dissenting).

⁹³ *Oyler v. Boles*, 368 U.S. 448, 456 (1962); *see also* *Wade v. United States*, 504 U.S. 181, 185–86 (1992); *Wayte v. United States*, 470 U.S. 598, 608 (1985); *Bordenkircher v. Hayes*, 434 U.S. 357, 364–65 (1978).

⁹⁴ *Booher v. USPS*, 843 F.2d 943, 945–46 (6th Cir. 1988) (quoting *Huffstutler v. Bergland*, 607 F.2d 1090, 1092 (5th Cir. 1979)). Indeed, the Supreme Court made this point in *Perry v. Sindermann*, 408 U.S. 593 (1972), a case involving a non-tenured college professor:

[E]ven though a person has no “right” to a valuable governmental benefit and even though the government may deny him the benefit for any number of reasons, there are some reasons upon which the government may not rely. It may not deny a benefit to a person on a basis that infringes his constitutionally protected interests

Id. at 597.

⁹⁵ *See, e.g.*, *Fillingim v. Boone*, 835 F.2d 1389 app. A, at 1399 (11th Cir. 1988) (per curiam); *Bootz v. Childs*, 627 F. Supp. 94, 103 (N.D. Ill. 1985); *State v. Robbins*, 401 A.2d 161, 164 (Me. 1979); *City of Minneapolis v. Buschette*, 240 N.W.2d 500, 504 (Minn. 1976).

⁹⁶ *See, e.g.*, *United States v. Alcaraz-Arellano*, 441 F.3d 1252, 1263–64 (10th Cir. 2006); *Bennett v. City of Eastpointe*, 410 F.3d 810, 818 (6th Cir. 2005).

a reasonable doubt. In cases where those cannot be shown, the defendant will be exonerated on the merits.

On the other hand, the reality of underenforcement means there must be some limit on prosecutorial discretion. As then-Attorney General and future Supreme Court Justice Robert Jackson famously explained:

If the prosecutor is obliged to choose his cases, it follows that he can choose his defendants. Therein is the most dangerous power of the prosecutor: that he will pick people that he thinks he should get, rather than pick cases that need to be prosecuted. With the law books filled with a great assortment of crimes, a prosecutor stands a fair chance of finding at least a technical violation of some act on the part of almost anyone. . . . It is in this realm—in which the prosecutor picks some person whom he dislikes or desires to embarrass, or selects some group of unpopular persons and then looks for an offense, that the greatest danger of abuse of prosecuting power lies. It is here that law enforcement becomes personal, and the real crime becomes that of being unpopular with the predominant or governing group, being attached to the wrong political views, or being personally obnoxious to or in the way of the prosecutor himself.⁹⁷

If Justice Jackson was right, then having no check on prosecutorial discretion would allow the criminal justice system to be used as a tool of political and social oppression.

There is no obvious reason that the police power should be greater than the authority of prosecutors. Selectivity in police action and selectivity in prosecution present similar problems.⁹⁸ One of the Court's rationales for the broad search incident to arrest doctrine is that "[a]n arrest is the initial stage of a criminal prosecution."⁹⁹ Arrests by police and charges by prosecutors must both be supported by

⁹⁷ Robert H. Jackson, *The Federal Prosecutor*, 31 J. AM. INST. CRIM. L. & CRIMINOLOGY 3, 5 (1940).

⁹⁸ In *Wayte*, the Court explained its justifications for prosecutorial discretion: "Such factors as the strength of the case, the prosecution's general deterrence value, the Government's enforcement priorities, and the case's relationship to the Government's overall enforcement plan are not readily susceptible to the kind of analysis the courts are competent to undertake." 470 U.S. at 607. Most of those reasons apply equally to enforcement priorities of police. See *Alcaraz-Arellano*, 441 F.3d at 1264 ("The standard for proof of a selective-prosecution claim is a 'demanding' one Similar caution is required in reviewing a claim of selective law enforcement." (citation omitted)).

⁹⁹ *United States v. Robinson*, 414 U.S. 218, 228 (1973) (quoting *Terry v. Ohio*, 392 U.S. 1, 26 (1968)).

probable cause.¹⁰⁰ But prosecutors enjoy absolute immunity for bringing charges,¹⁰¹ while investigators enjoy only qualified immunity.¹⁰² In addition, a prosecution is presumptively valid, while the police officer (or the state) must bear the burden of showing the validity of at least a warrantless arrest or search.¹⁰³ Application of *Oyler* would have been sufficient to resolve *Whren*, leading to precisely the same outcome, except without the Court's endorsement of racial selectivity, which is prohibited under *Oyler*.

II. THE RATIONALE FOR FOURTH AMENDMENT OBJECTIVITY

All other things being equal, the Justices have made clear that they, and the Constitution, are opposed to race discrimination in the criminal justice process.¹⁰⁴ Official acts of race discrimination, "in violation of the Constitution and laws of the United States[,] . . . cast doubt on the integrity of the whole judicial process. They create the appearance of bias in the decision of individual cases, and they increase the risk of actual bias as well."¹⁰⁵ As the Court said in a jury selection case, but with broader significance, systematic discriminatory practices "undermine public confidence in the fairness of our system of justice."¹⁰⁶ Accordingly, there is a "strong constitutional and statutory policy against racial discrimination . . . in criminal cases."¹⁰⁷ In

¹⁰⁰ See *Gerstein v. Pugh*, 420 U.S. 103, 111–12 (1975) ("The standard for arrest is probable cause, defined in terms of facts and circumstances 'sufficient to warrant a prudent man in believing that the [suspect] had committed or was committing an offense.'" (alteration in original) (quoting *Beck v. Ohio*, 379 U.S. 89, 91 (1964))); *United States v. Outler*, 659 F.2d 1306, 1310 (5th Cir. Unit B Oct. 1981) ("A grand jury can perform its function of determining probable cause and returning a true bill only if all elements of the offense are contained in the indictment.").

¹⁰¹ See *Imbler v. Pachtman*, 424 U.S. 409, 424–27 (1976).

¹⁰² See *Buckley v. Fitzsimmons*, 509 U.S. 259, 273–75 (1993).

¹⁰³ See *infra* Part IV.A.

¹⁰⁴ See *Georgia v. McCollum*, 505 U.S. 42, 50 (1992) (calling "[r]acial discrimination . . . repugnant in all contexts"). *But cf.* John E. Nowak, *The Gang of Five and the Second Coming of an Anti-Reconstruction Supreme Court*, 75 NOTRE DAME L. REV. 1091, 1096 (2000) (arguing that the Rehnquist Court majority wanted to reduce Congress's power to protect minorities under the Fourteenth Amendment).

¹⁰⁵ *Peters v. Kiff*, 407 U.S. 493, 502–03 (1972) (plurality opinion); see also *id.* at 507 (White, J., concurring in the judgment) (referring to "the strong statutory policy [against race discrimination in jury selection], which reflects the central concern of the Fourteenth Amendment with racial discrimination"). The Court has made the point in many other contexts. See, e.g., *Shaw v. Reno*, 509 U.S. 630, 657 (1993) ("Racial gerrymandering, even for remedial purposes, may balkanize us into competing racial factions; it threatens to carry us further from the goal of a political system in which race no longer matters—a goal that the Fourteenth and Fifteenth Amendments embody, and to which the Nation continues to aspire.").

¹⁰⁶ *Batson v. Kentucky*, 476 U.S. 79, 87 (1986).

¹⁰⁷ *Powers v. Ohio*, 499 U.S. 400, 421–22 (1991) (Scalia, J., dissenting) (quoting Alexander

McCleskey v. Kemp,¹⁰⁸ the Court explained: “Because of the risk that the factor of race may enter the criminal justice process, we have engaged in ‘unceasing efforts’ to eradicate racial prejudice from our criminal justice system.”¹⁰⁹ The work of scholars such as Tom Tyler and Cheryl Wakslak shows that the Court is right: to the extent that people believe the system is discriminatory, they support it less and view it as less legitimate.¹¹⁰ There is a cost, then, to leaving unremedied apparent violations of the constitutional prohibition against racial discrimination in the criminal justice system.¹¹¹

This section explores why the Court has held the Fourth Amendment to be objective. It concludes that those reasons do not require immunizing racial profiling, or preclude consideration of subjective motivation in that context. The Court has adopted Fourth Amendment objectivity for prudential reasons, but these reasons are completely consistent with investigating racial discrimination.

In addition, the Court has recognized numerous exceptions to the objective approach.¹¹² A major exception is when probable cause exists but there is police misconduct, wrongdoing, or error, which ren-

v. Louisiana, 405 U.S. 625, 633 (1972)). As the Court explained in *Rose v. Mitchell*, 443 U.S. 545 (1979):

Discrimination on account of race was the primary evil at which the Amendments adopted after the War Between the States, including the Fourteenth Amendment, were aimed. The Equal Protection Clause was central to the Fourteenth Amendment’s prohibition of discriminatory action by the State: it banned most types of purposeful discrimination by the State on the basis of race in an attempt to lift the burdens placed on Negroes by our society. It is clear from the earliest cases applying the Equal Protection Clause in the context of racial discrimination in the selection of a grand jury, that the Court from the first was concerned with the broad aspects of racial discrimination that the Equal Protection Clause was designed to eradicate, and with the fundamental social values the Fourteenth Amendment was adopted to protect, even though it addressed the issue in the context of reviewing an individual criminal conviction.

Id. at 554–55.

¹⁰⁸ *McCleskey v. Kemp*, 481 U.S. 279 (1987).

¹⁰⁹ *Id.* at 309 (quoting *Batson*, 476 U.S. at 85). Some critics claim the Court could have done better in *McCleskey*. See, e.g., Randall L. Kennedy, *McCleskey v. Kemp: Race, Capital Punishment, and the Supreme Court*, 101 HARV. L. REV. 1388, 1389 (1988) (explaining that “both the Court’s ruling and the way it was articulated [were] grievously flawed,” and comparing *McCleskey* to *Plessy v. Ferguson*, 163 U.S. 537 (1896), and *Korematsu v. United States*, 323 U.S. 214 (1944)).

¹¹⁰ See, e.g., Tom R. Tyler & Cheryl J. Wakslak, *Profiling and Police Legitimacy: Procedural Justice, Attributions of Motive, and Acceptance of Police Authority*, 42 CRIMINOLOGY 253, 273–74, 276 (2004).

¹¹¹ See *supra* note 14 and accompanying text.

¹¹² See *infra* Part II.B.

ders the search improper. This exception leaves ample room for consideration of unconstitutional motives.

A. *Prudential Reasons for Objective Fourth Amendment Analysis*

The Court has never held that something in the constitutional text, the *Federalist Papers*, or Farrand's *Records* shows that the Framers actually intended an objective Fourth Amendment. Nor are there consistent, historical judicial practices or approaches showing an unwavering objective interpretation. Instead, the Court's rationale for the objective standard is prudential. The Court rejects subjective inquiries to hold law enforcement to high standards for the protection of the people, to promote even-handed law enforcement, and for reasons of judicial economy. The first two reasons suggest that race discrimination should be considered by courts and deemed unreasonable. The policy of judicial economy implies that a subjective inquiry might be possible if the purpose is important, or if the inquiry would promote, rather than impair, even-handed law enforcement. These justifications are also perfectly consistent with *Oyler*—that, in general, motivation does not matter, except in the rare cases that it does.

1. *Holding Law Enforcement to Objectively High Standards*

An early justification for objective Fourth Amendment standards was the protection of defendants from arbitrary police conduct; the point of the cases was not to address the question of whether the subjective good faith of the officers was relevant, but rather to underscore that it was not sufficient to validate a search. For example, in *United States v. Ross*,¹¹³ citing the venerable *Carroll v. United States*,¹¹⁴ the Court explained: “[T]he probable-cause determination must be based on objective facts that could justify the issuance of a warrant by a magistrate and not merely on the subjective good faith of the police officers.”¹¹⁵ Similarly, in *United States v. Leon*,¹¹⁶ establishing a good-faith exception to the exclusionary rule for police who reasonably rely on an invalid judicial warrant, the Court explained:

We emphasize that the standard of reasonableness we adopt is an objective one. Many objections to a good-faith exception assume that the exception will turn on the subjective good faith of individual officers. “Grounding the modifica-

¹¹³ *United States v. Ross*, 456 U.S. 798 (1982).

¹¹⁴ *Carroll v. United States*, 267 U.S. 132 (1925).

¹¹⁵ *Ross*, 456 U.S. at 808 (citing *Carroll*, 267 U.S. at 161–62).

¹¹⁶ *United States v. Leon*, 468 U.S. 897 (1984).

tion in objective reasonableness, however, retains the value of the exclusionary rule as an incentive for the law enforcement profession as a whole to conduct themselves in accord with the Fourth Amendment.”¹¹⁷

In *Brown v. Texas*,¹¹⁸ the Court explained that the Fourth Amendment functions to “assure that an individual’s reasonable expectation of privacy is not subject to arbitrary invasions solely at the unfettered discretion of officers in the field,” and therefore “the 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, or that the seizure must be carried out pursuant to a plan embodying explicit, neutral limitations on the conduct of individual officers.”¹¹⁹ In these cases, the Court uses “objective” probable cause to mean evidence that will satisfy an unbiased magistrate.¹²⁰

Quite obviously, the interest in holding law enforcement to high standards of proof and protecting the public from arbitrary police action is furthered, not undermined, by discouraging officers from engaging in unconstitutional discrimination. This is particularly clear from *Brown*, which emphasized that the Fourth Amendment is concerned with “arbitrary invasions,” and therefore imposed “neutral limitations” on the conduct of the police.¹²¹

¹¹⁷ *Id.* at 919 n.20 (quoting *Illinois v. Gates*, 462 U.S. 213, 261 n.15 (1983) (White, J., concurring in the judgment)) (citing *Dunaway v. New York*, 442 U.S. 200, 221 (1979) (Stevens, J., concurring)). In *Dunaway*, Justice Stevens stated:

The justification for the exclusion of evidence obtained by improper methods is to motivate the law enforcement profession as a whole—not the aberrant individual officer—to adopt and enforce regular procedures that will avoid the future invasion of the citizen’s constitutional rights. For that reason, exclusionary rules should embody objective criteria rather than subjective considerations.

442 U.S. at 221 (Stevens, J., concurring).

¹¹⁸ *Brown v. Texas*, 443 U.S. 47 (1979).

¹¹⁹ *Id.* at 51; *see also, e.g.*, *Torres v. Puerto Rico*, 442 U.S. 465, 471 (1979) (“[T]he grounds for a search must satisfy objective standards which ensure that the invasion of personal privacy is justified by legitimate governmental interests.” (citing *Delaware v. Prouse*, 440 U.S. 648, 653–54 (1979))).

¹²⁰ *See Marshall v. Barlow’s, Inc.*, 436 U.S. 307, 331 (1978) (Stevens, J., dissenting) (“The essential function of the traditional warrant requirement is the interposition of a neutral magistrate between the citizen and the presumably zealous law enforcement officer so that there might be an objective determination of probable cause.”); *Katz v. United States*, 389 U.S. 347, 358 (1967); *see also Clancy, supra* note 3, at 1040 (arguing that Fourth Amendment reasonableness must be objective to constrain official exercise of discretion in warrantless searches).

¹²¹ *See Brown*, 443 U.S. at 51.

2. *Even-Handed Law Enforcement*

In its most recent decisions, the Court has explained that Fourth Amendment objectivity is designed to achieve even-handed law enforcement. In 2011, in *Kentucky v. King*,¹²² the Court explained:

The reasons for looking to objective factors, rather than subjective intent, are clear. Legal tests based on reasonableness are generally objective, and this Court has long taken the view that “evenhanded law enforcement is best achieved by the application of objective standards of conduct, rather than standards that depend upon the subjective state of mind of the officer.”¹²³

Also in 2011, in *Ashcroft v. al-Kidd*,¹²⁴ the Court stated: “This approach recognizes that the Fourth Amendment regulates conduct rather than thoughts; and it promotes evenhanded, uniform enforcement of the law.”¹²⁵ However, as Justice Alito noted in his concurrence for himself and Justices Scalia and Thomas in *Ricci v. DeStefano*,¹²⁶ an employment case, “evenhanded enforcement of the law” requires enforcing, not ignoring, the law’s “prohibition against discrimination based on race.”¹²⁷ The purpose of objectivity expressed in *King* and *al-Kidd*, read in light of the principle that Justice Alito articulated in *Ricci*, suggests that racial discrimination violates the Fourth Amendment because it frustrates even-handed law enforcement.

Employing an objective test, though, could root out a different form of Fourth Amendment arbitrariness: it could avoid invalidating objectively reasonable police action based on an officer’s inability to articulate a legitimate explanation for it.

¹²² *Kentucky v. King*, 131 S. Ct. 1849 (2011).

¹²³ *Id.* at 1859 (quoting *Horton v. California*, 496 U.S. 128, 138 (1990)).

¹²⁴ *Ashcroft v. al-Kidd*, 131 S. Ct. 2074 (2011).

¹²⁵ *Id.* at 2080 (citations omitted).

¹²⁶ *Ricci v. DeStefano*, 557 U.S. 557 (2009).

¹²⁷ *Id.* at 608 (Alito, J., concurring). In other cases, the Court has used “evenhanded” to indicate nondiscrimination. *See, e.g., Adderley v. Florida*, 385 U.S. 39, 47 (1966) (stating, in a case involving a civil rights protest, that “[n]othing in the Constitution of the United States prevents Florida from even-handed enforcement of its general trespass statute against those refusing to obey the sheriff’s order to remove themselves from what amounted to the curtilage of the jailhouse”); *see also, e.g., Elizabeth E. Joh, Discretionless Policing: Technology and the Fourth Amendment*, 95 CAL. L. REV. 199, 205 (2007) (“We entrust the police to enforce the law, to maintain order, and to use legitimate force if necessary. The police must not only shoulder this task, but we also expect them to accomplish these tasks by treating the public in a fair and even-handed way.” (footnote omitted)).

In *Devenpeck v. Alford*,¹²⁸ for example, a unanimous Court¹²⁹ refused to mandate the so-called “closely related offense” rule as a matter of constitutional law.¹³⁰ That rule, applied in some jurisdictions,¹³¹ dictates that even if probable cause exists for an offense, an arrest is invalid if the officer’s reason given at the time of the arrest was for some other offense not closely related to the offense for which probable cause exists.¹³² The Court held that an officer’s “subjective reason for making the arrest need not be the criminal offense as to which the known facts provide probable cause.”¹³³ The contrary result would lead to arbitrary results: “[a]n arrest made by a knowledgeable, veteran officer would be valid, whereas an arrest made by a rookie *in precisely the same circumstances* would not” if the rookie failed to identify the correct offense or class of offenses.¹³⁴ The Court also explained that the rule would make defendants worse off. Invalidating an arrest because of a bad explanation would mean “officers will cease providing reasons for arrest.”¹³⁵ “And even if this option were to be foreclosed by adoption of a statutory or constitutional requirement, officers would simply give every reason for which probable cause could conceivably exist,”¹³⁶ rendering the advice useless. Other cases show the Court’s reluctance to suppress based on an officer’s articulation of reasons for a particular action where facts known to the officer justified the action on a different ground.¹³⁷

This rationale does not militate against considering racial motivation. The problem arises from inarticulate officers who act for a legitimate legal reason but cannot explain the reason, or officers who do not know that they should justify their conduct on one ground rather

¹²⁸ *Devenpeck v. Alford*, 543 U.S. 146 (2004).

¹²⁹ Chief Justice Rehnquist did not participate. *Id.* at 147.

¹³⁰ *See id.* at 155–56.

¹³¹ *See id.* at 153 & n.2; *see also, e.g.*, *United States v. Watson*, 423 U.S. 411, 435 n.1 (1976) (Marshall, J., dissenting) (“And where the crime for which a suspect is arrested and that for which the officers have probable cause are closely related, courts typically use an objective rather than subjective measure of probable cause.”).

¹³² *See Devenpeck*, 543 U.S. at 153–54.

¹³³ *Id.* at 153.

¹³⁴ *Id.* at 154.

¹³⁵ *Id.* at 155.

¹³⁶ *Id.*

¹³⁷ *See, e.g.*, *Brigham City, Utah v. Stuart*, 547 U.S. 398, 405 (2006) (“It therefore does not matter here—even if their subjective motives could be so neatly unraveled—whether the officers entered the kitchen to arrest respondents and gather evidence against them or to assist the injured and prevent further violence” so long as there was a basis to enter on one ground.); *Warden v. Hayden*, 387 U.S. 294, 299–300 (1967) (upholding exigent circumstances search for weapons even though officer testified that he was searching for “the man or the money”).

than another, or on several grounds rather than one. There is no reason to think that officers who are legally or factually confused will, as a result, inaccurately admit to racial profiling. Because preventing racial discrimination promotes even-handed law enforcement and does not unfairly disadvantage inarticulate officers, this rationale does not militate against considering racial motivation in the reasonableness calculus.¹³⁸

3. *Avoiding “Grave and Fruitless Misallocation of Judicial Resources”*

Another influential explanation for the objective test comes from Justice White’s dissent, joined by Justices Harlan and Stewart, in *Massachusetts v. Painten*.¹³⁹ This dissent was relied on in important later cases, including *Leon*,¹⁴⁰ *Missouri v. Seibert*,¹⁴¹ and *Illinois v. Gates*.¹⁴² Justice White explained that subjective inquiries were incompatible with Fourth Amendment analysis because “sending state and federal courts on an expedition into the minds of police officers would produce a grave and fruitless misallocation of judicial resources.”¹⁴³

The Court has sometimes mentioned the difficulty of determining subjective motivation as a reason for objective rules.¹⁴⁴ But this rationale is not decisive; determining mental states is a core function of criminal courts because “[t]he existence of a *mens rea* is the rule of,

¹³⁸ Of course, sometimes claims of racial profiling will be successful and other times they will not, based on factors independent of the underlying merits, such as the quality of counsel, attitudes of the court, and the availability of records. But this sort of non-even-handed result is an inevitable feature of a system with differentially skilled and resourced police, prosecutors, defense attorneys, judges, and juries. If this sort of inequality is a reason not to recognize claims or defenses, no claims or defenses should be recognized.

¹³⁹ *Massachusetts v. Painten*, 389 U.S. 560, 562–67 (1968) (White, J., dissenting).

¹⁴⁰ *United States v. Leon*, 468 U.S. 897, 922 n.23 (1984).

¹⁴¹ *Missouri v. Seibert*, 542 U.S. 600, 626 (2004) (O’Connor, J., dissenting).

¹⁴² *Illinois v. Gates*, 462 U.S. 213, 266 (1983) (White, J., concurring in the judgment).

¹⁴³ *Painten*, 389 U.S. at 565 (White, J., dissenting); see also *id.* at 562 (Fortas, J., concurring) (suggesting that he did not “disagree with the position stated in the dissent on this issue”).

¹⁴⁴ In *Whren*, the Court stated that evidentiary difficulty was not the “only” or “even principal[]” reason for the objective approach. See *Whren v. United States*, 517 U.S. 806, 814 (1996). Nevertheless, this has sometimes been a concern. See, e.g., *Brigham City, Utah v. Stuart*, 547 U.S. 398, 405 (2006) (questioning whether “subjective motives could be so neatly unraveled”); *New York v. Quarles*, 467 U.S. 649, 656 (1984) (holding that the public safety exception to *Miranda v. Arizona*, 384 U.S. 436 (1966), is evaluated objectively because “[u]ndoubtedly most police officers, [in an emergency], would act out of a host of different, instinctive, and largely unverifiable motives”); see also *Seibert*, 542 U.S. at 626 (O’Connor, J., dissenting) (“[E]videntiary difficulties have led us to reject an intent-based test in several criminal procedure contexts.”); Leipold, *supra* note 2, at 559 (“[N]ormally, the goal in moving to an objective standard has been to streamline the pretrial and trial process.”).

rather than the exception to, the principles of Anglo-American criminal jurisprudence.’”¹⁴⁵ Further, if eliminating racism in the criminal justice system is as important as the Court has said, then having an occasional hearing on it cannot be considered too burdensome as a question of resources; after all, “[c]onvenience and efficiency are not the primary objectives—or the hallmarks—of democratic government.”¹⁴⁶

This language is also an expression of the principle that the judgment or mental state of the officer cannot turn legal conduct into illegal conduct. In *Painten*, the police generated probable cause after entering a suspect’s apartment with consent and engaging in consensual conversation.¹⁴⁷ At the time the police entered, however, “[t]heir motive, the courts below found, was to arrest and search, whether or not their investigation provided the probable cause that would make an arrest and search constitutional.”¹⁴⁸ That is, “the policeman was willing, had his lawful conduct not developed probable cause justifying respondent’s arrest, to search respondent’s apartment unlawfully in the hope of finding evidence of a crime.”¹⁴⁹ Justice White’s point was that an unexecuted plan to search illegally is substantively irrelevant to otherwise lawful police conduct, if it is neither carried out nor communicated to the suspect.¹⁵⁰ It was not solely an argument about the cost or difficulty of finding out the officer’s subjective intentions; in *Painten*, at least, that information was readily discovered.¹⁵¹ Therefore, the concern with judicial resources should not foreclose inquiry into racially motivated action, an examination that is not futile.

4. *Bright Line Rules*

Another rationale for objectivity is that it “allows the police to determine in advance whether the conduct contemplated will impli-

¹⁴⁵ *United States v. U.S. Gypsum Co.*, 438 U.S. 422, 436 (1978) (alteration in original) (quoting *Dennis v. United States*, 341 U.S. 494, 500 (1951)).

¹⁴⁶ *INS v. Chadha*, 462 U.S. 919, 944 (1983).

¹⁴⁷ *See Painten*, 389 U.S. at 563–64 (White, J., dissenting).

¹⁴⁸ *Id.* at 563.

¹⁴⁹ *Id.* at 564. It should be noted that “[a]t the time of respondent’s trial in 1958, Massachusetts did not have an exclusionary rule for evidence obtained by an illegal search or seizure.” *Id.* at 561 (per curiam).

¹⁵⁰ *See also, e.g., Graham v. Connor*, 490 U.S. 386, 397 (1989) (“An officer’s evil intentions will not make a Fourth Amendment violation out of an objectively reasonable use of force; nor will an officer’s good intentions make an objectively unreasonable use of force constitutional.” (citing *Scott v. United States*, 436 U.S. 128, 138 (1978))).

¹⁵¹ *See Painten*, 389 U.S. at 563 (White, J., dissenting).

cate the Fourth Amendment.”¹⁵² While it is true that police need clear legal guidance, the message of *Whren* is hardly clear: Linda Greenhouse recently cited it as “[a] good example of a case with dual messages.”¹⁵³ *Whren*’s complex rule says that racial selectivity does not render a search unreasonable, although it violates other provisions in theory, which are never enforced. A simple, easy to understand, bright-line rule would be that racial factors should not be considered in selecting people for stops, arrests, or searches.

B. *Precedent and Subjective Review of Searches Resting on Constitutional Violations*

1. *Exceptions to the General Principle of Objectivity*

Notwithstanding its determination that “[s]ubjective intentions play no role in ordinary, probable-cause Fourth Amendment analysis,”¹⁵⁴ the Court has by no means insisted that Fourth Amendment reasonableness must be divorced from subjective considerations in every context. Examination of the Court’s practices over time confirms that application of the objective test is a question of judicial choice. An important study by George Dix carefully and thoroughly explored the history of the Court’s treatment of the issue.¹⁵⁵ Up until the 1970s, the Court largely treated subjective intent in dicta, or by means of incidental and “uncritical” analysis.¹⁵⁶ Cases from the early 1900s on contain variations of the phrase “good faith on the part of the arresting officers is not enough” to constitute probable cause.¹⁵⁷ In another perceptive work, Kit Kinports elaborately examined the Court’s cases, and found that across criminal procedure “the Court shifts opportunistically from case to case between subjective and objective tests, and between whose point of view—the police officer’s or

¹⁵² *Michigan v. Chesternut*, 486 U.S. 567, 574 (1988). “This ‘reasonable person’ standard also ensures that the scope of Fourth Amendment protection does not vary with the state of mind of the particular individual being approached.” *Id.*

¹⁵³ Linda Greenhouse, *Imagining the Court*, N.Y. TIMES OPINIONATOR (Aug. 21, 2013, 9:00 PM), <http://opinionator.blogs.nytimes.com/2013/08/21/imagining-the-court/>.

¹⁵⁴ *Whren v. United States*, 517 U.S. 806, 813 (1996).

¹⁵⁵ Dix, *supra* note 3.

¹⁵⁶ *See id.* at 378–82.

¹⁵⁷ *Henry v. United States*, 361 U.S. 98, 102 (1959); *see also* *Hill v. California*, 401 U.S. 797, 803–04 (1971) (“[S]ubjective good-faith belief would not in itself justify either the arrest or the subsequent search. . . . [S]ufficient probability . . . is the touchstone of reasonableness under the Fourth Amendment.”); *Beck v. Ohio*, 379 U.S. 89, 97 (1964); *Carroll v. United States*, 267 U.S. 132, 161–62 (1925) (“[A]s we have seen, good faith is not enough to constitute probable cause. That faith must be grounded on facts . . . which in the judgment of the court would make [the officer’s] faith reasonable.” (quoting *Dir. Gen. of R.Rs. v. Kastenbaum*, 263 U.S. 25, 28 (1923))).

the defendant's—it views as controlling.”¹⁵⁸ Professors Dix and Kinports suggest that the Court's stop and frisk cases turn on a subjective analysis,¹⁵⁹ as do other criminal procedure cases not mentioned in *Whren*.¹⁶⁰

Examination of the Court's modern cases shows that objectivity is hardly complete. In every search and seizure, reasonableness is determined based on facts that the officer knew, and thus is subjective to that extent.¹⁶¹ In addition, the search or seizure must be intentional as opposed to accidental or inadvertent.¹⁶² In this way, the Fourth Amendment is far more subjective than is the objective justification advocated by some scholars in the context of criminal defenses. These defenses turn on whether the defendant's conduct *in fact* prevented a wrong, such as a homicidal killing, not whether the defendant *intended* to do so.¹⁶³

¹⁵⁸ Kit Kinports, *Criminal Procedure in Perspective*, 98 J. CRIM. L. & CRIMINOLOGY 71, 71 (2007).

¹⁵⁹ See *id.* at 85–86 (discussing *Sibron v. New York*, 392 U.S. 40 (1968)); Dix, *supra* note 3, at 416–18. The Supreme Court made this subjective component explicit in *Chimel v. California*, 395 U.S. 752 (1969), citing *Sibron* as applying the *Terry* standard, and as “holding that a policeman's action in thrusting his hand into a suspect's pocket had been neither motivated by nor limited to the objective of protection. Rather, the search had been made in order to find narcotics, which were in fact found.” *Id.* at 762 (footnote omitted). The subjectivity of *Terry* is important because many cases cite it for the proposition that the Fourth Amendment is objective. See, e.g., *Ashcroft v. al-Kidd*, 131 S. Ct. 2074, 2082 (2011); *Illinois v. Rodriguez*, 497 U.S. 177, 188–89 (1990); *Graham v. Connor*, 490 U.S. 386, 397 (1989); *Scott v. United States*, 436 U.S. 128, 137 (1978).

Professor Dix plausibly characterizes *Minnesota v. Dickerson*, 508 U.S. 366 (1993), as “appear[ing] to rely on a purely subjective approach in defining the scope of a permissible weapons frisk.” Dix, *supra* note 3, at 416. The Court noted that the state district court found that the officer “formed the opinion that the object . . . was crack . . . cocaine” and did not “claim that he suspected this object to be a weapon.” *Dickerson*, 508 U.S. at 377–78 (alteration in original) (internal quotation marks omitted). Further, the Minnesota Supreme Court “held that the officer's own testimony ‘belies any notion that he “immediately” recognized the lump as crack cocaine. . . . [T]he officer determined that the lump was contraband only after ‘squeezing, sliding and otherwise manipulating the contents of the defendant's pocket’—a pocket which the officer already knew contained no weapon.” *Id.* at 378 (quoting *State v. Dickerson*, 481 N.W.2d 840, 844 (Minn. 1992)). Thus, the Court relied on the officer's “opinion,” what he “suspected” and “recognized” and “knew” in the sense of conclusions rather than facts. *Id.*

¹⁶⁰ See Dix, *supra* note 3, at 380–82 (discussing *Jones v. United States*, 357 U.S. 493 (1958)).

¹⁶¹ See, e.g., *Devenpeck v. Alford*, 543 U.S. 146, 152 (2004) (citing *Maryland v. Pringle*, 540 U.S. 366, 371 (2003)).

¹⁶² See *Scott v. Harris*, 550 U.S. 372, 381 (2007) (“[A] Fourth Amendment seizure [occurs] . . . when there is a governmental termination of freedom of movement through means intentionally applied.” (alterations in original) (quoting *Brower v. Cnty. of Inyo*, 489 U.S. 593, 596–97 (1989)). This rationale seems to apply to searches as well as seizures. See *Weed v. City of Seattle*, No. C10-1274-RSM, 2012 WL 909935, at *2 (W.D. Wash. Mar. 15, 2012).

¹⁶³ See Anthony M. Dillof, *Unraveling Unknowing Justification*, 77 NOTRE DAME L. REV. 1547, 1554–56 (2002) (describing various scholarly approaches).

The Court has been quite clear that trial judges considering Fourth Amendment cases must consider the inferences and conclusions drawn by officers based on their knowledge, training, and experience.¹⁶⁴ Other issues, such as an officer's belief that a suspect is armed, may also be evaluated subjectively.¹⁶⁵

In addition, the reasonableness of some categories of searches turns on "actual motivations"; the Court explained that special-needs and administrative "exceptions do not apply where the officer's purpose is not to attend to the special needs or to the investigation for which the administrative inspection is justified."¹⁶⁶ Further, suspicionless checkpoints are permissible for some reasons, but not if the main programmatic purpose is general law enforcement.¹⁶⁷ Finally, as Andrew Ferguson has explained, the Court's recent exclusionary rule decisions seem to require close examination of fault and culpability of the officers involved, which in many cases will require examination of, or at least overlap with, the subjective motivation of the officers.¹⁶⁸

2. *Subjective Evaluation Based on Prior Unconstitutional Conduct*

A critical, directly relevant category of cases where the Supreme Court has held that it is appropriate to examine subjective motivation are those involving an otherwise valid search challenged as resting on an independent illegality or wrong. Thus, in *Franks v. Delaware*,¹⁶⁹ the Court held that a search based on a facially valid warrant would nevertheless violate the Constitution if police knowingly or recklessly used false information.¹⁷⁰

Similarly, in *Murray v. United States*,¹⁷¹ the Court held that a second search would be deemed independent of an earlier illegal search if the second search had an independent source.¹⁷² The second search

¹⁶⁴ See *infra* notes 291–93 and accompanying text.

¹⁶⁵ See Kit Kinports, *Veteran Police Officers and Three-Dollar Steaks: The Subjective/Objective Dimensions of Probable Cause and Reasonable Suspicion*, 12 U. PA. J. CONST. L. 751, 753 (2010) (noting debate in lower courts about whether courts should consider an officer's subjective conclusion that a suspect is armed).

¹⁶⁶ *Ashcroft v. al-Kidd*, 131 S. Ct. 2074, 2081 (2011).

¹⁶⁷ See *id.* (discussing *City of Indianapolis v. Edmond*, 531 U.S. 32 (2000)).

¹⁶⁸ See Andrew Guthrie Ferguson, *Constitutional Culpability: Questioning the New Exclusionary Rules*, 66 FLA. L. REV. 623, 638 (2014).

¹⁶⁹ *Franks v. Delaware*, 438 U.S. 154 (1978).

¹⁷⁰ *Id.* at 171 ("There must be allegations of deliberate falsehood or of reckless disregard for the truth Allegations of negligence or innocent mistake are insufficient.")

¹⁷¹ *Murray v. United States*, 487 U.S. 533 (1988).

¹⁷² See *id.* at 542.

pursuant to a warrant would not be independent “if the agents’ decision to seek the warrant was prompted by what they had seen during the initial entry, or if information obtained during that entry was presented to the Magistrate and affected his decision to issue the warrant.”¹⁷³ Thus, whether there is an independent source turns on the officer’s subjective decision. Actual motivation is also relevant when police have a valid warrant but search or seize the wrong person or place based on a claimed mistake. The action is invalid if the officer objectively should have known of the error or the officer actually knew, clearly a more subjective standard.¹⁷⁴

There is no conflict in these cases with a test allowing “certain actions to be taken in certain circumstances, *whatever* the subjective intent.”¹⁷⁵ The existence of probable cause is determined objectively, but in some extraordinary cases subjective considerations are relevant to the analytically distinct question of whether otherwise justified actions are unreasonable on a separate and independent ground.

Thus, Fourth Amendment objectivity is a more or less general rule with many exceptions, not a categorical imperative. Objectivity is not an essential, intrinsic quality of Fourth Amendment reasonableness. It is also important to underscore again precisely what is at stake if reasonableness were not limited to objectivity. If the Court adopted *Oyler* as the rule for police as well as prosecutorial discretion,

¹⁷³ *Id.* (footnote omitted).

¹⁷⁴ See *Maryland v. Garrison*, 480 U.S. 79, 85 (1987). In *Garrison*, the Court held that a search of an apartment not covered by a warrant need not result in suppression if it were the result of an honest mistake:

Plainly, if the officers had known, or even if they should have known, that there were two separate dwelling units on the third floor of 2036 Park Avenue, they would have been obligated to exclude respondent’s apartment from the scope of the requested warrant. But we must judge the constitutionality of their conduct in light of the information available to them at the time they acted.

Id. The key here is that actual knowledge of error invalidates the search even if a reasonable officer would not have known based on the facts; subjective realization, or awareness of facts sufficient so that a reasonable officer would realize, is sufficient. See *id.* at 86–87.

In other instances dealing with mistake, the Court has also looked to the officer’s actual belief. See, e.g., *Illinois v. Rodriguez*, 497 U.S. 177, 186 (1990) (“The Constitution is no more violated when officers enter without a warrant because they reasonably (though erroneously) believe that the person who has consented to their entry is a resident of the premises, than it is violated when they enter without a warrant because they reasonably (though erroneously) believe they are in pursuit of a violent felon who is about to escape.”); cf. *Groh v. Ramirez*, 540 U.S. 551, 568 (2004) (Kennedy, J., dissenting) (arguing that *Garrison* should be extended to afford some latitude for “honest mistakes” in police affidavits applying for search warrants). Lower courts also make the point. See, e.g., *Torres v. City of Madera*, 524 F.3d 1053, 1056 (9th Cir. 2008).

¹⁷⁵ *Whren v. United States*, 517 U.S. 806, 814 (1996).

broad categories of heretofore permissible forms of police conduct would not be called into question. The only issues now submerged in the objective test that would become cognizable are forms of discrimination that are already prohibited by other provisions of the Constitution.

C. *Six Justices Who Participated in Whren Have Reevaluated It*

There is another important way in which *Whren*'s force as precedent is limited, giving the Court room to reconsider it. In different contexts, *Whren* has given rise to discomfort for six of the nine Justices who initially supported it. In *Arkansas v. Sullivan*,¹⁷⁶ the Court reversed an Arkansas Supreme Court decision suppressing evidence because the police stopped a motorist based on probable cause as a pretext for a drug investigation.¹⁷⁷ Justice Ginsburg, writing also for Justices Stevens, O'Connor, and Breyer, concurred, "[g]iven the Court's current case law."¹⁷⁸ But these Justices expressed concern that, after *Whren* and its progeny, "such exercises of official discretion are unlimited by the Fourth Amendment."¹⁷⁹ They noted that the Court has in the past "departed from *stare decisis* when necessary to bring its opinions into agreement with experience and with facts newly ascertained,"¹⁸⁰ and suggested that the Court be prepared to do so if abuses appeared from the unlimited discretion conferred on police.¹⁸¹

In *Wilson*, the Court held that officers making traffic stops may order the passengers, as well as the driver, out of the vehicle, with no individualized suspicion.¹⁸² Justice Kennedy noted in his dissent that "[t]he practical effect of our holding in *Whren*, of course, is to allow the police to stop vehicles in almost countless circumstances."¹⁸³ It is unclear whether this constitutes an expression of second thoughts either about *Whren*'s holding or scope, but he noted that "[w]hen *Whren* is coupled with today's holding, the Court puts tens of millions of passengers at risk of arbitrary control by the police."¹⁸⁴

¹⁷⁶ *Arkansas v. Sullivan*, 532 U.S. 769 (2001) (per curiam).

¹⁷⁷ *See id.* at 771.

¹⁷⁸ *Id.* at 773 (Ginsburg, J., concurring).

¹⁷⁹ *Id.*

¹⁸⁰ *Id.* (internal quotation marks omitted).

¹⁸¹ *See id.*

¹⁸² *See Maryland v. Wilson*, 519 U.S. 408, 415 (1997).

¹⁸³ *Id.* at 423 (Kennedy, J., dissenting).

¹⁸⁴ *Id.*

Concurring in *United States v. Knights*,¹⁸⁵ Justice Souter noted that he would “reserve the question whether *Whren*’s holding, that ‘[s]ubjective intentions play no role in ordinary, probable-cause Fourth Amendment analysis,’ should extend to searches based only upon reasonable suspicion.”¹⁸⁶ *Knights* involved a warrantless search of a probationer’s residence based on reasonable suspicion and a condition of his probation, which the Court held was allowed under the Fourth Amendment;¹⁸⁷ the majority opinion cited *Whren* only in passing.¹⁸⁸ Nevertheless, Justice Souter’s concurrence is important because it emphasizes that *Whren* spoke specifically to probable cause.

Furthermore, in *Atwater v. City of Lago Vista*,¹⁸⁹ Justice Souter, writing for the Court, observed that “*Terry* certainly supports a more finely tuned approach to the Fourth Amendment when police act without the traditional justification that either a warrant (in the case of a search) or probable cause (in the case of arrest) provides.”¹⁹⁰ Therefore, precedent leaves room for considering application of *Whren* to searches and seizures based on reasonable suspicion alone, and in the context of searches and seizures tainted by antecedent constitutional violations.

III. REASONABLENESS AS REQUIRING CONSTITUTIONALITY

A remarkable feature of *Whren* is its implication that racial discrimination is validated by the principle that in “ordinary”¹⁹¹ cases, the existence of probable cause establishes reasonableness.¹⁹² The Court then seemed to conclude that racial profiling is in some sense an ordinary, not unusual, feature of the criminal justice system. Although some judges might believe that racial bias is remarkable enough to take a case out of the routine Fourth Amendment framework, discrimination may be ordinary as a matter of fact. For two major reasons, however, racial selectivity in enforcement is not constitutionally ordinary as a matter of law.

185 *United States v. Knights*, 534 U.S. 112 (2001).

186 *Id.* at 123 (Souter, J., concurring) (alteration in original) (citation omitted).

187 *See id.* at 121 (majority opinion).

188 *See id.* at 122.

189 *Atwater v. City of Lago Vista*, 532 U.S. 318 (2001).

190 *Id.* at 347 n.16.

191 *See Whren v. United States*, 517 U.S. 806, 813 (1996).

192 *See id.* at 813, 818–19. The Court noted that when probable cause exists, balancing is only performed in situations involving “searches or seizures conducted in an extraordinary manner,” including the use “of deadly force, . . . entry into a home without a warrant, [and] physical penetration of the body.” *Id.* at 818 (citations omitted) (citing *Tennessee v. Garner*, 471 U.S. 1 (1985); *Winston v. Lee*, 470 U.S. 753 (1985); *Welsh v. Wisconsin*, 466 U.S. 740 (1984)).

One problem arises in attempting to divorce from the Fourth Amendment the decision to stop or arrest based on race, which the Court explains is exclusively a Fourteenth Amendment Equal Protection Clause issue.¹⁹³ However, the Fourth Amendment applies to the states not of its own force, but through the Due Process Clause of the Fourteenth Amendment.¹⁹⁴ The Court has held that that very same Due Process Clause contains an antidiscrimination principle.¹⁹⁵ Thus, *Whren* posits a Due Process Clause which simultaneously prohibits and is indifferent to discrimination. This is untenable. In addition, the Court has failed to explain why reasonableness in *Whren* was not informed by its legal context, including other constitutional provisions. In other cases, the Court has considered the impact of relevant law outside the Fourth Amendment in determining reasonableness.¹⁹⁶

Another problem arises when the Fourteenth Amendment issue is treated as distinct from the Fourth Amendment. In holding that the unconstitutional decision to discriminate is unrelated to the resulting search, the Court inexplicably overlooks a major branch of constitutional criminal procedure, the fruit of the poisonous tree doctrine, which invalidates otherwise permissible searches, seizures, and interrogations because they occurred as a result of an antecedent constitutional violation. Unless the Court concludes that racial discrimination is a matter of particular unconcern to the Constitution, a search, seizure, or interrogation based on a prior violation of the Due Process or Equal Protection Clauses should be regarded as fruit of the poisonous tree.

A. *Can a Violation of the Due Process Clause Be “Reasonable” Under the Due Process Clause?*

The contention that the Constitution should be construed as a whole—as a unified text—is widely accepted:

A range of modern scholars, such as Charles Black, John Hart Ely, Laurence Tribe, Akhil Amar, and Vicki Jackson, have argued against constitutional interpretation that treats clauses of the document in isolation. Their argument is a compelling one: The Constitution was adopted as a whole (and its subsequent amendments operate against the back-

¹⁹³ See *id.* at 813.

¹⁹⁴ See *Mapp v. Ohio*, 367 U.S. 643, 655 (1961).

¹⁹⁵ See *Bolling v. Sharpe*, 347 U.S. 497, 498–99 (1954).

¹⁹⁶ See *infra* Part III.A.2.

drop of that whole), and its various parts are most sensibly read if they are construed together.¹⁹⁷

In two relevant ways, the Court has followed this approach. First, the protections of the Bill of Rights are read in light of the Fourteenth Amendment. They generally contain a nondiscrimination principle, often explicitly based on Fourteenth Amendment precedents. Second, the Fourth Amendment and “reasonable” searches and seizures are understood in light of other relevant provisions of the Constitution. *Whren*’s dicta is in tension with both of these bodies of law.

1. *The Antidiscrimination Due Process Clause*

Whren concludes that discriminatory conduct may be unconstitutional, but it is nonetheless “reasonable” under the Fourth Amendment. *Whren* rests on a technical distinction; the Fourth Amendment, the Court explains, is different from the Fourteenth Amendment’s Equal Protection Clause, and they can have different meanings. One problem with this is that the case came from the District of Columbia, where the Equal Protection Clause does not apply directly. The opinion’s failure to explain that the governing standard with respect to a discrimination claim came from the equal protection component of

¹⁹⁷ Paul M. Schwartz & William Michael Treanor, *Eldred and Lochner: Copyright Term Extension and Intellectual Property as Constitutional Property*, 112 YALE L.J. 2331, 2410–11 (2003) (footnote omitted) (citing CHARLES L. BLACK, JR., *STRUCTURE AND RELATIONSHIP IN CONSTITUTIONAL LAW* (1969); JOHN HART ELY, *DEMOCRACY AND DISTRUST: A THEORY OF JUDICIAL REVIEW* 11–41 (1980); 1 LAURENCE H. TRIBE, *AMERICAN CONSTITUTIONAL LAW* 38–41 (3d ed. 2000); Akhil Reed Amar, *The Document and the Doctrine*, 114 HARV. L. REV. 26 (2000); Vicki C. Jackson, *Holistic Interpretation: Fitzpatrick v. Bitzer and Our Bifurcated Constitution*, 53 STAN. L. REV. 1259 (2001)); see also Richard Albert, *Constitutional Handcuffs*, 42 ARIZ. ST. L.J. 663, 683 (2010) (“To regard a constitution as a mere compilation of individual provisions, each subject to a sliding scale of worth, is to devalue the constitutional text as a document whose constituent parts must be read together to give the larger whole its full meaning.”); J.M. Balkin & Sanford Levinson, *The Canons of Constitutional Law*, 111 HARV. L. REV. 963, 1013 (1998) (“We have witnessed in our own time the ‘shrinking’ of the Bill of Rights so that in the imagination of constitutional law professors it encompasses only the First Amendment, the Takings Clause, and the Due Process Clause. This way of thinking destroys the sense that the component parts of the Bill of Rights are interrelated.”); Steven G. Calabresi, *We Are All Federalists, We Are All Republicans: Holism, Synthesis, and the Fourteenth Amendment*, 87 GEO. L.J. 2273, 2301 (1999) (reviewing AKHIL REED AMAR, *THE BILL OF RIGHTS: CREATION AND RECONSTRUCTION* (1998)) (suggesting that one should read “the Fourteenth Amendment and the first ten amendments together with the original Constitution and with the Thirteenth and Fifteenth Amendments” to determine the scope of the Fourteenth Amendment as it affects the states). Several articles address the effect of the post-Reconstruction equality amendments on the interpretation of the Equal Protection Clause. See, e.g., Steven G. Calabresi & Julia T. Rickert, *Originalism and Sex Discrimination*, 90 TEX. L. REV. 1 (2011); Michael C. Dorf, *Equal Protection Incorporation*, 88 VA. L. REV. 951 (2002); Reva B. Siegel, *She the People: The Nineteenth Amendment, Sex Equality, Federalism, and the Family*, 115 HARV. L. REV. 947 (2002).

the Fifth Amendment's Due Process Clause demonstrates that the case failed to attract the Justices' most careful and precise analytical attention.¹⁹⁸

When evaluating a search and seizure question in a state, as opposed to the District of Columbia, of course, the Fourth Amendment does not apply directly. Instead, the restrictions of the Fourth Amendment are incorporated in the Due Process Clause of the Fourteenth Amendment, and thereby applied to the states.¹⁹⁹ Similarly, the exclusionary rule applies to the states because "the Fourth and Fourteenth Amendments require the exclusion [of] evidence"²⁰⁰ obtained as the result of an unreasonable search or seizure.

The Court's conclusion in *Whren*, then, necessarily implied not that the *Fourth* Amendment and the *Fourteenth* Amendment's Equal Protection Clause were distinct. Rather, its decision implied that the *Fourteenth* Amendment's Equal Protection Clause and the *Fourteenth* Amendment's Due Process Clause were distinct. The rationale makes perfect sense if the former is concerned with discrimination, while the latter is indifferent to it. But in several cases, the Court has read the

¹⁹⁸ Professor LaFave has stated:

The totality of the Court's analysis in *Whren* is, to put it mildly, quite disappointing. By misstating its own precedents and mischaracterizing the petitioners' central claim, the Court managed to trivialize what in fact is an exceedingly important issue regarding a pervasive law-enforcement practice. Certainly one would have expected more from an opinion which drew neither a dissent nor a cautionary concurrence from any member of the Court. I am not suggesting that the issue raised by petitioners is an easy one, but it certainly deserved a much more honest and forthright treatment than it received.

Wayne R. LaFave, *The "Routine Traffic Stop" from Start to Finish: Too Much "Routine," Not Enough Fourth Amendment*, 102 MICH. L. REV. 1843, 1859 (2004).

¹⁹⁹ See, e.g., *City of Ontario, Cal. v. Quon*, 560 U.S. 746, 750 (2010) ("The employee contends that the privacy of the messages is protected by the ban on 'unreasonable searches and seizures' found in the Fourth Amendment to the United States Constitution, made applicable to the States by the Due Process Clause of the Fourteenth Amendment." (citing *Mapp v. Ohio*, 367 U.S. 643 (1961))); *Berger v. New York*, 388 U.S. 41, 53 (1967) ("It is now well settled that 'the Fourth Amendment's right of privacy has been declared enforceable against the States through the Due Process Clause of the Fourteenth' Amendment." (quoting *Mapp*, 367 U.S. at 655)). See generally, e.g., Justin F. Marceau, *Un-Incorporating the Bill of Rights: The Tension Between the Fourteenth Amendment and the Federalism Concerns That Underlie Modern Criminal Procedure Reforms*, 98 J. CRIM. L. & CRIMINOLOGY 1231, 1245-52 (2008) (tracing history of incorporation of Bill of Rights).

²⁰⁰ *Brown v. Illinois*, 422 U.S. 590, 606 (1975) (White, J., concurring in the judgment); see also *Kaiser v. New York*, 394 U.S. 280, 282-83 (1969) (discussing "the exclusionary rule of the Fourth and Fourteenth Amendments"); cf. *Withrow v. Williams*, 507 U.S. 680, 712 (1993) (O'Connor, J., concurring in part and dissenting in part) ("[U]nder the Fifth and Fourteenth Amendments, we require the suppression of not only compelled confessions but tainted subsequent confessions as well.").

Fourteenth Amendment as a whole, and in light of the Amendment's history and purpose.²⁰¹ In a 1945 decision, the Court rejected a segregated union's due process challenge to a state antidiscrimination law: "A judicial determination that such legislation violated the Fourteenth Amendment would be a distortion of the policy manifested in that amendment, which was adopted to prevent state legislation designed to perpetuate discrimination on the basis of race or color."²⁰² As Justice Black argued in his concurrence in *Heart of Atlanta Motel, Inc. v. United States*,²⁰³ "it would be highly ironical to use the guarantee of due process—a guarantee which plays so important a part in the Fourteenth Amendment, an amendment adopted with the predominant aim of protecting Negroes from discrimination—in order to strip Congress of power to protect Negroes from discrimination."²⁰⁴ Further, as the Court explained in *Shelley v. Kraemer*²⁰⁵:

201 See *Palmer v. Thompson*, 403 U.S. 217, 220 (1971) ("History shows that the achievement of equality for Negroes was the urgent purpose not only for passage of the Fourteenth Amendment but for the Thirteenth and Fifteenth Amendments as well."); *Jones v. Alfred H. Mayer Co.*, 392 U.S. 409, 441 n.78 (1968) ("Mr. Justice Harlan, joined by Mr. Justice Day, dissented [in *Hodges v. United States*, 203 U.S. 1 (1906)]. In their view, the interpretation the majority placed upon the Thirteenth Amendment was 'entirely too narrow and . . . hostile to the freedom established by the Supreme Law of the land.' That interpretation went far, they thought, 'towards neutralizing many declarations made as to the object of the recent Amendments of the Constitution, a common purpose of which, this court has said, was to secure to a people theretofore in servitude, the free enjoyment, without discrimination merely on account of their race, of the essential rights that appertain to American citizenship and to freedom.'" (omission in original) (citations omitted)); *Ex parte Virginia*, 100 U.S. 339, 344–45 (1879) ("One great purpose of these amendments was to raise the colored race from that condition of inferiority and servitude in which most of them had previously stood, into perfect equality of civil rights with all other persons within the jurisdiction of the States. They were intended to take away all possibility of oppression by law because of race or color."); *id.* at 361 (Field, J., dissenting) ("The generality of the language used necessarily extends some of their provisions to all persons of every race and color; but in construing the amendments and giving effect to them, the occasion of their adoption and the purposes they were designed to attain should be always borne in mind."); *Strauder v. West Virginia*, 100 U.S. 303, 307 (1879) ("If this is the spirit and meaning of the amendment, whether it means more or not, it is to be construed liberally, to carry out the purposes of its framers."); *Slaughter-House Cases*, 83 U.S. (16 Wall.) 36, 71 (1872) ("We repeat, then, in the light of this recapitulation of events, almost too recent to be called history, but which are familiar to us all; and on the most casual examination of the language of these amendments, no one can fail to be impressed with the one pervading purpose found in them all, lying at the foundation of each, and without which none of them would have been even suggested; we mean the freedom of the slave race, the security and firm establishment of that freedom, and the protection of the newly-made freeman and citizen from the oppressions of those who had formerly exercised unlimited dominion over him."); see also *The Civil Rights Cases*, 109 U.S. 3, 44 (1883) (Harlan, J., dissenting) ("[E]ach amendment was addressed primarily to the grievances of that race . . .").

202 *Ry. Mail Ass'n v. Corsi*, 326 U.S. 88, 93–94 (1945).

203 *Heart of Atlanta Motel, Inc. v. United States*, 379 U.S. 241 (1964).

204 *Id.* at 278 (Black, J., concurring).

205 *Shelley v. Kraemer*, 334 U.S. 1 (1948).

Whatever else the framers sought to achieve, it is clear that the matter of primary concern was the establishment of equality in the enjoyment of basic civil and political rights and the preservation of those rights from discriminatory action on the part of the States based on considerations of race or color. Seventy-five years ago this Court announced that the provisions of the Amendment are to be construed with this fundamental purpose in mind.²⁰⁶

The tension in *Whren* goes deeper because the Due Process Clause itself contains an antidiscrimination principle. Akhil Amar explains that this was clear when the Amendment was drafted:

[F]or the framers and ratifiers of the Fourteenth Amendment, the words of its Equal Protection Clause were not expressing a *different* idea than the words of the Due Process Clause but were elaborating the *same* idea: the Equal Protection Clause was in part a clarifying gloss on the due process idea. (Indeed, an early draft of the Amendment spoke of “equal protection in the rights of life, liberty, and property.”)²⁰⁷

This is evident in *Cooper v. Aaron*,²⁰⁸ a Fourteenth Amendment case, which noted that “[t]he right of a student not to be segregated on racial grounds in schools so maintained is indeed so fundamental and pervasive that it is embraced in the concept of due process of law.”²⁰⁹

For this proposition, the Court cited *Bolling v. Sharpe*,²¹⁰ which prohibited segregation in District of Columbia public schools by applying equal protection principles of the Fifth Amendment’s Due Process Clause to the federal government.²¹¹ Subsequent cases make

²⁰⁶ *Id.* at 23.

²⁰⁷ Akhil Reed Amar, *Intratextualism*, 112 HARV. L. REV. 747, 772 (1999) (emphasis added) (quoting CONG. GLOBE, 39th Cong., 1st Sess. 1034 (1866)); see also Akhil Reed Amar, Terry and Fourth Amendment First Principles, 72 ST. JOHN’S L. REV. 1097, 1098–99, 1123–26 (1998); Ryan C. Williams, *The One and Only Substantive Due Process Clause*, 120 YALE L.J. 408, 480–81, 483 n.340 (2010) (discussing legislative history of Fourteenth Amendment).

²⁰⁸ *Cooper v. Aaron*, 358 U.S. 1 (1958).

²⁰⁹ *Id.* at 19 (citing *Bolling v. Sharpe*, 347 U.S. 497 (1954)); see also William G. Ross, *The Constitutional Significance of the Scottsboro Cases*, 28 CUMB. L. REV. 591, 593 (1998) (noting that “the due process clause [was] originally intended as a means of preventing racial discrimination”).

²¹⁰ *Bolling v. Sharpe*, 347 U.S. 497 (1954).

²¹¹ See *id.* at 499–500. The Court noted that “the concepts of equal protection and due process[] both stem[] from our American ideal of fairness.” *Id.* at 499. The Court ordinarily views the Fifth Amendment’s equal protection component as identical to the Fourteenth Amendment’s Equal Protection Clause, further demonstrating that due process also prohibits discrimination. See, e.g., *Adarand Constructors, Inc. v. Peña*, 515 U.S. 200, 217–18 (1995).

explicit the principle that the Fourteenth Amendment's Due Process Clause also prohibits discrimination, at least as to matters of life, liberty, and property.²¹² In *Loving v. Virginia*,²¹³ for example, the Court invalidated state antimiscegenation laws based on both the Equal Protection Clause, and the Due Process Clause. The Court explained: "To deny this fundamental freedom on so unsupportable a basis as the racial classifications embodied in these statutes, classifications so directly subversive of the principle of equality at the heart of the Fourteenth Amendment, is surely to deprive all the State's citizens of liberty without due process of law."²¹⁴ Other cases also show that the Due Process Clause contains an antidiscrimination principle, which the Court has recognized in procedural due process cases,²¹⁵ the "void

²¹² "[A]n arrest . . . of course constitutes a temporary deprivation of liberty." *FDIC v. Mallen*, 486 U.S. 230, 241 (1988). Several courts have persuasively argued that there is a liberty interest in intrastate travel. See *Johnson v. City of Cincinnati*, 310 F.3d 484, 498 (6th Cir. 2002); *Spencer v. Casavilla*, 903 F.2d 171, 174 (2d Cir. 1990) ("[O]ur Court has held that the Constitution also protects the right to travel freely within a single state.").

²¹³ *Loving v. Virginia*, 388 U.S. 1 (1967).

²¹⁴ *Id.* at 12; see also *Zablocki v. Redhail*, 434 U.S. 374, 383 (1978) ("The Court's opinion [in *Loving*] could have rested solely on the ground that the statutes discriminated on the basis of race in violation of the Equal Protection Clause. But the Court went on to hold that the laws arbitrarily deprived the couple of a fundamental liberty protected by the Due Process Clause, the freedom to marry." (citation omitted)). Other cases make the same point. See, e.g., *Cleveland Bd. of Educ. v. LaFleur*, 414 U.S. 632, 640 (1974) ("Because public school maternity leave rules directly affect one of the basic civil rights of man, the Due Process Clause of the Fourteenth Amendment requires that such rules must not needlessly, arbitrarily, or capriciously impinge upon this vital area of a teacher's constitutional liberty." (internal quotation marks and citation omitted)); *Mayer v. City of Chicago*, 404 U.S. 189, 193 (1971) (noting that holding of *Griffin v. Illinois*, 351 U.S. 12, 17 (1956), "rested on the 'constitutional guaranties of due process and equal protection both [of which] call for procedures in criminal trials which allow no invidious discriminations between persons and different groups of persons.'" (alteration in original) (quoting *Griffin*, 351 U.S. at 17)).

²¹⁵ See *Ham v. South Carolina*, 409 U.S. 524, 526–27 (1973) ("Since one of the purposes of the Due Process Clause of the Fourteenth Amendment is to insure these essential demands of fairness, and since a principal purpose of the adoption of the Fourteenth Amendment was to prohibit the States from invidiously discriminating on the basis of race, we think that the Fourteenth Amendment required the judge in this case to interrogate the jurors upon the subject of racial prejudice." (internal quotation marks and citations omitted)); *Peters v. Kiff*, 407 U.S. 493, 504 (1972) (Marshall, J., plurality opinion) ("Accordingly, we hold that, whatever his race, a criminal defendant has standing to challenge the system used to select his grand or petit jury, on the ground that it arbitrarily excludes from service the members of any race, and thereby denies him due process of law."); *id.* at 507 (White, J., concurring in the judgment) (referring to "the strong statutory policy [against race discrimination in jury selection], which reflects the central concern of the Fourteenth Amendment with racial discrimination"); cf. *Campbell v. Louisiana*, 523 U.S. 392, 400–02 (1998) (holding that white defendant had standing to raise due process challenge to discrimination against African Americans in selection of grand jurors, but not reaching scope of due process protection).

for vagueness” line of decisions,²¹⁶ and the cases holding that due process is violated by decisions on “arbitrary” grounds.²¹⁷

Consistent with their Fourteenth Amendment background, incorporated rights generally have their own antidiscrimination features. That is, the principles of the Fourteenth Amendment have incorporated themselves into the protections of the Bill of Rights as applied to the states. Justice Alito, writing for the Court, recognized this in *McDonald v. City of Chicago*,²¹⁸ which rejected the proposition that the Fourteenth Amendment did nothing more than prohibit discrimi-

²¹⁶ See *FCC v. Fox Television Stations, Inc.*, 132 S. Ct. 2307, 2317 (2012) (“Even when speech is not at issue, the void for vagueness doctrine addresses at least two connected but discrete due process concerns: first, that regulated parties should know what is required of them so they may act accordingly; second, precision and guidance are necessary so that those enforcing the law do not act in an arbitrary or discriminatory way.” (citing *Grayned v. City of Rockford*, 408 U.S. 104, 108–09 (1972))); *Skilling v. United States*, 561 U.S. 358, 402–03 (2010) (“To satisfy due process, ‘a penal statute [must] define the criminal offense [1] with sufficient definiteness that ordinary people can understand what conduct is prohibited and [2] in a manner that does not encourage arbitrary and discriminatory enforcement.’” (alterations in original) (quoting *Kolender v. Lawson*, 461 U.S. 352, 357 (1983))); see also *City of Chicago v. Morales*, 527 U.S. 41, 56 (1999) (plurality opinion).

²¹⁷ See William N. Eskridge, Jr., *Destabilizing Due Process and Evolutive Equal Protection*, 47 UCLA L. REV. 1183, 1212 (2000) (“[T]he Fifth Amendment cases . . . suggest that the antiarbitrariness principle of the Due Process Clause can ‘incorporate’ the antidiscrimination principle of the Equal Protection Clause.”). Decisions based on race are generally arbitrary. See *Wayte v. United States*, 470 U.S. 598, 608 (1985) (citing *Bordenkircher v. Hayes*, 434 U.S. 357, 364 (1978)). Due process requires that decisions not be made on arbitrary grounds. See *Cnty. of Sacramento v. Lewis*, 523 U.S. 833, 847 (1998) (“[T]he substantive component of the Due Process Clause is violated by executive action only when it ‘can properly be characterized as arbitrary, or conscience shocking, in a constitutional sense.’” (quoting *Collins v. Harker Heights*, 503 U.S. 115, 128 (1992))); *Nebbia v. New York*, 291 U.S. 502, 525 (1934) (“And the guaranty of due process, as has often been held, demands only that the law shall not be unreasonable, arbitrary, or capricious, and that the means selected shall have a real and substantial relation to the object sought to be attained.”); *Rd. Improvement Dist. No. 1 v. Mo. Pac. R.R. Co.*, 274 U.S. 188, 191 (1927) (“If, as found by the courts below, the assessment was plainly arbitrary and unreasonably discriminatory, it was in violation of both the due process and the equal protection clauses of the Fourteenth Amendment . . .”); *Truax v. Corrigan*, 257 U.S. 312, 329–30 (1921) (“It is true that no one has a vested right in any particular rule of the common law, but it is also true that the legislative power of a state can only be exerted in subordination to the fundamental principles of right and justice which the guaranty of due process in the Fourteenth Amendment is intended to preserve, and that a purely arbitrary or capricious exercise of that power whereby a wrongful and highly injurious invasion of property rights, as here, is practically sanctioned and the owner stripped of all real remedy, is wholly at variance with those principles.”); *Dobbins v. City of Los Angeles*, 195 U.S. 223, 241 (1904) (“[The facts and circumstances bring legislation] within that class of cases wherein the court may restrain the arbitrary and discriminatory exercise of the police power which amounts to a taking of property without due process of law and an impairment of property rights protected by the Fourteenth Amendment to the Federal Constitution.”).

²¹⁸ *McDonald v. City of Chicago*, 561 U.S. 742 (2010).

nation with respect to incorporated rights, but assumed it did at least that:

First, while § 1 of the Fourteenth Amendment contains ‘an antidiscrimination rule,’ namely, the Equal Protection Clause, municipal respondents can hardly mean that § 1 does no more than prohibit discrimination. If that were so, then the First Amendment, as applied to the States, would not prohibit nondiscriminatory abridgments of the rights to freedom of speech or freedom of religion; the Fourth Amendment, as applied to the States, would not prohibit all unreasonable searches and seizures but only discriminatory searches and seizures—and so on.²¹⁹

Innocently, as if *Whren* had never been decided, the Court recognized that because of its relationship with the Fourteenth Amendment, the Fourth Amendment prohibits “discriminatory searches and seizures” as a subset of “unreasonable searches and seizures.”

This language in *McDonald* was no slip. The Court has recognized that the substance of the amendments incorporated by the Fourteenth Amendment is violated by unreasonable discrimination, including the First Amendment’s Free Exercise, Establishment, and Speech and Press Clauses,²²⁰ the Fifth Amendment’s Due Process

²¹⁹ *Id.* at 778.

²²⁰ See *Capitol Square Review & Advisory Bd. v. Pinette*, 515 U.S. 753, 766 (1995) (Scalia, J., plurality opinion) (suggesting that “giving sectarian religious speech preferential access to a forum . . . would violate the Establishment Clause (as well as the Free Speech Clause, since it would involve content discrimination)”; *Bd. of Educ. v. Grumet*, 512 U.S. 687, 715 (1994) (O’Connor, J., concurring in part and concurring in the judgment) (“In my view, the Religion Clauses—the Free Exercise Clause, the Establishment Clause, the Religious Test Clause, Art. VI, cl. 3, and the Equal Protection Clause as applied to religion—all speak with one voice on this point: Absent the most unusual circumstances, one’s religion ought not affect one’s legal rights or duties or benefits.”); *id.* at 728 (Kennedy, J., concurring in the judgment) (“[T]he Establishment Clause forbids the government to use religion as a line-drawing criterion. In this respect, the Establishment Clause mirrors the Equal Protection Clause.”); *Church of the Lukumi Babalu Aye, Inc. v. City of Hialeah*, 508 U.S. 520, 534 (1993) (“The Free Exercise Clause, like the Establishment Clause, extends beyond facial discrimination. The Clause forbids subtle departures from neutrality, and covert suppression of particular religious beliefs.” (internal quotation marks and citations omitted)); *Erznoznik v. City of Jacksonville*, 422 U.S. 205, 215 (1975); *Gillette v. United States*, 401 U.S. 437, 449 n.14 (1971) (“[An Equal Protection claim] is not an independent argument in the context of these cases. We hold that the section survives the Establishment Clause because there are neutral, secular reasons to justify the line that Congress has drawn, and it follows as a more general matter that the line is neither arbitrary nor invidious.” (citation omitted)); *United States v. Seeger*, 380 U.S. 163, 188 (1965) (Douglas, J., concurring) (“[A discriminatory religious draft exception] would violate the Free Exercise Clause of the First Amendment. It would also result in a denial of equal protection by preferring some religions over others—an invidious discrimination that would run afoul of the Due Process Clause of the Fifth Amendment.”); *Niemotko v. Maryland*, 340 U.S. 268, 272 (1951) (“The conclusion is ines-

Clause,²²¹ the Sixth Amendment jury trial right,²²² and the Eighth Amendment.²²³ In many instances, Fourteenth Amendment Equal Protection Clause precedents have informed these decisions.²²⁴ The Fourth Amendment has not been wholly immune from the benign influences of the principles of the Fourteenth Amendment; the Court has found Fourth Amendment violations in situations where officers could exercise “standardless and unconstrained discretion.”²²⁵

2. *Constitutionality as Informing Reasonableness*

Nondiscrimination should be incorporated into reasonableness for another reason—namely, that unconstitutional searches are unreasonable. This rationale is independent of the idea that incorporation through the Fourteenth Amendment carries with it some of the Fourteenth Amendment’s principles. Instead, it follows from the concept of reasonableness in the Fourth Amendment, which would apply even

capable that the use of the park was denied because of the City Council’s dislike for or disagreement with the Witnesses or their views. The right to equal protection of the laws, in the exercise of those freedoms of speech and religion protected by the First and Fourteenth Amendments, has a firmer foundation than the whims or personal opinions of a local governing body.”).

²²¹ See *Bolling v. Sharpe*, 347 U.S. 497, 499 (1954) (“The Fifth Amendment, which is applicable in the District of Columbia, does not contain an equal protection clause as does the Fourteenth Amendment which applies only to the states. But the concepts of equal protection and due process, both stemming from our American ideal of fairness, are not mutually exclusive. The ‘equal protection of the laws’ is a more explicit safeguard of prohibited unfairness than ‘due process of law,’ and, therefore, we do not imply that the two are always interchangeable phrases. But, as this Court has recognized, discrimination may be so unjustifiable as to be violative of due process.”).

²²² See *Taylor v. Louisiana*, 419 U.S. 522, 527–28 (1975) (finding the right to a jury trial violated by exclusion of women, citing, *inter alia*, *Smith v. Texas*, 311 U.S. 128, 130 (1940), an equal protection case); see also *Duren v. Missouri*, 439 U.S. 357, 368 n.26 (1979) (discussing the relevance of equal protection in jury discrimination cases in a Sixth Amendment fair cross section analysis). But see *Duren*, 439 U.S. at 371 n.* (Rehnquist, J., dissenting) (challenging majority’s holding that equal protection principles are incorporated into the Sixth Amendment).

²²³ See *McCleskey v. Kemp*, 481 U.S. 279, 313 (1987) (rejecting claims that a death penalty system with disparate impact based on race was invalid under the Eighth Amendment in part because evidence “does not demonstrate a constitutionally significant risk of racial bias affecting the Georgia capital sentencing process”).

²²⁴ See *Church of the Lukumi Babalu Aye, Inc.*, 508 U.S. at 540 (Kennedy, J., plurality opinion) (“In determining if the object of a law is a neutral one under the Free Exercise Clause, we can also find guidance in our equal protection cases. As Justice Harlan noted in the related context of the Establishment Clause, ‘[n]eutrality in its application requires an equal protection mode of analysis.’ Here, as in equal protection cases, we may determine the city council’s object from both direct and circumstantial evidence.” (alteration in original) (quoting *Walz v. Tax Comm’n of New York*, 397 U.S. 664, 696 (1970) (Harlan, J., concurring))); *Taylor*, 419 U.S. at 527; *Police Dep’t of Chi. v. Mosley*, 408 U.S. 92, 95–96 (1972).

²²⁵ See *Brown v. Texas*, 443 U.S. 47, 51 (1979); *Delaware v. Prouse*, 440 U.S. 648, 661–63 (1979).

in, for example, a federal prosecution where the equality principle of the Fifth Amendment's Due Process Clause and the protections of the Fourth Amendment applied wholly independently of each other.

In an article twice cited by the Court, Professor Thomas Davies argued that the prohibition against "unreasonable" searches was meant to prohibit "illegal" searches.²²⁶ This conclusion is bolstered by the fact that the Court sometimes uses "unreasonable," "illegal" (or "unlawful"), and "unconstitutional" search essentially interchangeably; on many occasions, Justices have used all three terms in the same case (although not always in the same opinion).²²⁷ Similarly, in an ar-

²²⁶ See Thomas Y. Davies, *Recovering the Original Fourth Amendment*, 98 MICH. L. REV. 547, 693 (1999) ("Because 'unreasonable' was a pejorative synonym for gross illegality or unconstitutionality, 'unreasonable searches and seizures' simply meant searches and seizures that were inherently illegal at common law."); *id.* at 693 n.421 ("The label 'unreasonable searches and seizures' also captured the second sort of inherently illegal warrant—one issued for a purpose not authorized by positive law . . ."). The two majority decisions that rely on this article are *Virginia v. Moore*, 553 U.S. 164, 169 (2008), and *Atwater v. City of Lago Vista*, 532 U.S. 318, 336 (2001). However, it should be noted that Justice Scalia, writing for the majority in *Moore*, cited the article to bolster the conclusion that subsequently enacted statutory law, in and of itself, cannot form the basis of a Fourth Amendment violation. See *Moore*, 553 U.S. at 169.

²²⁷ See, e.g., *Hudson v. Michigan*, 547 U.S. 586, 607 (2006) (Breyer, J., dissenting) ("[T]he Government [cannot] use information obtained during an illegal search to subpoena documents that they illegally viewed during that search."); *id.* at 608 ("The Fourth Amendment insists that an unreasonable search or seizure is, constitutionally speaking, an illegal search or seizure."); *id.* at 622 ("Ordinarily a court will simply look to see if the unconstitutional search produced the evidence."); *Kyllo v. United States*, 533 U.S. 27, 32 (2001) ("unconstitutional"); *id.* ("unreasonable"); *id.* at 44 n.3 (Stevens, J., dissenting) ("illegality"); Pa. Bd. of Prob. & Parole v. Scott, 524 U.S. 357, 362 (1998) ("illegal search or seizure"); *id.* at 364 ("unconstitutional"); *id.* at 369 ("unreasonable"); *Horton v. California*, 496 U.S. 128, 133 (1990) ("unreasonable"); *id.* at 135 ("illegal"); *id.* at 148 n.4 (Brennan, J., dissenting) ("unconstitutionality"); *Segura v. United States*, 468 U.S. 796, 804 (1984) ("illegal"); *id.* ("unconstitutional"); *id.* at 806 ("unreasonable"); *Stoner v. California*, 376 U.S. 483, 489 (1964) ("unconstitutional"); *id.* at 490 ("unreasonable"); *id.* ("unlawful"); *Mapp v. Ohio*, 367 U.S. 643, 648 (1961) ("illegal"); *id.* at 654 ("unconstitutional"); *id.* at 655 ("unreasonable"); *Gouled v. United States*, 255 U.S. 298, 305 (1921) ("unreasonable"), *abrogated on other grounds by* *Warden v. Hayden*, 387 U.S. 294 (1967); *id.* at 306 ("illegal"); *id.* at 311 ("unconstitutional"); *cf.* *Murray's Lessee v. Hoboken Land & Improvement Co.*, 59 U.S. (18 How.) 272, 276–77 (1855) ("To what principles, then, are we to resort to ascertain whether this process, enacted by congress, is due process? To this the answer must be twofold. We must examine the constitution itself, to see whether this process be in conflict with any of its provisions.").

This conclusion is reinforced by the idea that reasonable people obey the law, so therefore the categories of reasonable-and-illegal or reasonable-and-unconstitutional conduct are of doubtful coherence. This is suggested by the holding in *Florida v. Bostick*, 501 U.S. 429 (1991), that the "reasonable person" test for determining whether police action constitutes a seizure "presupposes an innocent person." *Id.* at 438. Reasonable people obey the law. See *United States v. Rice*, 995 F.2d 719, 722 n.1 (7th Cir. 1993) ("[R]easonable people do not commit crimes."); see also W. PAGE KEETON ET AL., PROSSER AND KEETON ON THE LAW OF TORTS § 36, at 221 (5th ed. 1984) ("[T]he reasonable man would obey the criminal law . . ."); Ezra Ripley Thayer, *Public Wrong and Private Action*, 27 HARV. L. REV. 317, 322 (1914).

ticle also relied upon by the Justices, Professor Akhil Amar proposed reading the Fourth Amendment in light of other provisions of the Bill of Rights and the Fourteenth Amendment:

In thinking about the broad command of the Fourth Amendment, we must examine other parts of the Bill of Rights to identify constitutional values that are elements of *constitutional* reasonableness. These other Clauses . . . can furnish benchmarks against which to measure reasonableness and components of reasonableness itself. A government policy that comes close to the limit set by one of these independent clauses can, if conjoined with a search or seizure, cross over into constitutional unreasonableness.²²⁸

The Court's precedents suggest that Professors Davies and Amar are right in their general insight that non-Fourth Amendment constitutional law is relevant to reasonableness. For example, in a case requiring special procedures for First Amendment materials, the Court explained: "The Fourth Amendment proscription against 'unreasonable . . . seizures,' applicable to the States through the Fourteenth Amendment, must not be read in a vacuum. A seizure reasonable as to one type of material in one setting may be unreasonable in a different setting or with respect to another kind of material."²²⁹

The Court has also interpreted constitutional provisions in light of the Constitution as a whole in other cases. In *Simmons v. United States*,²³⁰ the Court read the Fourth Amendment in light of the Fifth Amendment, holding that a defendant had the right to raise a suppression claim without subjecting himself to incrimination.²³¹ In *Mapp*

²²⁸ Amar, *supra* note 3, at 805 (footnote omitted); *id.* at 805 n.170 ("I include here the Fourteenth Amendment, which is very much part of our Bill of Rights today."). This paper was cited in *Moore*, 553 U.S. at 170, *Atwater*, 532 U.S. at 332 n.6, 336, and *City of West Covina v. Perkins*, 525 U.S. 234, 247 n.2 (1999) (Thomas, J., concurring in the judgment).

²²⁹ *Roaden v. Kentucky*, 413 U.S. 496, 501 (1973) (omission in original); *see also, e.g.*, *United States v. U.S. Dist. Court for the E. Dist. of Mich., S. Div.*, 407 U.S. 297, 313 (1972) ("National security cases, moreover, often reflect a convergence of First and Fourth Amendment values not present in cases of 'ordinary' crime. Though the investigative duty of the executive may be stronger in such cases, so also is there greater jeopardy to constitutionally protected speech."); *Stanford v. Texas*, 379 U.S. 476, 485 (1965) ("[T]he constitutional requirement that warrants must particularly describe the 'things to be seized' is to be accorded the most scrupulous exactitude when the 'things' are books, and the basis for their seizure is the ideas which they contain. No less a standard could be faithful to First Amendment freedoms." (footnote and citations omitted)); AKHIL REED AMAR, *THE BILL OF RIGHTS: CREATION AND RECONSTRUCTION* 75–76 (1998) (discussing interplay of First and Fourth Amendments).

²³⁰ *Simmons v. United States*, 390 U.S. 377 (1968).

²³¹ *See id.* at 394 ("Thus, [the defendant] was obliged either to give up . . . a valid Fourth Amendment claim or, in legal effect, to waive his Fifth Amendment privilege against self-incrim-

v. Ohio,²³² Justice Black's controlling concurrence, which made the exclusionary rule applicable to the states, relied on the Fourth and Fifth Amendments together.²³³ Thus, the Court later explained, "*Mapp* held that the Fifth Amendment privilege against self-incrimination implemented the Fourth Amendment in such cases, and that the two guarantees of personal security conjoined in the Fourteenth Amendment to make the exclusionary rule obligatory upon the States."²³⁴ Professor Amar also noted that "[t]he founding generation well understood the deep connections between the Fourth and Seventh Amendments," namely, that unreasonable searches would be followed by jury trials of the offending officials.²³⁵

In 2011, in the Fourth Amendment case *Kentucky v. King*, the Court pointed to "[l]egal tests based on reasonableness" from outside the Fourth Amendment context to support the outcome.²³⁶ Thus, the Court recognized that other law is relevant to the meaning of Fourth Amendment reasonableness. For example, the Supreme Court has elaborately developed the concept of reasonableness in the area of equal protection. Both the Fourth Amendment and the equal protection principle ask the same question; even under its most lenient test, the Court holds that "unreasonable" classifications or actions violate the Equal Protection Clause.²³⁷ Not surprisingly, the Court has often referred to racial discrimination as "unreasonable."²³⁸ As Justice

ination. In these circumstances, we find it intolerable that one constitutional right should have to be surrendered in order to assert another.").

²³² *Mapp v. Ohio*, 367 U.S. 643 (1961).

²³³ See *id.* at 662 (Black, J., concurring) ("[W]hen the Fourth Amendment's ban against unreasonable searches and seizures is considered together with the Fifth Amendment's ban against compelled self-incrimination, a constitutional basis . . . requires the exclusionary rule.").

²³⁴ *Malloy v. Hogan*, 378 U.S. 1, 8 (1964). But see *United States v. Leon*, 468 U.S. 897, 906 (1984) ("The Fifth Amendment theory has not withstood critical analysis or the test of time . . ."). It is, nevertheless, an example of the Court's consideration of the amendments as they relate to and inform each other.

²³⁵ AMAR, *supra* note 229, at 74.

²³⁶ See *Kentucky v. King*, 131 S. Ct. 1849, 1859 (2011).

²³⁷ See, e.g., *Allegheny Pittsburgh Coal Co. v. Cnty. Comm'n*, 488 U.S. 336, 344 (1989) ("[I]f the selection or classification is neither capricious nor arbitrary, and rests upon some reasonable consideration of difference or policy, there is no denial of the equal protection of the law." (quoting *Brown-Forman Co. v. Kentucky*, 217 U.S. 563, 573 (1910))); *City of Charlotte v. Local 660, Int'l Ass'n of Firefighters*, 426 U.S. 283, 287 (1976) ("[I]t was therefore reasonable, and permissible under the Equal Protection Clause, for the city to develop standards or restrictions to determine who would be eligible for withholding [certain funds from paychecks]."); *Radice v. New York*, 264 U.S. 292, 296 (1924) ("The limitation of the legislative prohibition to cities of the first and second class does not bring about an unreasonable and arbitrary classification.").

²³⁸ See, e.g., *McLaughlin v. Florida*, 379 U.S. 184, 190 (1964) (invalidating race-specific for-

Thomas recently noted in his concurrence in *Parents Involved in Community Schools v. Seattle School District No. 1*,²³⁹ the Court's holding in *Plessy v. Ferguson*²⁴⁰ was that it could not find segregation "unreasonable";²⁴¹ that is, one of the great blunders in the Court's history came because most of the Justices failed to recognize that racial discrimination was constitutionally unreasonable. There is a strong doctrinal basis for the Court's view, consistently articulated other than in *Whren*, that unconstitutional behavior is unreasonable.²⁴²

In another way, the Court has recognized that other bodies of law are relevant to Fourth Amendment reasonableness, namely, in evaluating the scope of the reasonable expectation of privacy. Professor Orin Kerr has explained that the "positive law model" is one of several models of Fourth Amendment protection regularly employed by

nication law and noting that "[c]lassification 'must always rest upon some difference which bears a reasonable and just relation to the act in respect to which the classification is proposed, and can never be made arbitrarily and without any such basis'" (quoting *Gulf, Colo. & Santa Fé Ry. v. Ellis*, 165 U.S. 150, 155 (1897)); *Bolling v. Sharpe*, 347 U.S. 497, 499 (1954) ("And in *Buchanan v. Warley*, 245 U.S. 60 [(1917)], the Court held that a statute which limited the right of a property owner to convey his property to a person of another race was, as an unreasonable discrimination, a denial of due process of law."); *Henderson v. United States*, 339 U.S. 816, 824 (1950) (holding that rail car segregation constituted "undue or unreasonable prejudice or disadvantage"); *Mitchell v. United States*, 313 U.S. 80, 97 (1941) (invalidating Interstate Commerce Commission ruling upholding segregation and stating that "the Interstate Commerce Act expressly extends its prohibitions to the subjecting of 'any particular person' to unreasonable discriminations"); see also *Carr v. Corning*, 182 F.2d 14, 30 (D.C. Cir. 1950) (Edgerton, J., dissenting) ("Discriminations based on race alone are obviously irrelevant and invidious and therefore arbitrary and unreasonable." (footnote omitted) (quoting *Steele v. Louisville & Nashville R.R.*, 323 U.S. 192, 203 (1944))); *Gulf Coast Research Lab. v. Amaraneni*, 722 So. 2d 530, 534 (Miss. 1998) ("[I]ntentional discrimination on the basis of race or ethnic heritage would constitute objectively unreasonable grounds on which to terminate the plaintiffs.").

²³⁹ *Parents Involved in Cmty. Sch. v. Seattle Sch. Dist. No. 1*, 551 U.S. 701 (2007).

²⁴⁰ *Plessy v. Ferguson*, 163 U.S. 537 (1896).

²⁴¹ See *Parents Involved in Cmty. Sch.*, 551 U.S. at 773 (Thomas, J., concurring) (noting that *Plessy* upheld segregation because it could not "say that a law which authorizes or even requires the separation of the two races in public conveyances is unreasonable").

²⁴² See AMAR, *supra* note 229, at 268 ("[W]e must recall that the Reconstruction Congress meant to stamp out antebellum laws and Black Codes that had designated blacks as special targets for various searches and seizures. . . . As our society gives meaning to the notion that searches and seizures must not be 'unreasonable,' the Fourteenth Amendment reminds us that equality values must supplement privacy values."); AKHIL REED AMAR, *THE CONSTITUTION AND CRIMINAL PROCEDURE: FIRST PRINCIPLES* 37 (1997) ("[S]urely equal protection principles call for concern when blacks bear the brunt of a government search or seizure policy."); Sheri Lynn Johnson, *Race and the Decision to Detain a Suspect*, 93 *YALE L.J.* 214, 237-50 (1983); see also Tracey Maclin, "Black and Blue Encounters"—Some Preliminary Thoughts About Fourth Amendment Seizures: Should Race Matter?, 26 *VAL. U. L. REV.* 243, 250 (1991) (arguing that race should be considered in Fourth Amendment's "reasonable person" standard).

the Court²⁴³: “When courts apply [this] model, they look at whether there is some law that prohibits or restricts the government’s action (other than the Fourth Amendment itself). If the government broke the law in order to obtain the information it did, the government conduct violated a reasonable expectation of privacy.”²⁴⁴

Clear examples of the positive law model come from the overflight cases. In *Florida v. Riley*,²⁴⁵ the plurality, authored by Justice White and joined by Chief Justice Rehnquist and Justices Scalia and Kennedy, upheld aerial surveillance in part because it was legal: “We would have a different case if flying at that altitude had been contrary to law or regulation.”²⁴⁶ They noted that “it is of obvious importance that the helicopter in this case was *not* violating the law.”²⁴⁷ In *Dow Chemical Co. v. United States*,²⁴⁸ the Court upheld aerial surveillance in part because the property scanned was “open to the view and observation of persons in aircraft lawfully in the public airspace.”²⁴⁹

Support for this approach also comes from the Court’s cases considering state and federal laws to determine whether a particular police practice is reasonable.²⁵⁰ The Court has also looked at community norms and practices.²⁵¹ If statutes and even nonlegal norms can be

²⁴³ See Orin S. Kerr, *Four Models of Fourth Amendment Protection*, 60 STAN. L. REV. 503, 506 (2007).

²⁴⁴ *Id.* at 516.

²⁴⁵ *Florida v. Riley*, 488 U.S. 445 (1989).

²⁴⁶ *Id.* at 451 (plurality opinion).

²⁴⁷ *Id.*; see also Justin Marceau, *Plurality Decisions: Upward-Flowing Precedent and Acoustic Separation*, 45 CONN. L. REV. 933, 988–91 (2013) (discussing application of plurality opinion in *Riley*).

²⁴⁸ *Dow Chem. Co. v. United States*, 476 U.S. 227 (1986).

²⁴⁹ *Id.* at 239.

²⁵⁰ See, e.g., *Atwater v. City of Lago Vista*, 532 U.S. 318, 343 (2001) (“[B]oth the legislative tradition of granting warrantless misdemeanor arrest authority and the judicial tradition of sustaining such statutes against constitutional attack are buttressed by legal commentary that, for more than a century now, has almost uniformly recognized the constitutionality of extending warrantless arrest power to misdemeanors without limitation to breaches of the peace.”); *Tennessee v. Garner*, 471 U.S. 1, 15–16 (1985) (“In evaluating the reasonableness of police procedures under the Fourth Amendment, we have also looked to prevailing rules in individual jurisdictions.” (citing *United States v. Watson*, 423 U.S. 411, 421–22 (1976))). But see *Virginia v. Moore*, 553 U.S. 164, 168–69 & n.3 (2008) (holding that violation of Virginia statute did not give rise to Fourth Amendment violation but also noting that *Boyd v. United States*, 116 U.S. 616, 622–23 (1886), “applied the principle that statutes enacted in the years immediately before or after the Amendment was adopted shed light on what citizens at the time of the Amendment’s enactment saw as reasonable”).

²⁵¹ See *Steagald v. United States*, 451 U.S. 204, 217 n.10 (1981) (“[T]he Amendment’s prohibition against ‘unreasonable searches and seizures’ must be interpreted ‘in light of contemporary norms and conditions.’” (quoting *Payton v. New York*, 445 U.S. 573, 591 n.33 (1980))).

used to shape the content of reasonableness, then surely the Constitution, the highest law, should be even more influential.²⁵²

In sum, the idea that the Constitution should be construed as a whole has prevailed both among scholars and in the Court.²⁵³ The provisions of the Bill of Rights have been interpreted in light of Fourteenth Amendment values, and racial discrimination is unreasonable. Moreover, Fourth Amendment reasonableness is specifically informed by other constitutional provisions and even by statutes and regulations. It follows that an unconstitutional search or seizure is unreasonable.

B. Unconstitutionally Motivated Searches as Fruit of the Poisonous Tree

The problem of a search or seizure with an unconstitutional predicate remains even if the Fourth Amendment, contrary to the Court's decisions, is conceptualized as wholly distinct from the Fourteenth Amendment and other bodies of constitutional law.²⁵⁴ The fruit of the

²⁵² The understanding of the Bill of Rights in 1868, when they were made applicable to the states, is relevant. See *Minnesota v. Dickerson*, 508 U.S. 366, 382 (1993) (Scalia, J., concurring) (“[P]erhaps [stop and frisk] was considered permissible by 1868, when the Fourteenth Amendment (the basis for applying the Fourth Amendment to the States) was adopted.”). See generally Barry Friedman, *Reconstructing Reconstruction: Some Problems for Originalists (and Everyone Else, Too)*, 11 U. PA. J. CONST. L. 1201 (2009) (focusing on the Reconstruction Amendments of the Constitution to illustrate the difficulty in interpreting a document that was enacted piecemeal).

²⁵³ See, e.g., *Alden v. Maine*, 527 U.S. 706, 713 (1999) (reaching conclusion based on “the Constitution’s structure, its history, and the authoritative interpretations by this Court”).

²⁵⁴ The Court has recognized that a single act or wrong can implicate more than one provision of the Constitution. For example, in *Loving v. Virginia*, 388 U.S. 1, 11–12 (1967), a discriminatory marriage law was invalidated under both the Due Process Clause and the Equal Protection Clause. Racial discrimination in the right to vote can simultaneously implicate the Fourteenth and Fifteenth Amendments. See, e.g., *Thornburg v. Gingles*, 478 U.S. 30, 35 (1986) (noting that *Mobile v. Bolden*, 446 U.S. 55 (1980), held that “in order to establish a violation . . . of the Fourteenth or Fifteenth Amendments, minority voters must prove that a contested electoral mechanism was intentionally adopted or maintained by state officials for a discriminatory purpose”); *Rogers v. Lodge*, 458 U.S. 613, 621 (1982) (agreeing with lower courts that “determination of discriminatory intent is a requisite to a finding of unconstitutional vote dilution under the Fourteenth and Fifteenth Amendments” (internal quotation marks omitted)); *Smith v. Allwright*, 321 U.S. 649, 657 (1944) (“The Fourteenth Amendment forbids a state from making or enforcing any law which abridges the privileges or immunities of citizens of the United States and the Fifteenth Amendment specifically interdicts any denial or abridgement by a State of the right of citizens to vote on account of color.”). Of course, the idea that a single act may implicate multiple constitutional principles applies outside of the discrimination context. See, e.g., *Printz v. United States*, 521 U.S. 898, 922–23 (1997) (invalidating federal firearms law imposing duties on states under both principles of federalism and separation of powers in the federal government); *United States v. James Daniel Good Real Prop.*, 510 U.S. 43, 49–50 (1993) (explaining that the “seizure of property implicates . . . the Fourth Amendment and the Fifth”);

poisonous tree doctrine holds that an otherwise lawful search, seizure, or interrogation may be invalid if it is tainted by an antecedent legal violation.

*Nardone v. United States*²⁵⁵ may be the first case recognizing the doctrine; the Court held that statements seized in violation of a statute must be suppressed, as well as the evidence derived from those statements.²⁵⁶ As the Court later explained, “the ‘fruit of the poisonous tree’ doctrine excludes evidence obtained from or as a consequence of lawless official acts.”²⁵⁷ Modern cases make clear that “‘fruit of the poisonous tree’ analysis lead[s] to exclusion of derivative evidence only where the underlying police misconduct infringes a ‘core’ constitutional right.”²⁵⁸

The Court has never applied the fruit of the poisonous tree doctrine to evidence tainted because it derived from a discriminatory arrest.²⁵⁹ The Court, however, has applied the doctrine to the fruits of unlawful arrests.²⁶⁰ The Court has also held that a statement obtained in violation of the Due Process Clause of the Fourteenth Amendment may taint subsequently obtained evidence,²⁶¹ suggesting that the Four-

Soldal v. Cook Cnty., Ill., 506 U.S. 56, 70–71 (1992) (applying the Fourth and Fourteenth Amendments to determine whether an unreasonable seizure occurred); *see also* *Albright v. Oliver*, 510 U.S. 266, 286–87 (1994) (Souter, J., concurring in the judgment).

²⁵⁵ *Nardone v. United States*, 308 U.S. 338 (1939).

²⁵⁶ *See id.* at 340–41 (citing *Silverthorne Lumber Co. v. United States*, 251 U.S. 385, 392 (1920)).

²⁵⁷ *Costello v. United States*, 365 U.S. 265, 280 (1961); *see also, e.g.*, *Segura v. United States*, 468 U.S. 796, 804 (1984) (“[The exclusionary rule] ‘extends as well to the indirect as the direct products’ of unconstitutional conduct.” (quoting *Wong Sun v. United States*, 371 U.S. 471, 484 (1963))).

²⁵⁸ *New York v. Quarles*, 467 U.S. 649, 671 n.4 (1984) (O’Connor, J., concurring in part and dissenting in part) (citing *Michigan v. Tucker*, 417 U.S. 433, 445–46 (1974)).

²⁵⁹ *See, e.g.*, Brooks Holland, *Racial Profiling and a Punitive Exclusionary Rule*, 20 TEMP. POL. & CIV. RTS. L. REV. 29, 30 (2010); Brooks Holland, *Safeguarding Equal Protection Rights: The Search for an Exclusionary Rule Under the Equal Protection Clause*, 37 AM. CRIM. L. REV. 1107, 1109–10 (2000).

²⁶⁰ *See, e.g.*, *Brown v. Illinois*, 422 U.S. 590, 604–05 (1975) (“Brown’s first statement was separated from his illegal arrest by less than two hours, and there was no intervening event of significance whatsoever. In its essentials, his situation is remarkably like that of James Wah Toy in *Wong Sun*. We could hold Brown’s first statement admissible only if we overrule *Wong Sun*. We decline to do so. And the second statement was clearly the result and the fruit of the first.” (footnote omitted)); *Wong Sun*, 371 U.S. at 485–86.

²⁶¹ *See* *Leyra v. Denno*, 347 U.S. 556, 558–61 (1954) (finding coercion present in first confession continued into second confession, making the use of either in trial “forbidden by the Fourteenth Amendment”); *Brown v. Mississippi*, 297 U.S. 278, 282–83, 287 (1936) (reversing judgment upholding conviction of defendants whose confessions were first extracted after severe and repeated whippings and were subsequently given “free[ly] and voluntar[ily]” to sheriff); *see also* *Oregon v. Elstad*, 470 U.S. 298, 310 (1985) (“When a prior statement is actually coerced, the

teenth Amendment can be the source of a core constitutional right giving rise to fruit of the poisonous tree analysis. In *Elkins v. United States*,²⁶² the Court stated in dicta:

[N]o distinction can logically be drawn between evidence obtained in violation of the Fourth Amendment and that obtained in violation of the Fourteenth. The Constitution is flouted equally in either case. . . . It would be a curiously ambivalent rule that would require the courts of the United States to differentiate between unconstitutionally seized evidence upon so arbitrary a basis. Such a distinction indeed would appear to reflect an indefensibly selective evaluation of the provisions of the Constitution.²⁶³

More recently, the Court explained that “we know of no principled basis on which to create a hierarchy of constitutional values,”²⁶⁴ a sentiment paralleled in *Whren* itself.²⁶⁵ Unless the Court’s ability to identify preferred and disfavored constitutional provisions has improved, given that Fourth Amendment, Fifth Amendment, Sixth Amendment, and Fourteenth Amendment due process violations can result in suppression of the fruits of otherwise valid searches or interrogations, it seems reasonable that Fourteenth Amendment equal protection violations should qualify as a basis for suppression as well. Treating unconstitutionally motivated searches as the fruit of the poisonous tree is perfectly consistent with *Franks*, *Murray*, and other

time that passes between confessions, the change in place of interrogations, and the change in identity of the interrogators all bear on whether that coercion has carried over into the second confession.”); JOSEPH G. COOK, CONSTITUTIONAL RIGHTS OF THE ACCUSED § 12.9, at 12-79-12-81 (3d ed. 1996) (“Lower courts have frequently held that tangible evidence seized as the result of an illegal confession is inadmissible.”).

²⁶² *Elkins v. United States*, 364 U.S. 206 (1960).

²⁶³ *Id.* at 215.

²⁶⁴ *Valley Forge Christian Coll. v. Ams. United for Separation of Church & State, Inc.*, 454 U.S. 464, 484 (1982); see also *Gonzalez v. United States*, 553 U.S. 242, 256 (2008) (Scalia, J., concurring in the judgment) (“Apart from constitutional guarantee, I know of no objective criterion for ranking rights.”).

²⁶⁵ Rejecting a claim that there were so many traffic laws that the violation of one should not automatically permit a stop, the Court explained:

[W]e are aware of no principle that would allow us to decide at what point a code of law becomes so expansive and so commonly violated that infraction itself can no longer be the ordinary measure of the lawfulness of enforcement. And even if we could identify such exorbitant codes, we do not know by what standard (or what right) we would decide, as petitioners would have us do, which particular provisions are sufficiently important to merit enforcement.

Whren v. United States, 517 U.S. 806, 818-19 (1996).

cases allowing subjective examination of valid police actions predicated on prior illegality.²⁶⁶

To the extent that one accepts the idea that the central purpose of the Reconstruction Amendments was the protection of the liberty of the formerly enslaved people, the text of the amendments makes quite clear the centrality of protecting African Americans from discriminatory law enforcement action. The Thirteenth Amendment permits slavery and involuntary servitude only “as a punishment for crime whereof the party shall have been duly convicted.”²⁶⁷ The Fourteenth Amendment indirectly protects the right of African Americans to vote “except for participation in rebellion[] or other crime.”²⁶⁸ If the Fourteenth Amendment tolerated discriminatory law enforcement action, African American slavery could be reinstated, and African Americans liberally disenfranchised, through the expedient of a discriminatory justice system. As it happens, these disasters occurred in spite of the commands of the Constitution.²⁶⁹ But it is an insult to the drafting ability of the framers of the Reconstruction Amendments to believe that they happened with the acquiescence of the Fourteenth Amendment.

IV. ADDRESSING RACE-BASED STOPS AT SUPPRESSION HEARINGS

A. *Judicial Supervision of Police and Prosecutors Compared*

Assuming that the products of searches or arrests motivated by racial discrimination are substantively inadmissible, either because they are unreasonable under the Fourth Amendment itself or because of the fruit of the poisonous tree doctrine, procedurally, the claims could be raised without difficulty in ordinary suppression hearings. The Court’s reasons for precluding inquiry into the motivations of prosecutors do not apply to scrutiny of police conduct.

In *United States v. Armstrong*,²⁷⁰ the Supreme Court was extremely reluctant to allow defendants to explore the reasons for prosecutorial decisionmaking in the face of a selective prosecution

²⁶⁶ See *supra* Part II.B.2.

²⁶⁷ U.S. CONST. amend. XIII, § 1.

²⁶⁸ U.S. CONST. amend. XIV, § 2.

²⁶⁹ For a discussion of the reintroduction of forced labor, see Gabriel J. Chin, *The Jena Six and the History of Racially Compromised Justice in Louisiana*, 44 HARV. C.R.-C.L. L. REV. 361, 372–79 (2009). For a discussion of disenfranchisement, see Gabriel J. Chin & Randy Wagner, *The Tyranny of the Minority: Jim Crow and the Counter-Majoritarian Difficulty*, 43 HARV. C.R.-C.L. L. REV. 65 (2008).

²⁷⁰ *United States v. Armstrong*, 517 U.S. 456 (1996).

claim.²⁷¹ The holding in *Armstrong* rested on a separation of powers rationale. The Court explained that “[a] selective-prosecution claim asks a court to exercise judicial power over a ‘special province’ of the Executive.”²⁷² Further, because prosecutors exercise the President’s responsibility to execute the laws under the Constitution, “[t]he presumption of regularity supports’ their prosecutorial decisions and, ‘in the absence of clear evidence to the contrary, courts presume that they have properly discharged their official duties.’”²⁷³ If a prosecutor’s information or grand jury indictment is facially sufficient, *Armstrong* makes clear that there is ordinarily no occasion to examine the circumstances surrounding the prosecutor’s decision to bring charges.

By contrast, the Constitution and Congress command courts to regulate police searches, seizures, interrogations, and the evidence that they produce. The Fourth Amendment, of course, assigns magistrates responsibility for determining whether a warrant will issue for a search or an arrest before any police action occurs.²⁷⁴ “The essential function of the traditional warrant requirement is the interposition of a neutral magistrate between the citizen and the presumably zealous law enforcement officer so that there might be an objective determination of probable cause.”²⁷⁵ If police obtain a warrant before acting, their conduct will be evaluated more leniently afterward,²⁷⁶ but only because they took the risk of being turned down or asked to present additional facts before receiving the warrant. If police do not obtain a warrant, their conduct will be reviewed more closely after the fact.²⁷⁷ Unlike a prosecutorial decision to charge, the decision of police to

²⁷¹ See *id.* at 463–65.

²⁷² *Id.* at 464 (alteration in original) (quoting *Heckler v. Chaney*, 470 U.S. 821, 832 (1985)).

²⁷³ *Id.* (quoting *United States v. Chem. Found., Inc.*, 272 U.S. 1, 14–15 (1926)).

²⁷⁴ See U.S. CONST. amend. IV.

²⁷⁵ *Marshall v. Barlow’s, Inc.*, 436 U.S. 307, 331 (1978) (Stevens, J., dissenting).

²⁷⁶ As the Court explained in *Leon*:

Because a search warrant provides the detached scrutiny of a neutral magistrate, which is a more reliable safeguard against improper searches than the hurried judgment of a law enforcement officer engaged in the often competitive enterprise of ferreting out crime, we have expressed a strong preference for warrants and declared that in a doubtful or marginal case a search under a warrant may be sustainable where without one it would fall.

United States v. Leon, 468 U.S. 897, 913–14 (1984) (internal quotation marks and citations omitted).

²⁷⁷ See *Ornelas v. United States*, 517 U.S. 690, 699 (1996) (“The Fourth Amendment demonstrates a strong preference for searches conducted pursuant to a warrant, and the police are more likely to use the warrant process if the scrutiny applied to a magistrate’s probable-cause determination to issue a warrant is less than that for warrantless searches. Were we to eliminate this distinction, we would eliminate the incentive.” (internal quotation marks and citation omitted)).

seek evidence with or without a warrant, or proffer it in court, is routinely subject to judicial supervision.

In addition, Congress assigned federal courts the responsibility for hearing cases under a number of federal statutes regulating unlawful police conduct. These statutes include 18 U.S.C. § 242,²⁷⁸ a criminal statute applicable to official violations of civil rights, 42 U.S.C. § 1983,²⁷⁹ a private civil action, and 42 U.S.C. § 14141,²⁸⁰ which allows the Attorney General to seek relief against agencies with a pattern or practice of civil rights violations.²⁸¹ The federal courts thus have responsibility for police conduct—criminally and civilly, and over individual officers and law enforcement agencies as a whole—of a kind and to a degree which is unimaginable with respect to, say, the U.S. Department of Justice.

Another important distinction is that in the context of prosecutorial charging, there is an overall presumption of regularity.²⁸² With police action, the presumption runs the opposite way. The pros-

²⁷⁸ It provides:

Whoever, under color of any law, statute, ordinance, regulation, or custom, willfully subjects any person in any State, Territory, Commonwealth, Possession, or District to the deprivation of any rights, privileges, or immunities secured or protected by the Constitution or laws of the United States, or to different punishments, pains, or penalties, on account of such person being an alien, or by reason of his color, or race, than are prescribed for the punishment of citizens, shall be fined under this title or imprisoned not more than one year, or both

18 U.S.C. § 242 (2012).

²⁷⁹ It provides:

Every person who, under color of any statute, ordinance, regulation, custom, or usage, of any State or Territory or the District of Columbia, subjects, or causes to be subjected, any citizen of the United States or other person within the jurisdiction thereof to the deprivation of any rights, privileges, or immunities secured by the Constitution and laws, shall be liable to the party injured

42 U.S.C. § 1983 (2012).

²⁸⁰ It provides:

It shall be unlawful for any governmental authority, or any agent thereof, or any person acting on behalf of a governmental authority, to engage in a pattern or practice of conduct by law enforcement officers or by officials or employees of any governmental agency with responsibility for the administration of juvenile justice or the incarceration of juveniles that deprives persons of rights, privileges, or immunities secured or protected by the Constitution or laws of the United States.

42 U.S.C. § 14141(a) (2012).

²⁸¹ *See id.* § 14141(b).

²⁸² *See United States v. Armstrong*, 517 U.S. 456, 464 (1996).

ecution must prove that police conduct, such as interrogations²⁸³ and warrantless searches,²⁸⁴ are valid.²⁸⁵

Further, *Armstrong* noted that “[e]xamining the basis of a prosecution delays the criminal proceeding, threatens to chill law enforcement by subjecting the prosecutor’s motives and decisionmaking to outside inquiry, and may undermine prosecutorial effectiveness by revealing the Government’s enforcement policy.”²⁸⁶ But there is little danger of delay in determining whether a search was motivated by race; the documentary, electronic, and testimonial evidence that would determine other aspects of the legality of the search would also substantially answer whether it was unlawfully motivated.

There is also no significant risk of chilling law enforcement or unfairly invading the privacy of the police. Under existing rules, in evaluating the validity of a search or interrogation, the court will already consider “the totality of all the circumstances”²⁸⁷ and “examine the surrounding circumstances and the entire course of police conduct.”²⁸⁸ This is unlike the confidentiality prosecutors generally enjoy surrounding their filing of criminal charges.²⁸⁹ Disclosure of unlawful police motivations would be less intrusive, even, than inquiry the Court has permitted into the reasons for prosecutorial exercise of peremptory challenges,²⁹⁰ which requires disclosure of matters that are normally a protected part of the adversarial process.

²⁸³ See *Missouri v. Seibert*, 542 U.S. 600, 608 n.1 (2004) (plurality opinion) (“[T]he burden of showing admissibility rests, of course, on the prosecution. The prosecution bears the burden of proving, at least by a preponderance of the evidence, the *Miranda* waiver and the voluntariness of the confession.” (alteration in original) (internal quotation marks and citations omitted)).

²⁸⁴ See *Coolidge v. New Hampshire*, 403 U.S. 443, 455 (1971) (plurality opinion) (noting “burden is on those seeking the exemption to show the need” to justify warrantless search (quoting *United States v. Jeffers*, 342 U.S. 48, 51 (1951))); see also, e.g., *United States v. Karo*, 468 U.S. 705, 717 (1984) (“Warrantless searches are presumptively unreasonable, though the Court has recognized a few limited exceptions to this general rule.”).

²⁸⁵ Some jurisdictions follow the reasonable rule that if police action takes place pursuant to a warrant, the prosecution must produce some evidence that the warrant actually existed. See, e.g., *People v. Collins*, 69 Cal. Rptr. 2d 544, 548 (Ct. App. 1997).

²⁸⁶ *Armstrong*, 517 U.S. at 465 (quoting *Wayte v. United States*, 470 U.S. 598, 607 (1985)).

²⁸⁷ See *Schneckloth v. Bustamonte*, 412 U.S. 218, 227 (1973); see also, e.g., *Missouri v. McNeely*, 133 S. Ct. 1552, 1563 (2013) (“Whether a warrantless blood test of a drunk-driving suspect is reasonable must be determined case by case based on the totality of the circumstances.”).

²⁸⁸ *Oregon v. Elstad*, 470 U.S. 298, 318 (1985).

²⁸⁹ See *Armstrong*, 517 U.S. at 464–65. The fact that police may be sued under 42 U.S.C. § 1983 for racial profiling with only qualified immunity, but prosecutors enjoy absolute immunity, is further evidence of the lessened expectation that police conduct will be exempt from judicial scrutiny. See *supra* notes 101–02 and accompanying text.

²⁹⁰ See *Batson v. Kentucky*, 476 U.S. 79, 93 (1986) (holding that defendant has burden of

In sum, with respect to prosecutors, *Armstrong* refused to invade executive functions, ignore the presumption of regularity, or impose new procedures and create new inquiries into confidential areas. But in the context of review of police conduct, what is at stake is the addition of a focused inquiry on race in an area of traditional judicial supervision, with respect to a decision the police are already required to explain, in a proceeding that is already available. If racial discrimination in law enforcement is undesirable, this is a trivial price to pay to promote it.

B. Police Capacity to Articulate Subjective Motivation

Police would not find it difficult to explain the subjective bases of their conduct and actions. Police often testify about inferences, conclusions, beliefs, and suspicions in order to make their actions clear and understandable. For example, an officer in a suppression hearing could conceivably testify about naked facts, say, that she was in a certain location, saw an exchange of cash for a white powdery substance in a small plastic bag; and then that officer or some other expert could testify about high drug crime neighborhoods, and the characteristics of drug transactions, in an effort to lead the judge to connect the dots. Alternatively, the officer could testify that she was watching a crack house, why she believed it was a crack house, that she saw a drug deal, and why she believed it was a drug deal. Although the second version is much clearer, some absolutists might claim it is in tension with *Whren's* insistence that subjective beliefs are irrelevant.

The Court has not been radically objective in this way, instead instructing lower courts to consider officers' subjective conclusions in evaluating the existence of probable cause or reasonable suspicion. As Chief Justice Rehnquist explained for the Court in *Ornelas v. United States*,²⁹¹ decided in the same Term as *Whren*:

[O]ur cases have recognized that a police officer may draw inferences based on his own experience in deciding whether probable cause exists. To a layman the sort of loose panel below the back seat armrest in the automobile involved in this case may suggest only wear and tear, but to Officer Luedke, who had searched roughly 2,000 cars for narcotics, it suggested that drugs may be secreted inside the panel. An appeals court should give due weight to a trial court's finding

persuasion to prove purposeful discrimination in jury selection to trigger further investigation by court).

²⁹¹ *Ornelas v. United States*, 517 U.S. 690 (1996).

that the officer was credible and the inference was reasonable.²⁹²

Other decisions make clear the Court's view that courts considering suppression motions must consider subjective police inferences.²⁹³ At least when subjective considerations are helpful in prosecuting the case, there seems to be no inherent difficulty in police articulating them or in courts considering them.

The capacity of suppression hearings extends to consideration of racial motivation. The Supreme Court has held that the race of the suspect is substantively relevant to the question of reasonable suspicion or probable cause in immigration cases.²⁹⁴ Police defending searches or seizures based in part on the apparent ethnic ancestry of the suspect have no trouble explaining the reasons for their actions;²⁹⁵

²⁹² *Id.* at 700 (citing *United States v. Ortiz*, 422 U.S. 891, 897 (1975)).

²⁹³ *See, e.g.*, *United States v. Arvizu*, 534 U.S. 266, 273 (2002) (stating that police are entitled to make "inferences from and deductions about the cumulative information available" (citing *United States v. Cortez*, 449 U.S. 411, 418 (1981))); *see also* *Pennsylvania v. Dunlap*, 555 U.S. 964, 965 (2008) (Roberts, C.J., dissenting from denial of certiorari) ("[A] police officer may draw inferences based on his own experience in deciding whether probable cause exists." (alteration in original) (quoting *Ornelas*, 517 U.S. at 700)); *Ybarra v. Illinois*, 444 U.S. 85, 109 (1979) (Rehnquist, J., dissenting) ("While the test of reasonableness under the Fourth Amendment is necessarily objective as opposed to subjective, Officer Johnson's subjective suspicions help fill out his cryptic description of the 'objects' that he felt in Ybarra's pocket." (citation omitted)). Some have questioned whether police judgments are consistently correct and truthful. *See, e.g.*, I. Bennett Capers, *Crime, Legitimacy, and Testifying*, 83 IND. L.J. 835, 866–71 (2008) (discussing officer perjury as a widespread problem that courts appear unwilling or unable to address); L. Song Richardson, *Arrest Efficiency and the Fourth Amendment*, 95 MINN. L. REV. 2035, 2039 (2011) ("As a result of implicit biases, an officer might evaluate behaviors engaged in by individuals who appear black as suspicious even as identical behavior by those who appear white would go unnoticed."). At least one commentator has argued that the objective/subjective distinction, as applied to suppression hearings, approaches conceptual meaninglessness, and tends to obscure the issues and Fourth Amendment values at stake. *See* Craig S. Lerner, *Judges Policing Hunches*, 4 J.L. ECON. & POL'Y 25, 40–45 (2007).

²⁹⁴ *See* *United States v. Brignoni-Ponce*, 422 U.S. 873, 886–87 (1975) ("The likelihood that any given person of Mexican ancestry is an alien is high enough to make Mexican appearance a relevant factor."); *see also* *United States v. Martinez-Fuerte*, 428 U.S. 543, 563–64 & nn.16–17 (1976) (following *Brignoni-Ponce*); *United States v. Ramos*, 629 F.3d 60, 67 (1st Cir. 2010) ("There is nothing on the particular facts of this case to forbid the officers' consideration of the information that at least two of the van's occupants 'appeared' to be Middle Eastern."); *United States v. Bautista-Silva*, 567 F.3d 1266, 1270, 1272 (11th Cir. 2009) ("The Supreme Court has held that many of the factors that led Agent Cole to stop Bautista-Silva's vehicle 'may be taken into account in deciding whether there is reasonable suspicion to stop a [vehicle].'" (alteration in original) (quoting *Brignoni-Ponce*, 422 U.S. at 884)); *Melendres v. Arpaio*, 989 F. Supp. 2d 822, 847 (D. Ariz. 2013) (noting that "the ICE 287(g) training manual expressly allows for consideration of race" in developing reasonable suspicion).

²⁹⁵ *See* *Ramos*, 629 F.3d at 62–63 & n.2, 67 ("There is nothing on the particular facts of this case to forbid the officers' consideration of the information that at least two of the van's occupants 'appeared' to be Middle Eastern."); *Bautista-Silva*, 567 F.3d at 1270 (noting that the officer

there is no indication that the resulting hearings are confusing or unmanageable, or that the police are unable to remember when they stopped or arrested someone in part based on race.

The Court's practices, then, allow hearings to cover subjective matters, such as an officer's inferences, beliefs, and conclusions, when they are helpful in defeating suppression or obtaining a conviction. Similarly, evidence of racial motivation is perfectly admissible when it helps the prosecution's case, as the Court made clear in *United States v. Brignoni-Ponce*.²⁹⁶ Under those conditions, there is only one reason not to allow inquiry into racial motivation when it helps the defendant: that the Court has a special disfavor of claims of racial discrimination.²⁹⁷

CONCLUSION

Whren is in many ways the *Plessy* of its era. It endorsed racial discrimination, and thereby encouraged its spread. It also addressed essentially the same question, whether racial discrimination was unreasonable under the Constitution, and it reached the same result: no.

Whren's justification of discrimination was also utterly unnecessary. The Court could have reached the same outcome with pretext searches or arrests, while saying that racial discrimination was prohibited under the Fourth Amendment. It could even have reserved that question for a case where it was actually presented. Instead, it reached out to endorse discrimination.

Whren was also unsatisfactory as a matter of judicial craft, ignoring inconsistencies between the decision and other areas of Fourth

testified that one reason for stopping the vehicle was that it contained multiple Hispanic passengers); *Melendres*, 989 F. Supp. 2d at 828 ("As trial testimony further demonstrated, MCSO officers believe that unauthorized aliens are Mexicans, Hispanics, or Latinos."); see also Gabriel J. Chin, Carissa Byrne Hessick, Toni Massaro & Marc L. Miller, *A Legal Labyrinth: Issues Raised by Arizona Senate Bill 1070*, 25 GEO. IMMIGR. L.J. 47, 69 (2010) ("*Brignoni-Ponce* continues on a regular basis to be used by both the Department of Justice and courts of the United States."); Kevin R. Johnson, *Racial Profiling After September 11: The Department of Justice's 2003 Guidelines*, 50 LOY. L. REV. 67, 84 (2004) ("The guidelines cite *United States v. Brignoni-Ponce* as precedent, allowing for the consideration of race in law enforcement in certain circumstances.").

²⁹⁶ *United States v. Brignoni-Ponce*, 422 U.S. 873, 876 (1975).

²⁹⁷ As this Article was being finalized, an apparent police murder of Walter Scott, an unarmed African American man in South Carolina, was worldwide news. That story highlighted another possible reason for the Court to stay its hand, and a refutation. The Court might fear that it would be too easy for the police to lie about their motivation, as the officer in that case evidently lied about his conduct. However, notorious instances of police misbehavior seem to be creating pressure for police to record their conduct. To the extent that police texts, radio calls, and conduct are electronically recorded, it will not be impossible to develop evidence of subjective motivation.

Amendment jurisprudence. The Court should replace it with a bright-line rule prohibiting discrimination by police, just as it does for prosecutors. Just as the Court did not wait until the issue was presented to create the principle, the Court need not wait to eliminate it. It should repudiate its dicta, even if only with more dicta, in the next convenient Fourth Amendment case.