

2001

## Missing the Big Picture: The Supreme Court's Willful Blindness to Fourth Amendment Fundamentals in *Florida v. White*

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# FLORIDA STATE UNIVERSITY LAW REVIEW



MISSING THE BIG PICTURE:  
THE SUPREME COURT'S WILLFUL BLINDNESS TO FOURTH  
AMENDMENT FUNDAMENTALS IN *FLORIDA V. WHITE*

*George M. Dery III*

VOLUME 28

SPRING 2001

NUMBER 3

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Recommended citation: George M. Dery III, *Missing the Big Picture: The Supreme Court's Willful Blindness to Fourth Amendment Fundamentals in Florida v. White*, 28 FLA. ST. U. L. REV. 571 (2001).

MISSING THE BIG PICTURE:  
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*FLORIDA V. WHITE*

GEORGE M. DERY III\*

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I. INTRODUCTION

Suppose the United States Supreme Court treated itself to a visit to the National Gallery of Art. One doubts whether the Justices would be able to fully appreciate the artwork. In particular, imagine the members of the Court observing the paintings of Georges Seurat, the Post-Impressionist who created controversy by inventing “Divisionism,” a method sometimes called “Pointillism.”<sup>1</sup> In his paintings, Seurat meticulously juxtaposed “minute touches of unmixed pigments,”<sup>2</sup> relying on the mechanism of sight itself<sup>3</sup> to cause the viewer’s eye to combine the different colors into a whole “when viewed at the proper distance.”<sup>4</sup> Thus, in placing each individual speck of paint on the canvas, Seurat intended that his audience

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1. THAMES AND HUDSON, IMPRESSIONIST AND POST-IMPRESSIONIST MASTERPIECES AT THE MUSEE D’ORSEY 172 (1986). *The National Gallery of Art Web Page*, at <http://www.nga.gov/cgi-bin/printo?Object-6111/+0+none> [hereinafter *The National Gallery of Art*].

2. *The National Gallery of Art*, *supra* note 1, at 1.

3. See THAMES AND HUDSON, *supra* note 1, at 172.

4. *The National Gallery of Art*, *supra* note 1, at 1.

would see the bigger picture.<sup>5</sup> Yet, the current Court might foil Seurat's best plans. Indeed, it seems that Justice Clarence Thomas would lead a majority of the Court right up to a Seurat painting, such as *The Lighthouse at Honfleur*, with a magnifying glass, and say, "That one dot is pink!"<sup>6</sup> Apparently, four other Justices, huddled near the painting, would nod in agreement, missing the overall picture of a landscape of the beach.<sup>7</sup>

The Supreme Court likewise missed the big picture presented by the Fourth Amendment<sup>8</sup> when it rendered its decision in *Florida v. White*.<sup>9</sup> Five members of the Court focused almost exclusively on one speck of constitutional jurisprudence, the automobile exception, thus missing the larger rule of the Fourth Amendment itself. Justice Thomas, who delivered the Court's opinion in *White*, ruled that once a vehicle is deemed to be "contraband," it is vulnerable to immediate warrantless seizure, for an indefinite period of time, under the automobile exception.<sup>10</sup> Thus, *White* elevated the automobile exception to such high status that it outranks the Fourth Amendment mainstays of the timeliness of probable cause and the Warrant Clause<sup>11</sup> itself.

Much like Georges Seurat, the Framers created the Fourth Amendment realizing that each of its intricate parts affected the whole. Searches and seizures are to be moderated by reasonableness, police are to be checked by neutral magistrates, and warrants are to be supported by probable cause.<sup>12</sup> As members of the Court itself have previously acknowledged, each of these elements weighs in a delicate balance of government interests against those of the individual.<sup>13</sup> Yet, the Court in *White*, by focusing on one dot of law, obscured

5. The eye itself naturally makes this synthesis by "mingling [the colors] upon the retina." THAMES AND HUDSON, *supra* note 1, at 172.

6. Justice Thomas authored the majority opinion in *Florida v. White*, 526 U.S. 559 (1999).

7. The other Justices joining the majority opinion in *White* included Chief Justice William H. Rehnquist and Justices Sandra Day O'Connor, Antonin Scalia, and Anthony M. Kennedy.

8. The Fourth Amendment provides:

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

U.S. CONST. amend. IV.

9. 526 U.S. 559 (1999).

10. *Id.* at 564-65.

11. See U.S. CONST. Amend. IV (stating that "no warrant 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").

12. See *id.*

13. In three opinions, Justices Lewis F. Powell Jr., Harry A. Blackmun, and Felix Frankfurter have observed that "[w]hile the Fourth Amendment speaks in terms of freedom from unreasonable [searches], the Amendment does not leave the reasonableness of most [searches] to the judgment of courts or government officers; the Framers of the

the overall scene. Thus, in repeatedly tugging at one stitch, *White* threatened to unravel the entire tapestry of the Fourth Amendment.

This Article begins in Part II with a review of the history of the warrant preference and the creation and evolution of the automobile exception to the warrant requirement. Part III presents *White*, its factual background, lower court rulings, and the Supreme Court's decision. Finally, Part IV critically examines *White's* analysis and discusses its potential negative impact on Fourth Amendment protections.

## II. THE FOURTH AMENDMENT'S WARRANT MANDATE AND THE CREATION AND EVOLUTION OF ITS AUTOMOBILE EXCEPTION

### A. *The Fourth Amendment's Warrant Preference*

The Fourth Amendment does not prohibit all searches and seizures, but only those deemed "unreasonable."<sup>14</sup> Determining the precise meaning of reasonableness has been an elusive goal,<sup>15</sup> for the Amendment itself is subject to two contrasting interpretations.<sup>16</sup> The two approaches to "reasonableness" are based on the Fourth Amendment's two clauses: the Reasonableness Clause and the Warrant Clause. The Reasonableness Clause provides as follows: "The right of the people to be secure in their persons, houses, papers, and effects, against unreasonable searches and seizures, shall not be violated."<sup>17</sup> The Warrant Clause then provides as follows: "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."<sup>18</sup>

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Amendment balanced the interests involved." *New Jersey v. T.L.O.*, 469 U.S. 325, 351 (1985) (quoting *United States v. Place*, 462 U.S. 696, 696 (1983)); see also *Texas v. Brown*, 460 U.S. 730, 744-45 (1983) (Powell, J., concurring); *United States v. Rabinowitz*, 339 U.S. 56, 70 (1950) (Frankfurter, J., dissenting). In *New Jersey v. T.L.O.*, Justice Blackmun emphasized the importance of the Framers' original balancing of interests, cautioning that only in those exceptional circumstances in which special needs, beyond the normal need for law enforcement, make the warrant- and probable-cause requirement impracticable, is a court entitled to substitute its balancing of interests for that of the Framers.

14. U.S. CONST. amend. IV; see also *Elkins v. United States*, 364 U.S. 206, 222 (1960) (stating that what the "Constitution forbids is not all searches and seizures, but unreasonable searches and seizures").

15. In *Rabinowitz*, 339 U.S. at 63 (1949), the Court lamented that "[w]hat is a reasonable search is not to be determined by any fixed formula. The Constitution does not define what are 'unreasonable' searches and, regrettably, in our discipline we have no ready litmus paper test."

16. The *Rabinowitz* majority provided the view that reasonableness was not subject to any "fixed formula," but instead "must find resolution in the facts and circumstances of each case." *Id.* In his dissent, Justice Frankfurter presented the opposing view, arguing that reasonableness was determined with reference to the Warrant Clause. See *id.* at 70 (Frankfurter, J., dissenting).

17. U.S. CONST. amend. IV.

18. *Id.*

Some Justices of the Supreme Court have interpreted the Reasonableness Clause as standing alone, defining reasonableness without reference to the requirements specified in the Warrant Clause.<sup>19</sup> However, for most of the twentieth century, and now entering into the twenty-first century, the Supreme Court has considered the Warrant Clause as predominant, defining what was needed for a government intrusion to be considered reasonable.<sup>20</sup> The current Chief Justice has recognized the consensus of the Court that the warrant mandate defines reasonableness:

The ultimate standard set forth in the Fourth Amendment is reasonableness. In construing this command, there has been general agreement that “except in certain carefully defined classes of cases, a search of private property without proper consent is ‘unreasonable’ unless it has been authorized by a valid search warrant.”<sup>21</sup>

Another member of the current Court, Justice Stevens, has even termed the warrant preference as “settled law.”<sup>22</sup> In doing so, Justice Stevens quoted the following passage from the seminal case, *Coolidge v. New Hampshire*:

“The most basic constitutional rule in this area is that ‘searches conducted outside the judicial process, without prior approval by judge or magistrate, are *per se* unreasonable under the Fourth Amendment—subject only to a few specifically established and well-delineated exceptions.’ The exceptions are ‘jealously and carefully drawn,’ and there must be ‘a showing by those who seek exemption . . . that the exigencies of the situation made that course imperative.’ The burden is on those seeking the exemption to show the need for it.”<sup>23</sup>

The first automobile exception case, *Carroll v. United States*,<sup>24</sup> proved *Coolidge’s* point, for the automobile exception was so named because

19. “As the text of the Fourth Amendment indicates, the ultimate measure of the constitutionality of a governmental search is ‘reasonableness.’” *Vernonia School District 47J v. Acton*, 515 U.S. 646, 652 (1995).

20. In *Chimel v. California*, the Court expressed concern about a reasonableness standard lacking the guidance of the Warrant Clause:

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

395 U.S. 752, 765 (1968) (quoting *United States v. Rabinowitz*, 339 U.S. 56, 83 (1950) (Frankfurter, J., dissenting)).

21. *Cady v. Dombrowski*, 413 U.S. 433, 439 (1973).

22. *Florida v. White*, 526 U.S. 559, 568 (1999) (Stevens, J., dissenting).

23. *Id.* (quoting *Coolidge v. New Hampshire*, 403 U.S. 443, 453, 454-55 (1971)).

24. 267 U.S. 132 (1925).

it served as an exception to the requirement that a warrant precede a police search.<sup>25</sup>

Further, automobile exception jurisprudence not only continued to acknowledge the warrant preference, but also raised it to a “cardinal principle.”<sup>26</sup> This principle had very pragmatic results. Since a warrantless search was presumed “*per se* unreasonable . . . subject only to a few specifically established and well-delineated exceptions,”<sup>27</sup> the burden was on the government to prove any search without a warrant was reasonable. Thus, it behooved police to strictly adhere to the specified elements of any warrant exception, including the automobile exception.

*B. Carroll’s Common Sense Belief That Mobility Created an Exigency for the Automobile Exception*

In its interpretation of the automobile exception’s place in search and seizure jurisprudence, the Supreme Court has explicitly noted the importance of construing the Fourth Amendment as it was understood at the time of its adoption.<sup>28</sup> In *White* itself, Justice Thomas, who authored the Court’s opinion, intoned that “[i]n deciding whether a challenged governmental action violates the Amendment, we have taken care to inquire whether the action was regarded as an unlawful search and seizure when the Amendment was framed.”<sup>29</sup>

The *White* Court then went on to cite *Carroll* as a proper example of the Court’s adherence to original intent.<sup>30</sup> *Carroll* was a bootlegging case in which George Carroll and John Kiro were convicted of transporting sixty-eight quarts of whiskey and gin in an Oldsmobile Roadster, in violation of the National Prohibition Act<sup>31</sup>.<sup>32</sup> After forming probable cause that Carroll’s car contained contraband liquor,<sup>33</sup> but before obtaining a warrant, agents stopped and searched the roadster, finding the sixty-eight bottles of alcohol “behind the upholstery of the seats.”<sup>34</sup> While Carroll contended that the search violated the Fourth Amendment,<sup>35</sup> the Court ultimately ruled that the search was proper.<sup>36</sup>

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25. *Id.*

26. *United States v. Ross*, 456 U.S. 798, 825 (1982) (quoting *Katz v. United States*, 389 U.S. 347, 357 (1967)).

27. *Id.*

28. *See Florida v. White*, 526 U.S. 559, 563 (1999).

29. *Id.*

30. *See id.*

31. Ch. 85, § 26, 41 Stat. 305 (1919) (repealed 1933).

32. *See Carroll v. United States*, 267 U.S. 132, 134-35 (1925).

33. *See id.* at 162.

34. *Id.* at 135.

35. *See id.* at 134.

36. *See id.* at 162.

*White* boasted that *Carroll*'s holding "was rooted in federal law enforcement practice at the time of the adoption of the Fourth Amendment."<sup>37</sup> *Carroll*'s faithfulness to the Founders was demonstrated by that Court's examination of "laws of the First, Second, and Fourth Congresses that authorized federal officers to conduct warrantless searches of ships and to seize concealed goods subject to duties."<sup>38</sup> *White*'s explicit mandate to honor the Framers' intent thus invites anyone interested in understanding the Court's opinion to return to *Carroll*, the case that created the automobile exception in Fourth Amendment case law by studying the Congresses of the Founders. An exploration of *Carroll* will not only aid in assessing *White*'s holding and its implications, but will also provide a yardstick by which to measure the Court's own efforts at effectuating the original aims of the Fourth Amendment's creators.

The *Carroll* Court's concern with the Framers' intent permeates its reasoning. Chief Justice Taft, who authored the *Carroll* opinion, closely examined "[t]he first statute passed by Congress to regulate the collection of duties, the act of July 31, 1789."<sup>39</sup> *Carroll* surmised that review of the act of 1789 cast light on the Framers' view of Fourth Amendment rights, "[T]his act was passed by the same Congress which proposed for adoption the original amendments to the Constitution . . . ."<sup>40</sup>

Specifically, the detailed examination of this law enabled *Carroll* to determine the scope and underpinnings of the warrant preference. The Chief Justice noted a distinction between the searches of vehicles of transportation, such as a "ship or vessel," and such fixed structures as a "dwelling-house, store, [or] building."<sup>41</sup> The Duties Act of 1789 enabled collectors to enter and search the vessels upon mere "reason to suspect," while it authorized the search of structures only if the reason to suspect was bolstered by a warrant.<sup>42</sup> Thus, *Carroll* concluded that the first Congresses made a distinction "as to the necessity for a search warrant" between items concealed in "a dwelling house or similar place," and similar objects discovered "in course of transportation and concealed in a movable vessel where they readily could be put out of reach of a search warrant."<sup>43</sup> Essentially, officials should obtain prior approval by a judge whenever practically possible, such as in cases involving fixed structures. The warrant

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37. *Florida v. White*, 526 U.S. 559, 559 (1999).

38. *Id.*

39. *Carroll*, 267 U.S. at 150.

40. *Id.*

41. *Id.* at 150-51.

42. *Id.* (citing the statute).

43. *Id.* at 151.



mandate would not be required when following it would prove impossible.<sup>44</sup>

This point was so important to the creation of the automobile exception that the Court reiterated it only two pages later in its opinion:

We have made a somewhat extended reference to these statutes to show that the guaranty of freedom from unreasonable searches and seizures by the Fourth Amendment has been construed, practically since the beginning of the Government, as recognizing a necessary difference between a search of a store, dwelling house or other structure in respect of which a proper official warrant readily may be obtained, and a search of a ship, motor boat, wagon or automobile, for contraband goods, where it is not practicable to secure a warrant because the vehicle can be quickly moved out of the locality or jurisdiction in which the warrant must be sought.<sup>45</sup>

Therefore, the automobile exception was a child of necessity and exigency; when possessing probable cause, police were allowed to search vehicles without a warrant because a warrant requirement would simply be unworkable. Further, the unworkability was not mere inconvenience, but impossibility. Chief Justice Taft ruled:

In cases where the securing of a warrant is reasonably practicable, it must be used, and when properly supported by affidavit and issued after judicial approval protects the seizing officer against a suit for damages. In cases where seizure is impossible except without warrant, the seizing officer acts unlawfully and at his peril unless he can show the court probable cause.<sup>46</sup>

Therefore, as *White* proudly noted, *Carroll* did adhere to original intent. Unfortunately for the *White* Court, *Carroll's* obedience to the Framers pointed it in a direction that differed markedly from *White's* analysis. *Carroll's* painstaking review of the actions of the first Congresses caused Chief Justice William Howard Taft to reassert the warrant's role in Fourth Amendment litigation and to make only a narrow exception to the warrant mandate. Further, this exception was fully supported by common sense recognition of the exigencies caused by mobile vehicles. *Carroll's* simple distinction between fixed buildings and moving motorcars was so persuasive that it was still relied upon nearly forty years later. In *Preston v. United States*,<sup>47</sup> the Court reiterated *Carroll's* exigency requirement:

Common sense dictates, of course, that questions involving searches of motorcars or other things readily moved cannot be

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44. See *id.* at 156.

45. *Id.* at 153.

46. *Id.* at 156.

47. 376 U.S. 364 (1964).

treated as identical to questions arising out of searches of fixed structures like houses. For this reason, what may be an unreasonable search of a house may be reasonable in the case of a motor-car.<sup>48</sup>

### C. *Chambers' Strained Logic in Equating Seizure and Search of a Vehicle*

In 1970, in *Chambers v. Maroney*,<sup>49</sup> *Carroll's* decades-old exigency requirement was unceremoniously dumped.<sup>50</sup> *Chambers* involved an armed robbery of a service station of currency and coins by men who drove away in a blue compact station wagon.<sup>51</sup> Within an hour of the robbery and some two miles from the service station, police spotted a station wagon answering the description of the suspect vehicle.<sup>52</sup> The facts in the case supported probable cause to immediately search the station wagon in the field for evidence of the robbery.<sup>53</sup> However, police chose to forgo an immediate search in favor of driving the car to the station.<sup>54</sup> The stationhouse search of the car revealed guns and evidence linking the station wagon to the service station robbery.<sup>55</sup> The Court in *Chambers* ultimately upheld the delayed search under the automobile exception, thus ending any need for exigent circumstances.<sup>56</sup>

*Chambers'* elimination of the automobile exception's exigency prong was not based on adherence to the Framers' intent but to a single paragraph of illogic. Faced with a search of a car after it had been taken into the sole custody of police at the stationhouse,<sup>57</sup> the *Chambers* Court performed intellectual contortions to uphold the official intrusion. Justice White, writing the majority opinion, first paid lip service to the Warrant Clause's predominance by noting that "[a]rguably, because of the preference for a magistrate's judgment, only the immobilization of the car should be permitted until a search warrant is obtained."<sup>58</sup> This was because only the seizure, or "lesser" intrusion, is permissible until a magistrate authorizes the search, or "greater" intrusion.<sup>59</sup> Then, without reference to any specifics, the *Chambers* Court equated the "lesser" and "greater" intrusions by

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48. *Id.* at 366-67.

49. 399 U.S. 42 (1970).

50. *Id.* at 51-52.

51. *See id.* at 44.

52. *See id.*

53. *See id.* at 52.

54. *See id.* at 44.

55. *See id.* at 44-45.

56. *See id.* at 51-52.

57. *See id.* at 44.

58. *Id.* at 51.

59. *Id.*

finding “no difference between on the one hand seizing and holding a car before presenting the probable cause issue to a magistrate and on the other hand carrying out an immediate search without a warrant.”<sup>60</sup> Hence, under the automobile exception, the *more intrusive* search is to be treated the *same*, “for constitutional purposes,” as the *less intrusive* seizure.<sup>61</sup> Justice White’s likening of more with less enabled the *Chambers* Court to extend the automobile exception from searches in the field to those at the station when the car is already safely within police custody.<sup>62</sup>

*Chambers* gained credibility by receiving the respected patina that comes with being cited as precedent. In 1975, *Texas v. White*,<sup>63</sup> a per curiam opinion, explicitly reaffirmed *Chambers*.<sup>64</sup> In *Texas v. White*, police arrested the defendant for attempting to pass fraudulent checks at a bank’s drive-in window in Amarillo.<sup>65</sup> While one officer drove the defendant to the police station, the other drove his car to the station house.<sup>66</sup> Later, a search of the defendant’s vehicle at the station recovered four other checks that he had tried to pass at another bank.<sup>67</sup> Despite the lack of any facts pointing to exigency, the *Texas v. White* Court found the search reasonable:

In *Chambers v. Maroney* we held that police officers with probable cause to search an automobile at the scene where it was stopped could constitutionally do so later at the station house without first obtaining a warrant. There, as here, “[t]he probable-cause factor” that developed at the scene “still obtained at the station house.”<sup>68</sup>

In still another per curiam opinion, *Michigan v. Thomas*,<sup>69</sup> the Court again relied upon *Chambers* to rule that “officers may conduct a warrantless search of the vehicle, even after it has been impounded and is in police custody.”<sup>70</sup> To remove any doubt about *Chambers*’ vitality, the *Thomas* opinion noted that it “firmly reiterated this holding in *Texas v. White*.”<sup>71</sup> Further, the *Thomas* Court took the extra step of specifically rejecting various scenarios of exigency as limits on the *Chambers* rule. *Thomas* urged:

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60. *Chambers*, 399 U.S. at 52.

61. *Id.*

62. *See id.* at 52.

63. 423 U.S. 67 (1975).

64. *Id.* at 68.

65. *Id.* at 67.

66. *See id.*

67. *See id.*

68. *Id.* at 68 (quoting *Chambers v. Maroney*, 399 U.S. 42, 52 (1970)).

69. 458 U.S. 529 (1982).

70. *Id.* at 261.

71. *Id.*

It is thus clear that the justification to conduct such a warrantless search does not vanish once the car has been immobilized; nor does it depend upon a reviewing court's assessment of the likelihood in each particular case that the car would have been driven away, or that its contents would have been tampered with, during the period required for the police to obtain a warrant.<sup>72</sup>

*Chambers* became even more firmly established in the 1984 per curiam opinion, *Florida v. Meyers*.<sup>73</sup> In *Meyers* the Court not only reaffirmed *Chambers*, but also *Chambers*' progeny, *Thomas*.<sup>74</sup> Further, this opinion even contained an air of irritation at any court failing to grasp the import of *Chambers*. Indeed, *Meyers* found fault with the District Court of Appeal in that case because it "either misunderstood or ignored our prior rulings with respect to the constitutionality of the warrantless search of an impounded automobile."<sup>75</sup> Thus, three opinions, all of which might have lacked the benefit of full briefing and argument,<sup>76</sup> and none of which divined the Framers' intent, enabled the Court to establish, as firmly entrenched, a rule that created a curious break with *Carroll*'s formulation of the automobile exception.

The Court did rely on *Chambers* in one fully briefed case, *United States v. Ross*.<sup>77</sup> Yet, the *Ross* Court only employed *Chambers* to support the scope of an automobile exception search in terms of *place*, and not of *time*. In *Ross*, upon probable cause, police searched two containers found in the defendant's car, a "lunch-type' brown paper bag," and a "red leather pouch."<sup>78</sup> The heroin found in the bag and the currency found in the pouch were later introduced at trial to convict the defendant of possession of heroin with the intent to distribute.<sup>79</sup> When the *Ross* Court analyzed *Chambers*, it used *Chambers*' permissible search under the car's dashboard as support to allow the search of the two containers, the bag, and the pouch.<sup>80</sup>

72. *Id.*

73. 466 U.S. 380 (1984).

74. *See id.* at 382.

75. *Id.*

76. Per curiam opinions do not receive the same treatment accorded traditional opinions. In *Pennsylvania v. Mimms*, 434 U.S. 106 (1977), Justice Stevens noted this limitation in a per curiam opinion: "I respectfully dissent from the grant of certiorari and from the decision on the merits without full argument and briefing." *Id.* at 124.

77. 456 U.S. 798 (1982).

78. *Id.* at 801.

79. *See id.*

80. *See id.* at 818. *Ross* opined:

In *Chambers v. Maroney* the police found weapons and stolen property "concealed in a compartment under the dashboard." No suggestion was made that the scope of the search was impermissible. It would be illogical to assume that the outcome of *Chambers* . . . would have been different if the police had found the secreted contraband enclosed within a secondary container and had opened that container without a warrant. . . . [I]f it was reasonable to open the con-

*Chambers*, the case permitting warrantless searches of cars after they were no longer in danger of being moved, ultimately did receive its analytical fig leaf. The case which perhaps best explained the shift in the automobile exception's logical foundations was *California v. Carney*.<sup>81</sup> In *Carney*, police searched the defendant's motor home after obtaining probable cause that he was using it as a site to exchange "marihuana for sex."<sup>82</sup> The search recovered marijuana on the motor home's table, in the cupboards, and in the refrigerator.<sup>83</sup> Chief Justice Warren Burger, writing for the *Carney* Court, traced the automobile exception back to *Carroll*.<sup>84</sup> The Chief Justice noted that *Carroll* "recognized that the privacy interests in an automobile are constitutionally protected; however, it held that the ready mobility of the automobile justifies a lesser degree of protection of those interests."<sup>85</sup> Yet, the Court in *Carney* added a new rationale for the automobile exception:

However, although ready mobility alone was perhaps the original justification for the vehicle exception, our *later cases* have made clear that ready mobility is not the only basis for the exception. The reasons for the vehicle exception, we have said, are twofold. "Besides the element of mobility, less rigorous warrant requirements govern because the expectation of privacy with respect to one's automobile is significantly less than that relating to one's home or office."<sup>86</sup>

However, perhaps much to Justice Thomas' consternation, the factors bolstering the second, "lessened expectation of privacy in cars" rationale bore little connection to anything the Founders might have imagined. To explain the lessened privacy expectations of motorists, the Chief Justice offered:

"Automobiles, unlike homes, are subjected to pervasive and continuing governmental regulation and controls, including periodic inspection and licensing requirements. As an everyday occurrence, police stop and examine vehicles when license plates or inspection stickers have expired, or if other violations, such as exhaust fumes or excessive noise, are noted, or if headlights or other safety equipment are not in proper working order."<sup>87</sup>

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cealed compartment in *Chambers*, it would have been equally reasonable to open a paper bag crumpled within it.

*Id.* (citation omitted).

81. 471 U.S. 386 (1985).

82. *Id.* at 388.

83. *See id.*

84. *See id.* at 390.

85. *Id.* Chief Justice Burger also noted that "[t]he capacity to be 'quickly moved' was clearly the basis of the holding in *Carroll*." *Id.*

86. *Id.* at 391 (emphasis added) (citation omitted).

87. *Id.* at 392 (quoting *South Dakota v. Opperman*, 428 U.S. 364, 368 (1976)).

Thus, later opinions attempted to fill in the gaps in logic left by *Chambers*' abrupt shift away from the exigency rationale. The Court seemed intent on obscuring its drift away from *Carroll* with repeated citations of *Chambers*' holding and by the reference to "later cases" creation of a new "lesser expectations of privacy" rationale.<sup>88</sup> Such tactics could not hide the Court's plain break with the Framers' intent as manifested in *Carroll*.

*D. Johns' Unexplained Extension of the Duration of Law Enforcement's Right to Search Impounded Vehicles*

Perhaps the Court itself was uncomfortable with *Chambers*' attempt to explain away the automobile exception's exigency requirement for, in *United States v. Johns*,<sup>89</sup> the Court chose instead to simply avoid any explanation. In *Johns*, federal agents in Arizona observed what appeared to be drug smuggling, about fifty miles from the Mexican border. Agents inferred that small aircraft had landed on remote airstrips to supply pickup trucks with plastic packages full of marijuana.<sup>90</sup> Instead of searching the trucks at the desert airstrip, the marijuana packages were taken to a Drug Enforcement Agency warehouse and searched without a warrant three days later.<sup>91</sup> Upon certiorari, the Court reversed the Ninth Circuit's conclusion that the "delay after the initial seizure made the subsequent warrantless search unreasonable within the meaning of the Fourth Amendment."<sup>92</sup>

The *Johns* majority not only avoided providing a rationale to explain the reasonableness of a delayed search, but it appeared to be engaged in an exercise of telling the reader what it would *not* discuss. Although Justice O'Connor, the author of the Court's opinion in *Johns*, acknowledged that the three-day delay of the search of the impounded trucks was the "central issue" in the case,<sup>93</sup> she repeatedly refused to announce a rule specifically addressing it. Initially, *Johns* merely repeated earlier case law that the "justification to conduct such a warrantless search does not vanish once the car has been immobilized,"<sup>94</sup> and that, with the automobile exception, "there is no requirement of exigent circumstances to justify such a warrantless search."<sup>95</sup> However, the *Johns* Court offered no rationale to support a delay as long as three days. Instead, Justice O'Connor relied on *Ross*'

88. *Id.* at 391.

89. 469 U.S. 478 (1985).

90. *See id.* at 480.

91. *See id.* at 481.

92. *Id.* at 480.

93. *Id.* at 483.

94. *Id.* at 484 (quoting *Michigan v. Thomas*, 458 U.S. 259, 261 (1982)).

95. *Id.* (quoting *Florida v. Meyers*, 466 U.S. 380 (1984)).

failure to establish “temporal restrictions” to the automobile exception in upholding the delayed search in *Johns*.<sup>96</sup>

Yet, *Johns* also refused to state a rule placing an outer time limit on automobile exception searches. Justice O’Connor cautioned:

*We do not suggest* that police officers may indefinitely retain possession of a vehicle and its contents before they complete a vehicle search. Nor do we foreclose the possibility that the owner of a vehicle or its contents might attempt to prove that delay in the completion of a vehicle search was unreasonable because it adversely affected a privacy or possessory interest.<sup>97</sup>

Thus, in the case extending the automobile exception’s time limits to a matter of *days* rather than hours, the only clear declarations dealt with the decisions the Court *refused* to make.

The Court would again announce the automobile exception’s lack of need for exigent circumstances, perhaps fittingly, in two more per curiam opinions, *Pennsylvania v. Labron*<sup>98</sup> and *Maryland v. Dyson*.<sup>99</sup> *Labron* actually involved two cases, *Labron* and *Kilgore*. In *Labron*, police arrested Edwin Labron after watching him engage in a “series of drug transactions on a street in Philadelphia.”<sup>100</sup> After arrest, police searched the trunk of “a car from which the drugs had been produced,” recovering cocaine.<sup>101</sup> *Kilgore*’s facts were almost as simple: an undercover informant connected Randy Kilgore’s truck to a drug sale, which resulted in police recovering cocaine from the truck’s floor. In both *Labron* and *Kilgore*, the Pennsylvania Supreme Court found exigent circumstances to be a necessary automobile exception element.<sup>102</sup> In *Labron*, the Court deemed the Pennsylvania Supreme Court’s exigency requirement to be “incorrect,” ruling that “[i]f a car is readily mobile and probable cause exists to believe it contains contraband, the Fourth Amendment thus permits police to search the vehicle without more.”<sup>103</sup>

In *Dyson*, a case in which the Court described the facts as “virtually identical” to those in *Labron*, the Court reached a similar re-

96. *Id.* at 485. Justice O’Connor wrote:

*Ross*, as the Court of Appeals noted, did observe in a footnote that if police may immediately search a vehicle on the street without a warrant, “a search soon thereafter at the police station is permitted if the vehicle is impounded.” When read in context, these remarks plainly do not suggest that searches of containers discovered in the course of a vehicle search are subject to temporal restrictions not applicable to the vehicle search itself.

*Id.* (citation omitted).

97. *Johns*, 469 U.S. at 487 (emphasis added) (citation omitted).

98. 518 U.S. 938 (1996).

99. 527 U.S. 465 (1999).

100. *Labron*, 518 U.S. at 939.

101. *Id.*

102. *See id.*

103. *Id.* at 940.

sult.<sup>104</sup> *Dyson* involved a sheriff deputy's vehicular search based on an informant's tip.<sup>105</sup> At 11 a.m. on July 2, 1996, the deputy learned from a "reliable confidential informant" that Kevin Dyson had driven to New York to buy drugs and would return in a particular red Toyota with "a large quantity of cocaine."<sup>106</sup> After corroborating the tipster's information by learning that Dyson was a "known drug dealer" in the county, the deputy then stopped and searched his car at 1 a.m., on July 3, 1996.<sup>107</sup> The Court in *Dyson* found this search to be within the automobile exception, despite the fact that the deputy had several hours in which to obtain a warrant.<sup>108</sup> Indeed, *Dyson* explicitly stated, "the 'automobile exception' has no separate exigency requirement."<sup>109</sup> Thus, in the same term that the Court decided *White*, the Court in *Dyson* destroyed any remnant of *Carroll's* exigency requirement.

## II. FLORIDA V. WHITE

### A. Facts

The facts are short, but not simple. At some time during the months of July and August 1993,<sup>110</sup> police observed Tyvessel Tyvorus White "using his car to deliver cocaine, and thereby developed probable cause to believe that his car was subject to forfeiture under the Florida Contraband Forfeiture Act."<sup>111</sup> Presumably, the facts which

104. *Maryland v. Dyson*, 527 U.S. 465, 467 (1999).

105. *See Dyson*, 527 U.S. at 465.

106. *Id.*

107. *Id.* at 466.

108. *See id.*

109. *Id.*

110. Perhaps because of law enforcement's failure to immediately act upon this information and arrest White, there is no clear record of the dates of police observations of defendant's activities. *See White v. State*, 710 So. 2d 949, 950 n.2 (Fla. 1998). Regarding the lack of certainty as to the dates, the Florida Supreme Court noted:

The dates of the alleged prior illegal activities were July 26, 1993, and August 4 and 7, 1993. We commend the State's candor in providing these dates during oral argument. *As both parties noted at oral argument, the record is unclear as to the actual dates.* The State noted that these dates are contained in White's motion for post conviction relief under Florida Rule of Criminal Procedure 3.850.

*Id.* (emphasis added).

111. *Florida v. White*, 526 U.S. 559, 561 (1999). Florida's Contraband Forfeiture Act provides, in pertinent part:

Any contraband article, vessel, motor vehicle, aircraft, other personal property, or real property used in violation of any provision of the Florida Contraband Forfeiture Act, or in, upon, or by means of which any violation of the Florida Contraband Forfeiture Act has taken place, may be seized and shall be forfeited.

FLA. STAT. § 932.703(1)(a) (2000). The Supreme Court has interpreted this provision to simply mean that "certain forms of contraband, including motor vehicles used in violation of the Act's provisions, may be seized and potentially forfeited." *White*, 526 U.S. at 561.



supported the probable cause for the forfeiture would have also sufficed to support an arrest of White. Therefore, Florida's police could have both arrested White and seized his car. However, "[f]or reasons unexplained," police chose to do neither.<sup>112</sup>

Instead, police allowed months to pass until they arrested White, at his place of employment, on an unrelated matter.<sup>113</sup> Police officers had determined just before the arrest that they would seize White's car under the state's forfeiture act.<sup>114</sup> Accordingly, once police had taken White into custody on the unrelated charges, they secured the car's keys and seized it "from the parking lot of White's employment."<sup>115</sup> The seizure of White's car was not incident to his arrest or by warrant.<sup>116</sup> The sole basis for the seizure was because the police decided that the car was forfeitable under Florida's forfeiture act.<sup>117</sup>

Once the car was seized and moved to the Bay County Joint Narcotics Task Force headquarters, it became subject to a "routine inventory search," which revealed two pieces of crack cocaine.<sup>118</sup> When White later moved to suppress this cocaine, the trial court reserved ruling on the issue, letting the evidence go to the jury.<sup>119</sup> Then, at a post-conviction suppression hearing, the trial court denied the defendant's motion.<sup>120</sup>

### B. Lower Court Rulings

White appealed to the First District Court of Appeal of Florida, which affirmed the trial court's ruling.<sup>121</sup> However, its holding was hardly an endorsement for the notion that the automobile exception supported the seizure of White's vehicle. Indeed, the First District Court treated the automobile exception as, at most, a fallback argument, which it considered in a single paragraph.<sup>122</sup>

Judge William A. Van Nortwick, who authored the First District Court opinion, initially focused on whether the seizure properly followed the state statute.<sup>123</sup> When it finally considered the seizure's Fourth Amendment implications, the First District Court of Appeal turned to the federal circuits for guidance, noting that these courts

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112. *White*, 526 U.S. at 567 (Stevens, J. dissenting).

113. *See id.* at 561. The First District Court of Appeal of Florida carefully noted: "The charges on which White was arrested are not the subject of the instant appeal." *White v. State*, 680 So. 2d 550, 551 n.2. (Fla. 1st DCA 1996).

114. *See White v. State*, 680 So. 2d at 551.

115. *White v. State*, 710 So. 2d. 949, 950 (Fla. 1998).

116. *See id.*

117. *See White*, 526 U.S. at 562.

118. *White*, 680 So. 2d. at 551.

119. *See id.* at 552.

120. *See id.*

121. *See id.* at 557.

122. *See id.* at 554-55.

123. *See id.* at 552-53.

were split on the issue.<sup>124</sup> Judge Van Nortwick essentially chose to fall in with the majority and held that “a warrantless seizure of a motor vehicle based on probable cause that the vehicle was used in violation of the Forfeiture Act does not violate the Fourth Amendment.”<sup>125</sup>

In offering reasoning to support its holding, the court did not rush to employ the automobile exception. Instead, Judge Van Nortwick adhered to, as the court’s preferred rationale, an argument stemming from law enforcement’s right to perform warrantless arrests. The court found the following reasoning as convincing:

“If federal law enforcement agents, armed with probable cause, can arrest a drug trafficker without reporting to the magistrate for a warrant, we see no reason why they should not also be permitted to seize the vehicle the trafficker has been using to transport his drugs. Appellants would have us accord the trafficker’s property interest greater deference than his liberty interest; they seem to suggest that the injury caused by erroneous detention . . . is somehow greater in the case of one’s property than it is in the case of one’s liberty. We are not persuaded.”<sup>126</sup>

Almost as an afterthought, Judge Van Nortwick mentioned the “so-called ‘automobile exception.’”<sup>127</sup> *White v. State* noted the two reasons advanced for the automobile exception: 1) vehicle mobility and 2) the lessened privacy expectations with respect to automobiles.<sup>128</sup> Judge Van Nortwick then recognized that “a warrantless search and seizure of a motor vehicle may pass constitutional scrutiny absent any exigent circumstances other than the characteristics inherent in a motor vehicle.”<sup>129</sup> He therefore found it logical to use the “same reasons” of mobility and lessened privacy to allow a vehicle seizure “under a forfeiture statute without a prior warrant.”<sup>130</sup>

In its automobile exception discussion, the First District Court of Florida took great pains to avoid simply stating that the seizure of *White*’s car fell within the automobile exception. Instead, it only intended to use the automobile exception as an analogy. Like cars seized under the automobile exception, cars seized by the forfeiture laws are both mobile and have a lessened expectation of privacy. Thus, like cars subject to the automobile exception, cars subject to forfeiture statutes can be seized without a warrant.

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124. *See id.* at 553.

125. *Id.* at 554.

126. *Id.* (quoting *U.S. v. Valdes*, 876 F.2d 1554, 1559-60 (11th Cir. 1998)).

127. *Id.* at 554.

128. *Id.* at 554.

129. *Id.* at 554-55.

130. *Id.* at 555.

The fact that *White v. State* was careful *not* to rely on the automobile exception as precedent, squarely deciding the seizure under the forfeiture issue, indicates that the District Court determined that it was not directly relevant. This is further borne out by Judge Van Nortwick's reliance on "logic,"<sup>131</sup> grounds not nearly as strong as prior case law.

When, at the Florida Supreme Court, the automobile exception rationale was placed squarely at issue, it did not fare well.<sup>132</sup> The Florida Supreme Court, in an opinion authored by Justice Harry Lee Anstead, hearkened back to a view of the automobile exception articulated by *Carroll*—an indication of concern for the intentions of the Fourth Amendment's Framers. Justice Anstead characterized the automobile exception as "a narrow, situation-dependent exception which requires much more than the fact that an automobile is the object sought to be seized and searched."<sup>133</sup> To even trigger the "situation" mentioned by the Florida Supreme Court, two factors needed to exist: 1) "there must be probable cause to believe contraband is in the vehicle at the time of the search and seizure," and 2) "there must be some legitimate concern that the automobile 'might be removed and any evidence within it destroyed in the time a warrant could be obtained.'"<sup>134</sup>

When applying this two-pronged rule, *White v. State* deemed the automobile exception to be "inapposite as authority," for the case's facts failed to clear the rule's first hurdle, probable cause.<sup>135</sup> Justice Anstead simply noted that "it is conceded that the government had no probable cause to believe that contraband was present in White's car."<sup>136</sup> As for the Florida Supreme Court's second requirement of exigent circumstances, Justice Anstead found it "obvious" that such facts were absent in the case.<sup>137</sup> He opined:

There simply was no concern presented here that an opportunity to seize evidence would be missed because of the mobility of the

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131. Judge Van Nortwick asserted, "*Logically*, for the same reasons, a motor vehicle may be seized under a forfeiture statute without a prior warrant." *Id.* (emphasis added). Moreover, the District Court further undermined the importance of its reference to the automobile exception by certifying the entire issue to the Florida Supreme Court. *Id.*

132. See *White v. State*, 710 So. 2d. 949, 951 (Fla. 1998).

133. *Id.* at 953.

134. *Id.* Justice Anstead also stated this test as follows:

The automobile exception is predicated upon the existence of exigent circumstances consisting of the known presence of contraband in the automobile at the time, combined with the likelihood that an opportunity to seize the contraband will be lost if it is not immediately seized because of the mobility of the automobile.

*Id.* at 952.

135. *Id.* at 953.

136. *Id.* at 953.

137. *Id.*

vehicle. Indeed, the entire focus of the seizure here was to seize the vehicle itself as a prize because of its alleged prior use in illegal activities, rather than to search the vehicle for contraband known to be therein, and that might be lost if not seized immediately.<sup>138</sup>

Having disposed of the automobile exception contention, the Court in *White v. State* then considered the argument which so persuaded the District Court of Appeal, that “since a defendant’s person can be seized without a warrant his property should be no different.”<sup>139</sup> Justice Anstead recognized that such reasoning “simply proves too much.”<sup>140</sup> Specifically, he noted:

If we were to follow that reasoning to its logical conclusion we would, in essence, amend the Fourth Amendment out of the Constitution and do away with the requirement of a warrant entirely for the search and seizure of property. It will always be more intrusive to seize a person than it will be to seize his property. That is the nature of human values. However, such an approach would apparently have us do away with the constitutional law of search and seizure as to property entirely, simply because we have permitted the warrantless arrest of a person.<sup>141</sup>

Thus, although the First District Court of Appeal of Florida and the Florida Supreme Court reached opposite conclusions regarding the lawfulness of the seizure and search of White’s car, the judges authoring the conflicting opinions could indeed find common ground—*White v. State* was not a case which was easily answered by deeming police action to have fallen within the automobile exception. Judge Van Nortwick only cautiously analogized his case to the automobile exception precedent, while Justice Anstead refused to even go that far. The uniform hesitancy to broaden the automobile exception to fit the facts regarding White’s car would soon be overcome by the highest court in the land.

### C. *The Supreme Court’s Extension of the Automobile Exception to Seizing the Entire Car as “Contraband”*

In *White*, the United States Supreme Court, in an opinion authored by Justice Thomas, politely chided the reader that, when interpreting the Fourth Amendment, one must take care to “inquire whether the action was regarded as an unlawful search and seizure when the Amendment was framed.”<sup>142</sup> The *White* Court then went on to present an entire opinion without any independent examination of

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138. *Id.* at 954.

139. *Id.*

140. *Id.*

141. *Id.*

142. *Florida v. White*, 526 U.S. 559, 563 (1999).

the Framers' intent. Instead, it delegated this task to *Carroll*, the original automobile exception case in which the Court labored through the details of legislation of the first Congresses to discern the Founders' intent.<sup>143</sup> *White's* brief review of *Carroll* confirmed the Court's distinction, in the "necessity for a search warrant," between fixed structures and "movable" vessels which "readily could be put out of reach of a search warrant."<sup>144</sup>

After the *White* Court's short trip down memory lane, Justice Thomas considered the Florida Supreme Court's refusal to expand the automobile exception to apply to the entire vehicle. *White* noted that the state supreme court had observed that "police lacked probable cause to believe that respondent's car contained contraband."<sup>145</sup> Justice Thomas determined this was beside the point, for police "certainly had probable cause to believe that the vehicle *itself* was contraband under Florida law."<sup>146</sup>

Interestingly, *White* then relied upon an exigency rationale to support the seizure of the entire car. Justice Thomas averred:

Recognition of the need to seize readily movable contraband before it is spirited away undoubtedly underlies the early federal laws relied upon in *Carroll*. . . . This need is equally weighty when the *automobile*, as opposed to its contents, is the contraband that the police seek to secure.<sup>147</sup>

This argument seemed strangely incongruous, given the Court's flat ruling in the very same term in *Dyson* that exigency is simply not a requirement of the automobile exception.<sup>148</sup> Thus, the Court trumpeted exigency when it existed as a colorable argument in *White*, yet rejected it as an element of the automobile exception in *Dyson* when the facts failed to demonstrate any emergency circumstances.

As a fallback argument, *White* offered that law enforcement deserved "greater latitude" in this seizure of a car, for it occurred in a "public place."<sup>149</sup> Here, Justice Thomas analogized to the Court's arrest cases.<sup>150</sup> In particular, the *White* Court offered as an example

143. Justice Thomas noted:

In *Carroll*, . . . [o]ur holding was rooted in federal law enforcement practice at the time of the adoption of the Fourth Amendment. Specifically, we looked to laws of the First, Second, and Fourth Congresses that authorized federal officers to conduct warrantless searches of ships and to seize concealed goods subject to duties.

*Id.* at 563-64.

144. *Id.*

145. *Id.* at 564-65.

146. *Id.* at 565.

147. *Id.* at 565 (citation omitted).

148. See *Maryland v. Dyson*, 527 U.S. 465, 465 (1999).

149. *White*, 526 U.S. at 565.

150. See *id.*

*United States v. Watson*,<sup>151</sup> which permitted “warrantless arrests in public places where an officer has probable cause to believe that a felony has occurred.”<sup>152</sup> *White* then contrasted *Watson* with its warrant requirement for arrests *in the home* under *Payton v. New York*,<sup>153</sup> explaining the distinction as between “a warrantless seizure in an open area and such a seizure on private premises.”<sup>154</sup> The logic of the arrest cases would thus seem to distinguish between a seizure of a car in public and a seizure of the same vehicle in a private garage. Since *White*’s car was out in public, the Court was willing to extend to it *Watson*’s right of warrantless seizure.

Justice Thomas sought further support for *White*’s seizure from duty and tax cases.<sup>155</sup> Accordingly, the Court in *White* characterized its facts as “nearly indistinguishable from those in *G.M. Leasing Corp. v. United States*,”<sup>156</sup> a case permitting a warrantless seizure of automobiles “in partial satisfaction of income tax assessments.”<sup>157</sup> Thus, much of the support for *White*’s dramatic expansion of the automobile exception cannot be traced directly to the original intent of the Framers or to automobile exception precedent. Instead, the very Court which exalted the consideration of law at the time of the framing<sup>158</sup> reached out to such varied authorities as arrest of the person and seizures to satisfy debts under the laws of duty and tax.

## V. THE IMPLICATIONS OF THE COURT’S REASONING IN *WHITE*

### A. *White*’s Analytical Approach Has Potentially Begun an Unraveling of the Fourth Amendment Tapestry One Stitch at a Time

The *White* Court preoccupied itself with one dot on the Fourth Amendment canvas to the detriment of the individual’s privacy rights as a whole. If Fourth Amendment “reasonableness” were a grand tapestry, *White* would unravel it in its entirety simply by doggedly tugging at a single thread. As will be discussed below, such narrow reasoning created an unprincipled reliance on labels and undermined the traditional protections of the warrant preference.

However, before studying each of these concerns in turn, *White*’s reasoning must be assessed on its own merits. Were Justice Thomas’ arguments compelling on their own terms? The *White* opinion began its Fourth Amendment analysis by lauding the *Carroll* case for ad-

151. 423 U.S. 411 (1976).

152. *White*, 526 U.S. at 565 (discussing the holding of *Watson*).

153. 445 U.S. 573 (1980).

154. *White*, 526 U.S. at 566 (quoting *Payton*, 445 U.S. at 587).

155. *See id.*

156. 453 U.S. 923 (1978).

157. *White*, 526 U.S. at 566.

158. *See id.* at 563.

hering to the Framers' intent.<sup>159</sup> However, *White* itself failed to learn the very lesson it touted in *Carroll*, for instead of pursuing an in-depth analysis of what the Founders might have considered a reasonable intrusion on a vehicle, *White* simply selected its favorite buzz-phrases from *Carroll*. Indeed, *White's* treatment of *Carroll* mirrored its approach to the Fourth Amendment itself; Justice Thomas picked at particular parts of *Carroll* in isolation rather than considering the impact of this seminal automobile exception case as a whole.

A closer examination of *Carroll* calls into question several of Justice Thomas' conclusions in *White*. Chief Justice William H. Taft, the author of the majority opinion in *Carroll*, carved out a narrow exception to the warrant requirement only after an extremely cautious and methodical analysis. The Chief Justice took the trouble to provide a detailed review of the legislative history of the federal statute at issue<sup>160</sup> and to study the enactments of the First, Second, and Fourth Congresses.<sup>161</sup> As Justice Thomas noted, *Carroll's* meticulous approach did lead it to make a distinction in the "necessity for a search warrant between goods . . . concealed in a dwelling house" and those "in the course of transportation and concealed in a movable vessel."<sup>162</sup>

Yet, in a manner all too consistent with the Court's myopic focus, the *White* Court ran with this conclusion without placing it within *Carroll's* bigger picture. *White's* rush to pick pieces of *Carroll* to support its narrow view caused the Court to miss the more fundamental point that the automobile exception was firmly founded upon the warrant requirement. In *Carroll*, Chief Justice Taft reaffirmed the Court's warrant preference as a *mandate*: "In cases where the securing of a warrant is reasonably practicable, it *must* be used."<sup>163</sup> Further, to forgo a warrant, police had an extreme burden to establish probable cause: "In cases where seizure is impossible except without warrant, the seizing officer acts unlawfully and at his peril unless he can show the court probable cause."<sup>164</sup> Thus, unless circumstances made it *impossible* to obtain one, officers had to get a warrant.

Thus, as noted in Part II, the Court created the automobile exception out of the necessity that comes from using common sense. Police could skip a warrant to search an automobile in which they had probable cause to believe that it contained contraband. Otherwise, such searches could never be accomplished before the moving vehicle

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159. *See id.* at 564-65.

160. Further, *Carroll's* analysis of the National Prohibition Act included extensive quotation of the actual language provided in the law. *See Carroll v. United States*, 267 U.S. 132, 143-47 (1925).

161. *See id.* at 150-51.

162. *Id.* at 151; *see also White*, 526 U.S. at 556.

163. *Carroll*, 267 U.S. at 156 (emphasis added).

164. *Id.*

escaped the jurisdiction.<sup>165</sup> Due to the exigency of inherent mobility, the automobile exception was born.

The *White* Court seemed to experience difficulty fitting the automobile exception's exigency element into the bigger picture. Justice Thomas noted that "[r]ecognition of the need to seize readily movable contraband before it is spirited away undoubtedly underlies the early federal laws relied upon in *Carroll*."<sup>166</sup> Justice Thomas therefore chose to rely upon exigency in *White*. He offered the following reasoning: "This need is equally weighty when the *automobile*, as opposed to its contents, is the contraband that the police seek to secure."<sup>167</sup> *White's* logic here deteriorated into a strained syllogism: 1) All cars are moveable and so must be searched immediately without warrant; 2) in this case, we have a car; 3) and therefore, with the existence of this car, we have an exigency and can search without a warrant.

In offering such a rationale, the *White* Court failed to perceive a myriad of problems presented in the bigger picture. First, Justice Thomas' "car creates exigency" contention simply did not square with the facts in the case. If the police in *White* were so concerned with time that they failed to get a warrant, why did they initially fail to seize Mr. White's car for several months?<sup>168</sup> When confronted with this gap in logic, the *White* Court was curiously unfazed. In fact, Justice Thomas could not be bothered with considering the issue of official delay.<sup>169</sup> He noted:

At oral argument, respondent contended that the delay between the time that the police developed probable cause to seize the vehicle and when the seizure actually occurred undercuts the argument that the warrantless seizure was necessary to prevent respondent from removing the car out of the jurisdiction. We express no opinion about whether excessive delay prior to a seizure could render probable cause stale, and the seizure therefore unreasonable under the Fourth Amendment.<sup>170</sup>

The Court here treated official delay as affecting a collateral issue of the "staleness" of probable cause—whether a delay in action would undermine a police conclusion that the car was still subject to seizure under the forfeiture statute. This judicial tangent away from the central issue of exigency, obtaining evidence before the car is allowed to leave the jurisdiction, to the secondary concern of the life span of probable cause, is curious. Since the Court itself has based the propriety of the seizure not on whether the vehicle *contained* contra-

165. See *id.* at 153.

166. *White*, 526 U.S. at 565.

167. *Id.*

168. See *id.* at 561.

169. See *id.* at 565 n.4.

170. *Id.*



band, but whether the car *itself* was seizeable contraband, staleness ceased to exist as a practical issue. After all, the police seized White's car, not because they believed that it contained contraband, but because they believed that the car itself had *become* contraband, a status that would not change with the passage of time.<sup>171</sup>

Perhaps, in its footnoted retort to the respondent, *White* considered the nonissue of probable cause in part to obscure the real weakness exposed by its "car creates exigency" rationale. The most glaring flaw in Justice Thomas' exigency contention is the simple lack of urgency. Justice Stevens recognized this in his dissent when he argued, "an exigent circumstance rationale is not available when the seizure is based upon a belief that the automobile may have been used at some time in the past to assist in illegal activity and the owner is already in custody."<sup>172</sup> The Florida Supreme Court, upon which Justice Stevens relied, was even more explicit:

There simply was no concern presented here that an opportunity to seize evidence would be missed because of the mobility of the vehicle. Indeed, the entire focus of the seizure here was to seize the vehicle itself as a prize because of its alleged prior use in illegal activities, rather than to search the vehicle for contraband known to be therein, and that might be lost if not seized immediately.<sup>173</sup>

Further, as previously noted in Part III, *White's* "car creates exigency" logic not only runs afoul of the case's facts, but of the Court's own law. In the same term that the Court decided *White*, it handed down *Dyson*, a case in which the Court held that the finding of probable cause "alone satisfies the automobile exception to the Fourth Amendment's warrant requirement."<sup>174</sup> Thus, Justice Thomas' emphasis on exigency not only did not match the reality of the individual case, but it failed to consider the larger picture of Fourth Amendment case law that the Court itself had painted.

171. The First District Court of Appeal of Florida pinpointed the testimony which supported the seizure in this case. Judge Van Nortwick noted:

Here, the police had probable cause to believe White's vehicle had been used to facilitate the sale of cocaine, as indicated by the following trial testimony:

THE COURT: Do you know what basis existed at the time you made the arrest and searched the car to file a forfeiture proceeding, what information did you have that that vehicle had been used in illegal activity?

OFFICER SQUIRE: These were all Doug Pierce's cases, it's my understanding this vehicle had been used to deliver and sell cocaine on at least two occasions, maybe three.

PROSECUTOR: And you had been present at at least one of those sales?

OFFICER SQUIRE: Yes.

THE COURT: A sale from the car?

OFFICER SQUIRE: Yes.

*White v. State*, 680 So. 2d 550, 552-53 & n. 3. (Fla. 1st DCA 1996).

172. *Florida v. White*, 526 U.S. 559, 570 (1999) (Stevens, J., dissenting).

173. *White v. State*, 710 So. 2d 949, 954 (Fla. 1998).

174. *Maryland v. Dyson*, 527 U.S. 465, 467 (1999).

The Court's "car creates exigency" blunder was not an isolated event. *White's* careless generalizations from random particulars burdened the entire opinion. To bolster the seizure of *White's* car from the parking lot, Justice Thomas noted that "our Fourth Amendment jurisprudence has consistently accorded law enforcement officials greater latitude in exercising their duties in public places."<sup>175</sup> He then mentioned the distinction in the warrant requirement made between arrests in public and those in the home.<sup>176</sup> However, close examination of the precedent upon which Justice Thomas relied, *United States v. Watson*<sup>177</sup> and *Payton v. New York*,<sup>178</sup> hardly support an expansion of warrantless public arrest to warrantless seizures of vehicles on the street.

*Watson*, the case upholding law enforcement's right to public arrest without warrant,<sup>179</sup> hardly reached its conclusion in a manner consistent with *White*. Instead, Justice Byron White, authoring the *Watson* opinion, took great care to consider the law of arrest in the larger picture of history, state adjudication, and legal theory.<sup>180</sup> He recognized that, for decades, the Court had construed the Fourth Amendment with an eye to ancient authority originating in England.<sup>181</sup> *Watson* concluded:

The cases construing the Fourth Amendment thus reflect the ancient common-law rule that a peace officer was permitted to arrest without a warrant for a misdemeanor or felony committed in his presence as well as for a felony not committed in his presence if there was reasonable ground for making the arrest.<sup>182</sup>

Unlike the *White* Court, the *Watson* Court backed up words extolling the virtue of adhering to the Framers' original intent with deeds. The Court in *Watson* emphasized:

[I]t is important for present purposes to note that in 1792 Congress invested United States marshals and their deputies with "the same powers in executing the laws of the United States, as sheriffs and their deputies in the several states have by law, in executing the laws of their respective states." The Second Congress thus saw no inconsistency between the Fourth Amendment and legislation giving United States marshals the same power as local peace officers to arrest for a felony without a warrant.<sup>183</sup>

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175. *White*, 526 U.S. at 565.

176. *See id.*

177. 423 U.S. 411 (1976).

178. 445 U.S. 573 (1980).

179. *See Watson*, 423 U.S. at 424.

180. *See id.* at 418-23.

181. *See id.* at 417-18.

182. *Id.* at 418.

183. *Id.* at 420 (citation omitted).

In its similar review of state law, the *Watson* Court quoted a mid-nineteenth century case from Massachusetts, *Rohan v. Sawin*: “The authority of a constable, to arrest without warrant, in cases of felony, is most fully established by the elementary books, and adjudicated cases.”<sup>184</sup> Since it was in the “elementary books,” warrantless arrest could hardly be considered a novel legal rule. This was shown by *Watson*’s recognition that authority to arrest without warrant “has also been the prevailing rule under state constitutions and statutes.”<sup>185</sup>

*Watson* was still not content by its demonstration that warrantless public arrest was firmly embedded in common law, the Founders’ minds, and state rules. It continued its analysis by considering the work of the American Law Institute, which “undertook the task of formulating a model statute governing police powers and practice in criminal law enforcement and related aspects of pretrial procedure.”<sup>186</sup> Here, even the American Law Institute, the law reformers who draft the model codes, chose to adhere to “the traditional and almost universal standard for arrest without a warrant.”<sup>187</sup>

*Watson*’s in-depth approach to arrest law not only shamed *White* for the manner in which it addressed the issue of warrantless seizure of vehicles, but, when read in connection with *Payton*, belied Justice Thomas’ inference that the Court allowed warrantless action merely because it occurred in public. A closer look at *Payton* reveals that *White* oversimplified its rule in order to rely upon *Payton* as support.

Justice Stevens, who authored *Payton*, placed arrests in the larger context of government intrusion.<sup>188</sup> He deemed it “well settled” that when police officers see “objects such as weapons or contraband found in a public place” they may seize such items without a warrant, for “[t]he seizure of property in plain view involves no invasion of privacy and is presumptively reasonable.”<sup>189</sup> However, the *Payton* Court considered it a “basic principle of Fourth Amendment law” that warrantless searches within a home were “presumptively unreasonable.”<sup>190</sup> This was due to the increased interest in privacy that exists inside one’s home.<sup>191</sup> The homeowner’s privacy rights were so powerful that they extended to the search of *persons* in their homes. Justice Stevens found the following reasoning persuasive:

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184. *Watson*, 423 U.S. at 419 (citation omitted).

185. *Id.*

186. *Id.* at 422.

187. *Id.* (quoting MODEL PENAL CODE § 120.1 commentary at 289 (Proposed draft 1975)).

188. See *Payton v. New York*, 445 U.S. 573, 586-90 (1980).

189. *Id.* at 586-87.

190. *Id.* at 586 (quoting *Coolidge v. New Hampshire*, 403 U.S. 443, 477-78 (1971)).

191. See *id.* at 587-88.

[C]onstitutional protection afforded to the individual's interest in the privacy of his own home is equally applicable to a warrantless entry for the purpose of arresting a resident of the house; for it is inherent in such an entry that a search for the suspect may be required before he can be apprehended.<sup>192</sup>

Thus, *Payton* made the distinction between arrests in public and those in a home based on the crucial criterion of privacy. The *Payton* Court was sufficiently sophisticated to understand that a seizure might not be an isolated event, but instead part of a larger intrusion that included a search. Rather than treating the arrest of a person and the search of that person as separate and independent events, *Payton* realized that, in an arrest at a home, the seizure and search intrusions were intertwined. Therefore, the *Watson/Payton* precedent did not simply apply the warrant requirement based upon whether or not police had a roof over their heads. These cases, when read together, limit seizures in the home because of the potential invasion they could have on the right of *privacy*. When the complete portrait painted by *Watson* and *Payton* is thus fully viewed, these cases actually point to a conclusion opposite that reached in *White*. Instead of allowing warrantless seizures of cars merely because these vehicles can be seen on a public street, *Watson* and *Payton* would restrict such actions if they would ultimately result in warrantless searches of the vehicles' *interiors*.

The Divisionist painter Seurat understood that his artwork relied upon the viewer to consider the whole. In the most basic sense, he expected that those looking at his entire painting would allow their eyes to naturally combine a red dot with an yellow one in order to see orange. The *Payton* Court was likewise alert to the whole; it mandated a warrant for an arrest in a home because prior judicial approval was necessary to protect the *privacy* invaded in *executing* an arrest in a house.

To its credit, the *White* Court seemed to make an attempt, however clumsily, to connect the seizure power with its resulting privacy invasion. Justice Thomas explicitly noted the distinction between a seizure "in an open area and such a seizure on private premises."<sup>193</sup> However, *White* went on to conclude "seizures of automobiles . . . on public streets, parking lots, or other open places, [does] not involve any invasion of privacy."<sup>194</sup> *White's* consideration of the interplay of seizure and privacy caused it to look directly at a red dot and a yellow dot and still miss the resulting blend into orange. Justice Thomas failed to see a privacy problem because he focused only on the

192. *Id.* at 588.

193. *Florida v. White*, 526 U.S. 559, 566 (1999) (quoting *Payton v. New York*, 445 U.S. 573, 587 (1980)).

194. *Id.* (quoting *G.M. Leasing Corp. v. United States*, 429 U.S. 338, 351 (1997)).

police seizure of White's vehicle in "a public area—respondent's employer's parking lot."<sup>195</sup> The seizure of White's car and the invasion of his privacy were indeed intertwined, but not because of the *place* where the car was located. Instead, the privacy invasion occurred during the later, and common, inventory search under *South Dakota v. Opperman*.<sup>196</sup> Justice Thomas himself recognized as much when he noted that the seizure in *White* led to a "subsequent inventory search."<sup>197</sup> Justice Stevens was even more explicit:

And a seizure supported only by the officer's conclusion that at some time in the past there was probable cause to believe that the car was then being used illegally is especially intrusive when followed by a routine and predictable inventory search—even though there may be no basis for believing the car then contains any contraband or other evidence of wrongdoing.<sup>198</sup>

Thus, the *White* Court identified as the relevant privacy invasion the police intrusion upon the location where the vehicle was parked, rather than the inventory search which routinely occurred with the impounding of a seized vehicle. *White's* attention seems curiously misdirected. The search for a car in a typical garage would rarely be highly intrusive; where would an individual "hide" the car in the garage? In contrast to this relatively minimal intrusion, an inventory search of the interior of the vehicle itself can be quite probing, for people have been known to store all sorts of personal items in the compartments and containers of cars. In focusing on the stray speck of information regarding the vehicle's location, the Court blinded itself to the larger invasion of the inventory search.

The *White* opinion therefore is not a model of internal consistency. Justice Thomas demanded inquiry into the Framers' intent and then failed to independently perform such an assessment.<sup>199</sup> The Court in *White* promoted an exigency argument that was unsupported by the case's facts and inconsistent with case law the Court itself had handed down in the very same term.<sup>200</sup> Furthermore, it relied on selected passages of arrest precedent that failed to provide an analytical foundation for warrantless seizures of vehicles.<sup>201</sup> This piecemeal approach thus enabled the Court to expand the automobile exception at the cost of the bigger picture of Fourth Amendment fundamentals.

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195. *Id.*

196. 428 U.S. 364 (1976).

197. *White*, 526 U.S. at 562.

198. *Id.* at 571-72 (Stevens, J., dissenting).

199. *See id.* at 563.

200. *See Maryland v. Dyson*, 527 U.S. 465, 467 (1999).

201. *See White*, 526 U.S. at 565-66.

### B. *The Court in White Promoted Label Logic*

*White* not only honed-in on bits of search and seizure law at the cost of the overall picture of Fourth Amendment jurisprudence, it magnified the significance of various rules by stamping them with labels. The resulting label-logic wound up arguing too much. As much was alluded to even by the justices who concurred with the majority opinion.<sup>202</sup> Justice Souter wrote separately in order to explicitly voice his reservation:

I join the Court's opinion subject to a qualification against reading our holding as a general endorsement of warrantless seizures of anything a State chooses to call "contraband," whether or not the property happens to be in public when seized. The Fourth Amendment does not concede any talismanic significance to use of the term "contraband" whenever a legislature may resort to a novel forfeiture sanction in the interest of law enforcement, as legislatures are evincing increasing ingenuity in doing.<sup>203</sup>

Justice Souter's assertion to the contrary cannot conceal the obvious danger in the *White* Court's reasoning. The Court has resorted to label-logic, where a notion's *name* has more importance than its origins in precedent or its implications for Fourth Amendment rights. In fact, Justice Souter may have stumbled upon the perfect metaphor in speaking of a talisman; to the majority in *White*, the legal category of "contraband" became a talisman—a thing "producing apparently magical or miraculous effects."<sup>204</sup>

Now, when a state legislature speaks the sacred word "contraband," the *White* Court would have all Fourth Amendment restrictions magically disappear. The incantation of "contraband" caused this very result in *White*, where the Florida legislature defined "contraband" to include any "vehicle of any kind, . . . which was used . . . as an instrumentality in the commission of, or in aiding or abetting in the commission of, any felony."<sup>205</sup> The Court in *White* then used this legislative label to extend the automobile exception to include "the vehicle *itself*."<sup>206</sup> Thus, the critical fact that "there must be probable cause to believe contraband is in the vehicle *at the time* of the search and seizure,"<sup>207</sup> an element crafted by *Carroll*, simply disappeared.

The "car as contraband" formulation dramatically extended the potential reach of the government's seizure powers. Traditionally, contraband has been understood to be objects so evil that their mere

202. See *id.* at 566-67 (Souter, J., concurring & Breyer, J., joining).

203. *Id.*

204. MERRIAM-WEBSTER'S COLLEGIATE DICTIONARY 1202 (10th ed. 1993).

205. *White*, 526 U.S. at 565 n.3 (quoting FLA. STAT. § 932.701(2)(a)(5) (2000)).

206. *Id.* at 565.

207. *White v. State*, 710 So. 2d 949, 953 (Fla. 1998) (emphasis added).

production or possession constitutes criminality.<sup>208</sup> Thus, the very dangerous nature of the property itself, whether it be counterfeit money, controlled substances, or illegal weapons, offered a common sense rationale for official seizure. These items were therefore unlawful to possess “regardless of purpose.”<sup>209</sup> Automobiles hardly fit within a category of such a nefarious nature, for “[t]here is nothing even remotely criminal in possessing an automobile.”<sup>210</sup>

Expanding “contraband” to include neutral items could have unfortunate collateral consequences in daily practice. In his dissent, Justice Stevens recognized the potential unfairness in the “state’s treatment of certain vehicles as ‘contraband’ based on past use.”<sup>211</sup> He noted, “Unlike a search that is contemporaneous with an officer’s probable-cause determination, a belated seizure may involve a serious intrusion on the rights of innocent persons with no connection to the earlier offense.”<sup>212</sup> Justice Stevens cited *Bennis v. Michigan*<sup>213</sup> as support.<sup>214</sup> In *Bennis*, Tina Bennis lost her family car, which she herself had paid for, when her husband was caught performing a lewd act with a prostitute in the vehicle.<sup>215</sup> The Supreme Court upheld Michigan’s forfeiture of the car despite Tina Bennis’ uncontested innocence.<sup>216</sup> In *White*, the Court’s unrestricted use of the “contraband” label risks similar troubles for those who lose vehicles in the Fourth Amendment context.

### C. *White Undermined the Warrant Preference*

The Court which crafted the majority opinion in *Carroll* would hardly recognize either the current version of the warrant preference or its automobile exception to it. As noted in Part II.B., the *Carroll* Court strictly adhered to the mandates of the Warrant Clause, crafting the automobile exception only after in-depth analysis convinced it that such a rule would not run counter to the Framers’ original intent.<sup>217</sup> Further, decades of litigation served to reinforce *Carroll*’s deference to the Warrant Clause. Nearly a half-century after *Carroll*, the Court accepted as its “most basic constitutional rule” in Fourth

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208. Contraband is defined as, “in general, any property which is unlawful to produce or possess.” BLACK’S LAW DICTIONARY 322 (6th ed. 1990).

209. *White*, 526 U.S. at 571 (Stevens, J., dissenting).

210. *Id.* (quoting *Austin v. United States*, 509 U.S. 602, 621 (1993)).

211. *Id.* at 571 (Stevens, J., dissenting).

212. *Id.*

213. 516 U.S. 442 (1996).

214. *See White*, 526 U.S. at 571 (Stevens, J., dissenting).

215. *See Michigan ex rel. Wayne County Prosecutor v. Bennis*, 527 N.W.2d 483, 486 (Mich. 1994).

216. For a detailed discussion of *Bennis v. Michigan*, see George M. Dery III, *Adding Injury to Insult: The Supreme Court’s Extension of Civil Forfeiture to Its Illogical Extreme in Bennis v. Michigan*, 48 S.C. L. REV. 359 (1997).

217. *See supra* Part II.B.

Amendment law that “searches conducted outside the judicial process, without prior approval by judge or magistrate, are *per se* unreasonable . . . subject only to a few specifically established and well-delineated exceptions.”<sup>218</sup>

The warrant presumption has been so revered in the Court’s precedent that the *White* Court itself was leery to overtly reject it. However, as Justice Stevens noted, although *White* dared “not expressly disavow the warrant presumption,” its ruling “suggest[ed] that the exceptions have all but swallowed the general rule.”<sup>219</sup> This was due to the fact that the *White* Court’s deeds spoke louder than its words. The *White* Court branded the case before it as one within the automobile exception despite the dearth of probable cause to believe the car contained any contraband<sup>220</sup> and notwithstanding the police’s total lack of concern in the exigency of losing the vehicle from its jurisdiction.<sup>221</sup> *White*’s invocation of the automobile exception was particularly brash; even the First District Court of Appeal of Florida, which ruled in the government’s favor, only ventured to say it was “influenced” by the fact that the evidence was found in a vehicle.<sup>222</sup>

Extending the automobile exception to include seizure of the vehicle itself was especially unfortunate in *White*, for the circumstances of the case revealed exceptionally lax policing. For reasons known only to the officers involved, police failed to either arrest *White* or search his vehicle when they first learned of his drug sales from his car.<sup>223</sup> Instead they waited over two months before arresting *White* on an entirely unrelated offense.<sup>224</sup> At least, it is assumed it was some two months; due to its own carelessness, the government had to estimate this time by relying on information supplied by the defendant.<sup>225</sup> Such uncertainty about the timing hardly points to exigency—rather, it appears that gaining access to *White*’s vehicle under the automobile exception was not a law enforcement priority.

218. *Coolidge v. New Hampshire*, 403 U.S. 442, 454-55 (1971) (quoting *Katz v. U.S.*, 389 U.S. 347, 357 (1967)).

219. *White*, 526 U.S. at 569 (Stevens, J., dissenting).

220. The Florida Supreme Court reasoned: “Since it is conceded that the government had no probable cause to believe that contraband was present in *White*’s car, we conclude that *Carney* and the automobile exception are inapposite as authority.” *White v. State*, 710 So. 2d 949, 953 (Fla. 1998).

221. Justice Stevens dryly noted as follows: “For reasons unexplained, the police neither arrested *White* [when originally suspected of selling narcotics from his vehicle] nor seized his automobile as an instrumentality of his alleged narcotics offenses.” *White*, 526 U.S. at 567 (Stevens, J., dissenting).

222. *White v. State*, 680 So. 2d 550, 554 (Fla. 1st DCA 1996).

223. See *White*, 526 U.S. at 567 (Stevens, J., dissenting).

224. See *id.*; *White v. State*, 710 So. 2d at 950.

225. Justice Anstead of the Florida Supreme Court wrote, “the State noted that [the relevant] dates are contained in *White*’s motion for post-conviction relief.” *White v. State*, 710 So. 2d at 950 n.2.



It is hard to picture a case where police would have more leisure to obtain a warrant. The officers searching White's car would be hard-pressed to offer details supporting any exigency preventing prior judicial approval. What is most striking however, is that the Florida officials did not even bother. As Justice Stevens noted, "the particularly troubling aspect of this case is not that the State provides a weak excuse for failing to obtain a warrant either before or after White's arrest, but that it offers us no reason at all."<sup>226</sup> The facts demonstrate the drift the Court has suffered since its original formation of the automobile exception. *Carroll* has been so eroded that the concept of impossibility has been turned on its head. Once, police could act without a warrant only when the seizure with warrant would be impossible.<sup>227</sup> Now, in *White*, the only impossibility presented involves the official explanation of delay—police cannot explain months of inaction, so they do not even bother making the attempt. Therefore, when the Court in *White* chose to sanction this behavior with an extension of the automobile exception, it destroyed the practical impact of the traditional warrant preference.

Marginalizing the warrant requirement for government seizure of contraband is perilous, for the Court itself has recognized that the lure of gain may cloud official judgment. In a case apparently so clear that it did not require full briefing, the Court in *Connally v. Georgia*<sup>228</sup> expressed concern about the impact a monetary interest in a matter could have on government decisionmaking.<sup>229</sup> In *Connally*, the Court reviewed a Georgia statute that provided a five dollar fee to the justice of the peace for every search warrant he or she issued.<sup>230</sup> The same justice of the peace, however, collected no fee for "reviewing and denying" a search warrant application.<sup>231</sup> The choice whether to grant or deny a warrant affected the "financial welfare" of the justice of the peace.<sup>232</sup> The situation therefore offered "a possible temptation to the average man as a judge . . . or which might lead him not to hold the balance nice, clear and true between the State and the accused."<sup>233</sup> Since Georgia's payment scheme undermined the neutrality of the magistrate, *Connally* held that "the issuance of the search warrant . . . effected a violation of the protections afforded [the de-

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226. *White*, 526 U.S. at 573 (Stevens, J., dissenting).

227. See *Carroll v. United States*, 267 U.S. 132, 156 (1925).

228. 429 U.S. 245 (1977) (per curiam).

229. *Id.* at 246-49.

230. See *id.* at 246.

231. *Id.* (emphasis added).

232. *Id.* at 250.

233. *Id.* at 250 (quoting *Bennett v. Cottingham*, 290 F. Supp. 759, 762-63 (N.D. Ala. 1968)).

fendant] by the Fourth and Fourteenth Amendments of the United States Constitution."<sup>234</sup>

If *Connally* felt compelled to strike down a statute based on the corrupting effects of five dollars, it is curious that *White* failed to recognize the dangers inherent from seizing an entire car, potentially worth thousands of dollars. The amount of money at stake in *White* was not unique. The high finances involved in seizure matters is belied by the cases' very names: *United States v. \$405,089.23 U.S. Currency*,<sup>235</sup> *Calero-Toledo v. Pearson Yacht Leasing Co.*,<sup>236</sup> and *One Lot Emerald Cut Stones and One Ring v. United States*.<sup>237</sup> Thus, *White's* logic would seem to indicate that five dollars could cause a member of the judiciary to compromise his principals, but cash, yachts, and precious gems would have no such effect on police.<sup>238</sup>

Finally, in ignoring the temptations that the powers of forfeiture offer to officials unrestricted by warrants, the Court made its most fundamental failure to consider the Framers' intentions. The United States Constitution's very structure is based on the Founders' realization that officials cannot be trusted to avoid the temptations pro-

234. *Id.* at 251.

235. 56 F.3d 41 (9th Cir. 1995).

236. 416 U.S. 663 (1974).

237. 409 U.S. 232 (1972).

238. Such a conclusion regarding the relative neutrality of judges and officers is all the more curious when viewed in light of *Johnson v. United States*, 333 U.S. 10 (1948), wherein the Court considered the impartiality of magistrates and police in its support of the Fourth Amendment warrant preference:

The point of the Fourth Amendment . . . is not that it denies law enforcement the support of the usual inferences which reasonable men draw from evidence. Its protection consists in requiring that those inferences be drawn by a neutral and detached magistrate instead of being judged by the officer engaged in the often competitive enterprise of ferreting out crime.

*Id.* at 13. One factor distinguishing *Connally* from the other seizure cases was *Connally's* direct connection between case outcome and compensation. Although *Connally's* justice of the peace took his position primarily because he was "interested in a livelihood," he received no salary; and instead he was compensated directly by "how many warrants he issued." *Connally*, 429 U.S. at 246. The Court, however, has previously failed to rely on the direct versus indirect distinction. The Court has found a "direct, personal, pecuniary interest" in the outcome of litigation in circumstances where any gain was channeled to the community rather than to the individual magistrate. *Id.* at 249. Indeed, this phrase was first used by a unanimous Court in *Tumey v. Ohio*, 273 U.S. 510 (1927), which involved prohibition violations being tried before a village mayor. The mayor was deemed to have a "direct, personal, pecuniary interest" even though he was a salaried official and any fines were divided between the state and village. *Connally*, 429 U.S. at 248-49. The Court applied the same analysis in *Ward v. Village of Monroeville*, 409 U.S. 57 (1972), a case with an even weaker link between case outcome and individual compensation. In *Ward*, the mayor who sat in judgment of the defendant "had no direct personal financial stake in the outcome of cases before him." *Connally*, 429 U.S. at 249. Yet, "a major portion of the village's income was derived from the fines, fees, and costs imposed in the mayor's court." *Id.* Local police and federal agencies today might face similar temptations with the increased budgetary reliance upon forfeitures.

vided by unchecked power.<sup>239</sup> As noted in the *Federalist Papers*, the Framers divided the federal government into three branches, not out of blind trust of officialdom, but out of suspicion of it.<sup>240</sup> Essentially, the Founders, in their pragmatism, knew that best way to check one official's accumulation of power was to have others in government jealously guard their own power.<sup>241</sup> Instead of ignoring human frailties of character, the Framers employed them to limit the dangers of power.

In contrast to the sophisticated awareness of human nature demonstrated by our Founders, the Court in *White* seemed strangely naive. Justice Thomas was all too solicitous of state legislatures and local police. Now, state governments can amend the automobile exception's boundaries by statute; legislators are able to extend government seizure power merely by expanding their definition of what constitutes "contraband." Meanwhile, police on the beat are empowered to make an on-the-scene determination as to what objects fall under the "contraband" label. Further, they may then act on their independent categorizations by seizing items that may end up filling department coffers. All of these actions, whether by the legislative or executive branches, can occur without bothering to seek approval from a single judge. One wonders whether the Framers, who Justice Thomas yearns to understand, would even recognize the debris remaining after *White* as the Fourth Amendment.

## VI. CONCLUSION

When Georges Seurat painted *Sunday on the Island of La Grande Jatte*, he undertook a "difficult . . . disciplined and painstaking"

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239. See THE FEDERALIST NO. 51, at 320 (James Madison, et al.) (Clinton Rossiter ed., 1961).

240. Federalist No. 51 provided in part:

But the great security against a gradual concentration of the several powers in the same department consists in giving to those who administer each department the necessary constitutional means and personal motives to resist encroachments of the others. The provision for defense must in this, as in all other cases, be made commensurate to the danger of attack. Ambition must be made to counteract ambition. The interest of the man must be connected with the constitutional rights of the place. It may be a reflection on human nature that such devices should be necessary to control the abuses of government. But what is government itself but the greatest of all reflections on human nature? If men were angels, no government would be necessary. If angels were to govern men, neither external nor internal controls on government would be necessary. In framing a government which is to be administered by men over men, the great difficulty lies in this: you must first enable the government to control the governed; and in the next place oblige it to control itself. A dependence on the people is, no doubt, the primary control on the government; but experience has taught mankind the necessity of auxiliary precautions.

*Id.*

241. See *id.*

task.<sup>242</sup> His meticulous system relied upon the viewer to stand back from his work “at the proper distance” so as to allow the minute spots of paint to combine into a sensible whole.<sup>243</sup> Likewise, when the Founders crafted the Fourth Amendment, they created an all-encompassing rule based upon a careful balancing of the variety of competing interests involved.<sup>244</sup> The Framers meant for their audience to consider the Amendment as a whole, and not pick it apart piecemeal by obsessing on narrow labels such as “contraband” and “automobile exception.”

For all the effort Seurat put into his art, he could not ensure that his work would be viewed properly. *White* demonstrated that the Framers of the Fourth Amendment suffer a similar limitation. For all their careful balancing, the Founders could not prevent the current Court from choosing to favor one part of the Fourth Amendment litigation at the expense of the others. *White*'s failure to see the entire portrait of the Fourth Amendment has the potential to enable the automobile exception to swallow the warrant preference.

Therefore, followers of Fourth Amendment jurisprudence should be alert to potential developments. Despite its own protestations to the contrary, the Court seems ready to abandon fundamentals established by the Founders. Moreover, the current members of the Court seem increasingly reliant upon label-logic. Also, the justices appear to be ever more willing to undermine the Court's own warrant preference with ever-larger exceptions. Finally, the attentive observer might be alert to still one more observation: If the justices are seen to be on their way to the National Gallery of Art, look for Justice Thomas to be headed for the Seurat exhibit with a magnifying glass.

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242. GARDENER HELEN, *GARDNER'S ART THROUGH THE AGES, II RENAISSANCE AND MODERN ART* 782 (7th ed. 1980).

243. *The National Gallery of Art*, *supra* note 1, at 1.

244. Justice Blackmun spoke of this balancing process in considering the warrant preference. He observed, “[T]he Framers of the Amendment balanced the interests involved and decided that a [search] is reasonable only if supported by a judicial warrant based on probable cause.” *New Jersey v. T.L.O.*, 469 U.S. 325, 351 (1985) (Blackmun, J., concurring) (quoting *U.S. v. Place*, 462 U.S. 696, 722 (1983)).