

Note

ARIZONA V. GANT: MISSING AN OPPORTUNITY TO BANISH BRIGHT LINES FROM THE COURT'S VEHICULAR SEARCH INCIDENT TO ARREST JURISPRUDENCE

JACK BLUM*

In *Arizona v. Gant*,¹ the Supreme Court of the United States revisited a perennial issue regarding the search incident to arrest exception to the Fourth Amendment: the circumstances under which law enforcement may search a car whose occupant has been arrested.² The Court held that a vehicle may be searched where the arrestee is unsecured and within reaching distance of the vehicle's passenger compartment when the search occurs.³ In addition, the Court, adopting the "evidence standard" first espoused by Justice Scalia in *Thornton v. United States*,⁴ concluded that a vehicle may also be searched incident to its occupant's arrest where it is reasonable to believe that the vehicle contains evidence of the crime of arrest.⁵

In reaching this result, the Court curtailed the bright-line standard of *New York v. Belton*⁶ and endorsed a limited view of this exception to the Fourth Amendment that is more consistent with the exigency-based approach espoused in *Chimel v. California*.⁷ Unfortunately, the Court also adopted Justice Scalia's evidence standard, which is itself a scaled back bright-line standard that will undermine *Chimel*'s protections, making the *Gant* rule internally inconsistent.⁸ In addition to being inconsistent with *Chimel*, the evidence standard con-

Copyright © 2011 by Jack Blum.

* J.D. Candidate, 2012, University of Maryland School of Law; B.A., 2007, St. Mary's College. This Note is dedicated to the memory of L. Jack Rose, the author's namesake, role model, and grandfather. The author would like to thank Stephanie Bignon and the other editors of the *Maryland Law Review* for their tremendous advice and support throughout the writing process.

1. 129 S. Ct. 1710 (2009).

2. *Id.* at 1714.

3. *Id.* at 1719.

4. 541 U.S. 615, 632 (2004) (Scalia, J., concurring in the judgment) ("I would therefore limit *Belton* searches to cases where it is reasonable to believe evidence relevant to the crime of arrest might be found in the vehicle.")

5. *Gant*, 129 S. Ct. at 1719.

6. 453 U.S. 454 (1981).

7. 395 U.S. 752 (1969); see *infra* Part IV.A.

8. See *infra* Part IV.B.1.

flicts with the Fourth Amendment's historical foundation⁹ and is likely to introduce further ambiguity and inconsistency¹⁰ into a doctrine that has seen no shortage of either.¹¹ Although it may have had to do so through only a plurality opinion, the Court should have returned the search incident to arrest exception in the vehicular context to *Chimel's* exigency-based rationale, which better accords with the Fourth Amendment's historical foundation.¹²

I. THE CASE

This latest twist in the Court's Fourth Amendment jurisprudence arises out of the investigation of a suspected narcotics house, during the course of which the police arrested Rodney Gant and searched his car.¹³ Acting on a tip, the police first encountered Gant when they knocked on the door of the house where narcotics activity was allegedly occurring, and Gant answered.¹⁴ Gant was not arrested at that time; instead, the police, continuing their investigation, left the house and ran a computer check on Gant's name, discovering that he had a suspended driver's license and an outstanding warrant for his arrest.¹⁵ The police later returned to the house and encountered Gant for a second time when he drove into the house's driveway.¹⁶ As Gant entered the driveway, an officer shined a flashlight into the car and identified him.¹⁷ Gant parked and exited the vehicle, walking several feet away before the officer confronted him.¹⁸ The officer took Gant into custody for the outstanding warrant and for operating a motor vehicle with a suspended driver's license.¹⁹ After the officer had handcuffed and secured Gant in a patrol car, two police officers performed a warrantless search of Gant's vehicle, where they found a bag of cocaine and a weapon.²⁰

9. *See infra* Part IV.B.2.

10. *See infra* Part IV.B.3.

11. *See infra* Part II.

12. *See infra* Part IV.C.

13. *State v. Gant*, 43 P.3d 188, 190–91 (Ariz. Ct. App. 2002), *cert. granted*, 538 U.S. 976, *and vacated*, 540 U.S. 963 (2003).

14. *Id.* at 190.

15. *Id.* The warrant was for an unrelated failure to appear. *Id.*

16. *Id.* The police encountered two other individuals, whose presence was immaterial to Gant's arrest, outside the house during their second visit, one of whom was found to be in possession of a crack pipe. *Id.*

17. *Id.*

18. *State v. Gant*, 162 P.3d 640, 641 (Ariz. 2007), *aff'd*, 129 S. Ct. 1710 (2009).

19. *Gant*, 43 P.3d at 190. Gant did not challenge the lawfulness of his arrest. *Id.* at 191.

20. *Gant*, 162 P.3d at 641.

At trial, Gant sought to suppress the evidence discovered during the search of his vehicle, arguing that no exception to the Fourth Amendment warrant requirement justified the search, thus making it illegal.²¹ The trial court denied Gant's motion, finding that the search fell under the search incident to arrest exception, and Gant was convicted of unlawful possession of cocaine for sale and unlawful possession of drug paraphernalia.²² On appeal, the Court of Appeals of Arizona relied heavily upon two United States Supreme Court decisions²³: *Chimel v. California*, a landmark case defining the extent of the search incident to arrest exception,²⁴ and *New York v. Belton*, in which the Court had determined how *Chimel* applies to an arrestee who is a "recent occupant" of an automobile.²⁵ The court of appeals held that *Belton* did not justify the search of Gant's vehicle because Gant had voluntarily exited the vehicle before the officer initiated contact with him, and accordingly Gant was not a recent occupant of the vehicle.²⁶ The United States Supreme Court subsequently granted the State of Arizona's petition for certiorari.²⁷

Prior to argument, however, the Supreme Court of Arizona decided the case of *State v. Dean*,²⁸ in which it strongly criticized the

21. *Gant*, 43 P.3d at 191. The Fourth Amendment states that "[t]he right of the people to be secure in their persons, houses, papers, and effects, against unreasonable searches and seizures, shall not be violated, and no Warrants shall issue, but upon probable cause, supported by Oath or affirmation, and particularly describing the place to be searched, and the persons or things to be seized." U.S. CONST. amend. IV.

22. *Gant*, 43 P.3d at 190-91.

23. *Id.* at 191-94.

24. See 395 U.S. 752, 762-63 (1969) (explaining that a search incident to arrest is only justified where officer safety or evidence preservation is at issue).

25. 453 U.S. 454, 460 (1981). In *Chimel*, the Court ruled that police could perform a warrantless search incident to arrest of the area within an arrestee's "immediate control" when necessary to secure weapons or evidence, *Chimel*, 395 U.S. at 762-63, while in *Belton*, the Court defined the area of "immediate control" in a vehicular arrest as the entirety of the vehicle's passenger compartment, including "the contents of any containers found within" it, *Belton*, 453 U.S. at 460.

26. *Gant*, 43 P.3d at 194.

27. *Arizona v. Gant*, 538 U.S. 976 (2003) (granting certiorari). Arizona appealed to the United States Supreme Court after the Supreme Court of Arizona denied review of the court of appeals's decision without comment. Petition for Writ of Certiorari at 6, *Gant*, 538 U.S. 976 (No. 02-1019), 2002 WL 32101152, at *6.

28. 76 P.3d 429 (Ariz. 2003) (en banc). In *Dean*, the Court of Appeals of Arizona, referencing its decision in *State v. Gant*, had found that the search of a defendant's car was reasonable because police had initiated contact with the defendant before he exited the vehicle, even though the actual arrest took place in a different location more than two hours after the defendant had exited the car. *State v. Dean*, 55 P.3d 102, 106 (Ariz. Ct. App. 2002), *overruled by* 76 P.3d 429.

court of appeals' analysis in *State v. Gant*.²⁹ The Supreme Court of Arizona decried the court of appeals' "singular focus"³⁰ on the time when the police initiated contact with an arrestee and, instead, held that occupancy is a function of when and where the arrest occurs relative to the vehicle.³¹ In addition, foreshadowing a doctrinal question that would later be addressed by the United States Supreme Court,³² the Supreme Court of Arizona noted in dictum that neither of the two exigency-based rationales set out by the United States Supreme Court in *Chimel*—officer safety and evidence preservation—was present to justify the search of Dean's car.³³

In light of *Dean*'s repudiation of *State v. Gant*'s reasoning, the United States Supreme Court vacated the court of appeals' decision in *Gant* and remanded the case for reconsideration.³⁴ The court of appeals proceeded to remand the case to the trial court for an evidentiary hearing on the legality of the search of Gant's car.³⁵ On remand, the trial court found that Gant was a recent occupant of the vehicle because police contacted him as he stepped out of the car and arrested him several feet away and again denied Gant's motion to suppress.³⁶ The court of appeals, echoing the Supreme Court of Arizona's dictum in *Dean*,³⁷ reversed the trial court's decision,³⁸ this time finding the search of Gant's vehicle illegal because it was justified by neither officer safety nor evidence preservation.³⁹

The State appealed the case to the Supreme Court of Arizona, which rejected the contention that *Belton* authorized the search of

29. *Dean*, 76 P.3d at 436. The Supreme Court of Arizona noted that since "[a] suspect arrested next to a vehicle presents the same threat to officer safety and the same potential for destruction of evidence whether or not he was alerted prior to arrest . . . [i]t makes no sense to have two different rules applicable to . . . the same situation." *Id.*

30. *Id.*

31. *Id.* at 436–37 (stating that the *Belton* rule applies "when [the defendant] is arrested 'in close proximity to the vehicle immediately after the [defendant] exits the automobile'" (second alteration in original) (quoting *Glasco v. Commonwealth*, 513 S.E.2d 137, 142 (Va. 1999))).

32. *See infra* Part III.

33. *Dean*, 76 P.3d at 437.

34. *Arizona v. Gant*, 540 U.S. 963 (2003) (vacating *Gant* for reconsideration in light of *Dean*).

35. *State v. Gant*, 143 P.3d 379, 381 (Ariz. Ct. App. 2006), *aff'd*, 162 P.3d 640 (Ariz. 2007), *aff'd*, 129 S. Ct. 1710.

36. *Id.* (noting the trial court's finding that "the 'search was conducted immediately after arrest,' and Gant was arrested in 'close proximity' to his vehicle").

37. *Id.* at 382.

38. *Id.* at 380.

39. *Id.* at 382 ("[O]ur analysis must be guided by the rationales underlying the search incident to arrest exception . . . these rationales are absent under the circumstances here.").

Gant's vehicle.⁴⁰ The court noted that *Belton* defined only the "permissible scope of the search," but did not resolve the "threshold question" of whether any search could be lawfully conducted incident to arrest when the scene had already been secured.⁴¹ The Supreme Court of Arizona interpreted *Belton* narrowly, ruling that *Belton* did not dispense with the requirement that one of the *Chimel* rationales of officer safety or evidence preservation be present.⁴² Judge Bales, writing in dissent, noted that Justice Brennan, in his *Belton* dissent, "explicitly made the argument that the majority adopts here" but could not persuade a majority of the Court to support his position.⁴³ Conceding that "there may be good reasons to reconsider *Belton*,"⁴⁴ Judge Bales argued that *Belton* searches do not depend on whether a *Chimel* rationale is present in a particular case.⁴⁵ The United States Supreme Court granted certiorari to determine whether *Belton* authorizes warrantless searches of automobiles incident to arrest where the safety and evidence rationales described in *Chimel* are absent.⁴⁶

II. LEGAL BACKGROUND

The search incident to arrest exception to the Fourth Amendment warrant requirement has a "checkered history."⁴⁷ Born as dictum, the exception expanded in both scope and authority during the Prohibition era.⁴⁸ The exception's nascent years were filled with turmoil, as the Court at various times attempted to ground it in the oscillating rationales of exigent circumstances and evidence gathering.⁴⁹ By the 1960s, it appeared that the exigency rationale had won the

40. *State v. Gant*, 162 P.3d 640, 643 (Ariz. 2007), *aff'd*, 129 S. Ct. 1710 (2009) (reasoning that "*Belton* dealt with a markedly different set of circumstances from those present in this case").

41. *Id.*

42. *Id.* at 645 ("We do not, however, read *Belton* . . . as abandoning the *Chimel* justifications for the search incident to arrest exception."). The court recognized that its narrow interpretation of *Belton* was not the majority view. *Id.*

43. *Id.* at 648 (Bales, J., dissenting). The majority rejected the dissent's contention that its opinion overruled *Belton*, maintaining that the two cases were factually distinguishable. *Id.* at 643 (majority opinion).

44. *Id.* at 646 (Bales, J., dissenting).

45. *Id.* at 647. The dissent contended that "the core premise" of the Court's decision in *Belton* was to create a bright-line rule "that does not depend on case-by-case adjudication." *Id.* at 649 (citing *Thornton v. United States*, 541 U.S. 615, 622–23 (2004)).

46. *Arizona v. Gant*, 129 S. Ct. 1710, 1714–16 (2009) ("The chorus that has called for us to revisit *Belton* includes courts, scholars, and Members of this Court who have questioned that decision's clarity and its fidelity to Fourth Amendment principles. We therefore granted the State's petition for certiorari.").

47. *Id.* at 1723.

48. *See infra* Part II.A.1.

49. *See infra* Part II.A.1–2.

field, although not before the Court again briefly reverted to an evidence-gathering rationale.⁵⁰ This victory was later undermined, however, as the Court attempted to fashion the search incident to arrest exception into a bright-line test while still purporting to maintain its exigency-based rationale,⁵¹ causing a split among state and lower federal courts.⁵² By the time the *Gant* Court took up the issue, the exception was fraught with confusion, having led some Members of the Court to call for a new framework to govern the search incident to arrest exception.⁵³

A. *The Court Wavered Between Exigency and Evidence-Gathering Rationales Before Settling on the Former in Chimel*

The text of the Fourth Amendment has proven susceptible to two different interpretations, as some Justices contend that it creates a general warrant requirement while others argue that it prohibits only unreasonable searches.⁵⁴ The conflict between these two interpretations has significantly affected the development of the search incident to arrest exception, as the Court has vacillated between an exigency rationale, which requires exigent circumstances to justify deviation from the general warrant requirement,⁵⁵ and an evidence-gathering rationale, which allows warrantless searches as a reasonable means of discovering evidence and solving crimes.⁵⁶ As the search incident to

50. See *infra* Part II.A.3.

51. See *infra* Part II.B.1.

52. See *infra* Part II.B.2.

53. See *infra* Part II.B.3.

54. Compare *United States v. Rabinowitz*, 339 U.S. 56, 70 (1950) (Frankfurter, J., dissenting) (“When the Fourth Amendment outlawed ‘unreasonable searches’ . . . the framers said with all the clarity of the gloss of history that a search is ‘unreasonable’ unless a warrant authorizes it, barring only exceptions justified by absolute necessity.”), *overruled by* *Chimel v. California*, 395 U.S. 752 (1969), *with id.* at 60 (majority opinion) (“It is unreasonable searches that are prohibited by the Fourth Amendment. It was recognized by the framers of the Constitution that there were reasonable searches for which no warrant was required.” (citation omitted)).

55. For example, in *Trupiano v. United States*, a case that applied the exigency rationale, the Court focused on the general need for a search warrant, noting that the search incident to arrest exception requires the presence of “some other factor . . . that would make it unreasonable or impracticable to require the arresting officer to equip himself with a search warrant.” 334 U.S. 699, 708 (1998) (describing the search incident to arrest exception as a right that must be “strictly limited” to prevent it from “swallow[ing] the general principle” that search warrants are required), *overruled by* *United States v. Rabinowitz*, 339 U.S. 56 (1950); see also *infra* Part II.A.2.

56. For instance, in *United States v. Rabinowitz*, a case applying an evidence-gathering rationale, the Court emphasized that “searching for other proofs of guilt within the control of the accused found upon arrest . . . was not ‘unreasonable.’” 339 U.S. at 61 (citation omitted); see also *infra* Part II.A.3.

arrest doctrine has developed from dictum into a substantial exception to the warrant requirement,⁵⁷ the Court has wavered between the two bases, struggling to root the exception firmly in either.⁵⁸

1. *The Court's Prohibition Era Search and Seizure Cases Expanded the Concept of the Search Incident to Arrest from Dictum into a Significant Fourth Amendment Doctrine*

Much of the Court's Fourth Amendment search and seizure jurisprudence originates from *Weeks v. United States*,⁵⁹ where the Court first required that unconstitutionally obtained evidence be excluded from trial.⁶⁰ *Weeks* also contains the Court's first mention of the search incident to arrest exception,⁶¹ as the Court noted that the right of law enforcement to search the arrestee's *person* to discover and seize evidence was "always recognized under English and American law."⁶² The Court's acknowledgement of this right, however, was unquestionably dictum: *Weeks* addressed the prosecution's right to use materials obtained in violation of the Constitution as evidence rather than the search incident to arrest.⁶³ In cases subsequent to *Weeks*, the Court expanded both the scope and the precedential force of the search incident to arrest exception.

The Court next took up the exception in *Carroll v. United States*,⁶⁴ a case in which a Prohibition agent pulled over a known bootlegger on the highway and, acting without a search warrant, found bottles of whiskey located within the seats of the bootlegger's automobile.⁶⁵ The Court reasoned that a "necessary difference" exists between a building search and a vehicle search and concluded that a search warrant was less imperative for the latter because of the risk that the vehicle could be removed from the jurisdiction before a warrant could be

57. See *infra* Part II.A.1.

58. Compare *infra* Part II.A.2, with *infra* Part II.A.3.

59. 232 U.S. 383 (1914).

60. *Id.* at 398; see also *United States v. Robinson*, 414 U.S. 218, 224 (1973) (noting that "virtually all of this Court's search and seizure law has been developed since [*Weeks*]"). Prior to *Weeks*, courts did not take notice of the way in which evidence material to a criminal trial was obtained. See *Weeks*, 232 U.S. at 395–96 (citing numerous cases that had applied this earlier rule).

61. See *Chimel v. California*, 395 U.S. 752, 755 (1969) (recognizing that the search incident to arrest exception "seems first to have been articulated by the Court in 1914 as dictum in *Weeks*").

62. *Weeks*, 232 U.S. at 392. The Court acknowledged the existence of this exception while attempting "by a process of exclusion to state what [the *Weeks* case was] not." *Id.*

63. *Id.* at 393; see also *Chimel*, 395 U.S. at 755 (describing the discussion of the search incident to arrest exception in *Weeks* as "dictum").

64. 267 U.S. 132 (1925).

65. *Id.* at 134–37.

obtained.⁶⁶ The *Carroll* Court accordingly justified its holding based upon the impracticability of obtaining search warrants for movable vehicles, but noted that “[i]n cases where the securing of a warrant is reasonably practicable, it must be used.”⁶⁷ The Court also issued an expanded statement of the search incident to arrest exception in the *Carroll* opinion, noting that searches of not only the arrestee’s person—as mentioned in *Weeks*⁶⁸—but also of the area within the arrestee’s control were permissible.⁶⁹ As in *Weeks*, however, the *Carroll* Court’s reference to the search incident to arrest exception was dictum.⁷⁰

Two years later, the Court solidified the search incident to arrest exception in *Marron v. United States*⁷¹ and upheld the search and seizure of a ledger found in a closet by police during a defendant’s arrest.⁷² Prior to *Marron*, the validity of the exception had been controversial and not universally accepted.⁷³ Not only did *Marron* elevate the exception from dictum to holding, it also expanded the exception’s scope to encompass “all parts of the premises used for the unlawful purpose” grounding the arrest.⁷⁴ Whereas *Carroll* had justified the warrantless search based upon the exigency of the vehicle’s potential for being removed before a warrant could be obtained,⁷⁵ the

66. *Id.* at 153. The Court in *Carroll* also noted that federal revenue laws dating back to the first Congress in 1789 had consistently given agents greater authority to inspect and seize contraband found in vehicles. *Id.* at 150–51.

67. *Id.* at 153, 156.

68. 232 U.S. at 392.

69. *Carroll*, 267 U.S. at 158 (“[W]hatever is found upon his person or in his control . . . may be seized and held as evidence in the prosecution.”).

70. *Id.* at 158 (“The right to search and the validity of the seizure are not dependent on the right to arrest.”). For this reason, *Carroll* is best known for creating the “automobile exception,” which permits warrantless vehicle searches when its criteria are satisfied. *See Maryland v. Dyson*, 527 U.S. 465, 466 (1999) (per curiam) (noting that the automobile exception was first recognized in *Carroll*). The automobile exception allows a warrantless search where “a car is readily mobile and probable cause exists to believe it contains contraband.” *Pennsylvania v. Labron*, 518 U.S. 938, 940 (1996) (per curiam) (citing *California v. Carney*, 471 U.S. 386, 393 (1985)). Apart from the inherent exigency of the automobile’s mobility, the automobile exception contains no additional exigency requirement. *Id.*

71. 275 U.S. 192 (1927). *Marron* did not involve a vehicle search. *See id.* at 198–99.

72. *Id.*

73. *Id.* at 195 (noting that lower courts differed in their views of searches like the one in *Marron*, which “present[ed] one of the most frequent causes of appeals” at the time).

74. *Id.* at 199. The seized ledger was found in a closet, *id.* at 194, which would not be construed as being within the arrestee’s “immediate control” under the framework established by subsequent cases. *See, e.g., Chimel v. California*, 395 U.S. 752, 763 (1969) (“There is no comparable justification, however, for routinely searching any room other than that in which an arrest occurs—or, for that matter, for searching through all the desk drawers or other closed or concealed areas in that room itself.”).

75. *See supra* notes 66–67 and accompanying text.

Court in *Marron* focused on the police's interest in gathering evidence, noting that the police "had a right without a warrant contemporaneously to search the place in order to find and seize the things used to carry on the criminal enterprise."⁷⁶

2. *The Court Later Retreated from Marron's Broad, Evidence-Based Conception of the Search Incident to Arrest, Justifying the Exception with a More Restrictive Exigency Rationale*

After broadly expanding the search incident to arrest exception in the Prohibition era cases of *Carroll* and *Marron*, the Court generally strengthened the warrant requirement,⁷⁷ such as by requiring exigent circumstances to justify warrantless searches incident to arrest. One of the earliest cases⁷⁸ to narrow the Court's holding in *Marron* was *Go-Bart Importing Co. v. United States*.⁷⁹ In *Go-Bart*, Prohibition agents compelled an arrestee "by threat of force"⁸⁰ to open his safe and desk, from which the agents, without a valid warrant,⁸¹ seized various items following a search.⁸² The Court implied that it had embraced an exigency standard by noting that although the officers had the information and time necessary to obtain a warrant, they had failed to do so.⁸³

A year later, the Court expanded on *Go-Bart* in *United States v. Lefkowitz*,⁸⁴ striking down the warrantless search of an arrestee's office subsequent to his arrest for participating in a conspiracy to sell liquor.⁸⁵ In refusing to admit the unconstitutionally obtained evidence, the *Lefkowitz* Court emphasized that the searches were "made solely to find evidence of [the arrestee's] guilt of the alleged conspir-

76. *Marron*, 275 U.S. at 199.

77. See *California v. Acevedo*, 500 U.S. 565, 582 (1991) (Scalia, J., concurring in the judgment) (remarking that after *Weeks*, "our jurisprudence lurched back and forth between imposing a categorical warrant requirement and looking to reasonableness alone. . . . By the late 1960's, the preference for a warrant had won out, at least rhetorically" (citations omitted)).

78. James J. Tomkovicz, *Divining and Designing the Future of the Search Incident to Arrest Doctrine: Avoiding Instability, Irrationality, and Infidelity*, 2007 U. ILL. L. REV. 1417, 1423 (noting that *Go-Bart* was the "first reversal of direction" from the broad searches allowed by *Marron*).

79. 282 U.S. 344 (1931).

80. *Id.* at 349.

81. *Id.* (noting that one of the agents "exhibited a paper which he falsely claimed was such a warrant").

82. *Id.* at 349–50 (describing the seized items).

83. *Id.* at 358 ("Notwithstanding [the fact that the officer] had an abundance of information and time to swear out a valid warrant, he failed to do so.").

84. 285 U.S. 452 (1932).

85. *Id.* at 458–60, 467 (concluding that "[a]n arrest may not be used as a pretext to search for evidence").

acy or some other crime,” thus suggesting that an evidence-gathering rationale was insufficient to uphold a search incident to arrest.⁸⁶ In its holding, the Court also strongly endorsed the necessity of a search warrant wherever practical, declaring that “magistrates” are in a better position to decide whether a particular search is reasonable than are “hurried . . . officers . . . who may happen to make arrests.”⁸⁷

The Court appeared to embrace an exigency rationale for warrantless searches incident to arrest in *Trupiano v. United States*,⁸⁸ declaring unconstitutional the raid and warrantless search of a distillery where the government had failed to obtain a search warrant despite having adequate opportunity to do so.⁸⁹ The Court noted that the warrantless search incident to arrest is a “strictly limited right” that “grows out of the inherent necessities of the situation at the time of the arrest” and that it must be grounded in some exigency that makes it “unreasonable or impracticable to require the arresting officer to equip himself with a search warrant.”⁹⁰ The mere fact that obtaining a search warrant could be inconvenient to officers or cause a delay in the execution of a search was insufficient to dispense with the warrant requirement.⁹¹ Thus, while *Go-Bart* and *Lefkowitz* merely hinted at a rejection of the evidence-gathering justification, *Trupiano* was the Court’s first full-throated embrace of a strict exigency standard to justify warrantless searches incident to arrest.

3. *The Court Briefly Returned to an Evidence-Gathering Rationale to Justify the Search Incident to Arrest Exception Before Seemingly Settling on the Exigency Rationale*

While *Trupiano* seemed to firmly root the search incident to arrest exception in a strict exigency standard, it was not long before the Court again used an evidence-gathering rationale to justify a more le-

86. *Id.* at 465. Additionally, the Court distinguished the case from *Marron*, noting that the ledger seized in *Marron* was in plain view at the time of arrest and was part of the equipment used to carry out an ongoing crime. *Id.* The Court further noted that no crime was being committed in the officers’ presence at the time of the search in *Lefkowitz*. *Id.* at 462–63.

87. *Id.* at 464.

88. 334 U.S. 699 (1948), *overruled by* *United States v. Rabinowitz*, 339 U.S. 56 (1950).

89. *Id.* at 705–06. In *Trupiano*, an Internal Revenue agent infiltrated the distillery and worked there undercover as a “mash man” for approximately three weeks before the raid, using a portable two-way radio to relay information about the distillery’s operations to his superiors. *Id.* at 701–02. On the basis of intelligence that the agent provided, a truckload of alcohol had been seized after it left the distillery three days before the raid in question. *Id.*

90. *Id.* at 708.

91. *Id.* at 706 (citing *Johnson v. United States*, 333 U.S. 10, 15 (1948)).

nient application of the exception. In *United States v. Rabinowitz*,⁹² decided only two years after *Trupiano*, the Court again considered the warrantless search of an office subsequent to arrest, this time reaching a different conclusion than in *Go-Bart* and *Lefkowitz*.⁹³ Asserting the right of law enforcement to “search the place where the arrest is made in order to find and seize things connected with the crime,”⁹⁴ the Court ruled that the government’s failure to obtain a search warrant did not render the warrantless search unreasonable even though the agents may have had time to obtain the warrant prior to undertaking the search.⁹⁵ Thus, while *Trupiano* focused on the need for exigent circumstances to justify any deviation from the warrant requirement,⁹⁶ *Rabinowitz* crafted a standard that showed greater deference to law enforcement.⁹⁷

Despite the instability that had previously typified the Court’s warrantless search incident to arrest jurisprudence, *Rabinowitz* lasted nineteen years before being overruled by *Chimel v. California*.⁹⁸ In *Chimel*, the Court reviewed an even more extensive warrantless search than those at issue in *Go-Bart*, *Lefkowitz*, and *Rabinowitz*, as the police searched the arrestee’s entire three bedroom house subsequent to his arrest.⁹⁹ Justice Stewart, writing for the Court, began his opinion with a thorough historical review of the search incident to arrest exception, noting that the scope of allowable searches incident to arrest had waxed and waned in the years after it was first iterated in *Weeks*.¹⁰⁰

The Court identified two exigencies that justify a warrantless search incident to arrest: (1) the need to remove weapons in the arrestee’s possession, and (2) the need to prevent evidence from being

92. 339 U.S. 56 (1950).

93. *Id.* at 62–64. Agents searched Rabinowitz’s office after another individual identified Rabinowitz as a dealer of forged stamps. *Id.* at 57.

94. *Id.* at 61 (quoting *Agnello v. United States*, 269 U.S. 20, 30 (1925)) (internal quotation marks omitted).

95. *Id.* at 65 (reasoning that “[i]t is fallacious to judge events retrospectively and thus to determine, considering the time element alone, that there was time to procure a search warrant”).

96. *See supra* notes 90–91 and accompanying text.

97. *Rabinowitz*, 339 U.S. at 65 (“Some flexibility will be accorded law officers engaged in daily battle with criminals for whose restraint criminal laws are essential.”).

98. 395 U.S. 752, 768 (1969) (“[*Rabinowitz* is] no longer to be followed.”).

99. *Id.* at 754. In *Chimel*, officers obtained a warrant to arrest Chimel for burglarizing a coin shop. *Id.* at 753. After arresting Chimel at his home, the officers, over Chimel’s objection, searched Chimel’s entire home, seizing a variety of coins, medals, and tokens. *Id.* at 753–54. The Court sidestepped Chimel’s assertion that the officers arranged for the arrest to take place at his home solely to justify the search. *Id.* at 767 & n.13.

100. *Id.* at 755–61.

concealed or destroyed.¹⁰¹ Having identified these exigencies, the Court held that they could justify a search of both the arrestee's person and the area "within his immediate control."¹⁰² In so holding, however, the Court required that the scope of a warrantless search incident to arrest be limited specifically by the existence of the twin exigencies justifying the search in the first instance.¹⁰³ Accordingly, the Court found the search of Chimel's entire home unconstitutional because the police searched far beyond the area from which Chimel could have obtained a weapon or an item of evidence.¹⁰⁴ Noting further that any decision on the legality of a warrantless search mandated a careful balancing of the defendant's interest in his own privacy and the police's interest in enforcing the law, the Court ultimately concluded that the warrant requirement could not be excused "without a showing . . . that the exigencies of the situation made [a warrantless search] imperative."¹⁰⁵ *Chimel* re-established the proposition set forth in *Trupiano* that the search incident to arrest exception is a "strictly limited right" justified only by exigent circumstances.¹⁰⁶

B. The Court Applied the Search Incident to Arrest Doctrine to the Vehicular Context, Leading to Confusion Among State and Lower Federal Courts and Calls for a New Framework

The search incident to arrest exception, hardly a model of clarity, became even more muddled when the Court attempted to determine its scope in the context of the "recurring factual situation" of the arrest of a vehicle's occupant or recent occupant.¹⁰⁷ While the Court attempted to fashion a "straightforward rule"¹⁰⁸ to govern vehicular searches, the result created a split among the state and lower federal courts.¹⁰⁹ The wide range of criticism generated by the Court's application of the search incident to arrest exception to the vehicular con-

101. *Id.* at 762–63.

102. *Id.* at 763 (defining a defendant's area of immediate control as "the area from within which he might gain possession of a weapon or destructible evidence").

103. *Id.* at 762–63 (explaining that "[t]he scope of [a] search must be 'strictly tied to and justified by' the circumstances which rendered its initiation permissible" (alterations in original) (quoting *Terry v. Ohio*, 392 U.S. 1, 19 (1968)) (internal quotation marks omitted)).

104. *Id.* at 768.

105. *Id.* at 761 (quoting *McDonald v. United States*, 335 U.S. 451, 456 (1948)) (internal quotation marks omitted).

106. *Id.* at 759 (quoting *Trupiano v. United States*, 334 U.S. 699, 708 (1948)) (internal quotation marks omitted).

107. *New York v. Belton*, 453 U.S. 454, 460 (1981).

108. *Id.* at 459–60.

109. *See infra* Part II.B.1–2.

text boiled to the surface in the 2004 decision *Thornton v. United States*, in which two Justices called for a new framework and a majority of Justices expressed dissatisfaction with the status quo.¹¹⁰

1. *The Supreme Court Applied Chimel's Area of Immediate Control Rule to Situations in Which the Arrestee Is a Recent Occupant of an Automobile*

In the often-maligned¹¹¹ case of *New York v. Belton*, the Court sought to provide a workable definition of the permissible scope of a search incident to arrest where the arrestee is an occupant of a vehicle, and the arrestee's area of immediate control includes the vehicle's interior.¹¹² *Belton* arose out of an uncommon situation¹¹³ in which a lone police officer pulled over a vehicle containing four men and, upon smelling the odor of marijuana, ordered the men out of the car and placed them under arrest.¹¹⁴ As the officer possessed only a single pair of handcuffs, he could not restrain the men¹¹⁵ and accordingly ordered each suspect to a different section of the highway in order to separate them while he searched the car.¹¹⁶ Inside the passenger compartment, the officer found a bag of cocaine in one of Belton's jacket pockets.¹¹⁷

Faced with this set of facts, the *Belton* Court read *Chimel* in light of the "generalization" that articles inside the passenger compartment of

110. See *infra* Part II.B.3.

111. See, e.g., *State v. Fry*, 388 N.W.2d 565, 579–80 (Wis. 1986) (Bablitch, J., dissenting) ("I do not find one commentary favorable to the *Belton* rule, and there are many which are not."), *overruled by* *State v. Dearborn*, 786 N.W.2d 97 (Wis. 2010).

112. 453 U.S. 454, 460 (1981).

113. See *infra* note 116 (explaining that police departments generally advise officers not to conduct vehicle searches until the vehicle's occupants have been secured).

114. *Belton*, 453 U.S. at 455–56.

115. Brief for the Petitioner at 3, *Belton*, 453 U.S. 454 (No. 80-328), 1980 WL 339862, at *3.

116. *Belton*, 453 U.S. at 456. The *Belton* opinion sheds no light on why the arresting officer failed to postpone his search until support arrived, instead conducting it while the four suspects stood unrestrained on the highway. A 2002 study soliciting guidelines for search incident to arrest procedures from police departments across the State of California found that not a single department's procedures endorsed this approach. Myron Moskowitz, *A Rule in Search of a Reason: An Empirical Reexamination of Chimel and Belton*, 2002 Wis. L. REV. 657, 664, 675–76. One of the responding departments explained that a vehicle search requires an officer to place his body into awkward positions that limit the officer's defensive range of motion, divert the officer's attention from the suspect(s), and often expose the officer's firearm. *Id.* at 675. Accordingly, police search procedures generally call for officers to refrain from searching a vehicle until all of its occupants have been secured and, in the case of multiple suspects, to wait for reinforcements to arrive before beginning the search. *Id.* at 675–76.

117. *Belton*, 453 U.S. at 456.

an automobile are “generally, even if not inevitably,” within the arrestee’s area of immediate control.¹¹⁸ Based on this “generalization,” the Court held that police may search the passenger compartment of an automobile as a contemporaneous incident of the lawful arrest of the automobile’s occupant.¹¹⁹ The Court further held that police could search any containers located within the passenger compartment, whether open or closed.¹²⁰ Finally, the Court approvingly cited, without explicitly incorporating into its holding, language from *United States v. Robinson*,¹²¹ decided in the interim between *Chimel* and *Belton*, that indicated that the authority to search containers exists regardless of the probability that evidentiary or safety concerns exist in a particular case.¹²² The Court noted, however, that its holding did not alter the fundamental principles established in *Chimel* that concerned the basic scope of a search incident to arrest.¹²³

2. *Courts at the State and Federal Levels Have Not Applied Belton’s Rule Uniformly*

While the *Belton* Court sought to create a “single familiar standard”¹²⁴ to govern the search of an automobile incident to arrest, state and lower federal courts often struggled to apply its rule.¹²⁵ In addition to the problem of factual ambiguity regarding when the *Bel-*

118. *Id.* at 460.

119. *Id.* *Belton*’s holding expressly does not apply to the trunk of a vehicle. *Id.* at 460 n.4.

120. *Id.* at 460–61. The Court defined a container as “any object capable of holding another object,” including “closed or open glove compartments, consoles, or other receptacles . . . as well as luggage, boxes, bags, clothing, and the like.” *Id.* at 460 n.4.

121. 414 U.S. 218 (1973).

122. *Belton*, 453 U.S. at 461 (“The authority to search the person incident to a lawful custodial arrest . . . does not depend on what a court may later decide was the probability in a particular arrest situation that weapons or evidence would in fact be found” (quoting *Robinson*, 414 U.S. at 235) (internal quotation marks omitted)). The *Belton* Court’s inclusion of this language is curious because *Robinson* only considered the search of the arrestee’s *person*, which the *Robinson* Court described as a “distinct proposition[]” that had been “treated quite differently” from the search of an arrestee’s *area of control*. *Robinson*, 414 U.S. at 224.

123. *Belton*, 453 U.S. at 460 n.3 (“Our holding today does no more than determine the meaning of *Chimel*’s principles in this particular and problematic context. It in no way alters the fundamental principles established in the *Chimel* case regarding the basic scope of searches incident to lawful custodial arrests.”).

124. *Id.* at 458 (quoting *Dunaway v. New York*, 442 U.S. 200, 213 (1979)) (internal quotation marks omitted).

125. *See, e.g.*, *United States v. McLaughlin*, 170 F.3d 889, 895 (9th Cir. 1999) (Trott, J., concurring) (recognizing the lack of clarity provided by *Belton* and the confusion that it had engendered).

ton rule applies,¹²⁶ state and lower federal courts have adopted opposing interpretations on whether one of the *Chimel* rationales must be present to authorize a search.¹²⁷ This confusion seems to have arisen from the *Belton* Court's approval of the holding in *Robinson* that the presence of a *Chimel* exigency is not required in every case where the arrestee's *person* is searched incident to arrest.¹²⁸ The fact that *Belton* did not explicitly extend *Robinson* to searches of the arrestee's area of control in its holding,¹²⁹ combined with the statement that *Belton* did not alter the fundamental principles of *Chimel*,¹³⁰ has led to confusion

126. See *Belton*, 453 U.S. at 470 (Brennan, J., dissenting) (listing issues likely to raise such factual ambiguity). Justice Brennan noted that the *Belton* decision did not, for instance, resolve (1) how long after the arrest a *Belton* search may be conducted, (2) how close the arrestee must be to the vehicle to justify a search, (3) whether probable cause must exist before the arrestee is removed from the car or may be formed afterward, and (4) how the passenger compartment is defined for vehicles such as taxicabs or hatchbacks. *Id.*; see also, e.g., *McLaughlin*, 170 F.3d at 890 (upholding a search that began five minutes after the police had removed the arrestee from the scene); *United States v. Lugo*, 978 F.2d 631, 633–34, 636 (10th Cir. 1992) (striking down a search that began after the arrestee had left the scene).

127. At the state level, compare *State v. Fry*, 388 N.W.2d 565, 572 (Wis. 1986) (finding that *Chimel*'s "justifications . . . exist regardless of the officer's subjective intent" and that "[t]he validity of a search incident to arrest is determined by the legality of the arrest and whether the search was limited to an area from which the defendant might gain possession of a weapon or evidentiary items"), overruled by *State v. Dearborn*, 786 N.W.2d 97 (Wis. 2010), with *Ferrell v. State*, 649 So. 2d 831, 833 (Miss. 1995) (striking down a search that "cannot be classified as incident to arrest" because the arresting officer could not have had a reasonable concern about his safety or the possible destruction of evidence). Some states have even refused to apply *Belton*, either holding that it conflicts with privacy protections guaranteed by their state constitutions or ignoring the case completely. See Moskowitz, *supra* note 116, at 696 n.175 (listing cases). At the federal level, compare *United States v. Hrasky*, 453 F.3d 1099, 1101 (8th Cir. 2006) (noting that *Belton* did not require a case-by-case adjudication of the presence of the *Chimel* rationales (citing *Belton*, 453 U.S. at 459)), and *McLaughlin*, 170 F.3d at 891–92 (same), with *United States v. Green*, 324 F.3d 375, 379 (5th Cir. 2003) (finding that the search of an arrestee's vehicle was not justified where neither *Chimel* rationale was present).

128. See, e.g., *Fry*, 388 N.W.2d at 572 (explaining that while "*Robinson* involved searches of the person[] . . . *Belton* applied [*Robinson*'s] reasoning to searches beyond the person of the defendant" (citation omitted)); *Hrasky*, 453 F.3d at 1101 (concluding, based upon the *Robinson* language quoted in *Belton*, that "*Belton* similarly rejected the contention that 'there must be litigated in each case the issue of whether or not there was present one of the reasons' supporting a search incident to arrest" (quoting *Belton*, 453 U.S. at 459) (internal quotation marks omitted)).

129. See *Belton*, 453 U.S. at 460 ("[W]e hold that when a policeman has made a lawful custodial arrest of the occupant of an automobile, he may, as a contemporaneous incident of that arrest, search the passenger compartment of that automobile." (footnote omitted)). The *Belton* Court did, however, reference *Robinson* when discussing law enforcement's ability to search containers that could not hold a weapon or evidence of the crime of arrest. *Id.* at 461.

130. See *supra* note 123 and accompanying text.

R

R

as to whether the *Chimel* rationales must exist to justify a *Belton* search.¹³¹

The Court's post-*Belton* cases also did not provide guidance as to which interpretation of *Belton* should be followed when a lawful arrest has occurred. In *Knowles v. Iowa*,¹³² for example, the Court declined to extend the *Belton* rule to the search of a vehicle whose occupant received a traffic citation instead of being arrested.¹³³ In so doing, the Court noted the absence of the *Chimel* justifications in this circumstance,¹³⁴ but the Court explicitly limited its holding to the constitutionality of a "search incident to citation" where those rationales were absent.¹³⁵

3. *Members of the Court Criticized Belton and Called for a New Search Incident to Arrest Framework in Thornton*

In *United States v. Thornton*, the Court held that *Belton* applies to situations where the police do not initiate contact until after the arrestee has left the vehicle.¹³⁶ In that case, the defendant had parked and exited his vehicle before police were able to initiate contact with him.¹³⁷ After a consensual pat down, which revealed drugs concealed on the defendant's person, the officer arrested the defendant and then proceeded to search the defendant's vehicle, where he found a handgun.¹³⁸ The Court noted that the arrest of a suspect located next to a vehicle presented concerns regarding officer safety and evidence preservation that were identical to those presented by the arrest of a suspect inside the vehicle, and the Court explained that no logical reason existed for applying different standards to the two scenarios.¹³⁹

131. See Leslie A. Lunney, *The (Inevitably Arbitrary) Placement of Bright Lines: Belton and Its Progeny*, 79 TUL. L. REV. 365, 380–81 (2004) (attributing *Belton*'s failure to "fully resolve the ongoing dispute over warrantless searches incident to arrest" in the automotive context to the "underlying tension" between the *Belton* Court's endorsement of *Robinson*'s reasoning and proclaimed fidelity to *Chimel*'s fundamental principles).

132. 525 U.S. 113 (1998).

133. *Id.* at 118–19 (declining to extend *Robinson*'s "'bright-line rule' to a situation where the concern for officer safety is not present to the same extent and the concern for destruction or loss of evidence is not present at all").

134. See *id.* at 117–19 (explaining why the *Chimel* rationales generally would not justify a "search incident to citation").

135. *Id.* at 117 ("But neither of these underlying rationales for the search incident to arrest exception is sufficient to justify the search in the present case.").

136. 541 U.S. 615, 617 (2004).

137. *Id.* at 618.

138. *Id.*

139. *Id.* at 621 ("It would make little sense to apply two different rules to what is, at bottom, the same situation.").

Thornton is also significant because a majority of the Justices used the case to criticize *Belton*.¹⁴⁰ Justice Scalia, while concurring in the Court's judgment, called for a new search incident to arrest framework to replace *Belton*'s bright-line rule.¹⁴¹ Contending that "*Belton* cannot reasonably be explained as a mere application of *Chimel*,"¹⁴² Justice Scalia sought to return the search incident to arrest exception in the vehicular context to a framework based on "the more general interest in gathering evidence."¹⁴³ While acknowledging that *Chimel* is a "plausible account[] of what the Constitution requires,"¹⁴⁴ Justice Scalia proposed that *Belton* searches should be allowed only in "cases where it is reasonable to believe evidence relevant to the crime of arrest might be found in the vehicle."¹⁴⁵ The tension between the exigency and evidentiary bases for the search incident to arrest exception, seemingly extinguished by *Chimel*, was thus reignited with Justice Scalia's separate opinion in *Thornton*.¹⁴⁶

140. In addition to Justice Scalia's critical attack, which was joined by Justice Ginsburg, *id.* at 625–29 (Scalia, J., concurring in the judgment) ("[I]n our search for clarity, we have now abandoned our constitutional moorings and floated to a place where the law approves of purely exploratory searches of vehicles . . ." (quoting *United States v. McLaughlin*, 170 F.3d 889, 894 (9th Cir. 1999) (Trott, J., concurring)) (internal quotation marks omitted)), Justice O'Connor criticized *Belton*'s rule as a "police entitlement" based on a "shaky foundation," *id.* at 624 (O'Connor, J., concurring in part). Justices Stevens and Souter criticized the Court for extending *Belton*'s bright-line rule without providing sufficient guidance as to how the extension should be applied and reiterated a concern regarding *Belton*'s authorization of passenger compartment container searches. *Id.* at 634–36 (Stevens, J., dissenting).

141. *See id.* at 629 (Scalia, J., concurring in the judgment) ("If *Belton* searches are justifiable, it is not because the arrestee might grab a weapon or evidentiary item from his car, but simply because the car might contain evidence relevant to the crime for which he was arrested.").

142. *Id.* at 631. Justice Scalia noted that the Government's brief in *Thornton* failed to cite a single instance where a handcuffed arrestee managed to retrieve a weapon or piece of evidence from his vehicle. *Id.* at 626–27 (discussing the cases cited by the United States where a handcuffed arrestee used a weapon to attack a police officer).

143. *Id.* at 629. To support this proposition, Justice Scalia cited principally to *Rabinowitz*. *Id.* For additional discussion of *Rabinowitz*, see *supra* text accompanying notes 92–97. R

144. *Thornton*, 541 U.S. at 631. Justice Scalia essentially equated the legitimacy of *Rabinowitz* with that of *Chimel*, noting that "neither [case] is so persuasive as to justify departing from settled law." *Id.*

145. *Id.* at 632.

146. *Cf. Tomkovicz*, *supra* note 78, at 1448 ("Consequently, if the 'evidence-gathering' rationale of *Rabinowitz* is to supplant the 'concealment or destruction' rationale of *Chimel* as an explanation for the searches that are currently authorized by *Belton*, those searches would remain constitutional *only* in 'cases where it is reasonable to believe evidence relevant to the crime of arrest might be found in the vehicle.'"). R

III. THE COURT'S REASONING

In *Arizona v. Gant*,¹⁴⁷ the Supreme Court of the United States affirmed the judgment of the Supreme Court of Arizona and held that *Chimel* restricts the warrantless search of an automobile incident to an occupant's arrest to situations where "the arrestee is unsecured and within reaching distance of the passenger compartment at the time of the search."¹⁴⁸ The Court also concluded, "Although it does not follow from *Chimel*," the search of a vehicle incident to arrest is justified where police have reason to believe the vehicle contains evidence of the crime of arrest.¹⁴⁹ Writing for the majority, Justice Stevens examined *Chimel* and *Belton* and noted that the Court's holding in *Belton* had been "widely understood to allow a vehicle search incident to the arrest of a recent occupant," even where there is no possibility of the arrestee accessing the automobile during the search.¹⁵⁰ Justice Stevens attributed this understanding to Justice Brennan's strong dissent in *Belton*.¹⁵¹ Rejecting this broad reading, Justice Stevens explained that it was "incompatible" with the statement in *Belton* that the fundamental principles of *Chimel* remained intact.¹⁵²

In adopting a narrow interpretation of *Belton*, the Court found that the State of Arizona had underestimated the privacy interests at stake in the search incident to arrest exception¹⁵³ while overestimating the clarity and necessity to police supposedly offered by the broader interpretation.¹⁵⁴ While acknowledging that a person's privacy interest in a vehicle is less than a person's privacy interest in a home, the Court found that a broad blanket authorization to search not only the passenger compartment but also any containers located therein implicated concerns about "unbridled [police] discretion" and posed "a serious and recurring threat to the privacy of countless individuals."¹⁵⁵ The Court then suggested that the *Belton* rule was a

147. 129 S. Ct. 1710 (2009).

148. *Id.* at 1719, 1724.

149. *Id.* (citing *Thornton*, 541 U.S. at 632 (Scalia, J., concurring in the judgment)).

150. *Id.* at 1716–18.

151. *Id.* at 1718; see *New York v. Belton*, 453 U.S. 454, 468 (1981) (Brennan, J., dissenting) (predicting that *Belton* would allow searches of inaccessible areas of the vehicle and would allow searches even if the arrestees were handcuffed and secured in the backseat of a police car).

152. *Gant*, 129 S. Ct. at 1719 (reasoning that "[t]o read *Belton* as authorizing a vehicle search incident to every recent occupant's arrest would thus untether the rule from the justifications underlying the *Chimel* exception"); see also *supra* note 123 and accompanying text.

153. *Gant*, 129 S. Ct. at 1720.

154. *Id.* at 1720–21.

155. *Id.* at 1720.

“bright line” in name only,¹⁵⁶ explaining that state and lower federal courts had reached differing standards in determining the factual predicates for its application.¹⁵⁷ Furthermore, the Court noted that the police may continue to invoke other exceptions to the warrant requirement in the vehicular context, making the broad interpretation of *Belton* “unnecessary to protect law enforcement . . . interests.”¹⁵⁸ The Court reasoned that while its decision limited the ability of officers to conduct warrantless searches, a broad construction of *Belton* would treat the right to search as a “police entitlement,” which cannot justify an exception to the Fourth Amendment warrant requirement.¹⁵⁹

The majority then advanced several arguments in opposition to the dissenting opinion’s contention that stare decisis compelled adherence to the broad interpretation of *Belton*.¹⁶⁰ The majority first explained that while stare decisis is essential to the stability of the law, it does not require the Court to affirm an unconstitutional practice, especially “in a case that is so easily distinguished from the decisions that arguably compel it.”¹⁶¹ The Court also downplayed the suggestion that law enforcement reliance necessitated the application of stare decisis to the broad interpretation of *Belton*, maintaining that police reliance fell short of the “broader societal reliance” required to

156. *See id.* at 1721 (“The rule has thus generated a great deal of uncertainty, particularly for a rule touted as providing a ‘bright line.’”).

157. *Id.* at 1720–21 & nn.6–7. Specifically, the Court pointed out that lower courts had split on where and when law enforcement’s initial contact with the arrestee must take place to bring the *Belton* rule into effect, as well as on the reasonableness of a search executed after the arrestee is removed from the scene. *Id.* at 1720 n.6 (listing cases in which courts applied differing standards regarding when and where police must first make contact with the arrestee for *Belton* to apply); *id.* at 1721 n.7 (citing cases showing a lack of consistency among state and lower federal courts as to the legitimacy of a permissible *Belton* search after the arrestee had been removed from the scene).

158. *Id.* at 1721. For instance, the Court explained that warrantless searches are generally permitted (1) where the officer has reasonable suspicion that an individual is dangerous, (2) where there is probable cause to believe the vehicle contains evidence of criminal activity, and (3) where an officer reasonably suspects a dangerous individual may be hiding. *Id.*

159. *Id.* Justice O’Connor first asserted that *Belton* treated the ability to search a vehicle incident to arrest as a “police entitlement” in her partial concurring opinion in *Thornton*. *See supra* note 140.

160. *Gant*, 129 S. Ct. at 1722–23.

161. *Id.* at 1722. The Court asserted that *Gant* was easily distinguishable from *Belton* in that *Gant* was a lone arrestee securely detained by multiple officers, whereas in *Belton* “one officer [was] confronted by four unsecured arrestees.” *Id.* The Court also distinguished *Gant* from *Thornton* because the police arrested *Gant* for a traffic, rather than a drug, offense. *Id.*

invoke stare decisis.¹⁶² Finally, the Court asserted that *Belton* was based on a “faulty assumption” that “authorize[d] myriad unconstitutional searches,” which obviated the argument that stare decisis requires upholding the broad interpretation of *Belton*.¹⁶³

Justice Scalia wrote a concurring opinion in which he criticized the majority’s interpretation of *Belton* as an “artificial narrowing”¹⁶⁴ and called for *Chimel* to be “entirely abandoned” in the context of vehicular searches and for *Belton* and *Thornton* to be overruled.¹⁶⁵ In place of the *Chimel-Belton-Thornton* framework, Justice Scalia proposed allowing police to search an automobile incident to arrest only where it is reasonable to believe that the vehicle contains evidence of the crime of arrest or of other crimes that the officer has probable cause to believe occurred.¹⁶⁶ Despite his disagreement with Justice Stevens’s interpretation of *Belton*, Justice Scalia joined the majority opinion because of a desire to avoid a “4-to-1-to-4 opinion that [would] leave[] the governing rule uncertain.”¹⁶⁷ He reasoned that “plainly unconstitutional searches” permitted by the broad interpretation of *Belton* were a “greater evil” than the lack of certainty resulting from the narrow interpretation.¹⁶⁸

In dissent, Justice Alito defended the (broad) bright-line interpretation of *Belton* and criticized the majority’s two-part test.¹⁶⁹ Justice

162. *Id.* at 1722–23. The Court found that the police’s reliance interest was outweighed by “the countervailing interest that all individuals share in having their constitutional rights fully protected.” *Id.* at 1723.

163. *Id.* (“We now know that articles inside the passenger compartment are rarely ‘within the area into which an arrestee might reach’” (quoting *New York v. Belton*, 453 U.S. 454, 460 (1981)) (internal quotation marks omitted)).

164. *Id.* at 1725 (Scalia, J., concurring). Justice Scalia explained that he understood *Belton* and *Thornton* to always allow a search incident to arrest, regardless of the presence of *Chimel* rationales. *Id.* at 1724. Justice Scalia called for the Court to overturn *Belton* on the ground that it was “badly reasoned” and produced unconstitutional results. *Id.* at 1725.

165. *Id.* at 1725.

166. *Id.* The majority opinion adopted this proposal with regard to evidence of the crime of the arrest as a second justification for a warrantless search incident to arrest. *See supra* text accompanying note 149. The majority’s adoption of this proposal, however, does not mention searches for other crimes that an officer has probable cause to believe occurred. *Gant*, 129 S. Ct. at 1719 (“[W]e also conclude that circumstances unique to the vehicle context justify a search incident to a lawful arrest when it is ‘reasonable to believe evidence relevant to the crime of arrest might be found in the vehicle.’” (quoting *United States v. Thornton*, 541 U.S. 615, 632 (2004) (Scalia, J., concurring in the judgment))).

167. *Gant*, 129 S. Ct. at 1725 (Scalia, J., concurring).

168. *Id.*

169. *Id.* at 1726–27 (Alito, J., dissenting). Justice Breyer wrote a separate dissent in which he conceded that *Belton*’s bright-line rule could “produce results divorced from its underlying Fourth Amendment rationale,” but nonetheless argued that the majority had not met the “heavy burden” required to overcome stare decisis and overturn precedent. *Id.* at 1725–26 (Breyer, J., dissenting).

Alito contended that by abandoning the clear bright-line test, the majority had “substantially overruled” both *Belton* and *Thornton* without justifying its “departure from the usual rule of stare decisis.”¹⁷⁰ The dissent examined several justifications for overruling precedent,¹⁷¹ ultimately concluding that considerable police reliance,¹⁷² the absence of changed circumstances or subsequent decisions undermining *Belton*,¹⁷³ and the quality of *Belton*’s reasoning¹⁷⁴ required continued adherence to the broad interpretation. Justice Alito also criticized the second part of the Court’s rule, which adopted Justice Scalia’s evidence standard, as having been adopted “uncritically from Justice Scalia’s separate opinion in *Thornton*,” and he argued that it “raise[d] doctrinal and practical problems.”¹⁷⁵

IV. ANALYSIS

In *Arizona v. Gant*, the Court limited *Belton* searches to situations where the arrestee is unsecured and in reaching distance of the vehicle’s passenger compartment when the search occurs, or where there is reason to believe that the vehicle contains evidence of the crime of arrest.¹⁷⁶ The jurisprudence concerning the search incident to arrest exception to the Fourth Amendment’s warrant requirement has been unstable and adhered little to the rule of stare decisis.¹⁷⁷ In *Gant*, the

170. *Id.* at 1727–28 (Alito, J., dissenting). The dissent asserted that *Belton* had explicitly endorsed a bright-line approach to vehicular searches incident to arrest, and that Justice Brennan’s dissent in *Belton* was not a mischaracterization of *Belton*’s holding. *Id.* at 1727.

171. *Id.* at 1728. Justice Alito listed several relevant factors to be considered in overruling a constitutional precedent, including: (1) reliance on the precedent, (2) important changes in circumstances since the decision was rendered, (3) the precedent’s workability, (4) the extent to which the precedent was undermined by later decisions, and (5) the quality of the precedent’s reasoning. *Id.*

172. *Id.* The dissent disputed the majority’s distinction between reliance by law enforcement and reliance by society generally, arguing that the case supporting the majority’s position did not actually refer to societal reliance, but rather found reliance based upon law enforcement training and conduct. *Id.* at 1728–29; see also *supra* text accompanying note 162.

173. *Gant*, 129 S. Ct. at 1729 (Alito, J., dissenting).

174. *Id.* at 1729–31 (calling *Belton* a “modest—and quite defensible—extension of *Chimel*”). Justice Breyer did not join the section of Justice Alito’s dissent that defended *Belton*’s reasoning. *Id.* at 1726.

175. *Id.* at 1731. Justice Alito noted a discrepancy between this “reasonable to believe” standard and the Fourth Amendment’s “probable cause” standard. *Id.* He also questioned why this standard restricted searches to the crime of arrest rather than allowing them whenever police have reason to believe the vehicle contains evidence of other criminal activity. *Id.*

176. *Id.* at 1719 (majority opinion).

177. See *Chimel v. California*, 395 U.S. 752, 755 (1969) (“The decisions of this Court bearing upon [this] question have been far from consistent, as even the most cursory review makes evident.”).

Court rightly invalidated the broad interpretation of *Belton*, as that decision was poorly reasoned and inconsistent with precedent.¹⁷⁸ Unfortunately, the *Gant* decision will not be a lasting precedent because its two justifications for warrantless searches in the vehicular context are internally inconsistent.¹⁷⁹ The *Gant* Court erred by appending Justice Scalia's evidence standard to *Chimel*'s exigency-based approach, as the evidence standard resembles a bright-line rule and disregards the Fourth Amendment's historical foundation.¹⁸⁰ Furthermore, the evidence standard, by virtue of its thin doctrinal basis, is unacceptably vague and will present numerous problems for those who will apply it in practice.¹⁸¹ Instead of merely vanquishing *Belton*'s bright-line rule while adopting Justice Scalia's more limited bright-line, the Court should have issued a full-throated restoration of *Chimel*'s exigency-based standard, even if it may have only been able to do so in the form of a plurality opinion.¹⁸²

A. *The Court in Gant Rightly Limited Belton's Applicability to the Spatial Scope of Warrantless Searches Incident to Arrest Where the Arrestee Is Unsecured*

This Note will not address at length the largely semantic question of whether *Gant* overruled *Belton* or merely adopted a more limited interpretation of its holding. What is relevant here is that *Gant* erased the portion of *Belton* that could be interpreted to permit warrantless searches incident to arrest in every instance where the recent occupant of an automobile is arrested, while maintaining the portion of the opinion that defined the spatial scope of the recent occupant's area of control when the arrestee is unsecured and able to reach the vehicle's passenger compartment.¹⁸³ Even accepting, arguendo, Justice Alito's conclusion that the majority in *Gant* "substantially overruled *Belton*,"¹⁸⁴ the Court should not be faulted for overturning a

178. See *infra* Part IV.A.

179. See *infra* Part IV.B.1.

180. See *infra* Part IV.B.2.

181. See *infra* Part IV.B.3.

182. See *infra* Part IV.C.

183. See *Arizona v. Gant*, 129 S. Ct. 1710, 1719 (2009) ("Accordingly, we reject this [broad] reading of *Belton* and hold that the *Chimel* rationale authorizes police to search a vehicle incident to a recent occupant's arrest only when the arrestee is unsecured and within reaching distance of the passenger compartment at the time of the search.").

184. See *supra* note 170 and accompanying text. Although it is clear that the majority in *Gant* significantly reduced *Belton*'s significance, whether *Gant* actually overruled *Belton* is disputable. The majority did not, for instance, alter *Belton*'s core generalization that the entire passenger compartment, and any containers therein, may be searched regardless of whether a given item was actually within the arrestee's reach as long as the arrestee was

case that is based on a judicial fiction and patently at odds with the precedent cited to support it.¹⁸⁵

The *Belton* decision has received a considerable amount of criticism in the years since it was issued.¹⁸⁶ One of the case's main failings is that it attempted to distill a general rule from a situation in which generally accepted police procedures relating to the search of a vehicle had not been followed.¹⁸⁷ In this uncommon situation,¹⁸⁸ in which a police officer searched a vehicle while multiple suspects remained unsecured on the highway, the Court read *Chimel* in light of the "generalization" that articles inside the passenger compartment of an automobile are within the arrestee's area of control.¹⁸⁹ Armed with this "generalization"—actually a judicial fiction given that it is common practice for police officers to restrain arrestees before searching their vehicles¹⁹⁰—the Court authorized searches of an arrestee's vehicle and any containers located therein.¹⁹¹ The *Belton* Court hinted that it was expanding the *Robinson* rule, which dispensed with the requirement of a *Chimel* exigency in searches of an arrestee's person and containers found thereon, to searches of an arrestee's

unsecured and in reaching distance of the passenger compartment at the time of the search. *Gant*, 129 S. Ct. at 1718–19.

185. See *New York v. Belton*, 453 U.S. 454, 465–66 (1981) (Brennan, J., dissenting) (calling the notion "that the interior of a car is *always* within the immediate control of an arrestee who has recently been in the car" a "fiction" and arguing that the Court's holding "ignores both precedent and principle").

186. See, e.g., *id.*; see also *supra* note 111.

187. See Moskowitz, *supra* note 116, at 674–75 (discussing the *Belton* Court's rationale for the bright-line standard and noting that "[t]he Court might have been better served by finding some means of determining what really happens when the police arrest the driver of an automobile"); see also *supra* note 116 (discussing typical police procedures for the search of a vehicle).

188. See *supra* note 116.

189. *Belton*, 453 U.S. at 460.

190. See *Thornton v. United States*, 541 U.S. 615, 628 (2004) (Scalia, J., concurring in the judgment) ("[T]he practice of restraining an arrestee on the scene before searching a car that he just occupied is so prevalent that holding that *Belton* does not apply in that setting would . . . largely render *Belton* a dead letter." (alteration in original) (quoting Brief for the United States at 36–37, *Thornton*, 541 U.S. 615 (No. 03-5165), 2004 WL 121585, at 36–37) (internal quotation marks omitted)). Justice Scalia noted that the cases cited in the Government's brief in *Thornton* contained not a single instance where a restrained arrestee had managed to retrieve a weapon or evidence from his vehicle. See *supra* note 142. Even Justice Alito, who defended *Belton* in *Gant*, conceded in *Gant* that *Belton*'s generalization is rarely true. See *Arizona v. Gant*, 129 S. Ct. 1710, 1729 (2009) (Alito, J., dissenting) ("Surely it was well known in 1981 that a person who is taken from a vehicle, handcuffed, and placed in the back of a patrol car is unlikely to make it back into his own car to retrieve a weapon or destroy evidence.").

191. *Belton*, 453 U.S. at 460–61.

R

R

R

R

R

area of control.¹⁹² While this hint was not part of the Court's explicit holding, most courts have understood *Belton* to require no actual showing of exigency to authorize the search of a vehicle.¹⁹³

As a result, *Belton* arguably untethered the justification for vehicular searches incident to arrest from the *Chimel* exigency standard, thereby untethering its reasoning from *Chimel* despite the Court's statement that *Belton* did not alter *Chimel*'s fundamental principles.¹⁹⁴ Searches of an arrestee's person and area of control have "historically been formulated into two distinct propositions,"¹⁹⁵ and while the exigency requirement reasonably can be removed from the former due to inherent officer safety concerns,¹⁹⁶ removing the exigency requirement from the latter leads to "erroneous" and "unconstitutional" results.¹⁹⁷ Whereas *Chimel*'s exception to the warrant requirement was justified by officer safety and evidence preservation, *Belton*'s holding is based predominantly on an interest in certainty.¹⁹⁸ There certainly is

192. See *id.* at 461 (citing *United States v. Robinson*, 414 U.S. 218 (1973), for the proposition that such searches are permitted despite the fact that containers found on an arrestee's person "will sometimes be such that they could hold neither a weapon nor evidence of the criminal conduct for which the suspect was arrested").

193. See, e.g., *State v. Gant*, 162 P.3d 640, 645 (Ariz. 2007), *aff'd*, 129 S. Ct. 1710 (2009) (noting that the bright-line interpretation of *Belton* was the majority view).

194. *Belton*, 453 U.S. at 468 (Brennan, J., dissenting) ("By approving the constitutionality of the warrantless search in this case, the Court carves out a dangerous precedent that is not justified by the concerns underlying *Chimel*. Disregarding the principle 'that the scope of a warrantless search must be commensurate with the rationale that excepts the search from the warrant requirement,' the Court for the first time grants police officers authority to conduct a warrantless 'area' search under circumstances where there is no chance that the arrestee 'might gain possession of a weapon or destructible evidence.'" (citation omitted)); *id.* at 460 n.3 (majority opinion) (noting that *Belton* did not "alter[] the fundamental principles established in the *Chimel* case regarding the basic scope of searches incident to lawful custodial arrests").

195. *Robinson*, 414 U.S. at 224.

196. An arrest necessarily subjects law enforcement to "extended exposure" with the arrestee, whom officers take into custody and transport to a police station. *Id.* at 234–35. An arrestee carrying a small weapon on his person, even if handcuffed, could possibly retrieve that weapon and use it to attack an officer at any point during the arrest process. Moskowitz, *supra* note 116, at 672. Once the arrestee is removed from the scene of arrest, however, he will obviously be unable to retrieve any items from that scene. See *Thornton v. United States*, 541 U.S. 615, 626 (Scalia, J., concurring in the judgment) (critiquing the assertion that an arrestee may be able to escape and retrieve a weapon or evidence following his arrest and placement in a patrol car).

197. *Arizona v. Gant*, 129 S. Ct. 1710, 1725 (2009) (Scalia, J., concurring); *United States v. McLaughlin*, 170 F.3d 889, 894–95 (9th Cir. 1999) (Trott, J., concurring) (discussing constitutional flaws in *Belton*'s bright-line interpretation).

198. See *Belton*, 453 U.S. at 458 ("In short, '[a] single familiar standard is essential to guide police officers . . .'" (alteration in original) (quoting *Dunaway v. New York*, 442 U.S. 200, 213–14 (1979))); see also *Thornton*, 541 U.S. at 634 (Stevens, J., dissenting) (stating that "*Belton*'s basic rationale . . . rested not on a concern for officer safety, but rather on an overriding desire to hew 'to a straightforward rule, easily applied, and predictably en-

an interest in having a clear rule.¹⁹⁹ That interest, however, does not justify a standard that functions as a “police entitlement,”²⁰⁰ allowing warrantless searches every time police effectuate an arrest on the highway.²⁰¹

Therefore, the *Gant* Court’s rejection of *Belton*’s bright-line interpretation wisely pruned an exception to the warrant requirement that had, in the context of vehicular searches, sprawled beyond its original constitutional justifications.²⁰² The Court essentially reduced *Belton* to a spatial description of those sections of the vehicle that are within the area of an occupant’s control when the occupant is unsecured and able to reach the passenger compartment at the time of the search.²⁰³ In undoing the *Belton* Court’s misguided extension of the bright-line principle²⁰⁴ to searches of an arrestee’s area of control,²⁰⁵ *Gant* ensures that *Belton* will honor its pledge to do “no more than determine

forced’” (quoting *Belton*, 453 U.S. at 459)); Tomkovicz, *supra* note 78, at 1435–36 (considering and rejecting other potential motivations for *Belton*’s holding). R

199. See *Belton*, 453 U.S. at 459–60 (“When a person cannot know how a court will apply a settled principle to a recurring factual situation, that person cannot know the scope of his constitutional protection, nor can a policeman know the scope of his authority.”). Unfortunately, this justification ignores the Court’s longstanding recognition that Fourth Amendment reasonableness turns not on “a neat set of legal rules” but on “the factual and practical considerations of everyday life on which reasonable and prudent men, not legal technicians, act.” *Ornelas v. United States*, 517 U.S. 690, 695–96 (1996) (quoting *Illinois v. Gates*, 462 U.S. 213, 231 (1983)) (internal quotation marks omitted).

200. See *supra* note 140. R

201. Cf. *Thornton*, 541 U.S. at 634 (reasoning that “the interest in certainty that supports *Belton*’s bright-line rule surely does not justify an expansion of the rule” to searches incident to traffic citations).

202. See *Belton*, 453 U.S. at 468 (Brennan, J., dissenting) (“By approving the constitutionality of the warrantless search in this case, the Court carves out a dangerous precedent that is not justified by the concerns underlying *Chimel*.”); see also *McLaughlin*, 170 F.3d at 894 (Trott, J., concurring) (bemoaning that “in our search for clarity, we have now abandoned our constitutional moorings and floated to a place where the law approves of purely exploratory searches of vehicles”).

203. *Arizona v. Gant*, 129 S. Ct. 1710, 1718 (2009) (“That is, when the passenger compartment is within an arrestee’s reaching distance, *Belton* supplies the generalization that the entire compartment and any containers therein may be reached.”); see also Michael Goodin, *Arizona v. Gant: The Supreme Court Gets It Right (Almost)*, 87 U. DET. MERCY L. REV. 115, 142 (2010) (noting that *Gant*’s narrow reading of *Belton* “does provide an answer to the difficult question of how much of the interior of an [sic] automobile officers should be able to search incident to arrest”).

204. Chief Justice Rehnquist has colorfully denounced the false comfort of bright-line standards, noting that “any search for ‘bright lines’ . . . is apt to be illusory. Our entire profession is trained to attack ‘bright lines’ the way hounds attack foxes.” *Robbins v. California*, 453 U.S. 420, 443 (1981) (Rehnquist, J., dissenting).

205. See *supra* text accompanying notes 197–203. R

the meaning of *Chimel's* principles in [a] particular and problematic context.”²⁰⁶

B. The Gant Court Erred by Embracing a Rule That Combined the Exigency and Evidence-Gathering Rationales Because the Rule Creates Doctrinal Inconsistency and Ambiguity

Although *Gant* rightly limited *Belton's* applicability to situations in which the arrestee is unsecured and within reaching distance of the vehicle's passenger compartment, it nevertheless, through inclusion of Justice Scalia's evidence standard, failed to alleviate the inconsistency that has plagued the search incident to arrest exception for decades.²⁰⁷ The combination of *Chimel's* exigency-based standard and Justice Scalia's evidence standard is internally inconsistent, mixing *Chimel's* doctrine with that of prior cases that *Chimel* expressly overruled.²⁰⁸ The evidence standard is also inconsistent with the historical principles existing at the time of the founding,²⁰⁹ and its thin doctrinal support will cause continued ambiguity within search incident to arrest jurisprudence.²¹⁰ To avoid these inconsistencies and ambiguities, the *Gant* Court should have posited a rule based solely on *Chimel's* exigency rationale, even though doing so may have resulted in a rule that garnered support from only a plurality of the Justices.²¹¹

1. Justice Scalia's Evidence Standard, Which May Resemble a Bright-Line Rule, Undermines the Principles of Chimel

By grafting Justice Scalia's evidence standard onto the exigency-based rationale of *Chimel*, the Court in *Gant*, like the Court in *Belton*, undermined *Chimel's* carefully analyzed policy justifications for the search incident to arrest exception.²¹² The Court in *Chimel* conducted

206. *Belton*, 453 U.S. at 460 n.3; cf. Goodin, *supra* note 203, at 141–42 (concluding that “[t]he Court's decision in *Gant* laid out the proper framework for interpreting *Belton*” because the facts of *Belton* demonstrate that the *Chimel* rationales were present in that case and that the opinion “should have [had only] limited applicability”).

207. See *infra* Part IV.B.1; see also *Chimel v. California*, 395 U.S. 752, 755 (1969) (calling the Court's decisions regarding the search incident to arrest exception “far from consistent”).

208. See *infra* Part IV.B.1.

209. See *infra* Part IV.B.2.

210. See *infra* Part IV.B.3.

211. See *infra* Part IV.C.

212. See *New York v. Belton*, 453 U.S. 454, 463 (1981) (Brennan, J., dissenting) (criticizing the Court for “turn[ing] its back on the product of” *Chimel's* careful analysis of “more than 50 years of conflicting precedent governing the permissible scope of warrantless searches incident to custodial arrest” by “formulating an arbitrary ‘bright-line’ rule applicable to ‘recent’ occupants of automobiles that fails to reflect *Chimel's* underlying policy justifications”); Tomkovicz, *supra* note 78, at 1472 (observing that the evidence standard

a thorough exploration of the historical background of the Fourth Amendment warrant requirement and the search incident to arrest exception, examining the Amendment's colonial origins and the turmoil characterizing the exception subsequent to its first iteration in *Weeks*.²¹³ The Court ultimately crafted a standard that carefully balanced individuals' rights to privacy and legitimate law enforcement interests.²¹⁴ *Chimel* thus comes down firmly on the side of a general warrant requirement, describing the need for search warrants as a "constitutional requirement" that "serves a high function."²¹⁵ While Justice Scalia may dismiss "the preference for a warrant" as merely rhetorical or illusory,²¹⁶ *Chimel* is clear in requiring "a showing by those who seek exemption from the constitutional mandate [of a search warrant] that the exigencies of the situation made that course imperative."²¹⁷ The decision then defines the two exigencies that allow the search of an arrestee's person and area of control under certain circumstances.²¹⁸ Overall, *Chimel* is pragmatic in recognizing that excep-

adopted in *Gant* could "mark a return to the regime that produced a result found unacceptable by the entire Warren Court in *Chimel*.").

The development of the search incident to arrest doctrine makes clear that the Court not only oscillated between the exigency and evidence-gathering rationales during the doctrine's early development, *see supra* Part II.A, but also that these rationales are highly inconsistent with one another, *see, e.g.*, *Abel v. United States*, 362 U.S. 217, 235 (1960) (conceding that the Court's search incident to arrest cases "cannot be satisfactorily reconciled" due to "strong and fluctuating differences of view on the Court"). This inconsistency is illustrated by the frequency with which the Court overruled its precedents as it shifted the search incident to arrest between the two rationales. *Compare* *United States v. Rabinowitz*, 339 U.S. 56 (1950) (overruling *Trupiano v. United States*, 334 U.S. 699 (1948)), *overruled by* *Chimel v. California*, 395 U.S. 752 (1969), *with* *Chimel*, 395 U.S. 752 (overruling *Rabinowitz*).

213. *Chimel*, 395 U.S. at 755–62.

214. *See* Tomkovicz, *supra* note 78, at 1429 (explaining that *Chimel*'s "dual goals were to ensure that officers had the authority they need and deserve, while also preserving privacy interests those officers had no reason to invade").

215. *Chimel*, 395 U.S. at 761 (quoting *McDonald v. United States*, 335 U.S. 451, 455–56 (1948)) (internal quotation marks omitted). *Compare id.*, *with* *Rabinowitz*, 339 U.S. at 60 ("It is unreasonable searches that are prohibited by the Fourth Amendment. It was recognized by the framers of the Constitution that there were reasonable searches for which no warrant was required." (citation omitted)).

216. *California v. Acevedo*, 500 U.S. 565, 582 (1991) (Scalia, J., concurring in the judgment) ("By the late 1960's, the preference for a warrant had won out, at least rhetorically. . . . The victory was illusory." (citation omitted)).

217. *Chimel*, 395 U.S. at 761 (quoting *McDonald*, 335 U.S. at 456) (internal quotation marks omitted).

218. *Id.* at 763 (noting officer safety and evidence preservation as exigencies that justify a search of the arrestee or his area of control incident to his arrest).

tions to the warrant requirement should be created through specific factual circumstances rather than through bright-line standards.²¹⁹

Justice Scalia's evidence standard, however, justifies warrantless searches incident to arrest on the ground of law enforcement's interest in securing evidence rather than on the ground of exigent circumstances.²²⁰ Although purporting to abandon bright-line rules in the search incident to arrest context,²²¹ the Court's adoption of the evidence standard may have incidentally created a new bright line that defines the scope of the arrestee's Fourth Amendment rights in the search incident to arrest context solely by the offense for which the arrestee has been detained. The arbitrariness of defining the right to search incident to arrest by the offense of arrest is illustrated by a comparison of the facts of *Gant* and *Thornton*. In each case, the driver of an automobile was arrested shortly after exiting his vehicle: *Gant* for an outstanding warrant²²² and *Thornton* for possession of marijuana and crack cocaine found during a consensual pat down.²²³ Both *Gant* and *Thornton* were handcuffed and secured in the back of a patrol car at the time of the search,²²⁴ and the practical difficulty of obtaining a search warrant through proper procedures in each case was

219. See *New York v. Belton*, 453 U.S. 454, 464 (1981) (Brennan, J., dissenting) (“[I]n determining whether to grant an exception to the warrant requirement, courts should carefully consider the facts and circumstances of each search and seizure, focusing on the reasons supporting the exception rather than on any bright-line rule of general application.”); *Ker v. California*, 374 U.S. 23, 33 (1963) (noting the Court’s “long-established recognition that standards of reasonableness under the Fourth Amendment are not susceptible of Procrustean application”); see also *Tomkovicz*, *supra* note 78, at 1419 (describing *Chimel*’s “straightforward, commonsense approach,” which was designed to ensure that “future developments [in the search incident to arrest exception] might be incremental, progressive, rooted in principle, and faithful to Fourth Amendment values”).

220. *Thornton v. United States*, 541 U.S. 615, 629 (2004) (Scalia, J., concurring in the judgment) (“*Belton* searches are justifiable . . . because the car might contain evidence relevant to the crime [of arrest].”). According to Justice Scalia, the “application of *Chimel* in [the vehicular] context should be entirely abandoned.” *Arizona v. Gant*, 129 S. Ct. 1710, 1725 (2009) (Scalia, J., concurring). Thus, Justice Scalia does not attempt to justify his evidence standard using an exigency framework in either *Gant* or *Thornton*. *Id.* (“I would hold that a vehicle search incident to arrest is *ipso facto* ‘reasonable’ only when the object of the search is evidence of the crime for which the arrest was made, or of another crime that the officer has probable cause to believe occurred.” (emphasis added)); *Thornton*, 541 U.S. at 629 (Scalia, J., concurring in the judgment) (justifying the evidence standard based on a “general interest in gathering evidence”).

221. See *Gant*, 129 S. Ct. at 1719 (“Accordingly, we reject [the broad] reading of *Belton* and hold that the *Chimel* rationale authorizes police to search a vehicle incident to a recent occupant’s arrest only when the arrestee is unsecured and within reaching distance of the passenger compartment at the time of the search.”).

222. *Gant*, 129 S. Ct. at 1715.

223. *Thornton*, 541 U.S. at 618.

224. *Gant*, 129 S. Ct. at 1715; *Thornton*, 541 U.S. at 618.

identical.²²⁵ Yet, because *Gant* was arrested for a traffic violation and Thornton was arrested for a drug violation, the evidence standard prohibited the search of *Gant*'s vehicle while allowing that of Thornton's.²²⁶

While *Belton*'s bright-line was based upon the "generalization" that an automobile's passenger compartment was within the arrestee's area of immediate control,²²⁷ the evidence standard's potential bright line derives from Justice Scalia's assumption that "it is not illogical to assume that evidence of a crime is most likely to be found where the suspect was apprehended."²²⁸ Although the evidence standard requires that an officer have reason to believe the vehicle contains evidence of the crime of arrest, both *Gant*²²⁹ and *Thornton*²³⁰ suggest that "reason to believe" can be found entirely in the nature of the crime of arrest—that is, whether the crime of arrest is evidentiary or nonevidentiary.²³¹ In fact, many state and lower federal courts applying *Gant*

225. *Cf.* *Chimel v. California*, 395 U.S. 755, 762 (1969) ("Only last Term . . . we emphasized that 'the police must, whenever practicable, obtain advance judicial approval of searches and seizures through the warrant procedure'" (quoting *Terry v. Ohio*, 392 U.S. 1, 20 (1968))). Indeed, the practical difficulty of obtaining a search warrant for an arrestee's vehicle has been drastically reduced by modern technologies such as cellular networks and Wi-Fi, which allow police departments to keep officers connected while on patrol, allowing officers to "communicate quickly with judges [and] obtain an arrest or search warrant while monitoring the site of suspected criminal activity." Ed Lee, *Best Practices in Mobile Data Communications*, OFFICER.COM, [http://www.officer.com/print/Law-Enforcement-Technology/Best-practices-in-mobile-data-communications/1\\$40887](http://www.officer.com/print/Law-Enforcement-Technology/Best-practices-in-mobile-data-communications/1$40887) (last visited Feb. 11, 2011). Requiring that police remotely obtain a warrant will take longer than automatically allowing the search in every instance, but "the mere fact that law enforcement may be made more efficient can never by itself justify disregard of the Fourth Amendment." *Mincey v. Arizona*, 437 U.S. 385, 393 (1978).

226. *Gant*, 129 S. Ct. at 1719 (noting that "when a recent occupant is arrested for a traffic violation, there will be no reasonable basis to believe the vehicle contains relevant evidence"); *Thornton*, 541 U.S. at 632 (Scalia, J., concurring in the judgment) (affirming the search of Thornton's vehicle because Thornton "was lawfully arrested for a drug offense" and "[i]t was reasonable . . . to believe that further contraband or similar evidence relevant to the crime . . . might be found in the vehicle").

227. *New York v. Belton*, 453 U.S. 454, 460 (1981).

228. *Thornton*, 541 U.S. at 630 (Scalia, J., concurring in the judgment).

229. *See Gant*, 129 S.Ct. at 1719 ("[W]hen a recent occupant is arrested for a traffic violation, there will be no reasonable basis to believe the vehicle contains relevant evidence. [In other cases], including *Belton* and *Thornton*, the offense of arrest will supply a basis for searching the passenger compartment of an arrestee's vehicle" (citations omitted)).

230. *See Thornton*, 541 U.S. at 632 (Scalia, J., concurring in the judgment) ("In this case . . . petitioner was lawfully arrested for a drug offense. It was reasonable for Officer Nichols to believe that further contraband or similar evidence relevant to the crime for which he had been arrested might be found in the vehicle . . .").

231. *See* Christopher D. Totten, *Arizona v. Gant and Its Aftermath: A Doctrinal "Correction" Without the Anticipated Privacy "Gains,"* 46 CRIM. L. BULL. 1293, 1311 (2010) (noting that courts applying the evidence standard may engage in a "categorical analysis" by "establish-

have followed this approach of looking only to the nature of the crime of arrest in determining whether a search incident to arrest is authorized under the evidence standard.²³² And even if Justice Scalia's assumption may "appear[] to be built on firmer ground" than *Belton*,²³³ it is questionable whether a defendant's arrest for an evidentiary offense sufficiently indicates that evidence of that offense may be found in the vehicle to justify a bright-line standard allowing a vehicular search incident to arrest.²³⁴ By continuing to authorize searches incident to arrest when a defendant is arrested for an evidentiary offense,²³⁵ the evidence standard, itself resembling a bright-line rule, continues to suffer from the same issues of arbitrariness as the *Belton* standard.²³⁶

ing certain categories of underlying crimes that do or do not satisfy [the evidence standard]" while "neglect[ing] to examine the factual basis for the officer's 'reason to believe' in particular cases."). A nonevidentiary offense is "a crime which, by its nature, does not give rise to cognizable grounds for concluding that evidence probative of its commission might be found in the vicinity of the arrestee." Tomkovicz, *supra* note 78, at 1452 n.222.

232. See, e.g., *United States v. Webster*, 625 F.3d 439, 444–45 (8th Cir. 2010) ("We have previously distinguished cases . . . in which defendants were arrested for drug offenses from *Gant* . . . because the former situation provides a reasonable basis for officers to believe the vehicle contains evidence of the crime of arrest . . ."); *United States v. Leak*, No. 3:09-cr-81-W, 2010 WL 1418227, at *5 (W.D.N.C. Apr. 5, 2010) (using the evidence standard to permit a vehicle search where the defendant was arrested for carrying a concealed weapon without discussing the specific facts of the arrest); *Brown v. State*, 24 So. 3d 671, 678 (Fla. Dist. Ct. App. 2009) ("[T]he 'reasonable belief that evidence might be found' prong of *Gant* can be satisfied solely from the inference that might be drawn from the nature of the offense of arrest itself, and the assumption that evidence might be found at the place of arrest."); *Daves v. State*, No. 11-09-00075-CR, 2010 WL 3612520, at *3 (Tex. Ct. App. Sept. 16, 2010) (declining to suppress the results of a search incident to a driver's arrest for narcotics paraphernalia based on the nature of the crime of arrest without discussion of the facts of arrest). *But see infra* note 300 (explaining that some lower courts continue to apply a fact-based inquiry to determine whether there is reason to believe that the vehicle contains evidence of the crime for which the arrestee has been detained).

233. *Thornton*, 541 U.S. at 625 (O'Connor, J., concurring in part); see also David S. Rudstein, *Belton Redux: Reevaluating Belton's Per Se Rule Governing the Search of an Automobile Incident to an Arrest*, 40 WAKE FOREST L. REV. 1287, 1343 (2005) ("Justice Scalia's proposed rule is certainly built on firmer ground than the per se rule adopted by the Court in *Belton*." (footnote and internal quotation marks omitted)).

234. Cf. Tomkovicz, *supra* note 78, at 1463–64 (noting that in many cases, "the mere fact of arrest tells us little, if anything, about the existence of seizable objects in nearby areas"). Notably, Justice Scalia's assumption is not supported by the search results in *Thornton*, the case in which Justice Scalia first advocated for the evidence standard's application. In *Thornton*, the police officer found three bags of marijuana and one bag of crack cocaine in the defendant's pocket while searching him outside of his vehicle. *Thornton*, 541 U.S. at 618. Upon searching Thornton's car, however, the officer did not find additional drugs but did find a BryCo 9-millimeter handgun. *Id.*

235. Cf. Tomkovicz, *supra* note 78, at 1451 (describing the evidence standard as "[t]he reaffirmation of *Belton* authority for 'evidentiary' offenses").

236. See *New York v. Belton*, 453 U.S. 454, 463 (1981) (Brennan, J., dissenting) (calling *Belton*'s bright-line rule "arbitrary"); *supra* text accompanying notes 222–26.

R

R

The evidence standard also clashes with *Chimel* due to its potential to be used as a basis for police to make pretextual arrests in order to search a suspect's vehicle. A common criticism of warrantless searches is that in abandoning the requirement for judicial pre-approval of the search, they give police officers incentives to undertake fishing expeditions that, if successful in producing incriminating evidence, can be justified after the fact.²³⁷ Unlike *Belton's* bright-line standard, which allowed "purely exploratory searches,"²³⁸ the evidence standard may limit law enforcement's ability to conduct vehicular searches on the basis of minor traffic offenses alone.²³⁹ The evidence standard does not obviate the danger, however, that officers may make arrests in the absence of probable cause for evidentiary offenses in order to search a suspect's vehicle for incriminating evidence.²⁴⁰ It also does not eliminate the risk that police may engage in a "constitutionally objectionable[] sort of rummaging" in an arrestee's vehicle in order to obtain evidence.²⁴¹

But *Chimel's* heavy emphasis on the need for police to submit their evidence of probable cause to a neutral magistrate *before* undertaking a search was largely based on the risk of pretextual searches.²⁴²

237. As Professor Tracey Maclin has noted, the warrantless search is a high-reward/low-risk proposition for police. See Tracey Maclin, *The Central Meaning of the Fourth Amendment*, 35 WM. & MARY L. REV. 197, 246 (1993) (discussing the potential for abuse inherent in the warrantless search). If the search turns up evidence, then "probable cause can be easily manufactured" in subsequent judicial proceedings. *Id.* If the search does not yield evidence, however, "the encounter can be quickly terminated and the officer and the individual will go their separate ways." *Id.* This process incentivizes police to search based on a variety of motivations, including "curiosity, the desire to hassle an individual, or as a device to quickly assert the officer's authority during a street encounter." *Id.*

238. *United States v. McLaughlin*, 170 F.3d 889, 894 (9th Cir. 1999) (Trott, J., concurring).

239. See Rudstein, *supra* note 233, at 1343 (noting that the evidence standard "nearly eliminate[s] the incentive for police officers to use a custodial arrest for a minor traffic offense as a pretext to conduct an otherwise impermissible search of an automobile and its contents"). Notably, however, at least one circuit has held that driving while impaired may qualify as an evidentiary offense in certain circumstances. See *United States v. Tinsley*, 365 F. App'x 709, 711 (8th Cir. 2010) (finding that police had reason to believe that evidence of the crime of driving while impaired would be present in the vehicle). Driving while impaired is thus one example of an evidentiary offense that may prove susceptible to abuse as law enforcement and lower courts continue to apply *Gant* in practice.

240. *Cf. United States v. Rabinowitz*, 339 U.S. 56, 80 (1950) (Frankfurter, J., dissenting) (observing that the evidence-gathering rationale for the search incident to arrest, which forms the foundation of Justice Scalia's evidence standard, would have the effect of "mak[ing] the arrest an incident to an unwarranted search instead of a warrantless search an incident to an arrest"), *overruled by Chimel v. California*, 395 U.S. 752 (1969).

241. Tomkovicz, *supra* note 78, at 1463.

242. See *Chimel*, 395 U.S. at 761 ("And so the Constitution requires a magistrate to pass on the desires of the police before they violate the privacy of the home.") (quoting *McDonald v. United States*, 335 U.S. 451, 456 (1948)); *id.* at 767 (noting that "one result of deci-

R

R

When an illegal search uncovers evidence, whether of the crime of arrest or otherwise, the damage is done—while courts provide some level of after-the-fact protection against unconstitutional arrests and searches, the *Chimel* Court specifically noted that it considered the ex post facto protection provided by courts to be insufficient.²⁴³ By allowing searches where it is wholly practicable for police to obtain a warrant, the evidence standard, which resembles a bright-line rule, undermines the principles underlying *Chimel*, creating inconsistency within the *Gant* Court’s opinion.

2. *The Evidence Standard’s Disregard for the Warrant Requirement Is Inconsistent with the Historical Foundation of the Fourth Amendment*

The evidence standard is also problematic because it conflicts with the history underlying the Fourth Amendment. The Fourth Amendment’s prohibition of unreasonable searches is not merely an ordering of words to be read in a contextual vacuum, but must be considered in light of the Framers’ intention to prohibit the practices that sparked the American Revolution.²⁴⁴ The Fourth Amendment was largely a reaction to the general warrants and writs of assistance²⁴⁵ that were detested by colonial Americans.²⁴⁶ Unlike *Chimel*’s exigency standard, which recognized that in the absence of exigent circumstances, “the Fourth Amendment has interposed a magistrate between the citizen and the police,”²⁴⁷ the evidence standard eschews the warrant requirement²⁴⁸ and leaves citizens’ Fourth Amendment rights

sions such as *Rabinowitz* . . . is to give law enforcement officials the opportunity to engage in searches not justified by probable cause, by the simple expedient of arranging to arrest suspects at home rather than elsewhere”).

243. *Id.* at 766 n.12 (“The Amendment is designed to prevent, not simply to redress, unlawful police action.”).

244. *Rabinowitz*, 339 U.S. at 69–70 (Frankfurter, J., dissenting) (describing the Fourth Amendment as “a safeguard against recurrence of abuses so deeply felt by the Colonies as to be one of the potent causes of the Revolution” and naming among these abuses unwarranted and unlimited searches).

245. A writ of assistance was a “species of warrant” common in colonial America that “authorized [customs officers] to seize any goods which they suspected to be smuggled, wherever found.” EDWARD CHANNING, *A STUDENT’S HISTORY OF THE UNITED STATES* 134 (2d ed. 1912).

246. *Chimel*, 395 U.S. at 761.

247. *Id.* (quoting *McDonald v. United States*, 335 U.S. 451, 455 (1948)) (internal quotation marks omitted).

248. In the search incident to arrest context, the warrant requirement has typically been understood to require law enforcement to obtain a warrant unless exigent circumstances render the judicial process impracticable. *See supra* note 55 and accompanying text (discussing the warrant requirement’s application to the search incident to arrest context). The evidence standard, however, allows for the judicial process to be regularly circum-

subject to “the caution and sagacity of petty officers . . . acting under the excitement” of an arrest.²⁴⁹ Any legitimate basis for the search incident to arrest exception must be “supported by a reasoned view of the background and purpose of the Fourth Amendment,”²⁵⁰ and in this regard, the evidence standard is lacking.²⁵¹

Justice Scalia equates the evidence and exigency standards to the extent that “both *Rabinowitz* and *Chimel* are plausible accounts of what the Constitution requires.”²⁵² But unlike *Chimel*, both *Rabinowitz* and Justice Scalia’s concurring opinion in *Gant* seize on the Fourth Amendment’s prohibition of “unreasonable searches and seizures,”²⁵³ reading the prohibition independently from the Fourth Amendment’s warrant specifications.²⁵⁴ As Justice Frankfurter noted in his *Rabinowitz* dissent, however, “[T]he framers said with all the clarity of

vented in the absence of exigent circumstances in situations where the arrestee is arrested for an evidentiary offense. *See supra* notes 224–26 and accompanying text (illustrating the evidence standard’s endorsement of a warrantless search in *Thornton* where no exigent circumstances existed).

249. *United States v. Lefkowitz*, 285 U.S. 452, 464–65 (1932) (striking down a warrantless search and suggesting that the evidence-gathering rationale, which underlies the evidence standard, is insufficient to uphold a search incident to arrest); *see also* Tomkovicz, *supra* note 78, at 1463 (observing that the evidence standard places “no significant limit on the scope of the search,” allowing a “constitutionally objectionable, sort of rummaging”). *Chimel*’s exigency standard, unlike the evidence standard, also conforms with the general tenor of the Bill of Rights, which tends to protect individual liberties at the expense of law enforcement convenience. *See, e.g.*, U.S. CONST. amend. V (granting protection against self-incrimination and the right to due process); *id.* amend. VI (securing the right of criminal defendants to trial by jury); *id.* amend. VIII (prohibiting excessive bail and cruel and unusual punishment); *see also Rabinowitz*, 339 U.S. at 82 (Frankfurter, J., dissenting) (“By the Bill of Rights the founders of this country subordinated police action to legal restraints, not in order to convenience the guilty but to protect the innocent.”).

250. *Chimel*, 395 U.S. at 760.

251. *See* Tomkovicz, *supra* note 78, at 1469 (“The balance that underlies Justice Scalia’s effort to preserve *Belton* authority for evidentiary offenses, however, seems quite inconsistent with the core balance struck by the Framers of the Constitution.”).

252. *Thornton v. United States*, 541 U.S. 615, 631 (2004) (Scalia, J., concurring in the judgment) (noting also that “neither is so persuasive as to justify departing from settled law”).

253. U.S. CONST. amend. IV.

254. *See supra* note 54 and accompanying text (discussing the longstanding controversy over the existence of a general warrant requirement); *see also Arizona v. Gant*, 129 S. Ct. 1710, 1724 (2009) (Scalia, J., concurring) (“To determine what is an ‘unreasonable’ search within the meaning of the Fourth Amendment, we look first to the historical practices the Framers sought to preserve; if those provide inadequate guidance, we apply traditional standards of reasonableness. Since the historical scope of officers’ authority to search vehicles incident to arrest is uncertain traditional standards of reasonableness govern.” (citations omitted)); *see also California v. Acevedo*, 500 U.S. 565, 581 (1991) (Scalia, J., concurring in the judgment) (“The Fourth Amendment does not by its terms require a prior warrant for searches and seizures; it merely prohibits searches and seizures that are ‘unreasonable.’”).

the gloss of history that a search is ‘unreasonable’ unless a warrant authorizes it.”²⁵⁵ Justice Scalia notes that the “uncertain” history of the search incident to arrest requires that “traditional standards of reasonableness govern,”²⁵⁶ a view that ignores Justice Frankfurter’s “gloss of history,” which implies a strong linkage between the Fourth Amendment’s reasonableness and warrant requirements.²⁵⁷

While uncertain is probably a fair characterization of the history of the search incident to arrest,²⁵⁸ Justice Scalia’s approach ignores the broader context of Fourth Amendment jurisprudence that is essential to understanding the exception itself.²⁵⁹ This broader history of the Fourth Amendment’s enactment—taking into account the experiences, understandings, and purposes of the men who drafted and ratified the Fourth Amendment—does not justify the evidence standard’s disregard for judicial warrants and abandonment of the probable cause standard.²⁶⁰

The Fourth Amendment was enacted shortly after the Revolutionary War and was intended as a safeguard against the colonial abuses that had prompted the colonists to sever ties with England.²⁶¹ While scholars disagree generally as to the reasons for the Revolution,²⁶² one

255. *United States v. Rabinowitz*, 339 U.S. 56, 70 (1950) (Frankfurter, J., dissenting), *overruled by Chimel*, 395 U.S. 752.

256. *Gant*, 129 S. Ct. at 1724 (Scalia, J., concurring).

257. *Rabinowitz*, 339 U.S. at 70 (Frankfurter, J., dissenting) (“[The Fourth Amendment] was the answer of the Revolutionary statesmen to the evils of searches without warrants and searches with warrants unrestricted in scope. Both were deemed ‘unreasonable.’”); *see also* WILLIAM J. CUDDIHY, *THE FOURTH AMENDMENT: ORIGINS AND ORIGINAL MEANING* 781 (2009) (“By providing a consensus against promiscuous, warrantless house searches that preceded national existence, [the Continental Congress] had already established a constitutional mandate against those searches before Adams, in 1780, furnished a terminology in the word ‘unreasonable.’”).

258. *See Tomkovicz, supra* note 78, at 1460 (explaining that “the most accurate characterization of the history of the search incident to arrest doctrine would appear to be then-Justice Rehnquist’s acknowledgement that early authorities dealing with the topic are ‘sparse’ and ‘sketchy’” (quoting *United States v. Robinson*, 414 U.S. 218, 230, 232 (1973))).

259. *Cf. Rabinowitz*, 339 U.S. at 80 (Frankfurter, J., dissenting) (“The test by which searches and seizures must be judged is whether conduct is consonant with the main aim of the Fourth Amendment.”).

260. *See Tomkovicz, supra* 78, at 1465–66 (observing that “[i]nsofar as it authorizes searches of areas around arrestees on the mere assumption that evidence or contraband is ‘most likely’ to be there, the *Rabinowitz* doctrine that Justice Scalia attempts to resuscitate . . . seems inconsistent with this Fourth Amendment history and unfaithful to a core principle that played a central historical role”).

261. *See supra* text accompanying notes 244–46.

262. *See generally, e.g.,* HOWARD ZINN, *A PEOPLE’S HISTORY OF THE UNITED STATES* 83 (1980) (discussing the role that large Loyalist landholdings played in incentivizing the American Revolution); Marc Egnal & Joseph A. Ernst, *An Economic Interpretation of the American Revolution*, 29 WM. & MARY Q. 3, 3 (1972) (observing that while restrictive British economic measures were “one ostensible cause of revolt,” “the colonial reaction to them was

R

R

significant viewpoint focuses on the discontent caused by the zeal with which the British employed warrantless searches to enforce customs laws and squash dissent in the colonies.²⁶³ For example, in *Boyd v. United States*,²⁶⁴ “the first Supreme Court decision in which the [F]ourth [A]mendment looms large,”²⁶⁵ the Court described a February 1761 debate²⁶⁶ that took place in Boston in which James Otis vigorously denounced the writ of assistance for giving revenue officers unfettered discretion to conduct warrantless searches for smuggled goods.²⁶⁷ John Adams would later declare that as a result of this debate, “[t]hen and there the child Independence was born.”²⁶⁸ In light of the history of vigorous colonial objection to the general search,²⁶⁹ it is more plausible that the Framers enacted the Fourth Amendment to express a strong preference for specific, judicial pre-approval of

determined in large part by a growing concern for the economy and for economic sovereignty, a concern that only coincidentally reinforced the dictates of patriotic principle”).

263. CUDDIHY, *supra* note 257, at 574 (“In the decade before the revolution, Americans perceived writs of assistance not only as a new and violent type of search but as part of an effort by Britain to subdue them politically, for the press had associated general searches with political oppression since [1763].”); *id.* at 779 (“In addresses to the American people on 21 October 1774 and to King George III five days later, Congress had denounced the power of the Commissioners of Customs ‘to break open and enter houses without the authority of any civil magistrate founded on legal information.’”); *see also* *Chimel v. California*, 395 U.S. 752, 761 (1969) (“The [Fourth] Amendment was in large part a reaction to the general warrants and warrantless searches that had so alienated the colonists and had helped speed the movement for independence.”); *Harris v. United States*, 331 U.S. 145, 159 (1947) (Frankfurter, J., dissenting) (discussing the abusive colonial search and seizure practices “that more than any one single factor gave rise to American independence”), *overruled by* *Chimel v. California*, 395 U.S. 752 (1969); *infra* note 266.

264. 116 U.S. 616 (1886). In *Boyd*, the Court considered the constitutionality of a statute requiring noncriminal defendants in federal revenue cases to hand over to prosecutors certain documents tending to prove the Government’s allegations, *id.* at 619–20, and found that the statute violated both the Fourth and Fifth Amendments, *id.* at 632.

265. TELFORD TAYLOR, *TWO STUDIES IN CONSTITUTIONAL INTERPRETATION* 53 (1969).

266. The debate took place when customs officials applied to the Superior Court in Massachusetts for new writs of assistance after their previous writs, issued by the colonial governor, were found to be improper. CHANNING, *supra* note 245, at 134. James Otis, then the king’s advocate for that region, resigned his post to oppose the issuance of the writs on behalf of a group of Boston merchants. *Id.* Otis’s speech, “often and rightly regarded as the first act in the American Revolution,” has unfortunately only been preserved in the “fragmentary” notes of John Adams, at the time a law student in Boston. *Id.*

267. *Boyd*, 116 U.S. at 625. *Boyd* identified this debate as “perhaps the most prominent event which inaugurated the resistance of the colonies to the oppressions of the mother country.” *Id.*

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

269. *See* CUDDIHY, *supra* note 257 at 552 (“The American appetite for British legal critics of [general] warrants grew as the revolution grew near, and books by those critics could be found in libraries everywhere in America.”); *id.* at 775 (“In 1774, the Continental Congress, voice of the united colonies, had thrice denounced general searches . . . not only because they were general but also because they were warrantless.”).

R

R

R

searches²⁷⁰ rather than as a means to allow discretion to law enforcement officers under the banner of reasonableness.²⁷¹

The Fourth Amendment's strong preference for the search warrant was also informed by the watershed pre-Revolutionary English case *Entick v. Carrington*,²⁷² which the Court in *Boyd* described as "one of the landmarks of English liberty"²⁷³ whose "propositions were in the minds of those who framed the Fourth Amendment . . . and were considered as sufficiently explanatory of what was meant by unreasonable searches and seizures."²⁷⁴ Lord Camden's judgment in *Entick* clearly anticipated a prospective, rather than retrospective, judicial role in authorizing searches, reasoning that a search should include "proper checks," such as "requir[ing] proofs beforehand."²⁷⁵ Lord Camden further explained that "the want of [such precautions] is an undeniable argument against the legality of the [search]."²⁷⁶ Significantly, Lord Camden explicitly rejected the "argument of utility, that such a search is a means of detecting offenders by discovering evidence," noting that even the strongest pretrial evidence does not rise to the level of proof but is merely suspicion.²⁷⁷

By focusing solely on the history of the search incident to arrest, Justice Scalia conveniently avoids the broader picture—that is, the Fourth Amendment's warrant preference and probable cause requirement.²⁷⁸ In permitting warrantless searches in situations where an ar-

270. *Cf. id.* at 775.

271. *See Chimel v. California*, 395 U.S. 752, 761 (1969) ("The Amendment was in large part a reaction to the general warrants and warrantless searches that had so alienated the colonists and had helped speed the movement for independence."); *United States v. Rabinowitz*, 339 U.S. 56, 70 (1950) (Frankfurter, J., dissenting) ("[The Fourth Amendment] was the answer of the Revolutionary statesmen to the evils of searches without warrants and searches with warrants unrestricted in scope. Both were deemed 'unreasonable.'"), *overruled by Chimel*, 395 U.S. 752.

272. 19 How. St. Tr. 1029 (C.P. 1765). *Entick* involved an action of trespass brought by John Entick against Nathan Carrington and three compatriots for the destructive search of Entick's home in November 1762. *Id.* at 1029–30. Carrington executed the search under the color of a general warrant authorized by the secretary of state, which identified Entick as the author of "The Monitor or British Freeholder," a pamphlet which, according to the warrant, "contain[ed] gross and scandalous reflections and invectives upon his majesty's government." *Id.* at 1031 (internal quotation marks omitted). The court found the warrant to be invalid, as the secretary of state did not have the power of a magistrate, making *Entick* an early adjudication of the warrantless search. *Id.* at 1047.

273. *Boyd*, 116 U.S. at 626.

274. *Id.* at 626–27.

275. *Entick*, 19 How. St. Tr. at 1067.

276. *Id.*

277. *Id.* at 1073.

278. *See Tomkovicz, supra* note 78, at 1465–66 (asserting that "[t]here is no debate . . . that the Framers did incorporate a probable cause demand as a vital safeguard against

restee and the arrestee's vehicle are secured and the acquisition of a warrant is practicable,²⁷⁹ the evidence standard ignores the need for judicial pre-approval of searches, which is one of *Entick's* "proper checks"²⁸⁰ and is strongly favored by the Fourth Amendment,²⁸¹ in favor of evidence gathering. Furthermore, the evidence-gathering rationale essentially reprises the "argument of utility" rejected in *Entick*.²⁸² If, as the Court noted in *Boyd*, *Entick's* principles are explanatory of the Fourth Amendment's prohibition of "unreasonable searches and seizures,"²⁸³ then Justice Scalia's concession that the evidence standard is "hard to reconcile with the influential case of *Entick v. Carrington*"²⁸⁴ demonstrates the evidence standard's lack of fidelity to constitutional principles. In addition, the evidence standard's abandonment of the probable cause standard clashes with the Framers' hostility toward general searches, which led to the explicit inclusion of probable cause in the Fourth Amendment.²⁸⁵ As the Court noted in *Boyd*, Fourth Amendment jurisprudence requires consideration of the Revolutionary and pre-Revolutionary experiences with oppressive searches and seizures in analyzing the Amendment.²⁸⁶ Because the evidence standard ignores this instruction and focuses

unjustified searches of the sort that were conducted pursuant to general warrants and writs of assistance").

279. See *supra* notes 222–26 and accompanying text.

280. *Entick*, 19 How. St. Tr. at 1067.

281. *United States v. Rabinowitz*, 339 U.S. 56, 70 (1950) (Frankfurter, J., dissenting) ("When the Fourth Amendment outlawed 'unreasonable searches' and then went on to define the very restricted authority that even a search warrant issued by a magistrate could give, the framers said with all the clarity of the gloss of history that a search is 'unreasonable' unless a warrant authorizes it, barring only exceptions justified by absolute necessity."), *overruled by* *Chimel v. California*, 395 U.S. 752 (1969).

282. Compare *Entick*, 19 How. St. Tr. at 1073 (rejecting the "argument of utility, that such a search is a means of detecting offenders by discovering evidence"), with *Thornton v. United States*, 541 U.S. 615, 629 (2004) (Scalia, J., concurring in the judgment) (referring to an "interest in gathering evidence relevant to the crime for which the suspect had been arrested" to justify the evidence standard).

283. *Boyd v. United States*, 116 U.S. 616, 626–27 (1886).

284. *Thornton*, 541 U.S. at 631 (Scalia, J., concurring in the judgment).

285. See *infra* notes 296–97 and accompanying text (discussing the evidence standard's use of the lower "reason to believe" standard rather than the more typical probable cause); see also Tomkovicz, *supra* note 78, at 1465–66 (noting that the probable cause demand is a "norm of reasonableness" motivated by the need to "show a certain level of likelihood that a seizable item is located in a place before intruding on that place" and that by authorizing searches "on the mere assumption that evidence or contraband is 'most likely' to be there," the evidence standard is "inconsistent" with and "unfaithful to a core principle that played a central historical role").

286. *Boyd*, 116 U.S. at 624–25 (instructing that "to ascertain the nature of the proceedings intended by the Fourth Amendment to the Constitution under the terms 'unreasonable searches and seizures,' it is only necessary to recall the contemporary or then recent history of the controversies on the subject, both in this country and in England").

R

R

R

only on the history of the search incident to arrest exception, it is unfaithful to the core principles favoring warrants and probable cause for searches.

3. *The Evidence Standard Is Not Supported by a Wide Body of Case Law and Thus Will Bring Unnecessary Ambiguity to the Search Incident to Arrest Exception*

Justice Scalia's evidence standard has only thin doctrinal support and was largely created out of whole cloth through his concurring opinion in *Thornton*.²⁸⁷ In fact, *Thornton* is the only case that the *Gant* Court cites to support the evidence standard.²⁸⁸ The concurring opinion in *Thornton* does not add much to the evidence standard's foundation, primarily citing to *Rabinowitz*,²⁸⁹ which itself is "hardly founded on an unimpeachable line of authority" and was overruled by *Chimel*.²⁹⁰

As additional support, Justice Scalia mustered a collection of cases predating *Weeks*' exclusionary rule that have little persuasive value in the search incident to vehicular arrest context.²⁹¹ There are two periods of particular relevance to analysis of the search incident to arrest exception. The first, as surely Justice Scalia would agree, is the founding period, when the Fourth Amendment was conceived

287. See *Arizona v. Gant*, 129 S. Ct. 1710, 1731 (2009) (Alito, J., dissenting) (remarking that the evidence standard was "take[n] uncritically from Justice Scalia's separate opinion in *Thornton*").

288. *Id.* at 1719 (majority opinion).

289. *Thornton*, 541 U.S. at 629 (Scalia, J., concurring in the judgment) (using *Rabinowitz* to illustrate that the "more general sort of evidence-gathering search is not without antecedent").

290. *Chimel v. California*, 395 U.S. 752, 760, 768 (1969) ("It is time . . . to hold that on [its] own facts, and insofar as the principles [it] stand[s] for are inconsistent with those that we have endorsed today, [*Rabinowitz* is] no longer to be followed."). Indeed, while the Court vacillated between the exigency and evidence-gathering rationales in its early search incident to arrest jurisprudence, see *supra* Part II.A, *Chimel* has now served as the basis of the Court's jurisprudence on this topic for forty years. See *Gant*, 129 S. Ct. at 1719 (rejecting an interpretation of *Belton* that would "untether the rule from the justifications underlying the *Chimel* exception"); *New York v. Belton*, 453 U.S. 454, 460 n.3 (1981) (explaining that its holding "in no way alter[ed] the fundamental principles established in the *Chimel* case regarding the basic scope of searches incident to lawful custodial arrests"); Tomkovicz, *supra* note 78, at 1419 ("The majority opinion in *Chimel v. California* acknowledged the somewhat inexplicable vacillations in search incident law and tried, mightily, to inject rationality and stability. A unanimous Court seemed determined to anchor the doctrine with weighty constitutional rationales that would enable it to withstand the next, inevitable shift in wind direction.").

291. See *Thornton*, 541 U.S. at 629–30 (Scalia, J., concurring in the judgment) (citing to numerous pre-*Weeks* cases supposedly "referring to the general interest in gathering evidence related to the crime of arrest with no mention of the more specific interest in preventing its concealment or destruction").

and adopted.²⁹² The second is the period subsequent to *Weeks* when “virtually all” of the Court’s jurisprudence on the subject of unreasonable searches and seizures was developed—primarily because of the strong incentive that the exclusionary rule gave defendants to litigate Fourth Amendment claims.²⁹³ Thus, cases from the post-founding, pre-*Weeks* period, in which a court in a criminal case would not permit “a collateral issue [to] be raised to ascertain the source [of competent] testimony,”²⁹⁴ lack vitality in comparison to modern cases in which Fourth Amendment issues are fully litigated. For these reasons, the *Gant* Court’s significant alteration of the foundation of the search incident to arrest exception through the addition of the evidence standard demands a doctrinally stronger ground than that provided by Justice Scalia.

One of the failings of a standard with thin doctrinal support, like Justice Scalia’s evidence standard, is that there is no body of case law addressing the various issues that the standard will raise.²⁹⁵ When is it “reasonable to believe” evidence might be found in the vehicle, and why did the Court not adopt the probable cause standard²⁹⁶ that officers must meet in order to make an arrest or obtain a search war-

292. See *Gant*, 129 S. Ct. at 1724 (Scalia, J., concurring) (“To determine what is an ‘unreasonable’ search within the meaning of the Fourth Amendment, we look first to the historical practices the Framers sought to preserve. . . .”); cf. CUDDIHY, *supra* note 257, at 777 (“Iterating the amendment of 1789 via litigation seventy years hence is like describing the New Deal Court of Chief Justice Hughes in the 1930s only through citations of its leading cases by today’s Roberts Court.”).

293. See *United States v. Robinson*, 414 U.S. 218, 224 (1973) (“Because the rule requiring exclusion of evidence obtained in violation of the Fourth Amendment was first enunciated in *Weeks* . . ., it is understandable that virtually all of this Court’s search and seizure law has been developed since that time.”); Christopher Slobogin, *Why Liberals Should Chuck the Exclusionary Rule*, 1999 U. ILL. L. REV. 363, 405 (noting that the exclusionary rule incentivizes defendants to litigate even the most trivial Fourth Amendment claims).

294. *Weeks v. United States*, 232 U.S. 383, 396 (1914).

295. Indeed, both the majority opinion and Justice O’Connor’s concurrence in *Thornton* noted the imprudence of adopting Justice Scalia’s standard where neither the parties to the case nor the courts below had an opportunity to address it. *Thornton*, 541 U.S. at 624 n.4 (majority opinion); *id.* at 625 (O’Connor, J., concurring in part) (“I am reluctant to adopt [the evidence standard] in the context of a case in which neither the Government nor the petitioner has had a chance to speak to its merit.”). This deficiency was hardly remedied in *Gant*, as *Gant*’s brief addressed the evidence standard in a mere three out of forty-eight pages and Arizona’s brief devoted only a footnote to it. Brief of Respondent at 45–47, *Gant*, 129 S. Ct. 1710 (No. 07-542) (discussing the evidence standard’s application to *Gant*’s case but not its general merits); Petitioner’s Brief on the Merits at 36 n.4, *Gant*, 129 S. Ct. 1710 (No. 07-542) (rejecting the evidence standard). The parties’ scant treatment of the evidence standard, however, dwarfs that of the lower courts in the *Gant* litigation, which did not address the issue at all. See *supra* Part I.

296. *E.g.*, *Gant*, 129 S. Ct. at 1731 (Alito, J., dissenting) (“Why, for example, is the standard for this type of evidence-gathering search ‘reason to believe’ rather than probable cause?”).

rant?²⁹⁷ Does an officer’s “reason to believe” that an arrestee’s vehicle may contain evidence of the crime of arrest flow from the specific facts of the arrest or solely from the character of the offense?²⁹⁸ While many state and lower federal courts have thus far followed the more categorical approach,²⁹⁹ *Gant* itself does not provide direct answers to any of these questions, leaving the doctrine potentially open to future shifts and uncertainty.³⁰⁰ Further, while it may be relatively clear for some offenses whether the vehicle could contain additional evidence,³⁰¹ for other offenses such clarity is lacking with regard to this threshold question.³⁰²

297. Wayne R. LaFave, *The Fourth Amendment in an Imperfect World: On Drawing “Bright Lines” and “Good Faith,”* 43 U. PITT. L. REV. 307, 312 (1982) (“[C]oncerning what is needed to justify the making of an arrest or search, the answer in most situations is that quantum of evidence which amounts to ‘probable cause.’”). Lower courts have so far interpreted “reason to believe” as requiring a lesser showing than “probable cause.” See, e.g., *United States v. Vinton*, 594 F.3d 14, 25 (D.C. Cir. 2010) (noting that if “reason to believe” equated to “probable cause,” then the evidence standard would be largely duplicative of the automobile exception).

298. Myron Moskovitz, *The Road to Reason: Arizona v. Gant and the Search Incident to Arrest Doctrine*, 79 Miss. L.J. 181, 188 (2009) (noting that “[in *Gant*,] Scalia does not address” whether “‘reason to believe’ flow[s] from facts *other than* the nature of the crime for which the suspect was arrested”).

299. See *supra* note 232. Under this reading, as explained in Part IV.B.1, the *Gant* Court may have incidentally created a bright-line rule that defines the scope of the arrestee’s Fourth Amendment rights in the search incident to arrest context only by the offense for which the arrestee has been detained. See discussion *supra* text accompanying notes 221–36. While recognizing this potential bright-line rule, this Section discusses the ambiguities that might result under the evidence standard because the Court failed to clarify which interpretation of the evidence standard to use in its opinion.

300. See *supra* note 298; *Gant*, 129 S. Ct. at 1719 (stating only that it was adopting the evidence standard from *Thornton*). Indeed, a split has already begun to emerge among state and lower federal courts applying the evidence standard, with some adhering to the categorical, bright-line view and others demanding particular facts to justify the reasonableness of an officer’s belief that the vehicle contains evidence of the crime of arrest. Compare *Brown v. State*, 24 So. 3d 671, 678 (Fla. Dist. Ct. App. 2009) (“[T]he ‘reasonable belief that evidence might be found’ prong of *Gant* can be satisfied solely from the inference that might be drawn from the nature of the offense of arrest itself . . .”), with *United States v. Reagan*, 713 F. Supp. 2d 724, 733–34 (E.D. Tenn. 2010) (suppressing evidence found during a search incident to arrest because the officer “did not articulate any particularized reason why he believed that Defendant’s vehicle contained evidence of DUI”).

301. For instance, traffic offenses often will not provide a reasonable basis to believe that the vehicle contains relevant evidence. *People v. Osborne*, 96 Cal. Rptr. 3d 696, 705 n.11 (2009) (“Traffic violations, such as driving on a suspended license . . . frequently provide no reasonable basis to believe the vehicle contains relevant evidence.”).

302. For example, when evaluating offenses, such as the possession of a weapon, near the vehicle, it is unclear whether it would be reasonable to believe that the vehicle contains evidence of the crime of arrest. Compare *United States v. Brunick*, 374 F. App’x 714, 716 (9th Cir. 2010) (holding that the evidence standard did not justify a search incident to arrest for possession of a concealed knife because no evidence found in the vehicle would have been “probative of the offense for which Brunick was arrested”), with *United States v.*

R
R
R

The evidence standard's lack of pedigree is all the more glaring because it will likely come to subsume the search incident to arrest exception. As Justice Stevens noted in *Gant*, it will be a "rare case" in which the *Chimel*-based prong of the vehicular search incident to arrest exception will allow a search, because police will be able to secure the arrestee in most situations.³⁰³ The evidence standard, however, could be used to justify warrantless searches anytime a person is arrested for an evidentiary offense.³⁰⁴ Justice Scalia's evidence standard, truly the holding of only a single Justice³⁰⁵ and lacking any considerable doctrinal pedigree, is the tail that wags the *Gant* dog. To paraphrase Chief Justice Rehnquist, *Gant* "retains the outer shell" of *Chimel* "but beats a wholesale retreat from the substance of that case."³⁰⁶

C. *Instead of Replacing Belton's Bright-Line with Justice Scalia's Evidence Standard, the Court Should Have Returned the Search Incident to Arrest Exception to a Purely Exigency-Based Rationale*

The *Gant* majority may have accepted Justice Scalia's evidence standard, with all of its attendant inconsistencies,³⁰⁷ as the price of eliminating *Belton*'s bright-line interpretation and avoiding a plurality opinion that would leave the governing rule uncertain.³⁰⁸ Thus, *Gant* was likely less the result of constitutional principle than it was the

Leak, No. 3:09-cr-81-W, 2010 WL 1418227, at *5 (W.D.N.C. Apr. 5, 2010) (citing the evidence standard to uphold search of arrestee's vehicle incident to arrest for carrying a concealed weapon). As discussed in Part IV.B.1, however, many courts appear to be sidestepping the analysis here by concluding that it is reasonable to believe that evidence of the crime of arrest exists in all cases where the crime of arrest qualified as an evidentiary offense.

303. *Gant*, 129 S. Ct. at 1719 n.4.

304. See *supra* Part IV.B.1 (discussing the manner in which the evidence standard resembles a bright-line rule).

305. See *Gant*, 129 S. Ct. at 1714, 1719 (twice refusing to adopt the evidence standard as a holding, instead relegating it to a mere conclusion); cf. Tomkovicz, *supra* note 78, at 1451 ("Although [Justice Stevens's dissenting opinion in *Thornton*] expressed no specific agreement with any of Justice Scalia's views [in *Thornton*], [his] dissatisfaction with the majority's expansion of *Belton* . . . indicates that [he] might well be inclined to join any effort to reduce [*Belton*'s] scope." (footnote omitted)).

306. *Planned Parenthood of Southeastern Pa. v. Casey*, 505 U.S. 833, 944 (1992) (Rehnquist, C.J., concurring in the judgment in part and dissenting in part) (describing the joint opinion's effect on *Roe v. Wade*, 410 U.S. 113 (1973)).

307. See generally *supra* Part IV.B.

308. See Tomkovicz, *supra* note 78, at 1451 (discussing, prior to *Gant*, the possibility that Justice Stevens might accept the evidence standard, without necessarily agreeing with it, as a means of limiting *Belton*'s bright-line interpretation); see generally Adam Liptak, *After 34 Years, a Plainspoken Justice Gets Louder*, N.Y. TIMES, Jan. 25, 2010, at A12 (describing Justice Stevens as a "master tactician" and insinuating that, over time, Justice Stevens has been able to convince other Justices to join his opinions); cf. *Gant*, 129 S. Ct. at 1725 (Scalia, J.,

R

R

avoidance of a 4-to-1-to-4 split among the Justices.³⁰⁹ Instead of producing an opinion in which Justices Stevens and Scalia each swallowed the bitter pill of endorsing the other's views in order to defeat the "greater evil"³¹⁰ of the broad interpretation of *Belton*,³¹¹ the *Gant* majority should have accepted the risk of a plurality opinion and fully restored *Chimel's* exigency-based approach to vehicular searches incident to arrest.

A full restoration of the *Chimel* standard in the context of vehicular searches incident to arrest would ensure that the doctrine does not return to a bright-line rule that fails to consider the particular factual scenario surrounding a given arrest. Any creation of a bright-line standard³¹² in the search incident to arrest context will be "illusory"³¹³ because the infinite spectrum of factual scenarios presented in the daily course of criminal arrests will "soon break[] down what might have been a bright line into a blurry impressionistic pattern."³¹⁴ Unlike the potential bright-line application of *Gant's* evidence standard, however, an exigency-based approach requires the fact-intensive consideration of whether officer safety or evidence preservation concerns justify a warrantless search incident to arrest.³¹⁵ While *Robinson* reasonably eliminated the need for exigent circumstances in searches of an arrestee's person incident to arrest,³¹⁶ the authority to search beyond the arrestee's person depends on the scope of the arrestee's area

concurring) ("It seems to me unacceptable for the Court to come forth with a 4-to-1-to-4 opinion that leaves the governing rule uncertain.").

309. See *supra* note 308.

310. *Gant*, 129 S. Ct. at 1725 (Scalia, J., concurring).

311. Indeed, *Gant's* majority opinion is hardly passionate about Justice Scalia's new rationale for a warrantless search, adopting it in a mere three sentences and citing only to Justice Scalia's opinion in *Thornton* for the rationale's origin. *Id.* at 1719 (majority opinion); *id.* at 1725 (Scalia, J., concurring) ("No other Justice . . . shares my view that application of *Chimel* in this context should be entirely abandoned.").

312. See *supra* Part IV.B.1.

313. See *Robbins v. California*, 453 U.S. 420, 443 (1981) (Rehnquist, J., dissenting) (referring to "any search for 'bright lines'" as "illusory").

314. *Id.*; see also *supra* Part IV.B.3 (discussing ambiguities in Justice Scalia's evidence standard).

315. See *Gant*, 129 S. Ct. at 1716 (noting that "[i]f there is no possibility that an arrestee could reach into the area that law enforcement officers seek to search, both justifications for the search incident to arrest exception are absent and [*Chimel's*] rule does not apply"); see also *New York v. Belton*, 453 U.S. 454, 465-66 (1981) (Brennan, J., dissenting) ("When the arrest has been consummated and the arrestee safely taken into custody, the justifications underlying *Chimel's* limited exception to the warrant requirement cease to apply: at that point there is no possibility that the arrestee could reach weapons or contraband.").

316. See *supra* note 196 and accompanying text.

R

R

of immediate control.³¹⁷ By restricting searches incident to arrest to the arrestee's actual area of immediate control and requiring that searches be limited by the existence of officer safety and evidence preservation concerns, the *Gant* Court would have tied the search incident to arrest tightly to the factual circumstances that render the warrantless search permissible.³¹⁸

An exigency-based standard is also more consistent with the Fourth Amendment's historical foundation because it places a high value on the acquisition of a search warrant.³¹⁹ The *Chimel* Court permitted only strictly limited searches of an arrestee's person and area of immediate control while requiring a warrant for more extensive searches.³²⁰ By restricting the scope of warrantless searches incident to arrest and overruling earlier cases that gave police the authority to engage in broad searches rarely justified by probable cause,³²¹ the *Chimel* Court attempted to restore the warrant and probable cause requirements to their rightful place as core constitutional principles.³²² Thus, the *Gant* Court should have issued a clarion restoration of *Chimel*, even if in the form of a plurality opinion, instead of adopting an inconsistent two-part standard that will encourage pretextual searches and violations of citizens' Fourth Amendment rights.

V. CONCLUSION

In *Arizona v. Gant*, the Supreme Court rejected the bright-line interpretation of *Belton* that allowed police to search an automobile

317. See *Chimel v. California*, 395 U.S. 752, 763 (1969) (authorizing searches only of "the area from within which [an arrestee] might gain possession of a weapon or destructible evidence"). The determination of the scope of an arrestee's area of immediate control will necessarily be a factual determination. See *Belton*, 453 U.S. at 471 (Brennan, J., dissenting) (listing "relevant factors" in determining the scope of an arrestee's area of control).

318. See *Chimel*, 395 U.S. at 762 (noting that "[t]he scope of [a] search must be 'strictly tied to and justified by' the circumstances which rendered its initiation permissible" (alterations in original) (quoting *Terry v. Ohio*, 392 U.S. 1, 19 (1968)) (internal quotation marks omitted)).

319. See *id.* at 761 (emphasizing that "[i]n the scheme of the [Fourth] Amendment . . . the requirement that 'no Warrants shall issue, but upon probable cause,' plays a crucial part").

320. See *id.* at 763 (explaining that no evidence preservation or officer safety justification exists for routinely searching rooms other than those in which the arrest occurs or even closed areas in the room where the arrest occurs and that such searches will generally require a search warrant).

321. *Id.* at 767-68.

322. See Tomkovicz, *supra* note 78, at 1419 (explaining that the *Chimel* Court was "determined to anchor the [search incident to arrest] doctrine with weighty constitutional rationales"); see also *supra* Part IV.B.2.

any time that a recent occupant was arrested.³²³ While the Court was right to relegate *Belton's* bright-line to the dustbin of history,³²⁴ it paid a high price for its victory. Perhaps due to a lack of support to enact a full restoration of *Chimel's* exigency standard, the Court instead adopted Justice Scalia's evidence standard as an additional justification for the warrantless search of a vehicle, which itself resembles a bright-line rule.³²⁵ The evidence standard, however, is inconsistent with *Chimel's* exigency rationale³²⁶ and the Fourth Amendment's historical foundation.³²⁷ Further, the evidence standard lacks precedential pedigree and, as a result, is unacceptably vague, providing those who will have to apply it with little guidance regarding when a given search comes within its purview.³²⁸ The *Gant* Court missed the opportunity to end the misguided attempts to apply a bright-line rule to the context of vehicular searches incident to arrest by restoring *Chimel's* exigency-based standard,³²⁹ and future majorities will be left with the task of returning the search incident to arrest exception to its proper basis.

323. *Arizona v. Gant*, 129 S. Ct. 1710, 1714 (2009) (holding that “*Belton* does not authorize a vehicle search incident to a recent occupant’s arrest after the arrestee has been secured and cannot access the interior of the vehicle” and concluding that “circumstances unique to the automobile context justify a search incident to arrest when it is reasonable to believe that evidence of the offense of arrest might be found in the vehicle”).

324. *See supra* Part IV.A.

325. *See supra* Part IV.C.

326. *See supra* Part IV.B.1.

327. *See supra* Part IV.B.2.

328. *See supra* Part IV.B.3.

329. *See supra* Part IV.C.