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Articles

*Michigan Department of State Police v. Sitz: A Roadblock to Meaningful Judicial Enforcement of Constitutional Rights*

by

Nadine Strossen*

The Supreme Court's decision in *Michigan Department of State Police v. Sitz,*¹ which upheld suspicionless stops and examinations of all drivers passing through a "sobriety checkpoint" or "drunk driving roadblock," severely eroded not only the fourth amendment rights directly at issue, but also other individual rights that were affected indirectly by the Court's analysis. Both the specific fourth amendment holdings and the general constitutional analysis embodied in *Sitz* were heralded by previous Rehnquist Court decisions. *Sitz,* however, epitomizes several rights-reducing trends and signals the onset of a new constitutional era during which the Court's role as the guardian of individual rights is narrowed in two significant, complementary respects. First, the Court exercises more judicial restraint in reviewing decisions by government officials, largely deferring to such decisions. Second, even when it does engage in judicial review, the Court enforces only constricted concepts of constitutional protections.

In terms of fourth amendment rights, *Sitz* marked the first time that the Supreme Court authorized police searches and seizures for

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criminal law enforcement purposes without any individualized suspicion whatsoever, let alone the traditional "probable cause" required by the fourth amendment's plain terms. Instead of targeting for investigation only those individuals reasonably suspected of committing a crime, the police were authorized to investigate mass groups of individuals based solely on the remote statistical chance that some of them would turn out to be law violators.

In its two 1989 decisions upholding mass, suspicionless drug-testing of certain employees in particular safety-sensitive jobs, the Court stressed that the drug tests were not conducted for ordinary law enforcement purposes, but instead were elements of administrative schemes designed to promote public safety and enforceable only by job-related sanctions. In contrast, the roadblock inspections upheld in *Sitz* were directed at core, classical law enforcement aims: seeking evidence to use in arresting and prosecuting individuals who violate the laws that criminalize driving while intoxicated.

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2. The fourth amendment to the United States Constitution 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.

3. Data from both the Michigan roadblock and drunk driving roadblocks operated in other jurisdictions consistently reveal that fewer than 1% of drivers passing through such roadblocks are arrested for driving while intoxicated. *See Sitz*, 110 S. Ct. at 2491 & n.3. Statistics reveal that, of all the drivers on public highways at any given moment, only a small percentage are intoxicated. *See Jacobs & Strossen, supra note 2, at 635 n.181.*

4. *See Skinner v. Railway Labor Executives' Ass'n*, 109 S. Ct. 1402, 1407, 1415 & n.5 (1989) ("[W]e assess the [Federal Railroad Administration]'s scheme in light of its obvious administrative purpose."); National Treasury Employees Union v. Von Raab, 109 S. Ct. 1384, 1390 (1989) ("It is clear that the Customs Service's drug-testing program is not designed to serve the ordinary needs of law enforcement. Test results may not be used in a criminal prosecution of the employee without the employee's consent.").

5. *See infra* text accompanying notes 90-92. This emphasis on the administrative-criminal law distinction is not meant to suggest that searches and seizures conducted for administrative purposes should not be governed by the fourth amendment. As the Court has recognized, an individual's privacy and personal security "suffers whether the government's motivation is to investigate violations of criminal laws or breaches of other statutory or regulatory standards." *Marshall v. Barlow's, Inc.*, 436 U.S. 307, 312-13 (1978). It would be "anomalous to say that the individual and his private property are fully protected by the Fourth Amendment only when the individual is suspected of criminal behavior." *Camara v. Municipal Court*, 387 U.S. 523, 530 (1967).

Perhaps the Court has become insufficiently protective of fourth amendment values in the context of administrative or other civil-purpose searches since issuing the above-cited decisions. *See Skinner*, 109 S. Ct. at 1425 (Marshall, J., dissenting) (noting that "the fourth amendment— unlike the fifth and sixth—does not confine its protections to either criminal or civil actions," and criticizing the majority's elimination of the probable cause requirement for civil searches).
Such mass stops of unsuspected ordinary citizens for purposes of criminal investigation are unprecedented in our society, although, as Justice Stevens noted in his dissent, they are "hallmarks of regimes far different from ours." 6 The Court's approval of such a dragnet scheme constitutes a dangerous new precedent that may pave the way for other massive, unfounded encroachments on individual privacy and liberty in the name of various law enforcement goals. 7

While the Court previously had sustained various types of administrative inspections that were not based on individualized suspicion, all of these are significantly distinguishable from drunk driving roadblock searches and seizures, not only because they were not aimed at enforcing criminal laws, but also for two additional reasons: the inspections were not personal in nature, but instead entailed examinations of buildings, objects, or documents; and the regulatory purposes for which the inspections were conducted could not have been served effectively through searches based on individualized suspicion. 8

In short, the Court previously had upheld suspicionless regulatory inspections on the rationale that they were effective and not intrusive. In stark contrast, the searches conducted at sobriety checkpoints are intrusive and not effective. These searches are intensely personal in nature, involving a police officer's close-range examination of the driver's face, breath, voice, clothing, hands, and movements. 9 Yet, as law enforcement officers and other experts consistently have recognized, roadblocks are less effective in detecting and deterring drunk driving than are police officers deployed on roving patrol, looking for actual signs of intoxicated driving. 10 Thus, in approving drunk driving roadblocks, the Court not only has breached the bedrock principle that a law enforcement end cannot justify an unconstitutional means; 11 even

Regardless of what fourth amendment standard is applicable to civil-purpose searches, a more protective standard must apply to criminal-purpose searches. The Court recognized this point in Camara itself. Camara, 387 U.S. at 537. In the rubric of the fourth amendment balancing test, the Court repeatedly has held that the subjective intrusiveness of a search or seizure is heightened when it is conducted for criminal law enforcement purposes. See, e.g., id. at 530.

6. Sitz, 110 S. Ct. at 2495 (Stevens, J., dissenting).
7. See infra text accompanying notes 328-345.
8. See infra text accompanying notes 249-254.
9. See infra notes 39-40 and accompanying text.
10. See infra notes 46-53 and accompanying text.
To declare that in the administration of the criminal law the end justifies the means—
to declare that the government may commit crimes in order to secure the conviction
worse, it has done so by employing a means that is ineffective. As a consequence, the law enforcement end does not justify the unconstitutional means in fact, even assuming it possibly could do so in theory.

This latter observation signals one of the broader adverse impacts of the *Sitz* decision. *Sitz* dilutes individual rights beyond those formerly\(^\text{12}\) protected by the fourth amendment. In overlooking the overwhelming evidence that mass roadblock searches are less effective in countering drunk driving than are searches based on individualized suspicion, and by declaring conclusorily that checkpoint searches and seizures should be permitted because they constitute a "reasonable" law enforcement measure,\(^\text{13}\) the Court imported into the personal rights realm the minimal level of judicial review that it heretofore reserved for regulations affecting property interests.\(^\text{14}\) The Court now has abdicated meaningful judicial review of government measures that abridge the personal liberties protected by specific Bill of Rights guarantees, much as it previously abdicated meaningful judicial review of government measures limiting the economic liberties protected by the due process and equal protection clauses.\(^\text{15}\)

...of a private criminal—would bring terrible retribution. Against that pernicious doctrine this Court should resolutely set its face. *Id.* at 485 (Brandeis, J., dissenting).

Abiding by this general principle in the particular context of enforcing the fourth amendment, the Supreme Court "has never sustained a search that was only based on the fact that officers reasonably expected to find evidence of a particular crime and voluntarily confined their activities to the least intrusive means consistent with that end." *Katz*, 389 U.S. at 356-57; see also J. LANDYNISKI, SEARCH AND SEIZURE AND THE SUPREME COURT 59-60 (1966) (quoting Lord Camden's observation regarding English common law tradition that "the mere need to solve crimes . . . did not allow the law to place its own enforcement above all other values."); Stewart, *The Road to Mapp v. Ohio and Beyond: The Origins, Development and Future of the Exclusionary Rule in Search-and-Seizure Cases*, 83 COLUM. L. REV. 1365, 1392-93 (1983) (Framers took into account and accepted the inevitable result of the fourth amendment that police officers obeying its strictures would catch fewer criminals.).

\(^{12}\) See *infra* Part III.

\(^{13}\) See *Sitz*, 110 S. Ct. at 2487; *infra* notes 329-332.


\(^{15}\) See *infra* notes 372-377 and accompanying text. Of course, there is no bright line between asserted rights that are "economic" or "property" in nature, and those that are "personal" in nature. See *infra* note 372. Nor is there a bright line separating the "general" guarantee of the due process and equal protection clauses and the more "specific" guarantees of other Bill of Rights provisions, such as the fourth amendment. For example, the due process clause has been invoked to protect highly personal rights of sexual and reproductive autonomy. See, e.g., Roe v. Wade, 410 U.S. 113 (1973); Griswold v. Connecticut, 381 U.S. 479 (1965).

Furthermore, an individual (and the Court) may consider an economic or property interest to be an important personal right. Additionally, an economic right may be inextricably linked to a personal right, in that the former is an essential prerequisite for meaningfully exercising the latter. See, e.g., Lynch v. Household Fin. Corp., 405 U.S. 538, 552 (1972). In *Lynch* the
In addition to demarcating a new constitutional epoch characterized by the judiciary's diminished institutional role in enforcing individual rights, Sitz marks a new constitutional regime of lessened individual rights in another respect. It exemplifies a trend toward narrowed judicial constructions of those rights by overemphasizing formal equality at the expense of meaningful, substantive freedoms. By allowing the government to subject all individuals to suspicionless searches and seizures at drunk driving roadblocks, so long as no particular individuals appear to be singled out for such baseless surveillance, Sitz construed the fourth amendment as primarily requiring that individuals be treated equally with respect to the justification offered for searches and seizures. The Court has stressed that the fourth amendment protects an individual's relative right not to be subjected to search or seizure on any lesser standard of justification than that permitting searches or seizures of other people. In contrast, the Court has discounted the fourth amendment's assurance of an absolute right not to be subjected to search or seizure absent a specific standard of justification—namely, probable cause that the particular individual has committed, or is about to commit, a crime.6

To be sure, the fourth amendment, along with other constitutional guarantees, does prohibit the government from making arbitrary or invidious distinctions among individuals. The government may not discriminate among individuals with respect to fourth amendment or other constitutional rights. The fourth amendment, however, also prohibits the government from subjecting any individuals to unjustified searches or seizures, even if it conducts the searches or seizures on an equal or nondiscriminatory basis. By overemphasizing the fourth

Court noted:

[The dichotomy between personal liberties and property rights is a false one. Property does not have rights. People have rights. The right to enjoy property without unlawful deprivation, no less than the right to speak or the right to travel, is in truth a "personal" right, whether the "property" in question be a welfare check, a home, or a savings account. In fact, a fundamental interdependence exists between the personal right to liberty and the personal right in property. Neither could have meaning without the other.]

Id. at 552.

Notwithstanding the blurry areas that have troubled both Supreme Court Justices and constitutional scholars, the basic distinctions have held true since the post-New Deal Court reversed Lochner v. New York, 198 U.S. 45 (1905), and its progeny. The Court generally has applied a minimal level of scrutiny to challenges under the due process or equal protection clauses to regulations affecting economic or property interests; and it generally has applied stricter scrutiny to challenges under the remaining Bill of Rights guarantees, which focus on more specific subjects such as—in the case of the fourth amendment—limits on government's search and seizure power. See infra notes 374-378 and accompanying text.

16. See infra Part II.
amendment's protection against discriminatory government intrusions and minimizing its protection against unjustified government intrusions, the Court substantially constricts fourth amendment rights.17

In this respect, Sitz exemplifies a recent narrowing trend in the Court's interpretation of several constitutional guarantees. For example, the Court increasingly has overemphasized formal equality in construing both the free speech clause and the free exercise clause of the first amendment. The Court reads these provisions as securing for every individual opportunities to engage in expressive and religious activities that are formally equal to other persons' opportunities. The Court has retreated from previous readings of both clauses as absolutely guaranteeing the right to engage in some expressive or religious activities.18 The equal protection clause bars governmental discrimination regarding specific constitutional rights. To read those rights as merely assuring nondiscrimination, therefore, is to render them superfluous and devoid of independent, substantive content.

Moreover, with respect to both fourth and first amendment claims, the Court has enforced only a formal concept of equality that stresses de jure classifications rather than de facto impact. The result is that the Court fails to even effectively guarantee freedom from discrimination in the exercise of these constitutional rights, let alone some more absolute freedom to exercise them.

This Article examines Sitz as an embodiment of the Court's recent erosion of individual rights, both under the fourth amendment and more generally. Part I critiques the Court's analysis and rulings in Sitz. Part II shows that Sitz epitomizes the Court's trend toward eviscerating the critical fourth amendment requirement that any search or seizure must be predicated on at least some degree of individualized suspicion. Part III discusses Sitz's illustration of two trends toward limiting judicial protection of individual rights more generally, both through narrowing the Courts' institutional role in enforcing rights, and through constricting the substantive content of rights-protective norms. It first explores the Court's abdication of meaningful judicial review of claimed individual rights violations and then discusses the Court's growing tendency to read constitutional guarantees as assuring only formal equality in the level of protection, but neither actual equality in the level of protection, nor any particular level of protection.

17. See infra Part III.B.(1).
18. See infra Part III.B.(2)(a) & (b).
I. A Critique of the Court’s Analysis in Sitz

Understanding the weaknesses in the Court’s rationale in Sitz for rejecting the fourth amendment challenge to sobriety checkpoint searches and seizures is important for two major reasons. First, because the Court’s holding does not foreclose other government decisionmakers from rejecting sobriety checkpoints, state court judges remain free to interpret their state constitutional analogues to the fourth amendment as barring drunk driving roadblock searches and seizures. Policymakers, including law enforcement officials and state legislators, also could choose not to implement sobriety checkpoints. Indeed, some law enforcement officials and legislators—including some in Michigan—already have rejected drunk driving roadblocks.


See Buracker, The “Roadblock” Strategy as a Drunken Driver Enforcement Measure, POLICE CHIEF, Apr. 1984, at 59. Roadblocks seem to us to affect the innocent citizen more than the drunken driver

So-called “high impact” enforcement strategies, such as roadblocks, have been demonstrated to have only a fleeting effect on enforcement problems that tend to be persistent and recurring in nature, as is the case with drunk driving offenses.

Moreover, [roadblocks] represent a substantial diversion of resources away from other important areas.

Id. at 59-62; see also Schwaneberg, By the Book: Troopers Get New Rules on Stops, Searches, Newark (N.J.) Star-Ledger, June 1, 1990, at 11 (New Jersey’s Superintendent of State Police said he wanted time to consider whether to abolish sobriety checkpoints).

21. A bill introduced during the 1983 session of Maryland’s House of Delegates would have prohibited the operation of drunk driving roadblocks throughout that state. See Md. H.D. 265, 1983 Reg. Session (a bill entitled, “An Act Concerning ‘Sobriety Checkpoint’ Prohibition”); see also Maryland Seeks to End Checks for Sobriety, Wash. Post, Mar. 8, 1983, at B1, col. 5 (state legislator describes drunk driving roadblocks as police tactic he might expect to see “in Russia, or Hitler-occupied Germany”). The bill was not favorably reported out of committee. Daily Rec. (Baltimore), Mar. 29, 1983, at 1, col. 7.

22. The Michigan Sheriffs’ Association formally voted to oppose the use of sobriety checkpoints in Michigan because of their ineffectiveness. See Joint Appendix at 94a, Michigan Dep’t of State Police v. Sitz, 110 S. Ct. 2481 (1990) (No. 88-1897) [hereinafter Joint Appendix]; see also Morse, Driver Checklanes Battle Nears End, Petosky (Mich.) News-Review, June 1, 1990:

[Michigan Attorney General Frank] Kelley hinted that his personal view on the issue [of sobriety checkpoints] might be different [from the state’s position in Sitz]. "A
Even if roadblocks are deemed to be permissible under both the fourth amendment and its state constitutional counterparts, they are not constitutionally mandatory in any jurisdiction. The constitutional and policy concerns outlined in this Article counsel heavily against any allocation of law enforcement resources to this invasive and ineffective device.

A critical assessment of the Sitz decision is important for a second major reason. That decision's rationale has far-ranging implications for constitutional law issues, involving both the fourth amendment and other Bill of Rights guarantees, beyond those specifically addressed in Sitz. Accordingly, an understanding of the Sitz rationales should illuminate a range of individual rights issues.

The majority opinion in Sitz, authored by Chief Justice Rehnquist and garnering four additional votes, violates constitutional law canons in three major respects. First, the Court exercises an inappropriately passive form of judicial review by granting too much deference to the judgment of a law enforcement official. Second, the Court fails to enforce the cardinal fourth amendment requirement that every search or seizure must be based on the constitutionally specified standard of lawyer doesn't always have to agree with the position he defends," Kelley said. . . .

"It takes 15 men to do them," Kelley said. "And if it's raining or snowing, they don't use them."

In 1984, the Michigan Legislature refused the Governor's request to approve sobriety checkpoints. See Sitz v. Department of State Police, 170 Mich. App. 433, 435, 429 N.W.2d 180, 181 (1988) ("Due to legislative opposition, defendants did not attempt to implement sobriety checkpoints [in 1985]"); see also Morse, supra (quoting Mark Granzotto, the Sitz plaintiffs' lawyer, as having heard that some Michigan legislators may try to block funding for drunk driving roadblocks despite Supreme Court's authorization).

23. Independent of any judicial rulings, it is entirely appropriate for policymakers to decide against a proposed law enforcement innovation based upon their independent view that the measure would intrude upon a constitutional right. See generally Brest, The Conscientious Legislator's Guide to Constitutional Interpretation, 27 STAN. L. REV. 585, 590-94 (1975) (discussing the role of legislators in interpreting the Constitution and in analyzing judicial opinions).

Policymakers who are concerned about preserving fourth amendment values would be especially motivated to oppose drunk driving roadblocks, even if they are not convinced that roadblock searches and seizures are in fact unconstitutional. The Supreme Court has construed the fourth amendment as protecting only "reasonable expectations of privacy." See Katz v. United States, 389 U.S. 347 (1967). The more invasive and extensive the searches and seizures are, and the more they are woven into our daily lives, the weaker the fourth amendment becomes as a potential shield against future governmental intrusions into personal privacy. Accordingly, a policymaker who is troubled by the spectre of other forms of suspicionless searches and seizures in the not-too-distant future should consider this a strong factor weighing against the approval of roadblocks. See infra text accompanying notes 301-305.

probable cause, or at the very least, some lesser degree of individualized suspicion. Instead, the Court evaluates sobriety checkpoint searches and seizures pursuant to the less rights-protective, manipulable "balancing" test. Finally, the Court inaccurately assesses roadblock searches and seizures under the balancing test, understating their individual rights costs and overstating their law enforcement benefits.

A. Deference to a Law Enforcement Official

The *Sitz* litigation challenged a sobriety checkpoint program established in 1986 by the Michigan Department of State Police.\(^{25}\) The Michigan Legislature previously had considered the recommendation of a legislatively authorized task force to establish such roadblocks; it rejected this recommendation.\(^{26}\) Notwithstanding the Michigan Legislature's repudiation of drunk driving roadblocks, the Director of the Michigan Department of State Police, an unelected official,\(^{27}\) implemented such roadblocks.\(^{28}\)

Although it was not even mentioned by the Supreme Court, the fact that the Michigan roadblock program was not authorized by the state legislature is constitutionally significant. The Court traditionally has accorded substantial deference to legislation. At least in theory, legislative enactments reflect the considered judgments of elected government bodies that represent the community at large, and that solicit facts and views from the community to inform their deliberative proceedings. These characteristics of the legislative process have been said to justify judicial deference to measures enacted through these processes.\(^{29}\) For example, in a 1990 decision in which the Court deferred

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27. See Mich. Comp. Laws § 4.432 (1979) ("[D]irector of Michigan State Police Department shall be appointed by governor, by and with the advice and consent of senate, and shall hold office during good behavior.").
28. During his annual State of the State Address, the Michigan Governor instructed the State Police Department Director to set up a sobriety checkpoint program. See *Sitz*, 170 Mich. App. at 435, 429 N.W. 2d at 181. It is possible, however, that the Governor in turn had done so on the recommendation of the Director, who previously had participated in a task force that had recommended sobriety checkpoints. See Opinion of the Circuit Court for the County of Wayne, July 24, 1986, *reprinted in* Petition for Writ of Certiorari at 45a, Michigan Dep't of State Police v. Sitz, 110 S. Ct. 2481 (1990) (No. 88-1897) [hereinafter *Sitz* trial court opinion]. In any event, the Director acted on his own initiative in appointing a Sobriety Checkpoint Advisory Committee that drafted guidelines for all aspects of the program's operation. See *id.*
29. See P. BREST, PROCESSES OF CONSTITUTIONAL DECISIONMAKING 982-83 (1975) (it would be "appropriate to accord more weight to policy determinations by a state legislature—a state's chief and most representative policy-making body—than to [policy determinations by] state and local agencies").
to the judgment reflected in an Act of Congress, it stressed "the deference due 'the duly enacted and carefully considered decision of a coequal and representative branch of our Government.'"

Notwithstanding the theoretical rationales for judicial deference to legislative decisions, it has been contended that legislative choices do not in fact represent rational conceptions of the common good, and therefore do not actually deserve judicial deference. Some commentators suggest that because courts have expertise concerning the criminal justice system, they should not defer to legislative judgments regarding search and seizure issues, even if they ought to defer to other legislative judgments.

Assuming arguendo that courts should defer to legislative decisions on search and seizure issues on a theoretical level (putting aside whether those theoretical reasons mentioned above actually exist), there still is no similar justification for deferring to search and seizure decisions by the appointed head of a state police agency. Such decisions are made by a single, unelected official, not by a broadly representative, elected body. The decisions are not informed by a procedure similar to the legislative hearing process, in which information and opinions are gathered from a broad cross-section of the community. Moreover, the decisions are not forged during a deliberative process similar to legislative debates in which the community-based information and opinions are later evaluated.

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32. See Developments in the Law—Equal Protection, 82 Harv. L. Rev. 1065, 1128 (1969) ("[W]hen the rights of the criminally accused are at issue, the argument that a court’s expertise is as great as that of any other governmental institution ... doubtless lends a certain attraction to the more active judicial posture which is adopted.").

33. Cf. Rostker v. Goldberg, 453 U.S. 57, 64-65 (1981) (Case involving challenge to Military Selective Service Act "arises in the context of Congress’ authority over national defense and military affairs, and perhaps in no other area has the Court accorded Congress greater deference.").

34. Even if one assumes that the decision to institute a sobriety checkpoint program was made by the Governor, an elected official, that decision still would lack all of the other material characteristics of legislative decisions: the Governor is not a broadly representative body; his decisions are not informed by a procedure similar to the legislative hearing process; and his decisions are not forged during a deliberative process similar to legislative debates. In any event, the fact remains that in Sitz, regardless of who initially authorized the roadblocks,
No doubt in an effort to de-emphasize the unilateral nature of the decisions by the Michigan State Police Director in instituting sobriety checkpoints, the Supreme Court stressed that the Director had received some guidance from a “Sobriety Checkpoint Advisory Committee.” That committee, however, did not provide the wide-ranging types of information and views that a legislature receives through its hearing process. First, the Director himself appointed the committee. He did not solicit guidance from the public at large, and in designating members of his committee, he apparently selected individuals who shared his opinions about the desirability of roadblocks. Second, the Director gave his committee only a limited mandate: to recommend procedures governing the operation of sobriety checkpoints, not to advise him on whether he should institute such checkpoints.

Under the Advisory Committee’s guidelines, checkpoints were to be set up at selected sites along Michigan state roads. All vehicles passing through a checkpoint would be stopped. Although the Court stated that the detained drivers would be “briefly examined for signs of intoxication,” this conclusory description belies the invasiveness of the inspections that roadblock officers were authorized to make.

The multiple examinations conducted by officers during the initial stop included the following: looking at the driver’s face and eyes to see whether they were, respectively, flushed or bloodshot; smelling the driver’s breath to determine whether it bore an odor of alcohol; engaging the driver in conversation to hear whether his voice was slurred; and inspecting the driver’s shirt to see whether it was unbuttoned. If the driver exhibited any of these indicia—or, indeed, for any other reason—the roadblock officers could direct him to pull aside and undergo “field sobriety tests,” which commonly include reciting the alphabet, touching a finger to one’s nose, standing on one foot, and walking a straight line. After directing a motorist to pull aside for further investigation, roadblock officers also could administer a breath test that measures the driver’s blood alcohol level. The “guidelines”

the decisions regarding all operational details of the sobriety checkpoint program—including the fact that it subjected motorists to searches and seizures without individualized suspicion—were made by the State Police Director, not the Governor.

36. The committee’s membership included representatives of the State Police force, local police forces, state prosecutors, and the University of Michigan Transportation Research Institute. Conspicuously absent from the committee membership were any criminal defense lawyers, civil liberties advocates, constitutional law experts, or members of the general driving public. See id.
37. Id.
38. Id.
39. See Joint Appendix, supra note 22, at 124a-125a, 127a.
in fact provided no meaningful guidance as to the circumstances under which a driver should be detained for more prolonged investigation. That determination was consigned to the discretion of individual officers conducting the initial stops.\textsuperscript{40}

The only sobriety checkpoint operation actually carried out under the Michigan State Police program was conducted for one hour and fifteen minutes in Saginaw County in 1986.\textsuperscript{41} During this period, 126 vehicles were stopped at the roadblock for initial inspections averaging twenty-five seconds in duration, two drivers were subjected to extensive field sobriety testing, and one of the two was arrested for driving under the influence of alcohol.\textsuperscript{42}

On the day before the Saginaw County checkpoint operation, Sitz and his fellow plaintiffs instituted their lawsuit seeking declaratory and injunctive relief from potential subjection to the checkpoints.\textsuperscript{43} Each of the six plaintiffs was "a licensed driver . . . who regularly travels throughout the State [of Michigan] in his automobile."\textsuperscript{44} Additionally, each plaintiff was also a member of the Michigan Legislature who had agreed with the majority of that elected body to reject drunk driving roadblocks. Although the Supreme Court opinion does not mention this fact, it is significant because it underscores that the governmental body to whose judgment the Court might properly defer, the state legislature, had itself rejected the challenged roadblocks.\textsuperscript{45}

\textsuperscript{40} See id. at 81a; see also TRAFFIC SERVICES DIVISION, MICHIGAN STATE POLICE, SOBRIETY CHECKPOINT GUIDELINES, May 1986, reprinted in Petition for Writ of Certiorari at 133a, 155a-156a, Michigan Dep't of State Police v. Sitz, 110 S. Ct. 2481 (1990) (No. 88-1897) (emphasis added) [hereinafter GUIDELINES]:

During the brief stop and contact with the driver, the officers will be alert for articulable indications of intoxication. These may include an odor of intoxicants about the driver, slurred speech, lack of physical coordination, unusual eye movements, disorientation, or other behavior commonly associated with [operating under the influence of liquor or drugs].

\ldots

Should indications of intoxication be present, the driver will be directed to move to an out-of-traffic location. \ldots

\ldots

The driver may then be requested to perform field sobriety tests and may be asked to take a pre-arrest breath test.

\textsuperscript{41} See Sitz, 110 S. Ct. at 2484. During the pretrial proceedings in the Sitz case, defendants agreed to delay further implementation of the program pending the outcome of this litigation. Id.

\textsuperscript{42} Id.

\textsuperscript{43} Id.

\textsuperscript{44} Id.

\textsuperscript{45} See also Morse, supra note 22 (citing reports that some Michigan legislators will attempt to block funding for sobriety checkpoint programs, notwithstanding the Supreme Court's ruling in Sitz). It should be noted that the Sitz plaintiffs did not sue in their legislative capacity, and therefore this capacity was not relevant to their standing.
During the trial, the Circuit Court of Wayne County heard extensive testimony about the intrusiveness and effectiveness of sobriety checkpoints. The plaintiffs’ witnesses stressed that roadblocks are not an effective means of addressing the drunk driving problem and that they are less effective than the traditional method of deploying police officers on roving patrol to look for signs of intoxicated drivers. The plaintiffs’ witnesses who attested to these conclusions included an internationally renowned academic expert on drunk driving and three Michigan county sheriffs. The latter group of law enforcement experts reflected the view of the Michigan Sheriffs’ Association, which formally had voted to oppose sobriety checkpoints because of their ineffectiveness. The foregoing conclusions about the relative ineffectiveness of suspicionless drunk driving roadblocks, in comparison with roving patrol stops on individualized suspicion, were buttressed during the plaintiffs’ cross-examinations of two defense witnesses: the Michigan State Police Director himself and an officer of the Maryland State Police, whose roadblock program served as the model for Michigan’s.

In accordance with the uncontroverted evidence as to sobriety checkpoints’ relative ineffectiveness compared with roving patrol stops based on reasonable suspicion, the trial court ruled that Michigan’s program violated both the fourth amendment and its counterpart in the Michigan Constitution. The Michigan Court of Appeals affirmed the holding that the program violated the fourth amendment and did not consider whether it violated the Michigan Constitution.

In reversing the unanimous holdings of all the lower court judges who ruled on the case, the Supreme Court repudiated the uncontradicted opinions of all the law enforcement officials and experts who

46. See Sitz, 110 S. Ct. at 2484.
47. See Joint Appendix, supra note 22, at 45a-46a, 53a-56a, 58a-59a, 72a, 73a (testimony of Dr. Lawrence Ross).
48. Id. at 86a-88a, 101a, 103a, 113a-114a.
49. Id. at 94a.
50. Id. at 76a-79a.
51. Id. at 79a, 119a; Tr. Vol. II, p. 87.
52. See Sitz trial court opinion, supra note 28, at 123a:

[T]he evidence indicates that sobriety checkpoints have only a minimal degree of effectiveness in curbing drunk driving... [S]obriety checkpoints can be used to effectuate only an extremely low number of arrests, and... they have no potential for a sustained deterrent effect. Moreover, the evidence has been replete with examples of reasonable constitutionally approved alternative procedures, which could and did curb drunk driving.

testified at trial. The Court ignored the evidence offered at trial and instead deferred to the unsubstantiated judgments of the Director of the Michigan State Police Department.\(^5\)

Even with respect to measures enacted by majoritarian branches of government, such an extreme degree of deference is inconsistent with the Court's appropriate and traditional role in shielding constitutionally guaranteed individual rights from majoritarian encroachments. This extreme deference is still more inappropriate when it is granted not to an elected governmental body, such as a state legislature, or even to an individual elected official, but instead to an appointed law enforcement official who is not accountable to the electorate. Judicial deference to such an official is not justified by democratic theory. For example, Professor Charles Black has argued that reviewing courts should accord the decisions of law enforcement officers "no presumption of constitutionality whatever."\(^5\)

Not only is the *Sitz* Court's deference to an unelected law enforcement official unjustified by democratic theory; even worse, it runs counter to that theory, particularly because the Michigan Legislature previously had rejected the very roadblock program at issue. The *Sitz* majority opinion disingenuously glosses over these significant facts by incorrectly implying that the actual roadblock program had received the approval of some "politically accountable officials."\(^5\)

Ironically, Chief Justice Rehnquist and his fellow Justices in the *Sitz*

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\(^5\) This extreme form of judicial deference exemplifies the Rehnquist Court's recent trend toward abdicating meaningful judicial review of claimed individual rights violations. See infra Part III.

\(^5\) C. Black, Structure and Relationship in Constitutional Law 78 (1969). Black notes:

If [Police] Chief Doe did not in good faith consider the federal constitutional problem, his judgment on it is nonexistent. If he did consider it, his judgment, I think it not too unkind to say, is worthless. When the accused person appeals to the Court on the federal constitutional ground, he is appealing to the very first official authorized or competent—or, for that matter, likely—to consider his claims. *Id.* at 89.

\(^5\) See *Sitz*, 110 S. Ct. at 2487. The Court stated:

Based on extensive testimony in the trial record, the [Michigan Court of Appeals] concluded that the checkpoint program failed the "effectiveness" part of the [*Brown v. Texas* balancing] test. . . .

. . . . This passage from *Brown* was not meant to transfer from politically accountable officials to the courts the decision as to which among reasonable alternative law enforcement techniques should be employed to deal with a serious public danger.

Since the Director of the State Police Department is appointed by the Governor, an elected official, arguably he is indirectly accountable to the electorate. Yet the same can be said of Supreme Court Justices and other non-elected judges, since they are appointed by elected officials. Viewed in this light, it is clear that the Director is no more politically accountable than are Supreme Court Justices. Accordingly, the Court's deference to the Director's decisions cannot be justified on the rationale that the latter more closely reflect democratic choices.
majority often profess great respect to state legislatures. Yet, in this case, the Court ignored the judgment of the Michigan Legislature.

In upholding Michigan’s drunk driving roadblock program despite its lack of statutory authorization and based on its deference to the judgments of an appointed police official, the Court’s opinion in *Sitz* violated established tenets of judicial review. Because the program was promulgated by a police agency, the Court should have subjected it to close scrutiny. Moreover, the Court previously has indicated that statutory authorization is a necessary (but not sufficient) prerequisite for the validity of any search or seizure not based on probable cause. A plausible argument therefore could be made that the Court should have invalidated the Michigan sobriety checkpoints because they were not statutorily authorized. Even putting that argument aside, consistent with the oft-stated principle that it should defer to judgments of state legislatures, the Court at least should have considered the Michigan Legislature’s repudiation of roadblocks as weighing against their


58. See, e.g., *C. Black*, supra note 55, at 78 (arguing that reviewing courts should accord decisions of law enforcement officers "no presumption of constitutionality whatever"); id. at 89-90.

59. See, e.g., *United States v. Villamonte-Marquez*, 462 U.S. 579, 584 (1983) (in upholding suspicionless document inspection on oceangoing vessel by United States Customs officials, Court noted that it appeared that the search was executed pursuant to statute whose "lineal ancestor[s]" date back to First Congress); *United States v. Martinez-Fuerte*, 428 U.S. 543, 566 n.19 (1976) (in upholding suspicionless Border Patrol stops at permanent checkpoints, Court noted "longstanding congressional authorization" for such stops); *United States v. Biswell*, 406 U.S. 311, 315 (1972) (legality of "a regulatory inspection system of business premises ... depends upon the authority of a valid statute").

60. The trial court held that the State Police Department Director was "superficially authorized" by state statute to implement the sobriety checkpoint program. *See Sitz* trial court opinion, supra note 28, at 28a, 40a. The relevant statute authorized the Director to "cause inspection to be made of motor vehicles on the public highways to detect defective equipment or other violations of law governing the use of public highways. ... For such purpose he may establish temporary vehicle check lanes at appropriate locations throughout the state ..." *Mich. Comp. Laws. Ann.* § 257.715(2)(b) (West 1990) (emphasis added).

This statute had been construed to govern the control of unsafe vehicles. *People v. Lee*, 371 Mich. App. 563, 567, 124 N.W.2d 736, 738 (1963). Despite its general reference to legal violations, there is no evidence that the statute specifically contemplated drunk driving roadblocks.
constitutionality. Its complete failure to ascribe any weight to that negative legislative judgment, and its passive deference to the contrary judgment of a single, unelected official, inverts canons of judicial construction.

B. Searches and Seizures and the Individualized Suspicion Requirement

(1) Precedent, Suspicionless Searches, and Drunk Driving Roadblocks

The *Sitz* plaintiffs argued that mass, suspicionless searches and seizures at drunk driving roadblocks violate the fourth amendment because they are not based on any individualized suspicion. Although the Court previously had authorized certain narrow categories of searches and seizures to proceed without any individualized suspicion, in approving each of these categories the Court had emphasized how limited they were, and that they were distinguished from most searches and seizures by a number of special features. The Court consistently had stressed that the few types of suspicionless searches and seizures it had approved were designed to promote "special governmental needs, beyond the normal need for law enforcement."61 None of these special features characterized drunk driving roadblock searches and seizures, which obviously were designed to promote law enforcement.

Prior to *Sitz*, the Court's most recent explanation of the "special needs exception" to the fourth amendment's individualized suspicion requirement was in *Skinner v. Railway Labor Executives' Association*62 and *National Treasury Employees Union v. Von Raab.*63 These companion cases, decided in 1989, upheld the mass, suspicionless drug-testing of employees in certain safety-sensitive jobs. In both cases, the Court stressed that its authorization of such searches and seizures absent particularized suspicion depended on the fact that they were not conducted for criminal law enforcement purposes. In *Von Raab*, for example, the Court explained:

Because the [drug] testing program adopted by the Customs Service is not designed to serve the ordinary needs of law enforcement, we have balanced the public interest in the Service's testing program against the privacy concerns implicated by the tests, without reference to our usual presumption in favor of the procedures specified in the Warrant Clause [the issuance of a warrant based upon probable cause], to assess whether the tests . . . are reasonable.64

64. Id. at 1397; see also id. at 1391-92 ("Our cases teach . . . that the probable-cause standard 'is peculiarly related to criminal investigations.'" (citations omitted)).
Consistent with the Court’s prior rulings, this passage echoes the traditional themes that probable cause is generally a prerequisite for any constitutional search and seizure and that evaluation of a search or seizure under the flexible balancing test, rather than the absolute probable cause requirement, only will be authorized in exceptional cases.\textsuperscript{65} Moreover, \textit{Von Raab} makes clear that an essential characteristic of such exceptional cases is the absence of criminal law enforcement aims. In this respect \textit{Von Raab} simply followed longstanding principles that all members of the Rehnquist majority recently have endorsed.\textsuperscript{66} For example, specifically in the context of automobile searches, the Supreme Court has held that the probable cause requirement is excused only when the search is conducted for non-law enforcement purposes.\textsuperscript{67} Accordingly, prior to the Supreme Court’s decision in \textit{Sitz}, several lower courts had ruled that roadblocks, including those aimed at drunk driving, would pass fourth amendment muster only if they were used for administrative purposes and not as a subterfuge to enforce criminal laws.\textsuperscript{68}

\begin{quote}
\textsuperscript{65} See, e.g., \textit{United States v. Place}, 462 U.S. 696, 722 (1983) (Blackmun, J., concurring) ("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."); see also infra notes 297-323 and accompanying text.

\textsuperscript{66} See, e.g., \textit{Skinner}, 109 S. Ct. at 1414 (Kennedy, J., joined by Rehnquist, C.J., White, Blackmun, O’Connor, & Scalia, JJ.):

Except in certain well-defined circumstances, a search or seizure in ... a [criminal] case is not reasonable unless it is accomplished pursuant to a judicial warrant issued upon probable cause. ... We have recognized exceptions to this rule, however, "when special needs, beyond the normal need for law enforcement, make the warrant and probable-cause requirement impracticable."

\textit{Id.} (citations omitted); \textit{O’Connor v. Ortega}, 480 U.S. 709, 725 (1987) (O’Connor, J., joined by Rehnquist, C.J., & White, J.) ("‘special needs, beyond the normal need for law enforcement, make the ... probable-cause requirement impracticable,’ ... for legitimate, work-related noninvestigatory intrusions as well as investigations of work-related misconduct") (quoting \textit{New Jersey v. T.L.O.}, 469 U.S. 325, 351 (1985) (Blackmun, J., concurring in judgment)); \textit{id.} at 732 (Scalia, J., concurring in judgment) ("While as a general rule warrantless searches are \textit{per se} unreasonable, we have recognized exceptions when 'special needs, beyond the normal need for law enforcement, make the warrant and probable-cause requirement impracticable ...’") (quoting \textit{New Jersey v. T.L.O.}, 469 U.S. at 351 (Blackmun, J., concurring in judgment)).

\textsuperscript{67} For example, in upholding an administrative inventory search of an automobile that had been impounded for multiple parking violations, the Court in \textit{South Dakota v. Opperman}, 428 U.S. 364 (1976), repeatedly stressed the "noncriminal context" of the search, explaining: "The standard of probable cause is peculiarly related to criminal investigations, not routine, noncriminal procedures." \textit{Id.} at 370 n.5. Moreover, the \textit{Opperman} opinion emphasized that the search in fact had been conducted for bona fide administrative purposes and was not a pretext for a criminal investigation. \textit{Id.} at 375-76.

\textsuperscript{68} See, e.g., \textit{Garrett v. Goodwin}, 569 F. Supp. 106, 118 (E.D. Ark. 1982) (consent decree authorized roadblocks to check drivers’ licenses and vehicle registrations only if specific
In contrast with the employee drug-testing programs evaluated under a balancing test in *Von Raab* and *Skinner*, the searches and seizures conducted at sobriety checkpoints are designed to serve ordinary law enforcement needs. The *Sitz* plaintiffs therefore argued that, under *Von Raab* and *Skinner*, such searches and seizures were per se required to be based on some degree of reasonable suspicion and that the applicability of this requirement did not depend on any balancing test.

Notwithstanding this contention's firm grounding in longstanding judicial precedents—and in the plain language and intent of the fourth amendment itself—*the Sitz* majority opinion summarily rejected it. The Court simply asserted that the quoted passage from *Von Raab* "was in no way designed to repudiate our prior cases dealing with police stops of motorists on public highways," and cited the Court's opinions in *United States v. Martinez-Fuerte* and *Brown v. Texas*, both of which employed a balancing test, as "the relevant authorities here." The Court did not even address the fourth amendment's probable cause requirement or the numerous judicial precedents, dating back more than two centuries, that consistently have viewed the particularized suspicion requirement as a cornerstone of individual liberty.

Chief Justice Rehnquist and the other Justices joining his *Sitz* opinion frequently have espoused the view that judges should adhere to the Constitution's plain meaning and original intent. This view has been expressed in opinions regarding a wide range of constitutional steps were taken to assure that criminal law enforcement needs had no role in conduct of roadblocks; for example, only officers whose primary duties were traffic enforcement could be present); *State ex rel. Ekstrom v. Justice Court*, 136 Ariz. 1, 5, 663 P.2d 992, 996 (1983) (invalidated roadblocks ostensibly for enforcing license and registration requirements, because court found that their real purpose was enforcing laws criminalizing drunk driving); *State v. Smith*, 674 P.2d 562, 563-65 (Okla. Crim. App. 1984) (invalidated roadblock allegedly maintained to check drivers' licenses because primary purpose was to identify drunk drivers).

69. *See infra* notes 198-239 and accompanying text.
73. *Sitz*, 110 S. Ct. at 2485. The Court's citation of *Brown* is misleading insofar as the Court implies that *Brown* involved police stops of motorists on public highways. The *Sitz* opinion states, "*Von Raab* ... was in no way designed to repudiate our prior cases dealing with police stops of motorists on public highways. *Martinez-Fuerte*, ... which utilized a balancing analysis in approving highway checkpoints for detecting illegal aliens, and *Brown v. Texas*, ... are the relevant authorities here." *Id.*

In fact, *Brown* involved the police stop of a pedestrian in an alley. *Brown*, 443 U.S. at 48. Moreover, *Brown* unanimously invalidated that stop precisely because it was not based on particularized suspicion that the individual had engaged in criminal activity. *Id.* at 51-52; *see infra* note 80 and accompanying text.
provisions,\textsuperscript{74} including the fourth amendment.\textsuperscript{75} It is therefore ironic that, when evaluating a novel law enforcement technique that may invade the liberty and privacy of unprecedented numbers of Americans,\textsuperscript{76} the Court considers the "relevant authorities" to be two relatively recent Supreme Court decisions.\textsuperscript{77} Moreover, of those two decisions only \textit{Martinez-Fuerte} authorized suspicionless searches and seizures, and the \textit{Martinez-Fuerte} Court repeatedly emphasized the unusual nature of the facts involved and the limited applicability of its holding.\textsuperscript{78} In \textit{Brown v. Texas},\textsuperscript{79} the other case purported to be a relevant authority for the \textit{Sitz} decision, the Court unanimously held that a police officer's brief detention of an individual violated the fourth amendment precisely because the officer lacked a "specific basis for believing he [was] involved in criminal activity."\textsuperscript{80} In short, even in light of the selected authorities deemed relevant by the \textit{Sitz} majority, sobriety checkpoint searches and seizures should have been invalidated.


\textsuperscript{75} See United States v. Verdugo-Urquidez, 110 S. Ct. 1839 (1990) (Rehnquist, C.J., joined by White, O'Connor, Scalia, & Kennedy, JJ.) (in holding that fourth amendment does not govern searches and seizures by United States agents of property owned by nonresident alien and located in foreign country, Court stressed amendment's drafting history, Framers' intent, and understanding of Framers' contemporaries); Illinois v. Krull, 480 U.S. 340, 362, 364-65 (1987) (O'Connor, J., dissenting) (Justice O'Connor stressed the Framers' intent when interpreting whether fourth amendment exclusionary rule applies to evidence obtained by police officer who conducted search in objectively reasonable reliance upon statute authorizing warrantless administrative searches, where statute was later found to violate fourth amendment).

\textsuperscript{76} In 1988, there were 164,197,000 licensed drivers in the United States, U.S. BUREAU OF THE CENSUS, \textit{Statistical Abstract of the United States:} 1990, 7, Table No. 2 (110th ed. 1990), out of a total population of 246,329,000. \textit{Id.} at 608, Table No. 1041. Thus, fully 66.7% of the total U.S. population—and, obviously, a substantially higher percentage of the adult population—are now subject to suspicionless searches and seizures at sobriety checkpoints.

\textsuperscript{77} Chief Justice Rehnquist and his ideological cohort also ignored, and thereby defied, the Founders' intent in another major decision during the 1989 Term that exemplified many of the same narrowed views of individual rights as did \textit{Sitz}. Employment Div., Dep't of Human Resources v. Smith, 110 S. Ct. 1595, 1616 (1990) (Blackmun, J., dissenting); see also infra Part III.B.(2)(b) (discussing \textit{Smith}).


\textsuperscript{79} 443 U.S. 47 (1979).

\textsuperscript{80} Id. at 52.
on the ground that they violate the usual particularized suspicion requirement.

To understand this conclusion, it is necessary to consider the criteria that, prior to *Sitz*, the Court had specified as justifying the evaluation of certain narrow classes of searches and seizures under a balancing test rather than under the strict individualized suspicion requirement. The Court first authorized an exception to this traditional rule, and articulated the specific factors that it said justified the exception, in *Camara v. Municipal Court*[^81] and *See v. City of Seattle.*[^82] Those cases held that administrative agents could conduct routine building inspections to enforce health and safety codes even if they did not suspect that any particular building contained code violations.[^83] In *Camara*, the Court stressed the limited nature of the authorized departure from the strict probable cause requirement and relied upon three principal factors[^84] to justify the departure. One such factor, as already noted, was the "special need" for the inspections and the fact that they were not "aimed at discovery of evidence of crime."[^85] The other two factors were: that building code inspections were not personal in nature; and that there was unanimous agreement among experts that these inspections constituted the only effective way to enforce the health and safety codes at issue, since many dangerous conditions proscribed by the codes, such as faulty wiring, were not observable from the outside and might not be apparent even to a building's occupants.[^86]

Since it decided *Camara* in 1967, the Court has allowed additional, limited categories of searches and seizures to be conducted without individualized suspicion and has evaluated them under a bal-

[^82]: 387 U.S. 541 (1967).
[^83]: *Camara*, 387 U.S. at 538; *See*, 387 U.S. at 545-46.
[^84]: *Camara*, 387 U.S. at 537. The Court also relied upon a fourth factor, that the inspections had a long history of judicial and public acceptance. *Id.* In contrast with the Court's continued use of the other criteria stressed in *Camara* and *See*, the Court has not continued to insist that other suspicionless searches and seizures be characterized by this factor.
[^85]: *Id.* While certain misdemeanors may be involved in administrative code violations, *see id.* at 527 n.2, the primary goal of administrative inspections is not criminal prosecution. The Supreme Court has expressly recognized that if the purpose of a search is to locate contraband or evidence of crime, then the fourth amendment provides the same protection to commercial property as it does to a private home. Donovan v. Dewey, 452 U.S. 594, 598 n.6 (1981); G.M. Leasing Corp. v. United States, 429 U.S. 338, 352-59 (1977).
[^86]: *Camara*, 387 U.S. at 537. Of course, the same argument could be made with respect to many other crimes, such as illegal possession of firearms or drugs. This factor alone therefore should not justify suspicionless searches and seizures. Indeed, the Supreme Court has never upheld a departure from the probable cause requirement solely on the ground that the law could not otherwise be effectively enforced. *See supra* note 11.
ancing test when it has found that they shared all three of the foregoing special factors present in *Camara.* In each of these subsequent cases, as in *Camara,* the Court emphasized that waiver of the particularized suspicion requirement and application of the fourth amendment balancing test is the exception rather than the rule. This was the Court’s rationale, for example, for invoking the balancing test in *Martinez-Fuerte.*

As is discussed in greater detail below, it recently has begun to seem that the avowedly “exceptional” cases in which the Court has dispensed with individualized suspicion and applied a balancing analysis have become so numerous that they threaten to swallow the particularized suspicion rule. Nonetheless, it is significant that the Court at least has recognized the traditional rule and has attempted to justify departures from it on the basis of “special needs” and the other criteria articulated in *Camara.* Not until *Sitz,* as Justice Brennan laments, does the Court’s rhetoric shift to “create[] the impression that the Court generally engages in a balancing test in order to determine the constitutionality of all seizures.”

In contrast with the other types of searches and seizures that the Court previously has allowed to proceed under a balancing approach absent individualized suspicion, searches and seizures at drunk driving roadblocks are not characterized by any of the *Camara* factors. First, the purpose of drunk driving roadblocks is to ferret out crimes—not reported crimes, but crimes that are statistically predictable. Drunk driving is a longstanding criminal offense. It is investigated by state and local police, not by administrative agency personnel. Almost all

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88. See supra note 87.
89. See infra Part II.
91. Criminal laws proscribing drunk driving have been relatively harsh for many decades. See, e.g., North v. Russell, 427 U.S. 328, 329-30 (1976) (affirming conviction of first-time drunk drinking offender who was sentenced to 30 days in jail, $150 fine, and revocation of his driver's license after a nonjury trial before a nonlawyer judge in police court); see also King & Tipperman, *The Offense of Driving While Intoxicated: The Development of Statutory and Case Law in New York,* 3 Hofstra L. Rev. 541 (1975).

As part of a trend beginning in the late 1950s, all states have adopted implied consent laws that require a driver to submit to a blood or breath test for alcohol if a police officer has probable cause to believe that the driver is intoxicated. See Lerblance, *Implied Consent to Intoxication Tests: A Flawed Concept,* 53 St. John's L. Rev. 39, 39 (1978). In the early 1970s, the federal government funded a major initiative to increase the arrest and conviction rates for drunk driving. See Zador, *Statistical Evaluation of the Effectiveness of Alcohol Safety Action Projects,* 8 Accident Analysis & Prevention 51 (1976).
persons arrested for drunk driving are convicted of a violation or a misdemeanor. A few are convicted of felonies, and the trend is toward increasingly harsh criminal sanctions. Second, unlike administrative inspections, searches and seizures at drunk driving roadblocks are personal. They involve the detention, inspection, and questioning of individuals, not just the inspections of premises, objects, or documents.

Finally, sobriety checkpoints are not "the only effective way" to enforce anti-drunk driving laws. Drunk drivers can be and are detected without roadblocks. Laws prohibiting drunk driving can be and are effectively enforced through traditional law enforcement techniques governed by the probable cause requirement. Drunk drivers, particularly the dangerous ones, often manifest their presence not only to experienced law enforcement officers, but also to lay observers. Many drunk drivers, especially those who pose the greatest danger, are stopped and arrested by police officers enforcing traffic laws. Probable cause to stop a vehicle for a traffic violation is not rare. Drivers exceed speed limits, follow other vehicles too closely, ignore lights and signs, cross center lines, and otherwise operate dangerously. An officer's further observations after making a traffic stop may give him probable cause to believe that the driver is intoxicated. The effectiveness of this traditional highway patrol approach is evidenced by the 1,190,000 drunk driving arrests in 1988, more arrests than for any other crime for which national data are compiled. In conclusion, with respect to all three criteria upon which the Camara Court relied to justify evaluating health and safety code inspections under a balancing test


93. In New York State, for example, a second drunk driving conviction within 10 years is a felony punishable by a four-year prison term. N.Y. VEH. & TRAF. LAW §§ 1192, 1193(1)(c) (McKinney Supp. 1990); N.Y. PENAL LAW § 70.00(2)(e) (McKinney 1987). As of 1982, approximately 29 people were incarcerated for this offense. D. MacDONALD, NEW YORK DEPARTMENT OF CORRECTIONAL SERVICES, PERSONS COMMITTED FOR DRIVING WHILE INTOXICATED OR CRIMINALLY NEGLIGENT HOMICIDE INVOLVING DRIVING WHILE INTOXICATED IN 1982 AND FIVE YEAR TREND: 1978-1982, at 2 (1983).

94. See PRESIDENTIAL COMMISSION ON DRUNK DRIVING, FINAL REPORT passim (1983) [hereinafter PRESIDENTIAL COMM’N REPORT] (experienced officer’s observations usually sufficient to establish probable cause).

95. Id.

96. Id.; PRESIDENTIAL COMM’N REPORT, supra note 94, at 15.

97. FBI CRIME REPORTS, supra note 92, at 180 (Table 31). Although many jurisdictions maintained drunk driving roadblocks for certain periods in 1988, the available statistics indicate that these roadblocks made only a minuscule contribution to the total number of arrests. See NATIONAL HIGHWAY TRAFFIC SAFETY ADMINISTRATION, U.S. DEPARTMENT OF TRANSPORTATION, THE USE OF SAFETY CHECKPOINTS FOR DWI ENFORCEMENT (1983) [hereinafter NATIONAL HIGHWAY SAFETY].
rather than enforcing the individualized suspicion requirement, drunk driving roadblocks differ from health and safety code inspections.

For similar reasons, drunk driving roadblocks differ materially from the immigration checkpoint stops and the pedestrian identification stop that the Court evaluated under a balancing test in *Martinez-Fuerte* and *Brown*. In contrast with the *Sitz* Court's conclusory, unexplained assertion that these cases "are the relevant authorities"\(^9\) governing sobriety checkpoints, analysis of those cases demonstrates that they do not even support the proposition that sobriety checkpoint stops should be *reviewed* under a balancing test, much less the proposition that these stops should be *approved* under such a test.

In *Martinez-Fuerte*,\(^9\) the Supreme Court authorized Border Patrol agents to stop briefly all cars passing through permanent checkpoints located on major highways leading away from the Mexican border in order to detect undocumented aliens.\(^10\) The Court found that the investigations conducted at Border Patrol checkpoints displayed all three special characteristics of suspicionless administrative inspections upon which it had relied in *Camara*. First, the aim of these investigations is not to discover evidence of crime, but to prevent undocumented aliens from remaining in the country. Almost all detected undocumented aliens agree to leave the country without deportation proceedings, much less criminal prosecution.\(^10\) Second, although somewhat personal, these investigations focus largely on the existence of documents regarding citizenship and immigration status.\(^10\) Finally, the Court concluded that the challenged investigations were essential for enforcing immigration laws.\(^10\)

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100. Id. at 566.
101. See Schuck, *The Transformation of Immigration Law*, 84 COLUM. L. REV. 1, 77-78 (1984). With the exception of major drug traffickers, undocumented aliens almost always are given the opportunity to leave the United States voluntarily; only those who refuse are deported. *Id*. In 1982, fewer than two percent of all undocumented aliens who were ordered by the Immigration and Naturalization Service (INS) to leave the country were formally deported. *Id*. Deportation proceedings are not criminal.

Although more than one million undocumented aliens are apprehended each year, only about 2700 criminal prosecutions are commenced annually under all immigration laws. DIRECTOR OF THE ADMINISTRATIVE OFFICE OF THE UNITED STATES COURTS, ANNUAL REPORT 293 (1982); see also Almeida-Sanchez v. United States, 413 U.S. 266, 278 (1973) (Powell, J., concurring) (analogizing searches for undocumented aliens to administrative inspections upheld in *Camara* because only three percent of undocumented aliens apprehended in the United States are prosecuted).

103. In support of this conclusion, the Court stated:

[M]aintenance of a traffic-checking program in the interior is necessary because the
For the foregoing reasons, *Martinez-Fuerte* does not support the *Sitz* Court's approval of suspicionless drunk driving roadblock searches and seizures under a balancing test. The *Sitz* Court's reliance on *Brown* is even more misplaced—indeed, it is mystifying. The *Brown* Court unanimously held that a police officer's suspicionless detention of an individual to ask for his name and address violated the fourth amendment. In an opinion authored by Chief Justice Burger, the Court ringingly acclaimed the time-honored principle that police officers may not disturb individual privacy and liberty absent particularized suspicion. In words that surely suggest the unconstitutionality of suspicionless searches and seizures at sobriety checkpoints, Chief Justice Burger declared:

In the absence of any basis for suspecting appellant of misconduct, the balance between the public interest and appellant's right to personal security and privacy tilts in favor of freedom from police interference. The Texas statute under which appellant was stopped and required to identify himself is designed to advance a weighty social objective in large metropolitan centers: prevention of crime. But even assuming that purpose is served to some degree by stopping and demanding identification from an individual without any specific basis for believing he is involved in criminal activity, the guarantees of the Fourth Amendment do not allow it.

The detention involved in *Brown*—a police officer's request of the detainee's name and address—was less intrusive than that involved in *Sitz*, and also entailed an examination that was less personal and less subject to police discretion. The *Brown* Court's unanimous ruling that "the balance" there "tilts in favor of freedom from police interference" therefore should apply a fortiori to the more intrusive, flow of illegal aliens cannot be controlled effectively at the border.

A requirement that stops on major routes inland always be based on reasonable suspicion would be impractical because the flow of traffic tends to be too heavy to allow the particularized study of a given car that would enable it to be identified as a possible carrier of illegal aliens.

*Id.* at 556-57.


105. *Id.* at 52.

106. *Id.* The *Sitz* majority's unexplained attempt to derive support from *Brown* may be based on the following dictum in the *Brown* opinion:

A central concern in [fourth amendment] balancing ... has been to assure that an individual's reasonable expectation of privacy is not subject to arbitrary invasions solely at the unfettered discretion of officers in the field. ... To this end, the Fourth Amendment requires that a seizure must be based on specific, objective facts indicating that society's legitimate interests require the seizure of the particular individual, or that the seizure must be carried out pursuant to a plan embodying explicit, neutral limitations on the conduct of individual officers.

*Id.* at 51 (citations omitted) (emphasis added).

The italicized language, however, does not transform *Brown* into a precedent supporting the *Sitz* ruling. First, when considered in the overall context of *Brown*'s holding and reasoning,
personal, and discretionary searches conducted at sobriety checkpoints.

In summary, Von Raab's holding that the individualized suspicion requirement could be dispensed with under a balancing analysis only in extraordinary circumstances, for searches and seizures not conducted for criminal law enforcement purposes, is reinforced by the Court's earlier rulings, including the very two cases that the Sitz majority identified as "the relevant authorities." For this reason, and also because they are not characterized by any of the special factors stressed in Camara and its progeny, suspicionless searches and seizures at sobriety checkpoints are materially distinguishable from any other suspicionless searches and seizures that the Court has analyzed under fourth amendment balancing.

(2) Implied Consent or Waiver and Suspicionless Roadblock Searches

Proponents of sobriety checkpoints sometimes seek to justify them on an implied consent or waiver rationale. They argue that driving is a privilege rather than a right, that the government may qualify this privilege by imposing certain conditions on it, and that one such permissible condition is being subject to searches and seizures at drunk driving roadblocks. By deciding to obtain operating licenses, the argument goes, drivers waive any rights they otherwise would have to be free from drunk driving roadblock searches and seizures. Alternatively phrased, drivers impliedly consent to roadblock searches and seizures. Chief Justice Rehnquist, who authored the Sitz opinion, suggested this theory in dicta in his 1975 opinion in United States v. Brignoni-Ponce.108

this language reasonably could be construed as requiring that any permissible plan must specify factors that could give rise to particularized suspicion. This is evident in the Brown Court's further assertion that:

[Even assuming ... [crime prevention] is served ... by stopping and demanding identification from an individual without any specific basis for believing he is involved in criminal activity, ... the Fourth Amendment do[es] not allow it. When such a stop is not based on objective criteria, the risk of arbitrary and abusive police practices exceeds tolerable limits.]

Id. at 52 (citation omitted).

Even if the Brown dictum can be viewed as authorizing suspicionless searches and seizures that were carried out under a plan sufficiently constraining police officer discretion, it would not sanction drunk driving roadblock searches and seizures. As explained in other portions of this Article, these searches and seizures are inherently discretionary. See supra notes 39-40 and accompanying text; infra notes 205-206 and accompanying text.


108. 422 U.S. 873 (1975) (Rehnquist, J., concurring): "[J]ust as travelers entering the country may be stopped and searched without probable cause and without founded suspicion, ... a strong case may be made ... to likewise stop motorists using highways in order to
The implied consent-waiver argument seeks support from the Court's decisions upholding suspicionless regulatory inspections of the facilities of certain pervasively regulated enterprises.\(^\text{109}\) The Court has analogized these inspections to the suspicionless administrative inspections it upheld in \textit{Camara} and \textit{See} on the basis of the special factors characterizing those inspections.\(^\text{110}\) It has determined that suspicionless inspections of the facilities of liquor, firearms, mining, and automobile junkyard businesses also are justified by a "federal regulatory presence [which] is sufficiently comprehensive and defined that the owner of commercial property cannot help but be aware that his property will be subject to periodic inspections undertaken for specific purposes."\(^\text{111}\) Under this reasoning, people who choose to operate such pervasively regulated enterprises have impliedly consented to suspicionless searches of their business facilities.\(^\text{112}\)

The implied consent-waiver argument that is derived from the cases concerning pervasively regulated enterprises does not justify suspicionless searches and seizures at drunk driving roadblocks. Granted, driving is subject to government regulation and may be viewed as a privilege rather than an unqualified right. Many other endeavors in contemporary life, however, also are subject to government regulation\(^\text{113}\) and also are more akin to privileges than to absolute rights.\(^\text{114}\) If the government could condition all such endeavors on the waiver of constitutional rights, then these rights effectively would be eliminated. For


\(^{\text{110}}\) \textit{See supra} notes 81-86 and accompanying text.

\(^{\text{111}}\) Donovan, 452 U.S. at 600.

\(^{\text{112}}\) \textit{See, e.g.,} Biswell, 406 U.S. at 316:

When a dealer chooses to engage in this pervasively regulated business and to accept a federal license, he does so with the knowledge that his business records . . . [and equipment] will be subject to effective inspection. Each licensee is annually furnished with a revised compilation of ordinances that describe his obligations and define the inspector's authority.

\(^{\text{113}}\) \textit{See} Van Alstyne, \textit{The Demise of the Right-Privilege Distinction in Constitutional Law}, 81 \textit{HARV. L. REV.} 1439, 1444 (1968) (some Supreme Court decisions "tacitly moved toward the proposition that because the private sector is subject to considerable public regulation, even the exercise of a prerogative in the private sector is merely a privilege.").

\(^{\text{114}}\) Indeed, even constitutionally guaranteed rights themselves are not absolute in nature. To argue, therefore, that once an interest is less than absolutely protected it can be subjected to any limitations, would render even our most cherished freedoms nugatory. This is one of several respects in which the implied consent-waiver argument proves too much.
this reason, both the Supreme Court and constitutional scholars repeatedly have maintained that the government may not condition the receipt of benefits or privileges on the forfeiture of constitutional freedoms.

The argument that driving may be conditioned on the deprivation of fourth amendment protections because it is a "privilege" rather than an absolute right proves too much. If the privilege of driving (or, for that matter, any other of the innumerable benefits or privileges that play essential roles in modern life) may be conditioned on a waiver of fourth amendment rights, why not condition it on a waiver of other constitutional rights as well? Would we allow the government summarily to convict drivers suspected of violating traffic laws, on the argument that they waived their due process rights under the fifth amendment? Or would we allow the government to execute these drivers for their infractions, on the argument that they waived their protection against cruel and unusual punishments under the eighth amendment? If the answer to either of the foregoing questions is "No," why is the waiver argument any more persuasive regarding fourth amendment rights?

Admittedly, the Court has indicated some approval of the waiver or implied consent rationale concerning fourth amendment guarantees


117. See Sullivan, supra note 116, at 1415. She argues that:

   The doctrine of unconstitutional conditions holds that government may not grant a benefit on the condition that the beneficiary surrender a constitutional right, even if the government may withhold that benefit altogether. It reflects the triumph of the view that government may not do indirectly what it may not do directly over the view that the greater power to deny a benefit includes the lesser power to impose a condition on its receipt.

118. A Supreme Court decision made precisely this point as early as 1926. See Frost & Frost Trucking Co., 271 U.S. 583. In that case the Court recognized that: "If the state may compel the surrender of one constitutional right as a condition of its favor, it may, in like manner, compel a surrender of all. It is inconceivable that guaranties [sic] embedded in the Constitution of the United States may thus be manipulated out of existence." Id. at 594.
in the line of cases regarding regulated enterprises. The heavily regulated enterprises involved in those cases, however, are readily distinguishable from driving in terms of the degree of regulation. Government regulation of driving is hardly as pervasive as regulation of the mining, firearms, and liquor businesses. While there is no absolute right to operate a motor vehicle on public roads, the Court has recognized that a driver's license represents sufficient liberty and property interests to prohibit its revocation or suspension without procedural due process.119 Because there is a greater right to drive than to operate a mine, or to manufacture or sell liquor or firearms, the government may impose more conditions on the latter activities than on driving.

For the foregoing reasons, the Supreme Court expressly has held that its fourth amendment rulings regarding pervasively regulated enterprises are inapplicable to automobile searches and seizures. For example, in Delaware v. Prouse,120 the Court acknowledged that "'[t]here are certain 'relatively unique circumstances' . . . in which consent to regulatory restrictions is presumptively concurrent with participation in the regulated enterprise.'"121 It distinguished the situation of '"[a]n individual operating . . . an automobile,"'122 explaining that such an individual "does not lose all reasonable expectation of privacy simply because the automobile and its use are subject to government regulation.'"123 The Court explained:

Automobile travel is a basic, pervasive, and often necessary mode of transportation to and from one's home, workplace, and leisure activities. Many people spend more hours each day traveling in cars than walking on the streets. Undoubtedly, many find a greater sense of security and privacy in traveling in an automobile than they do in exposing themselves by pedestrian or other modes of travel. Were the individual subject to unfettered governmental intrusion every time

121. Id. at 662.
122. Id. (quoting Marshall v. Barlow's, Inc., 436 U.S. 307, 313 (1978)). Similarly, in Almeida-Sanchez v. United States, 413 U.S. 266 (1973), the Court refused to extend the regulated enterprise cases to car searches conducted near the Mexican border for the purpose of enforcing immigration laws. In so holding, it explained, "A central difference between those cases and this one is that businessmen engaged in such federally licensed and regulated enterprises accept the burdens as well as the benefits of their trade, whereas the petitioner here was not engaged in any regulated or licensed business." Id. at 271; see also id. at 281 (Powell, J., concurring) ("One who merely travels [by car] in regions near the borders . . . can hardly be thought to have submitted to inspections in exchange for a special perquisite.").
123. Prouse, 440 U.S. at 662.
he entered an automobile, the security guaranteed by the Fourth Amendment would be seriously circumscribed. . . . [P]eople are not shorn of all Fourth Amendment protection when they step from their homes onto the public sidewalks. Nor are they shorn of those interests when they step from the sidewalks into their automobiles.\textsuperscript{124} This ruling is consistent with an established line of Supreme Court opinions that recognize the important privacy interests involved in automobile travel and that enforce the probable cause requirement with respect to searches and seizures of individuals traveling in automobiles.\textsuperscript{125}

C. Roadblock Searches and Seizures: Failing the Balancing Test

For the reasons discussed in the preceding section, neither \textit{Martinez-Fuerte} nor \textit{Brown} justifies the \textit{Sitz} Court's failure to require that searches and seizures conducted at drunk driving roadblocks be based on individualized suspicion or be evaluated under the balancing test. Even assuming\textit{ arguendo} that roadblock searches and seizures were properly reviewed under the balancing approach, the substantial differences between them and the stops upheld in \textit{Martinez-Fuerte}, as well as the stop struck down in \textit{Brown}, would mandate their invalidation. A fair assessment of the costs and benefits of drunk driving roadblock searches and seizures—of their effectiveness and intrusiveness—reveals that the Court exaggerated the former and understated the latter.

\textit{(1) Martinez-Fuerte} and Balancing

Until \textit{Sitz}, \textit{Martinez-Fuerte} was the only case in which the Court upheld a program subjecting the general public to suspicionless searches and seizures. There are, however, significant distinctions between the facts involved in the \textit{Martinez-Fuerte} situation and those at issue in \textit{Sitz}. Consequently, the factors that, on balance, were held to justify suspicionless searches and seizures in \textit{Martinez-Fuerte} would not yield the same result in \textit{Sitz}.

In his dissenting opinion in \textit{Sitz}, Justice Stevens noted several critical distinctions between the permanent immigration checkpoint stops upheld in \textit{Martinez-Fuerte} and the temporary sobriety checkpoint stops upheld in \textit{Sitz}. First, only the latter involve the element of surprise.\textsuperscript{126} The Court previously has recognized that the surprise

\textsuperscript{124} \textit{Id.} at 662-63.
\textsuperscript{125} \textit{See infra} notes 202-203 and accompanying text.
\textsuperscript{126} \textit{Michigan Dep't of State Police v. Sitz}, 110 S. Ct. 2481, 2492 (1990) (Stevens, J., dissenting).
nature of a search or seizure significantly increases its intrusiveness.\textsuperscript{127}

A central cause of the surprise that is engendered by a drunk driving roadblock (as distinguished from the permanent immigration checkpoints at issue in \textit{Martinez-Fuerte}) is the fact that sobriety checkpoints are temporary, commonly changing locales in a single night. The \textit{Martinez-Fuerte} opinion expressly cautioned that the reach of its holding was "confined to permanent checkpoints"\textsuperscript{128} for two reasons. First, investigations at permanent locations should cause less concern or fright because motorists would know, or could obtain knowledge of, their locations.\textsuperscript{129} Second, such investigations both appear to and actually do involve less discretionary law enforcement activity. The location is chosen not by officers in the field, but rather by officials responsible for making overall decisions regarding the most effective allocation of limited enforcement resources.\textsuperscript{130} As Justice Stevens noted in \textit{Sitz},\textsuperscript{131} their shifting, temporary location makes drunk driving roadblocks more analogous to the roving immigration enforcement patrols that the Supreme Court invalidated in \textit{Brignoni-Ponce}\textsuperscript{132} than to the permanent checkpoint stops it approved in \textit{Martinez-Fuerte}.\textsuperscript{133} Not only do police have more discretion with respect to the timing and location of drunk driving roadblocks in contrast with immigration roadblocks, but also the police have far more discretion in conducting a checkpoint investigation of sobriety in contrast with an investigation of immigration status. A search for relevant identification papers is far more easily standardized than is a search for evidence of intox-

\begin{itemize}
\item \textsuperscript{127} See United States v. Martinez-Fuerte, 428 U.S. 543, 558 (1976) ("subjective intrusion" of search or seizure is measured by extent to which it generates "concern or even fright" in person stopped or searched); see also \textit{Sitz}, 110 S. Ct. at 2492 (Stevens, J., dissenting) (citations omitted):
\begin{quote}
There is a critical difference between a seizure that is preceded by fair notice and one that is effected by surprise. That is one reason why \ldots any search at a permanent and fixed checkpoint is much less intrusive than a random stop. A motorist with advance notice of the location of a permanent checkpoint has an opportunity to avoid the search entirely, or at least to prepare for, and limit, the intrusion on her privacy.

No such opportunity is available in the case of a random stop or a temporary checkpoint, which both depend for their effectiveness on the element of surprise. A driver who discovers an unexpected checkpoint on a familiar local road will be startled and distressed. She may infer, \ldots correctly, that the police have made a discretionary decision to focus their law enforcement efforts upon her and others who pass the chosen point.
\end{quote}
\item \textsuperscript{128} \textit{Martinez-Fuerte}, 428 U.S. at 566 n.19.
\item \textsuperscript{129} \textit{Id.} at 559.
\item \textsuperscript{130} \textit{Id.}
\item \textsuperscript{131} See \textit{Sitz}, 110 S. Ct. at 2493 (Stevens, J., dissenting).
\item \textsuperscript{132} 422 U.S. 873, 884 (1975).
\item \textsuperscript{133} 428 U.S. at 566.
\end{itemize}
For this additional reason, searches and seizures conducted at sobriety checkpoints are more intrusive than those conducted at immigration checkpoints.

As Justice Stevens observed in *Sitz*, the intrusiveness of drunk driving roadblock searches and seizures is further heightened beyond that of immigration checkpoint searches and seizures because sobriety checkpoints operate almost exclusively at night, whereas immigration checkpoints also function during daylight hours.

For the various reasons noted in Justice Stevens' *Sitz* dissent, searches and seizures conducted at drunk driving roadblocks are more intrusive than searches and seizures conducted at immigration checkpoints. Moreover, as stressed in Justice Brennan's dissent, drunk driving roadblocks also are not as necessary as immigration checkpoints. The *Martinez-Fuerte* opinion emphasized that, as a practical matter, suspicionless immigration checkpoint stops were necessary for effective policing of the borders. In contrast, the evidence adduced

134. As Justice Stevens explained:
   ‘A Michigan officer who questions a motorist at a sobriety checkpoint has virtually unlimited discretion to detain the driver on the basis of the slightest suspicion. A ruddy complexion, an unbuttoned shirt, bloodshot eyes or a speech impediment may suffice to prolong the detention. Any driver who had just consumed a glass of beer, or even a sip of wine, would almost certainly have the burden of demonstrating to the officer that her driving ability was not impaired. *Sitz*, 110 S. Ct. at 2493 (Stevens, J., dissenting).

135. See id. (Stevens, J., dissenting) (citations omitted):
   A seizure followed by interrogation and even a cursory search at night is surely more offensive than a daytime stop that is almost as routine as going through a toll gate. . . . These fears are not, as the Court would have it, solely the lot of the guilty. Unwanted attention from the local police need not be less discomforting simply because one's secrets are not the stuff of criminal prosecutions. Moreover, those who have found—by reason of prejudice or misfortune—that encounters with the police may become adversarial or unpleasant without good cause will have grounds for worrying at any stop designed to elicit signs of suspicious behavior.

It is worth underscoring Justice Stevens' important but often ignored point in this context: that fourth amendment standards protective of individual liberty and privacy benefit innocent persons, as well as those engaged in criminal activities. For an opinion stressing this point specifically with respect to automobile searches and seizures, see *Brinegar v. United States*, 338 U.S. 160, 181 (1949) (Jackson, J., dissenting) (“[A] search against [the defendant's] car must be regarded as a search of the car of Everyman.”). See also *Draper v. United States*, 358 U.S. 307, 314 (1959) (Douglas, J., dissenting):

   Decisions under the Fourth Amendment . . . have not given the protection to the citizen which the letter and spirit of the Amendment would seem to require. One reason, I think, is that wherever a culprit is caught red-handed, as in leading Fourth Amendment cases, it is difficult to adopt and enforce a rule that would turn him loose. A rule protective of law-abiding citizens is not apt to flourish where its advocates are usually criminals. Yet the rule we fashion is for the innocent and guilty alike.

136. See *Sitz*, 110 S. Ct. at 2489-90.

in the Sitz trial, including the data from former roadblock operations and the opinions of law enforcement experts, solidly showed that mass roadblock stops are less effective in detecting and deterring drunk driving than are stops based on reasonable suspicion.138

In short, with respect to both major elements of the Court's fourth amendment cost-benefit analysis, drunk driving roadblocks are materially distinguishable from immigration checkpoints. Drunk driving roadblocks entail both significantly higher costs in terms of intrusiveness and significantly lower benefits in terms of effectiveness. For these reasons, a fair application of the balancing test would yield a different result in Sitz from the one it produced in Martinez-Fuerte.

Additionally, in upholding immigration checkpoints in Martinez-Fuerte, the Court stressed a factor that is completely absent from the drunk driving roadblock situation. It long has been accepted that, because of the extraordinary governmental interest in controlling our international borders, border area searches and seizures aimed at preventing illegal immigration and smuggling are subject to less stringent limitations than other types of searches and seizures.139 Although the checkpoint stops upheld in Martinez-Fuerte did not actually occur at the border,140 they clearly were aimed at preventing illegal immigration141

[138. See supra notes 47-53 and accompanying text. 139. In Carroll v. United States, 267 U.S. 132 (1925), the Court noted:
Travelers may be so stopped [without probable cause] in crossing an international boundary because of national self-protection reasonably requiring one entering the country to identify himself as entitled to come in, and his belongings as effects which may be lawfully brought in. But those lawfully within the country, entitled to use the public highways, have a right to free passage....
Id. at 154; accord Almeida-Sanchez v. United States, 413 U.S. 266, 279 (1973) (Powell, J., concurring) (border area searches of cars for undocumented aliens "draw a large measure of justification from the Government's extraordinary responsibilities and powers with respect to the border"). The Supreme Court has "always stressed the uniqueness of the border-search rule, and... repeatedly pointed out that its rationale cannot be applied to any other situation." United States v. Villamonte-Marquez, 462 U.S. 579, 598 n.6 (1983) (Brennan, J., dissenting); United States v. Ramsey, 431 U.S. 606, 616-20 (1977) (reviewing statutes and cases dating back to 1789). The Ramsey Court concluded that "searches made at the border, pursuant to the long-standing right of the sovereign to protect itself by stopping and examining persons and property crossing into this country, are reasonable simply by virtue of the fact that they occur at the border." Id. at 616; see also Almeida-Sanchez, 413 U.S. at 272-74 (searches may be made at the functional equivalents of borders as well as the borders themselves).
140. See Martinez-Fuerte, 428 U.S. at 545 (checkpoint was 66 miles from Mexican border).
141. People v. Gale, 46 Cal. 2d 253, 294 P.2d 13 (1956), supports the inference that the]
and were located at sites carefully chosen to maximize the apprehension of illegal aliens not easily detected at the border itself. The rationale of the border area search cases therefore could be extended plausibly to these immigration checkpoint investigations. Of course, this rationale does not encompass drunk driving roadblock investigations.

(2) Brown v. Texas and Balancing

The Sitz majority's reliance on Brown v. Texas is even more misplaced than its reliance on Martinez-Fuerte. As noted above, Brown struck down the brief stop at issue in that case precisely because it lacked individualized suspicion. Accordingly, far from supporting the Sitz ruling, Brown's holding directly undermines it. Nor can the Sitz result derive support from the balancing analysis employed in Brown. That analysis, which led to the Court's invalidation of suspicionless identification stops, even more clearly mandates invalidation of suspicionless sobriety checkpoint searches and seizures.

Brown enumerated three factors to be considered in a balancing analysis of searches and seizures not based on probable cause: "the gravity of the public concerns served by the seizure, the degree to which the seizure advances the public interest, and the severity of the intrapertinent feature of a search for purposes of assessing whether it should be governed by the relatively lenient standards applicable to "border searches" is not where it occurs, but what its purpose is. In Gale, the California Supreme Court invalidated an investigation conducted at a checkpoint near the Mexican border, stressing that its purpose was not to enforce immigration or customs regulations, but rather "to curb the juvenile problem" and check for "anything that looked suspicious." Id. at 256, 294 P.2d at 15. This analysis could support an argument that a search occurring away from the border but conducted for the purpose of enforcing immigration laws or customs regulations should be governed by border search standards.

142. The Border Patrol selected each permanent checkpoint location in accordance with several criteria designed to promote the apprehension of illegal aliens. For example, each checkpoint was required to be close to the confluence of two or more significant roads leading away from the border and beyond the 25-mile zone in which "border passes" are valid. Martinez-Fuerte, 428 U.S. at 553.

143. The Supreme Court has recognized that in certain circumstances, "border searches" to control immigration and importation can take place at the "functional equivalents" of the international border. See Almeida-Sanchez, 413 U.S. at 273. Such functional equivalents include, for example, a United States airport destination of an international flight. Id.

144. The Court always has stressed the uniqueness of the border search rule, and that its rationale cannot acceptably be applied to any other situation. See, e.g., Almeida-Sanchez, 413 U.S. at 272-74; Carroll v. U.S., 267 U.S. 132, 153-54 (1925).


146. See supra note 79 and accompanying text.

147. Brown, 443 U.S. at 53.
terference with individual liberty.'

Although the first Brown factor—the gravity of the public concerns motivating the roadblock searches and seizures—does not militate against such seizures, the other two Brown factors do tip the balance in that direction.

The drunk driving problem is of grave public concern. Yet, as the lower courts concluded in Sitz, roadblock seizures do not significantly redress that problem and may even be counterproductive. Moreover, sobriety checkpoint investigations are markedly more intrusive than the brief, impersonal, and non-discretionary demand for name and address that was struck down in Brown. In concluding that the sobriety checkpoints' effectiveness outweighed their intrusiveness, the Sitz majority therefore misapplied the Brown balancing approach.

(3) Balancing and Sitz: The Effectiveness of Sobriety Checkpoints

If the evidence in Sitz was insufficient to persuade the Court that the intrusiveness of the challenged law enforcement measure was not justified by its effectiveness, it seems difficult to conceive of a record that could do so. Certainly, there was no evidence that suspicionless stops are more effective than stops based on individualized suspicion. As Justice Stevens observed:

On the degree to which the sobriety checkpoint seizures advance the public interest . . . the Court's position is wholly indefensible. The Court's analysis of this issue resembles a business decision that measures profits by counting gross receipts and ignoring expenses. The evidence in this case indicates that sobriety checkpoints result in the

148. Id. at 50-51.
149. But see Michigan Dep't of State Police v. Sitz, 110 S. Ct. 2481, 2490-91 & n.2 (1990) (Stevens, J., dissenting) (referring to "law enforcement community's remarkable progress in reducing the death toll on our highways" and citing numerous statistics from the National Highway Traffic Safety Administration revealing substantial progress in reducing highway fatality rate in general, and alcohol-related fatal crashes in particular). Justice Stevens further added that, "It is . . . inappropriate for the Court to exaggerate that concern [with highway safety] by relying on an outdated statistic . . . ." Id. at 2494 n.7. See generally Jacobs & Strossen, supra note *, at 634-38 (available information concerning number of deaths and injuries caused by drunk drivers indicates that common perception of this phenomenon is exaggerated). "While the personal and social costs of drunk driving should not be minimized, they must be demystified and placed in proper perspective." Id. at 635.
150. See Sitz trial court opinion, supra note 28, at 92a-93a:
It was [the expert witness's] opinion that [sobriety] checkpoints did not have any long term, or lasting deterrent effect. That at best, such a program would only have a short term deterrent effect in the particular locale where they were implemented, and that this effect was dependent on extensive media coverage over which the police had no control. That at worst, such a program could have a counter productive effect in nearby areas, since due to the extensive manpower needed to maintain checkpoints, persons wishing to drink and drive or who wished to commit other crimes would feel safe to do so . . . .
arrest of a fraction of one percent of the drivers who are stopped, but there is absolutely no evidence that this figure represents an increase over the number of arrests that would have been made by using the same law enforcement resources in conventional patrols. Thus, although the gross number of arrests is more than zero, there is a complete failure of proof on the question whether the wholesale seizures have produced any net advance in the public interest in arresting intoxicated drivers. 151

The Supreme Court majority did not dispute the accuracy of the lower courts' conclusions, echoed by Justice Stevens, that mass, suspicionless investigations at drunk driving roadblocks are less effective in countering the drunk driving problem than investigations based on individualized suspicion. Rather, Chief Justice Rehnquist's majority opinion faulted the lower courts for having undertaken this analysis in the first place, suggesting that it constituted an unduly intrusive form of judicial review. In effect, the Sitz majority read the effectiveness component out of the balancing test. Consequently, this already deferential judicial review standard appears to have become so deferential as to result in almost per se validation of a challenged governmental measure.

Chief Justice Rehnquist proclaimed that Brown's statement that courts should evaluate "the degree to which the seizure advances the public interest ... [was] not meant to transfer from politically accountable officials to the courts the decision as to which among reasonable alternative law enforcement techniques should be employed to deal with a serious public danger." 152 In this same vein, Chief Justice Rehnquist instructed courts to defer to law enforcement officers' judgments without scrutinizing the evidence or reasons that might support or undermine those judgments:

Experts in police science might disagree over which of several methods of apprehending drunken drivers is preferable as an ideal. But for purposes of Fourth Amendment analysis, the choice among such reasonable alternatives remains with the governmental officials who have a unique understanding of, and a responsibility for, limited public resources. ... [The Court's precedents do not] support[] the searching examination of "effectiveness" undertaken by the Michigan court. 153

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151. Sitz, 110 S. Ct. at 2495 (Stevens, J., dissenting) (footnotes omitted).
152. Id. at 2487 (citation omitted). As noted above, this statement incorrectly implies that the policymaker who decided to implement the roadblocks was politically accountable. To the contrary, such roadblocks specifically were rejected by the politically accountable elected members of the Michigan Legislature and instead were initiated by an unelected official, the Director of the Michigan Department of State Police. See supra notes 27-29, 35-37 and accompanying text.
153. Sitz, 110 S. Ct. at 2487.
Contrary to Chief Justice Rehnquist's characterization, the Court's past fourth amendment cases evaluating suspicionless searches and seizures under a balancing test had rigorously scrutinized the effectiveness of such searches and seizures. Some of these decisions even required the state to demonstrate that the challenged searches and seizures were the least intrusive law enforcement measures that were reasonably effective in pursuing the relevant law enforcement goals.

The Court applied such heightened scrutiny, for example, in Delaware v. Prouse, which held that the fourth amendment was violated by a police officer's random detention of a car and driver, without any individualized suspicion, to check the driver's license and the vehicle's registration. The Court framed the central issue as "whether in the service of [the State's] important ends [(enforcing vehicle safety regulations)] the discretionary spot check is a sufficiently productive mechanism to justify the intrusion upon Fourth Amendment interests which such stops entail." The Court's negative response to this question was premised upon "the alternative mechanisms available, both those in use and those that might be adopted," that left the Court "unconvinced that the incremental contribution to highway safety of the random spot check justifies the practice under the Fourth Amendment."

The Prouse Court observed that no evidence demonstrated that the challenged stops "substantially promoted" the state's interest in increasing highway safety, or proved such stops were "necessary." The Prouse opinion repeatedly stressed the absence of empirical data to substantiate the alleged effectiveness of these stops and noted that they merely made "incremental" or "marginal" contributions to highway safety. Without citing any evidence, the Court declared that "[t]he foremost method of enforcing traffic and vehicle safety regulations . . . is acting upon observed violations." Finally, Prouse discounted the spot checks' alleged deterrent effect, noting that such

155. Id.
157. Id. at 663.
158. Id. at 659.
159. Id.
160. Id. at 661.
161. Id. at 660.
162. Id. at 659-61.
163. Id. at 659.
164. Id. at 661.
165. Id. at 659.
an effect was not substantiated by empirical evidence.\textsuperscript{166} In short, the \textit{Prouse} Court imposed upon the government the significant burden of proving the necessity of suspicionless searches and seizures.

The rigorous scrutiny to which the Court subjected the suspicionless search and seizure it invalidated in \textit{Prouse} has characterized the Court’s review of other searches and seizures that were based on less than probable cause.\textsuperscript{167} In \textit{Sitz}, it therefore was the Supreme Court’s vitiating judicial review, rather than the lower courts’ meaningful review, that was unprecedented.

If the Court had subjected drunk driving roadblocks to the degree of judicial review it employed in \textit{Prouse} and other precedents examining suspicionless searches and seizures, the outcome in \textit{Sitz} would have been different. No convincing data demonstrate that sobriety checkpoints “substantially promote,”\textsuperscript{168} much less are “necessary” for, highway safety.\textsuperscript{169} Even their proponents recognize that the potential effectiveness of drunk driving roadblocks does not lie in detecting drunk drivers and removing them from the roads.\textsuperscript{170} As Justice Stevens stressed in his \textit{Sitz} dissent, sobriety checkpoints produce very few drunk driving arrests.\textsuperscript{171} Rather, advocates seek to justify them chiefly on the basis of an alleged deterrent effect that is speculative

\begin{itemize}
\item \textsuperscript{166} \textit{Id.} at 660.
\item \textsuperscript{167} \textit{See}, e.g., \textit{Florida v. Royer}, 460 U.S. 491, 505-07 (1983) (fourth amendment was violated by investigative detention of suspected drug courier and search of his luggage at airport because government did not disprove feasibility of less intrusive search and seizure techniques that Court suggested); \textit{United States v. Brignoni-Ponce}, 422 U.S. 873, 884 (1975) (border patrol officers could not stop vehicles unless they had reasonable suspicion that vehicles contained undocumented aliens; Court asserted that law enforcement goals could be pursued through searches and seizures based upon individualized suspicion); \textit{Terry v. Ohio}, 392 U.S. 1, 30 (1968) (In upholding a brief stop and pat-down search of the suspects’ outer garments for weapons based on reasonable suspicion, the Court stressed that the officer “confined his search strictly to what was minimally necessary to learn whether the men were armed and to disarm them once he had discovered the weapons.”).
\item \textsuperscript{168} \textit{Prouse}, 440 U.S. at 661.
\item \textsuperscript{169} \textit{Id.} at 660.
\item \textsuperscript{170} \textit{See}, e.g., \textit{National Highway Safety}, \textit{supra} note 97, at 2 (“[Drunk driving roadblocks] . . . have not been proven cost effective when used solely for producing DWI arrests. . . .”).
\end{itemize}

The proponents of the Michigan drunk driving roadblock program upheld in \textit{Sitz} did not seek to justify that program as a means of apprehending drunk drivers. \textit{See} \textit{Sitz} trial court opinion, \textit{supra} note 28, at 45a-46a. The Director of Michigan Department of State Police testified that the checkpoints’ purpose would be primarily to deter, and only secondarily to apprehend, drunk drivers. \textit{Id.}

\textsuperscript{171} \textit{See} \textit{Sitz}, 110 S. Ct. at 2491 & n.3, 2495 (Stevens, J., dissenting) (“The evidence in this case indicates that sobriety checkpoints result in the arrest of a fraction of one percent of the drivers who are stopped . . . .”). For some of the voluminous evidence supporting Justice Stevens’ conclusion, see \textit{Sitz} trial court opinion, \textit{supra} note 28, at 79a-83a, and Jacobs \& Strossen, \textit{supra} note *, at 638 n.195.
and probably unmeasurable. Roadblock proponents argue that drunk drivers "would not be deterred by the possibility of being involved in a traffic violation or having some other experience" that would subject them to a police officer's scrutiny, but that they "would be deterred by the possibility" of being stopped at a roadblock.\(^\text{172}\) This argument, however, is "mere assertion" unsupported by convincing empirical evidence.\(^\text{173}\)

Indeed, as both lower courts concluded in *Sitz*, consistent with the uncontradicted evidence on point, the very fact that roadblocks would not produce a high arrest rate—as defendants admitted—belys any significant deterrent effect. When the threat of arrest is slight, drivers simply are not deterred by it.\(^\text{174}\) Only one year before the *Sitz* decision, the Rehnquist majority expressly endorsed this inherently logical notion in a similar context. In *Skinner v. Railway Labor Executives' Association*,\(^\text{175}\) the Court said: "[C]ommon sense confirms, that the . . . dismissal sanction that threatens employees who use drugs or alcohol while on duty cannot serve as an effective deterrent unless

\(^\text{172}^\) *Prouse*, 440 U.S. at 660. For an amplification of the weaknesses in the argument that drunk driving roadblocks deter drunk driving, see Jacobs & Strossen, *supra* note *, at 639-44. A recent study indicates that these roadblocks have no deterrent value. *See id.* at 639 n.197. Moreover, "studies of other enforcement measures that have increased drunk driving arrest rates have concluded that such measures do not reduce either drunk driving or alcohol-related fatalities," and that there is "no correlation between the number or rate of drunk driving arrests in a jurisdiction and the increase or decrease in fatal accidents." *Id.* at 642. Furthermore, statistics allegedly showing the effectiveness of drunk driving roadblocks are inaccurate. *See id.* at 642-45. Even the National Transportation Safety Board, which advocates roadblocks, recognizes that their deterrent impact cannot be isolated from the effect of other, simultaneously operative factors. *See id.* at 642 n.205. Even an initial reduction in drinking and driving following roadblocks soon is followed by a return to normal patterns, *see id.* at 643 & n.208, because "the most intractable drunk drivers are, by definition, the ones least concerned about apprehension and punishment." *See id.* at 644.

\(^\text{173}^\) *Prouse*, 440 U.S. at 660.


[T]he trial court's finding of a causal relationship between a program's success in achieving actual arrests and deterrence was supported by the testimony of plaintiffs' expert witness, Dr. Lawrence Ross, who has extensively researched issues relating to drinking and driving. Ross testified that available data indicated that one percent or fewer of the drivers passing through sobriety checkpoints are arrested for drunk driving. He further indicated that while studies indicated a short-term deterrent effect resulting from various campaigns against drunk driving, the statistics eventually returned to their normal level. Ross's explanation for this phenomenon was that while the publicity which accompanies the initiation of such programs leads the public to believe that the chances of being caught are high, once people learn that the chances of apprehension are not that high, people return to their normal behavior.

violators know that they are likely to be discovered.' This conclusion is fully consistent with the testimony of the plaintiffs' experts and the lower courts' rulings in Sitz. It is completely inconsistent, however, with the Supreme Court's unquestioning acceptance of the Sitz defendants' unsubstantiated assertion that sobriety checkpoints should have a deterrent effect. Yet, perhaps this is not surprising since, as Justice Marshall has observed, "consistency ... hardly has been a hallmark of the current Court's Fourth Amendment campaigns."

Not only are drunk driving roadblocks ineffective in promoting the detection or deterrence of drunk drivers, but also, as was true of the random stops in Prouse, there are "alternative mechanisms" for promoting the important goal of reducing drunk driving, including "[t]he foremost method of ... acting upon observed violations." The law enforcement experts who testified in Sitz consistently opined that if the nineteen officers who staffed the initial Michigan roadblock instead had been deployed on a strategically located and widely publicized roving patrol operation, they would have made more arrests and generated a greater deterrent effect. The effectiveness of the traditional highway patrol approach, whereby officers apprehend drunk drivers based on observed driving behavior, is evidenced by the facts that there are more drunk driving arrests, and those arrests result in a higher conviction rate, than for any other crime. Additionally, before drunk driving roadblocks were introduced in the 1980s, the number of highway deaths had been declining steadily. For these reasons, the Prouse conclusion that "the spot check does not appear sufficiently productive to qualify as a reasonable law enforcement

176. Id. at 1419-20.
178. Prouse, 440 U.S. at 659. For a discussion of anti-drunk driving measures that are effective and consistent with the fourth amendment, see Jacobs & Strossen, supra note *, at 645-49.
179. See Michigan Dep't of State Police v. Sitz, 110 S. Ct. 2481, 2490 & n.1 (1990) (Stevens, J., dissenting) (standard plan called for at least eight, and as many as twelve, officers at any roadblock).
180. Id. at 2491 n.4.
181. There were 1,190,000 drunk driving arrests in the United States in 1988, more than for any other crime for which national data are compiled. FBI Crime Reports, supra note 92, at 168 (Table 31).
182. Drunk driving cases have close to a 90% conviction rate, which is higher than that for any other offense. See Little, An Empirical Description of Administration of Justice in Drunk Driving Cases, 7 Law & Soc'y Rev. 473, 476 (1973).
183. See National Safety Council, Accident Facts 59 [hereinafter Accident Facts] (from 1971-1981, number of deaths per 100 million motor vehicle miles driven dropped 28%; rate of decline from 1980-1981 was 5%; and from 1981-1982, 9%).
practice under the Fourth Amendment"\textsuperscript{184} applies fully to sobriety checkpoints.

In his \textit{Sitz} majority opinion, Chief Justice Rehnquist attempted to distinguish the \textit{Prouse} opinion by noting its observation that "\textit{no empirical evidence indicated that} the challenged random stops of drivers to check for licenses \textit{would be an effective means of promoting roadway safety.}"\textsuperscript{185} This argument is unavailing for several reasons. First, it would not logically follow that merely because \textit{Prouse} itself may have involved a total lack of evidence as to the comparative effectiveness of the challenged law enforcement measure, the Court should find a measure ineffective \textit{only} on such an extreme record. Certainly \textit{Prouse} itself neither said nor implied that courts could find law enforcement measures ineffective solely upon a total absence of evidence supporting their efficacy. To the contrary, as then-Justice Rehnquist himself charged in his \textit{Prouse} dissent, the majority opinion in that case employed a vigorous form of judicial review.\textsuperscript{186} It is therefore disingenuous for now-Chief Justice Rehnquist to assert that \textit{Prouse} really applied an extremely passive, deferential form of scrutiny.

In any event, even assuming \textit{arguendo} that \textit{Prouse} authorized judicial findings that searches and seizures are ineffective only in the total absence of empirical evidence supporting their effectiveness, the \textit{Sitz} roadblocks still should have been invalidated. Neither the evidence emanating from the operation of the Michigan roadblock program itself nor the evidence generated from previous roadblock operations in other jurisdictions afforded any empirical indication that these roadblocks provided a net boost to the anti-drunk driving effort. The Director of the Michigan Department of State Police, who implemented that state's sobriety checkpoint program, explicitly "admitted that . . . he did not have . . . any empirical evidence to support [the] conclusion" that such checkpoints could effectively counter drunk driving.\textsuperscript{187}

Given the dearth of evidence showing that drunk driving roadblocks are effective in detecting or deterring drunk driving, the \textit{Sitz}

\textsuperscript{184} \textit{Prouse}, 440 U.S. at 660.
\textsuperscript{185} \textit{Sitz}, 110 S. Ct. at 2487.
\textsuperscript{186} See \textit{Prouse}, 440 U.S. at 667 (Rehnquist, J., dissenting) ("[T]he Court's approach reverses the presumption of constitutionality accorded acts of the States. The burden is not upon the State to demonstrate that its procedures are consistent with the Fourth Amendment, but upon respondent to demonstrate that they are not.").
majority's finding that the lower courts too closely examined the Police Department's assertions of effectiveness is tantamount to forbidding meaningful judicial review. The Supreme Court in effect requires lower courts to rubber-stamp the opinions of law enforcement officers that tip the balance in favor of law enforcement activities, even if those opinions are not supported by evidence, and worse yet, even if those opinions are contrary to the evidence.

(4) Balancing and Sitz: The Intrusiveness of Sobriety Checkpoints

The Sitz majority's assessment of the intrusiveness prong of the balancing test is as inaccurate as its assessment of the effectiveness prong. The Court adhered to its previous bifurcation of a search or seizure's intrusiveness into two elements: objective and subjective. In its discussion of objective intrusiveness, the Court stressed that the average duration of the initial stop at the Michigan roadblock operation was twenty-five seconds. The Court then concluded that the roadblock stops also would rank low on the scale of subjective intrusiveness because routine checkpoint stops should generate less fear than random stops. With respect to both types of intrusiveness, the Court concluded that the roadblock stops were equivalent to the immigration checkpoint stops upheld in Martinez-Fuerte.

The majority's conclusion that the challenged roadblock searches and seizures are only minimally intrusive ignores common sense reality as well as constitutional precedents. Actually, these searches and seizures are markedly more intrusive than any suspicionless searches or seizures that the Court previously has countenanced, including those upheld in Martinez-Fuerte. As noted above, even the initial search

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188. The degree of objective intrusiveness of a particular search or seizure depends upon its nature, duration, and scope. See United States v. Martinez-Fuerte, 428 U.S. 543, 558 (1976). The degree of subjective intrusiveness turns upon a hypothetical individual's perception of and reaction to it. See id. (“subjective intrusion” of search or seizure is measured by extent to which it generates “concern or even fright” in person stopped or searched).
189. Sitz, 110 S. Ct. at 2484, 2486.
190. Id. at 2486-87.
191. Id.
192. Ironically, the same Court that issued the Sitz decision, in upholding the Postal Service's regulation prohibiting all solicitation on sidewalks adjoining Post Offices, was willing to take judicial notice that a pedestrian's disrupted passage “by a person asking for money... is intrusive and intimidating.” United States v. Kokinda, 110 S. Ct. 3115, 3117 (1990); see also infra Part III.B.(2)a. One would think it even more self-evident that disruption of a motorist's passage by the 19 police officers who staffed the Michigan sobriety checkpoints—as opposed to a single private solicitor—would be intrusive and intimidating, especially since the police officers invoke the state's authority in attempting to obtain evidence of a crime and the solicitor simply seeks voluntary contributions to a cause.
193. See supra notes 39-40 and accompanying text.
involves a close-range examination of every aspect of the driver’s personal appearance and behavior. Moreover, police officers apparently have unfettered discretion to prolong and intensify the examination, including the power to examine the car’s interior, and to require drivers to perform roadside sobriety tests that are highly intrusive from both objective and subjective points of view. Both the objective and the subjective intrusiveness of searches and seizures conducted at sobriety checkpoints are magnified further by the fact that they may be used for law enforcement purposes other than countering the drunk driving problem. In previous decisions, the Supreme Court expressly recognized that, because of the opportunity offered by an automobile stop to inspect areas of the car not otherwise observable, a police stop of a moving vehicle is “materially more intrusive” than the average police stop of a pedestrian.

For all of the foregoing reasons, the Court unfairly confined its evaluation of the intrusiveness of sobriety checkpoints to “only the initial stop of each motorist passing through a checkpoint and the associated preliminary questioning and observation.” Although defenders of fourth amendment values should welcome the Court’s next statement that “[d]etention of particular motorists for more extensive field sobriety testing may require satisfaction of an individualized suspicion standard,” the intrusiveness of the initial investigation cannot accurately be measured in isolation from the more extensive investigations that the motorist knows—and fears—could follow.

The Sitz majority unfairly understated the objective intrusiveness of sobriety checkpoint searches by stressing that their average duration was twenty-five seconds. Surely the objective intrusiveness of a search is determined by its intensity as well as its length. To take an extreme example, a police officer might well be able to perform a visual inspection of an individual’s genital area in less than twenty-five seconds, yet this fact undoubtedly should not (and would not) render the search unintrusive. While sobriety checkpoint searches do not invade personal privacy to this degree, they do invade it substantially more than the routine document inspections upheld in Martinez-Fuerte.

The Sitz majority defied reality by asserting, without explanation, that there is “virtually no difference between the levels of intrusion” in-

194. See Jacobs & Strossen, supra note *, at 650-53 (discussing recent Supreme Court decisions that have held that a police officer who has lawfully stopped a car has expansive search and seizure options).
197. Id.
198. See supra notes 38-40 and accompanying text.
involved in searches at immigration checkpoints and sobriety checkpoints.\textsuperscript{199}

The \textit{Sitz} majority also understated the subjective intrusiveness of drunk driving roadblock searches and seizures. As Justice Stevens explained, these searches rank high in subjective intrusiveness because of the anxiety they produce by virtue of their surprise element, their discretionary character, and their nighttime occurrence.\textsuperscript{200} Justice Stevens effectively encapsulated this point when he said, "[U]nannounced investigatory seizures are, particularly when they take place at night, the hallmark of regimes far different from ours . . . ."\textsuperscript{201}

The subjective intrusiveness of searches and seizures conducted at drunk driving roadblocks is substantially understated by the \textit{Sitz} opinion for additional reasons.\textsuperscript{202} First, the subjective intrusiveness of a search or seizure depends in large part on the extent to which people value privacy in the setting where it occurs. The Supreme Court expressly has recognized that, because of an automobile traveler's significant expectations of privacy and security, wide-scale governmental interference with such travel would violate the fourth amendment. In \textit{Delaware v. Prouse}, the Court said:

Many people spend more hours each day traveling in cars than walking on the streets. Undoubtedly, many find a greater sense of security and privacy in traveling in an automobile than they do in exposing themselves by pedestrian or other modes of travel. Were the individual subject to unfettered governmental intrusion every time he entered an automobile, the security guaranteed by the Fourth Amendment would be seriously circumscribed.\textsuperscript{203}

The Supreme Court has stressed that another crucial determinant of a search's or seizure's subjective intrusiveness is the degree of discretion wielded by those conducting it.\textsuperscript{204} As previously noted, a search
or seizure at a drunk driving roadblock necessitates a broad range of discretionary decisions regarding investigatory techniques.\textsuperscript{205} Sobriety checkpoint investigations are not as susceptible to such routine, uniform administration as are Border Patrol checkpoints. To make a meaningful assessment of a driver's sobriety, the police officer at a drunk driving roadblock has to tailor the nature, scope, and duration of the investigation to the particular driver. What types of observations to make, what—if anything—the driver should be asked to say or do, what constitutes sufficient cause to trigger further investigation, and what the scope of any such protracted investigation should be are inherently discretionary determinations.

The inevitably central role played by the discretion of officers conducting sobriety checkpoints is manifest in the fact that the Michigan program's "Guidelines" contain no specific criteria for making any of these essential determinations.\textsuperscript{206} Although the initial roadblock stop may be uniform and automatic, every subsequent investigatory decision requires discretion.

The Supreme Court previously has recognized that an investigation should be deemed subjectively intrusive if its targets feel singled out for special treatment.\textsuperscript{207} Accordingly, the fact that only some individuals initially stopped at roadblocks will be subjected to more protracted searches and seizures is an added reason why drunk driving roadblock investigations should rank high on the subjective intrusiveness scale.\textsuperscript{208}

\begin{itemize}
  \item \textsuperscript{205} See supra notes 39-40 and accompanying text.
  \item \textsuperscript{206} See GUIDELINES, supra note 40 (quoting relevant portions of Guidelines).
  \item \textsuperscript{207} In United States v. Ortiz, 422 U.S. 891 (1975), the Court invalidated automobile searches conducted by Border Patrol agents at border checkpoints for the purpose of detecting illegal aliens. Although all cars were stopped, only some randomly selected cars were searched. Because motorists were subjected to investigations of varying length and scope, the Court viewed these investigations as subjectively intrusive, likening them to the random Border Patrol stops invalidated in United States v. Brignoni-Ponce, 422 U.S. 873 (1975). See Ortiz, 422 U.S. at 895 ("Where only a few are singled out for a search . . . motorists may find the searches especially offensive."). But see Martinez-Fuerte, 428 U.S. at 563 (Court authorized Border Patrol agents randomly to refer some motorists who had been stopped at border checkpoint to "secondary inspection area" for more extensive questioning, although not for the vehicle searches at issue in Ortiz).
  \item \textsuperscript{208} Along with other forms of discretionary police power, the power to conduct drunk driving roadblock investigations can be exercised in an invidiously discriminatory fashion. As Professor Anthony Amsterdam has noted, "The dangers of abuse of a particular power are, certainly, a pertinent consideration in determining whether the power should be allowed in the first instance." Amsterdam, Perspectives on the Fourth Amendment, 58 MINN. L. REV. 349, 435 (1974). Of particular significance for the sobriety checkpoint issue, he stated:
    A . . . compelling case can be made, obviously, for the rule that motor-vehicle stoppings without probable cause are altogether impermissible because the danger of abuse of the license-check pretext far outweighs the need of the police to apprehend
\end{itemize}
Sobriety checkpoints also are more subjectively intrusive than previously approved suspicionless searches and seizures because they aim to deter crime and apprehend criminals. As the Court has recognized, an individual who undergoes a search or seizure will reasonably experience greater concern or fright when its purpose is to enforce the criminal law than when its purpose is to enforce an administrative scheme.209

The argument that sobriety roadblocks are not subjectively intrusive cannot derive support from any asserted public approval of such measures. As Justice Brennan declared in his Sitz dissent:

I would hazard a guess that today's opinion will be received favorably by a majority of our society, who would willingly suffer the minimal intrusion of a sobriety checkpoint stop in order to prevent drunken driving. But consensus that a particular law enforcement technique serves a laudable purpose has never been the touchstone of constitutional analysis. . . . "Moved by whatever momentary evil has aroused their fears, officials—perhaps even supported by a majority of citizens—may be tempted to conduct searches that sacrifice the liberty of each citizen to assuage the perceived evil. But the Fourth Amendment rests on the principle that a true balance between the individual and society depends on the recognition of 'the right to be let alone—the most comprehensive of rights and the right most valued by civilized men.'"210

For the reasons just explained, the Sitz majority understated both the objective and subjective components of the intrusiveness of sobriety checkpoint searches and seizures as experienced by a reasonable driver undergoing such a search and seizure. The Sitz majority further diminished the actual intrusiveness of these searches and seizures by focusing on the experience of a single driver undergoing only the initial inspection. Surely it would be at least equally valid to measure the intrusiveness of these roadblocks in terms of the aggregate impact upon the numerous drivers detained in toto, as the Court itself has done in previous decisions concerning suspicionless searches and seizures.211

unlicensed drivers not observed to be violating other traffic laws or driving unsafely.

Id. at 436; accord Martinez-Fuerte, 428 U.S. at 559 (in explaining why Brignoni-Ponce had invalidated Border Patrol's discretionary, suspicionless car stops and investigations, the Court noted that "[t]here also was a grave danger that such unreviewable discretion would be abused by some officers in the field").

209. See, e.g., Camara v. Municipal Court, 387 U.S. 523, 530 (1967) (administrative inspection may be "a less hostile intrusion than the typical policeman's search for the fruits and instrumentalities of crime").


211. See Martinez-Fuerte, 428 U.S. at 558-59 (1976) ("In Brignoni-Ponce we recognized
Indeed, given the majority's method of evaluating the effectiveness side of the balance, the Court is required to consider the intrusiveness aspect from a commensurately collective perspective. On the side of the state interest, the majority addressed the overall, nationwide drunk driving problem, not just the gravity of the drunk driving problem associated with a single driver. Likewise, the Court weighed the effectiveness of roadblocks in terms of the potential aggregate impact of a complete roadblock operation, not just the limited impact of stopping a single driver. The Court's weighing of incommensurables plainly tips the balance artificially in favor of roadblocks.

The Sitz Court's failure to consider the collective costs that drunk driving roadblocks impose on individual liberty and privacy is only one example of its failure to consider a whole range of costs that should weigh into a fair fourth amendment balance. For example, the Court did not take account of the fact that sobriety checkpoint searches and seizures may have adverse consequences upon the very societal law enforcement interests that routinely are cited as justifications for such searches and seizures. Specifically, the Sitz majority neglected the fact that these massive searches and seizures may undermine individuals' respect for the legal system. The Court has noted that "[i]ndiscriminate application" of the exclusionary rule "may well

212. Compare Sitz, 110 S. Ct. at 2485-86 ("Drunk drivers cause an annual death toll of over 25,000 and in the same time span cause nearly one million personal injuries and more than five billion dollars in property damage.") (citations omitted) with id. at 2488 (considering "the degree of intrusion upon individual motorists who are briefly stopped").


The . . . most common fallacy in "balancing" is to place on one side the entire, cumulated "interest" represented by the state's policy and compare it with one individual's interest in freedom from the specific intrusion on the other side . . . . The semantic "balance" looks different when it matches the freedom of thousands of citizens from being stopped and questioned by police officers against the chance that one or a few will admit to a . . . violation.

Id. at 881, 618 P.2d at 441-42.

214. In his famous dissent in Olmstead v. United States, 277 U.S. 438, 485 (1928) (overruled by Katz v. United States, 389 U.S. 347 (1967)), Justice Brandeis declared, in this much-quoted passage: "Our Government is the potent, the omnipresent, teacher. For good or for ill, it teaches the whole people by its example. Crime is contagious. If the Government becomes a law-breaker, it breeds contempt for law; it invites every man to become a law unto himself; it invites anarchy."

For discussion of how the Court's application of the fourth amendment balancing analysis tends to underrate and overlook various costs of searches and seizures, see Strossen, The Fourth Amendment in the Balance: Accurately Setting the Scales Through The Least Intrusive Alternative Analysis, 63 N.Y.U. L. REV. 1173, 1195-1200 (1988).
generate disrespect for the law and administration of justice."\textsuperscript{211} It thus has taken notice of the potential law enforcement cost of enforcing fourth amendment standards—allowing some private lawbreakers to go unpunished. Likewise, it should acknowledge the potential law enforcement cost of not enforcing fourth amendment standards—allowing some governmental lawbreakers to go unpunished.\textsuperscript{216}

This Part of the Article has shown that \textit{Sitz} substantially departed from traditional fourth amendment principles in several important respects. Perhaps the most important departure was \textit{Sitz}'s abandonment of the formerly absolute requirement that searches or seizures for law enforcement purposes be founded on individualized suspicion, rather than evaluated under the flexible balancing test. Part II demonstrates that, in this respect, \textit{Sitz} culminates a recently accelerating trend in the Court's fourth amendment jurisprudence, which violates the amendment's text as well as its intent and historically accepted interpretation.

\textbf{II. \textit{Sitz}: The Culmination of the Court's Trend Toward Allowing Searches and Seizures Absent Individualized Suspicion}

In recent terms, Supreme Court decisions steadily have eroded the scope of the privacy and liberty rights that the fourth amendment protects.\textsuperscript{217} This erosion has characterized every element of fourth amendment jurisprudence, ranging from the definition of a "search" subject to fourth amendment standards,\textsuperscript{218} to the scope of the exclusionary rule regarding evidence obtained in violation of the fourth amendment.\textsuperscript{219} One comprehensive survey of these developments succinctly captured them in its title, \textit{The Incredible Shrinking Fourth Amendment}.\textsuperscript{220}

\begin{itemize}
\item \textsuperscript{216} See Barnett, \textit{Resolving the Dilemma of the Exclusionary Rule: An Application of Restitutive Principles of Justice}, 32 Emory L.J. 937, 983 (1983) (referring to the goal of achieving "a society free of crimes committed by any person, whether that person is in uniform or not").
\item \textsuperscript{217} Some ideas discussed in this Part of the Article were previously explored in Strossen, \textit{supra} note 214.
\item \textsuperscript{218} See, e.g., INS v. Delgado, 466 U.S. 610 (1984) (individual questioning of employees regarding their citizenship did not constitute seizures under the fourth amendment).
\item \textsuperscript{219} See, e.g., United States v. Leon, 468 U.S. 897 (1984) (exclusionary rule should not be applied to prevent use of evidence obtained by a search warrant later deemed invalid when officers reasonably relied on warrant and when magistrate was detached and neutral).
\end{itemize}
Sitz marks the apogee—or, more accurately, the nadir—of an especially important aspect of the Court's continuing assault on the fourth amendment: its evisceration of the central, traditional requirement that any search or seizure be based upon at least some degree of individualized suspicion that the targeted individual has committed, or is about to commit, a crime. The rapid erosion of this established fourth amendment doctrine—and its replacement by a manipulable balancing test—is highlighted by comparing the Sitz Court's almost casual dismissal of the argument that roadblock searches and seizures should be based on some individualized suspicion with the state of the law on the individualized suspicion requirement before the Court began to develop exceptions to the probable cause requirement slightly more than two decades ago.

A. The Traditional Strict Enforcement of the Probable Cause Requirement

As of 1968, the Supreme Court not only had never recognized a single exception to the principle that any detention of an individual had to be based on some level of individualized suspicion, but also it uniformly had insisted that such particularized suspicion rise to the relatively high level of "probable cause." The Court enforced a categorical rule that "any restraint on the person amounting to a seizure for the purposes of the Fourth Amendment was invalid unless justified by probable cause." No exception was made for personal seizures of any sort, including those deemed to be relatively brief or unintrusive. The Court enforced the same unqualified rule with respect to searches.

The absolute nature of the probable cause requirement was derived not only from the plain language of the fourth amendment,
but also from the intent of the Constitution’s Framers. The Supreme Court unearthed the deep historical roots of the fourth amendment’s probable cause requirement in *Henry v. United States*:225

The requirement of probable cause has roots that are deep in our history. The general warrant, in which the name of the person to be arrested was left blank, and the writs of assistance, against which James Otis inveighed, both perpetuated the oppressive practice of allowing the police to arrest and search on suspicion. Police control took the place of judicial control, since no showing of “probable cause” before a magistrate was required. . . .

That philosophy [rebelling against these practices] later was reflected in the Fourth Amendment. And as the early American decisions both before and immediately after its adoption show, common rumor or report, suspicion, or even “strong reason to suspect” was not adequate to support a warrant for arrest. And that principle has survived to this day.226

The conclusion that the fourth amendment requires probable cause as the prerequisite for any search or seizure is supported further by judicial precedent and scholarly exegesis concerning the appropriate relationship between the amendment’s two clauses: the first, or “reasonableness” clause, and the second, or “warrant” clause. Until recently, judges and scholars widely accepted the interpretation that the reasonableness clause was defined, at least in part, by the warrant clause.227

Searches or seizures must comply with fourth amendment standards in terms of both the justification for undertaking them and the manner in which they are executed.228 Under the conventional reading, the initiation of any search or seizure was presumptively unreasonable, and hence unconstitutional, unless it was based upon a warrant and probable cause.229 Neither the warrant nor the probable cause re-

226. *Id.* at 100-01 (footnotes omitted). The *Henry* Court further noted:
   It is important, we think, that this requirement [of probable cause] be strictly enforced, for the standard set by the Constitution protects both the officer and the citizen. If the officer acts with probable cause, he is protected even though it turns out that the citizen is innocent. . . . This immunity of officers cannot fairly be enlarged without jeopardizing the privacy or security of the citizen. *Id.* at 102.
227. *See, e.g., United States v. United States Dist. Court, 407 U.S. 297, 315 (1972) (fourth amendment reasonableness “turns, at least in part, on the more specific commands of the warrant clause”); Wasserstrom, supra note 220, at 281-82 (over past 30 years, during which Supreme Court has issued vast majority of its fourth amendment decisions, this has been the “conventional interpretation”).
228. *See Terry v. Ohio, 392 U.S. 1, 19-20 (1968).*
229. *See Wasserstrom, supra note 220, at 282.*
requirement could be excused unless the search or seizure fit within one of the few "jealously and carefully drawn" exceptions that the Supreme Court had carved out from each. In addition to being commenced in accordance with the warrant clause requirements, the search or seizure also had to comply with the reasonableness clause in terms of its execution.231

The principal alternative to the "conventional interpretation," the "general reasonableness" theory, holds that the two clauses impose a single, unitary, and overarching standard of reasonableness under which the existence of probable cause or a warrant is simply a constituent factor. In its classic formulation, this test turns "upon the facts and circumstances—the total atmosphere of the case."232 Between 1950 and 1969, the Court's rulings permitted warrantless searches or seizures that were deemed to be "reasonable."233 During this period, however, the Court continued to enforce the fourth amendment's probable cause requirement strictly.234

The fourth amendment's language and history give rise to strong arguments that even if a warrantless search or seizure could be deemed constitutionally reasonable, a search or seizure lacking probable cause could not be. If the police seek a warrant to conduct a search or seizure, the fourth amendment plainly bars the judge from issuing it absent probable cause. Accordingly, if the police could conduct a warrantless search absent probable cause on the ground that it is "reasonable," the police would have more authority to conduct searches and seizures than judges have to authorize them. This result inappropriately inverts the established relationship between the police and the courts in fourth amendment law.235

Notwithstanding the powerful arguments that probable cause is an indispensable element of any constitutionally-commenced search or seizure, in recent years the Court has supplanted the probable cause requirement with the same type of general reasonableness standard

232. United States v. Rabinowitz, 339 U.S. 56, 66 (1950) (overruled by Chimel v. California, 395 U.S. 752, 768 (1969)); see Amsterdam, supra note 208, at 394 (characterizing this test "as the nadir of fourth amendment development").
235. See Wong Sun v. United States, 371 U.S. 471 (1963). In discussing warrantless arrests, the Wong Sun Court noted that "[w]hether or not the requirements of reliability and particularity of the information on which an officer may act are more stringent where an arrest warrant is absent, they surely cannot be less stringent than where an arrest warrant is obtained." Id. at 479.
that it previously used to assess compliance with the fourth amendment's warrant requirement. Just as the former version of a fourth amendment "reasonableness" test has been discredited for dishonoring the fourth amendment's text, intent, and history, the newer incarnation of "reasonableness" should be rejected for similar reasons. This conclusion was supported by Justice Felix Frankfurter, "who more than any other . . . Justice[] sought the fourth amendment's meaning in its history." He pointed out that the warrant and probable cause clause would have been sufficient to counter the odious general warrants that so angered the American colonists and at which the fourth amendment was principally aimed. The Framers, he therefore concluded, must have added the reasonableness clause to expand—not to diminish—the protections afforded by the warrant and probable cause clause.

Until recently, the Court enforced the traditional, absolute probable cause requirement in the context of searches and seizures of automobile drivers as strictly as in other contexts. In *Carroll v. United States*, the Court created a motor vehicle exception to the fourth amendment's warrant requirement, on the rationale that it may not be "practicable to secure a warrant because the vehicle can be quickly moved out of the . . . jurisdiction." The Court, however, never has recognized an automobile exception to the fourth amendment's probable cause requirement. To the contrary, *Carroll* itself repeatedly stressed that automobile searches and seizures must be based upon probable cause. The *Carroll* opinion stated, for example, in words that are equally applicable to sobriety checkpoint searches and seizures:

It would be intolerable and unreasonable if a prohibition agent were authorized to stop every automobile on the chance of finding liquor, and thus subject all persons lawfully using the highways to the inconvenience and indignity of such a search. . . . [T] hose lawfully within the country, entitled to use the public highways, have a right

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237. Amsterdam, supra note 208, at 397.

238. Id. at 396.

239. Id. at 396-97 (citing *United States v. Rabinowitz*, 339 U.S. 56, 70 (1950) (Frankfurter, J., dissenting)).

240. 267 U.S. 132 (1925) (involving Prohibition agent's search for and seizure of liquor contained in automobile).

241. Id. at 153.
to free passage without interruption or search unless there is known to a competent official authorized to search, probable cause for believing that their vehicles are carrying contraband or illegal merchandise.242

The Supreme Court repeatedly has reaffirmed Carroll’s insistence that searches and seizures of automobiles, or their occupants, be based on probable cause.243 Until 1968, because of the Court’s absolute insistence that any detentions of any individuals—including automobile drivers—be predicated on probable cause, it clearly would have held that drunk driving roadblock investigations were per se unconstitutional. Even if the police detained only those motorists whom they had reasonable suspicion were intoxicated, traditional principles would have invalidated detentions not founded on the more demanding probable cause standard. The alleged effectiveness and intrusiveness of roadblock searches and seizures—the factors informing the Court’s current balancing test—would have been constitutionally irrelevant.

In stark contrast to the pre-1968 analysis, in Sitz not a single Justice—not even one of the three dissenters—so much as addresses the possibility that these searches and seizures should have been founded on probable cause, let alone endorses such a conclusion. The Sitz Court’s unanimous disregard of the probable cause concept dramatically demonstrates the rapid devaluation that this longstanding central fourth amendment requirement has undergone in the last two decades.

B. The Court’s Probable Cause Exceptions and Sobriety Checkpoints

Supreme Court Justices, as well as scholars, repeatedly have decried the confused state of fourth amendment law.244 This confusion

242. Id. at 153-54.
243. For example, in Brinegar v. United States, 338 U.S. 160 (1949), the Court stated: [T]he citizen who has given no good cause for believing he is engaged in [crime] is entitled to proceed on his way [driving on public highways] without interference. . . . [I]t is not true] that every traveler along the public highways may be stopped and searched at the officer's whim, caprice, or mere suspicion. Id. at 177 (footnote omitted). Furthermore, in Almeida-Sanchez v. United States, 413 U.S. 266 (1973), the Court noted that: [T]he Carroll doctrine does not declare a field day for the police in searching automobiles. Automobile or no automobile, there must be probable cause for the search. As Mr. Justice White wrote for the Court in Chambers v. Maroney [involving an automobile search]: "In enforcing the Fourth Amendment's prohibition against unreasonable searches and seizures, the Court has insisted upon probable cause as a minimum requirement for a reasonable search permitted by the Constitution."
Id. at 269-70 (footnote and citation omitted).
244. See, e.g., Chapman v. United States, 365 U.S. 610, 618 (1961) (Frankfurter, J., concurring in judgment) (“The course of true law pertaining to searches and seizures, as enunciated here, has not—to put it mildly—run smooth.”); Amsterdam, supra note 208, at
pervades the various cases that, in the past quarter-century, have recognized exceptions to the previously absolute probable cause requirement. These cases employ differing analytical approaches and rely on divergent rationales. Moreover, because many of these cases do not articulate a specific rationale, one must be inferred from the facts presented. The following analysis of these cases attempts to place them within an overall framework that is not necessarily evident from a review of the individual opinions.

The effort to impose some order on the chaos of Supreme Court decisions that recognize exceptions to the probable cause requirement is as important as it is difficult. It illuminates the pattern in the Court’s departure from the strict probable cause requirement, highlights Sitz’s role within that pattern, and suggests possible future directions.

The Court’s decisions permitting searches or seizures without probable cause can be grouped into three major categories. Listed in an order that reflects when the Court first recognized each of them, these categories are: suspicionless administrative inspections, first approved in *Camara v. Municipal Court* in 1967; investigative detentions based on “reasonable suspicion,” first allowed in *Terry v. Ohio* in 1968; and searches or seizures based on reasonable suspicion that were conducted for “special needs, beyond the ordinary need for criminal law enforcement,” first authorized in *New Jersey v. T.L.O.* in 1985.

Each category originally was defined relatively precisely and was justified in terms of a specific set of criteria that distinguished it from most searches and seizures. Consistent with the Court’s continued evisceration of traditional fourth amendment requirements, over time the Court has redefined each category more broadly and has failed to confine each exception to the originally elaborated criteria. Nonetheless, these three categories still provide a useful, coherent framework for assessing the Court’s departures from the probable cause standard. An examination of each of the three categories of searches and seizures not based on probable cause makes clear that drunk driving roadblock searches and seizures fit within none of them.

349 (“For clarity and consistency, the law of the fourth amendment is not the Supreme Court’s most successful product .... In a badly fractioned recent decision, one of the few passages that commanded a majority of the Court conceded ‘it would be nonsense to pretend that our decision today reduces Fourth amendment law to complete order and harmony.’”); Dworkin, *Fact Style Adjudication and the Fourth Amendment: The Limits of Lawyering*, 48 IND. L.J. 329, 329 (1973) (“The fourth amendment cases are a mess!”).

In its two 1989 decisions upholding suspicionless drug-testing of certain employees, the Court authorized further significant encroachments on the probable cause requirement beyond the intrusions of these previously recognized categories. It thus took a long additional step toward eliminating the previously absolute probable cause requirement. Yet even the expanded rationale of the drug-testing cases does not justify the suspicionless searches and seizures upheld in Sitz.

(I) The Administrative Inspection Exception

In 1967, the Court for the first time approved a search or seizure that was lacking in any individualized suspicion. In the companion cases of Camara v. Municipal Court and See v. City of Seattle, the Court held that administrative agents could conduct routine building inspections to enforce health and safety codes, even if investigators did not suspect that any particular building contained code violations.

These suspicionless searches of premises were substantially less threatening to the privacy and liberty values protected by the fourth amendment than the suspicionless seizures and searches of individuals upheld in Sitz. In validating what it nonetheless correctly recognized as a deviation from the cardinal fourth amendment requirement of individualized suspicion, the Camara opinion stressed both the non-personal nature of the inspections at issue and two further principal factors that differentiated them from most other searches and seizures: “the unanimous agreement among experts” that they constituted “the only effective way” to enforce the codes at issue, and the fact that they were not “aimed at discovery of evidence of crime.”

Subsequent to Camara, the Court has approved several additional types of suspicionless searches and seizures under the administrative inspection exception. All of these were characterized by all three of the special factors stressed in Camara. In contrast, sobriety check-

250. 387 U.S. 541 (1967).
251. See, 387 U.S at 546; Camara, 387 U.S. at 538.
252. Camara, 387 U.S. at 555-57.
point searches and seizures exhibit none of the special features that the Court cited to justify its departure from the individualized suspicion requirement in Camara.254

(2) The Terry Exception

In 1968, the Supreme Court in its landmark decision in Terry v. Ohio255 created a limited exception to the then universal rules requiring that any detention of a person, as well as any search or seizure for law enforcement purposes, be based on probable cause.256 It is an understatement to characterize this as a "major development in Fourth Amendment jurisprudence."257

Under the Terry exception, if a police officer has a "reasonable suspicion" that an individual is armed and dangerous and that suspicion is grounded in "specific and articulable facts" and "rational inferences from those facts," then the officer "is entitled for the protection of himself and others in the area to conduct a carefully limited search of the [suspect's] outer clothing . . . in an attempt to discover weapons which might be used to assault him."258 Since 1968, the Supreme Court has permitted brief "Terry-type stops" (often referred to as "investigative detentions") based upon reasonable suspicion in several additional circumstances.259
As Justice Douglas emphasized in his forceful Terry dissent, that decision represented a dramatic departure from the then-absolute requirement that detentions of individuals, which invade particularly sacrosanct privacy and liberty rights, must be based on the relatively exacting probable cause standard. Nonetheless, from today’s perspective, it is important to recognize how insubstantial Terry’s departure was compared to the much greater departures that have ensued.

Terry emphasized that the “demand for specificity in the information upon which police action is predicated”—regardless of whether such information is judged against the probable cause standard or the reasonable suspicion standard—“is the central teaching of this Court’s Fourth Amendment jurisprudence.” The Court noted that “anything less” than this objective standard “would invite intrusions upon constitutionally guaranteed rights based on nothing more substantial than inarticulate hunches, a result this Court has consistently refused to sanction.” Under Terry’s ruling, “courts still retain[ed] their traditional responsibility to guard against police conduct which . . . trenches upon personal security without the objective evidentiary justification which the Constitution requires.”

260. As Justice Douglas noted in his dissent in Terry, “Until the Fourth Amendment . . . is rewritten, the person and the effects of the individual are beyond the reach of all government agencies until there are reasonable grounds to believe (probable cause) that a criminal venture has been launched or is about to be launched.” Terry, 392 U.S. at 39 (Douglas, J., dissenting); see also id. at 38 (quoting Brinegar v. U.S., 338 U.S. 160, 175 (1949)): Only [the concept of probable cause] draws a meaningful distinction between an officer’s mere inkling and the presence of facts within the officer’s personal knowledge which would convince a reasonable man that the person seized has committed, is committing, or is about to commit a particular crime. “In dealing with probable cause, . . . as the very name implies, we deal with probabilities. These are not technical; they are the factual and practical considerations of everyday life on which reasonable and prudent men, not legal technicians, act.”

261. Terry, 392 U.S. at 21 n.18.


263. Terry, 392 U.S. at 22.

264. Id. at 15.
ther stressed that judicial enforcement of this central fourth amendment requirement was particularly important in the detention and investigation of an individual—the very kind of search or seizure involved in drunk driving roadblocks.265

Since 1968, the Court has expanded the narrow Terry exception to the probable cause requirement in two ways: to uphold detentions that were substantially less “brief” than the one involved in Terry,266 and to uphold detentions that were for purposes beyond the protective aim of Terry’s pat-down search for weapons.267 Although these expansions of the Terry doctrine are problematic because they erode fourth amendment rights,268 none of the cases that broadened Terry’s limited holding abrogated its requirement that any detention of an individual for law enforcement purposes be based on reasonable suspicion. Thus, all post-Terry investigative detention cases have honored its enforcement of the fourth amendment’s “central teaching” that police actions must be predicated upon specific, objective information.

265. This inestimable [fourth amendment] right of personal security belongs as much to the citizen on the streets of our cities as to the homeowner closeted in his study to dispose of his secret affairs. For, as this Court has always recognized, “No right is held more sacred, or is more carefully guarded, by the common law, than the right of every individual to the possession and control of his own person, free from all restraint or interference of others, unless by clear and unquestionable authority of law.

Id. at 8-9 (quoting Union Pac. Ry. v. Botsford, 141 U.S. 250, 251 (1891)).

266. See United States v. Sharpe, 470 U.S. 675, 682-88 (1985) (upheld 20-minute investigative detention, citing Terry); see id. at 702-03 (Brennan, J., dissenting):

The respondent William Sharpe and his passenger were pulled over to the side of the highway, concededly without probable cause, and held for more than 30 minutes, much of that time in the back seat of a police cruiser, before they ultimately were arrested and informed of the charges against them. In the meantime, the respondent Donald Savage was stopped one-half mile down the road, also according to the Court without probable cause. He was ordered out of his pickup truck at gunpoint, spread-eagled and frisked, and questioned by the detaining patrolman, Kenneth Thrasher, about a suspected shipment of marijuana in his vehicle. Although Savage repeatedly asked to be released, Thrasher held him for almost 15 minutes until DEA Agent Luther Cooke... could arrive... As Thrasher later conceded, Savage “was under custodial arrest” the entire time.

267. See United States v. Hensley, 469 U.S. 221, 227, 229 (1985) (first-time application of Terry to justify investigative detention, absent probable cause, because detained individual was suspected of involvement in completed crime; previous cases allowed investigative detentions without probable cause only if police suspected detained individual was about to commit a crime, or was committing a crime at the moment of the stop); Adams v. Williams, 407 U.S. 143 (1972) (Terry applied to justify detention of an individual suspected of possessing gun illegally, not because he was suspected of being armed and dangerous).

268. See Sharpe, 470 U.S. at 720 (Brennan, J., dissenting) (“[T]he Court has moved a step or two further in what appears to be ‘an emerging tendency... to convert the Terry decision into a general statement that the Fourth Amendment requires only that any seizure be reasonable.’”) (quoting United States v. Place, 462 U.S. 696, 721 (1983) (Blackmun, J., concurring in judgment)).
Terry and its progeny do not authorize the mass suspicionless detentions and investigations that occur at sobriety checkpoints because sobriety checkpoints violate the fundamental fourth amendment rule of specificity in the all-important context of invading personal security. Motorists are detained and investigated without particularized suspicion. In effect, they are presumptively subject to detention until the police are satisfied that they are not driving under the influence of alcohol.

(3) The "Special Needs" Exception

In its 1985 decision in New Jersey v. T.L.O., the Court created yet another exception to the probable cause requirement that since has been invoked in two more cases. T.L.O. held that a teacher or school official may initiate a search of a student's property "when there are reasonable grounds for suspecting that the search will turn up evidence that the student has violated or is violating either the law or the rules of the school." In short, the Court excused the probable cause requirement for student searches by school authorities and substituted a reasonable suspicion requirement. In so holding, the Court stressed the special characteristics of the school environment, which it said required teachers and administrators to have flexibility in maintaining order and discipline. The Court also emphasized that it was not authorizing "searches conducted by school officials in conjunction with or at the behest of law enforcement agencies" to be commenced on less than probable cause.

Between 1985 and 1989, the Court applied what has been termed T.L.O.'s "special needs" rationale to two additional cases. In both cases, as it did in T.L.O., the Court stressed that the government had a "special need[]" to conduct a search or seizure without having to satisfy the probable cause requirement. As in T.L.O., in both of

269. Justice Stevens said as much in his Sitz dissent. See supra note 134.
271. Id. at 342.
272. Id. at 339-40.
273. Id. at 341 n.7.
274. Griffin v. Wisconsin, 483 U.S. 868 (1987) (authorizing probation officer's search of probationer's home if there are "reasonable grounds" to believe that contraband is present); O'Connor v. Ortega, 480 U.S. 709 (1987) (per curiam) (allowing search of public employee's office by his employer for noninvestigatory, work-related purposes, as well as for investigations of work-related misconduct, based on reasonable suspicion).
275. See Griffin, 483 U.S. at 878 (need to preserve "deterrent effect of the supervisory arrangement" of probation); O'Connor, 480 U.S. at 725 (need to preserve "efficient and proper operation of the workplace").
these cases the Court emphasized that the search or seizure was not being conducted for ordinary law enforcement purposes and required that the commencement of the search or seizure be justified by reasonable suspicion.

The "special needs" exception seeks to justify deviations from constitutional principles on avowedly pragmatic grounds and therefore is subject to criticism. Even putting aside this principled objection to the entire category, the exception still could not justify drunk driving roadblock searches and seizures. As the name suggests, the crucial identifying feature of searches and seizures in the "special needs" category is that they were aimed at serving "special," non-law enforcement needs.

(4) The Drug-testing Cases

_National Treasury Employees Union v. Von Raab_ and _Skinner v. Railway Labor Executives' Association_ the Court's 1989 companion cases upholding mass, suspicionless drug-testing of employees in certain safety-sensitive positions, cannot be included in any of the previously recognized categories. These highly intrusive searches and seizures do not satisfy the stricter criteria that the Court had enu-

276. _See Griffin_, 483 U.S. at 873 ("Although we usually require that a search be supported by probable cause, . . . we have permitted exceptions when 'special needs, beyond the normal need for law enforcement, make the warrant and probable-cause requirement impracticable.'"); _O'Connor_, 480 U.S. at 725 ("'[S]pecial needs, beyond the normal need for law enforcement make the . . . probable-cause requirement impracticable, . . . for legitimate work-related, noninvestigatory intrusions as well as investigations of work-related misconduct.'") (both quoting _T.L.O._, 469 U.S. at 351 (Blackmun, J., concurring in judgment)).

277. _See Griffin_, 483 U.S. at 875, 880 (tip to police officer that probationer was storing guns in his apartment provided reasonable suspicion); _O'Connor_, 480 U.S. at 726 (charges of specific financial improprieties and sexual misconduct gave government employer reasonable suspicion of employee's misconduct).

278. _See Skinner v. Railway Labor Executives' Ass'n_, 109 S. Ct. 1402, 1424 (1989) (Marshall, J., dissenting) ("Constitutional requirements like probable cause are not fair-weather friends, present when advantageous, conveniently absent when 'special needs' make them seem not."); _see also id._ at 1423 ("The process by which a constitutional 'requirement' can be dispensed with as 'impracticable' is an elusive one to me.").

279. _See id._ at 1414-15 (majority opinion) (citation omitted) (emphasizing that probable cause requirement is enforced with particular strictness in criminal cases, and describing "special needs," apart from criminal law enforcement, involved in employee drug-testing program); _O'Connor_, 480 U.S. 709, 725 (1987) (citation omitted) (stressing that "special needs, beyond the normal need for law enforcement, make the . . . probable-cause requirement impracticable" for legitimate work-related, noninvestigatory intrusions as well as investigations of work-related misconduct." (quoting _T.L.O._ v. New Jersey, 469 U.S. at 351)).


merated when it previously had permitted other types of searches and seizures to proceed on less than probable cause.

The drug tests upheld in *Von Raab* and *Skinner* did not share two of the three special *Camara* criteria circumscribing permissible administrative inspections: they were highly personal in nature, and many experts forcefully contended that they were not even an effective way to enforce the drug-free employment standards at issue, let alone the only effective way to do so. The only *Camara* factor that also applied to the suspicionless drug tests in *Von Raab* and *Skinner* was that these drug tests, like the building inspections, were not aimed at discovering evidence of crime.

The drug tests likewise did not satisfy the standards for a *Terry*-type search insofar as they were full-fledged, highly intrusive searches that were not based on reasonable suspicion. Similarly, these tests were significantly distinguishable from the "special needs" cases because they were aimed at persons rather than property and were not based on reasonable suspicion. In short, the Court’s 1989 drug-testing decisions substantially expanded the Court’s previously established boundaries on permissible searches not founded on probable cause. In these two cases, as Justice Marshall said in his *Skinner* dissent, "[t]he Court [took] its longest step yet toward reading the probable-cause requirement out of the Fourth Amendment."283

As long a step as *Von Raab* and *Skinner* were toward the bottom of the slippery slope where the probable cause requirement is completely read out of the fourth amendment, *Sitz* carried that journey one long step further. The drug-testing cases at least shared with the administrative inspection cases the fact that the searches and seizures were not aimed at discovering evidence of crime. Indeed, in both drug-testing cases, the Court repeatedly emphasized this factor. Yet, in *Sitz*, the Court expressly declined to distinguish *Von Raab* on the basis of the criminal law enforcement purpose served by drunk driving roadblock searches and seizures. Consequently, none of the special factors that the Court cited to justify its departure from the individualized suspicion requirement in *Camara* characterized the roadblock searches and seizures in *Sitz*.

Likewise, even if the drug-testing cases could be viewed as legitimately expanding the boundaries of the "special needs" exception

282. See id. at 1431-32 (Marshall, J., dissenting).
283. Id. at 1423. The majority's rewriting of the amendment's plain language was vividly manifested in its purported "quotation" of that language; as Justice Marshall pointed out, "[t]he majority's recitation of the [Fourth] Amendment, remarkably" omitted the warrant and probable cause clause altogether.
284. See *Skinner*, 109 S. Ct. at 1407, 1415; *Von Raab*, 109 S. Ct. at 1389, 1390.
to permit suspicionless, personal searches for special, non-law-enforcement purposes, this expanded "special needs" category still would not encompass drunk driving roadblock searches and seizures because they are aimed at ordinary law enforcement, not at "special needs."

(5) Synthesizing Sitz and the Previous Exceptions

Table I is designed to illustrate the interrelationships among the following categories of cases: those in which the Court authorized searches or seizures lacking in probable cause before 1989, the 1989 drug-testing cases, and Sitz. The Table lists the five principal factors that the Court historically has stressed—in differing constellations—when upholding various searches and seizures not based on probable cause. First, there are the three major factors cited in Camara: (1) the non-personal nature of the search (designated on Table I as "Non-personal"); (2) its aim at "special," non-law-enforcement needs (designated on Table I as "Special needs"); and (3) its essentiality for pursuing those needs (designated on Table I as "Necessity"). Additionally, in upholding various other kinds of searches or seizures not based on probable cause, the Court has relied upon two other factors: that the search or seizure was relatively unintrusive, in that it was less extensive and of briefer duration than a full-fledged search or arrest (designated on Table I as "Brief"); and that the search or seizure was based on "reasonable suspicion" (designated on Table I as "Suspicion").

**TABLE I**

Factors Justifying Exceptions to Probable Cause Requirement

<table>
<thead>
<tr>
<th>Exceptions</th>
<th>Brief</th>
<th>Non-Personal</th>
<th>&quot;Special Needs&quot;</th>
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<th>Suspicion</th>
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<td>X</td>
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<td></td>
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<tr>
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<td>X 290</td>
<td>X</td>
<td></td>
<td></td>
<td>X</td>
</tr>
<tr>
<td>Von Raab &amp; Skinner 291</td>
<td></td>
<td>X</td>
<td></td>
<td></td>
<td></td>
</tr>
</tbody>
</table>

286. The exceptions are listed in chronological order, according to when the Supreme Court first recognized them.
287. See supra notes 249-254 and accompanying text.
288. See supra notes 255-269 and accompanying text.
289. See supra notes 270-279 and accompanying text.
290. All of these cases involved searches of property rather than persons. In T.L.O.,
This graphic presentation of the Court's sprint down the slippery slope, from almost always enforcing the probable cause requirement to almost always excusing it, makes certain patterns clear.

In 1967 in *Camara* and *See*, the Court first authorized an exception to the individualized suspicion requirement, and it did so in the context of full-fledged searches. Those searches, however, were not personal in nature, and were characterized by two more of the five special factors. In 1968 in *Terry*, the Court first made an exception to the probable cause requirement with respect to searches and seizures that were both personal in nature and aimed at enforcing the criminal law. The "stop and frisk" authorized in *Terry*, however, was relatively brief and unintrusive, and was based on reasonable suspicion.

Not until 1985 in *T.L.O.* did the Court waive the requirement that a search or seizure not founded on probable cause must be absolutely essential to the governmental end in question. Even so, the search and seizure in *T.L.O.* itself, as well as in the subsequent "special needs" cases, exhibited three other exceptional features: they were non-personal in nature, they were not aimed at law enforcement, and they were based on reasonable suspicion.

After *T.L.O.*, it was clear that the Court did not regard any single factor as an absolute prerequisite for overlooking the fourth amendment's probable cause requirement. The Court also, however, had not excused the probable cause requirement on the basis of any single factor alone, unless the search or seizure was further characterized by two other special criteria. Until it decided *Von Raab* and *Skinner* in 1989, the Court always had insisted that searches and seizures not founded on probable cause display at least three of the special features summarized above.

However, the Court's rule appeared to authorize searches of students themselves. See *New Jersey v. T.L.O.*, 469 U.S. 325, 341-42 (1985) ("[A] search of a student by a . . . school official will be 'justified at its inception' when there are reasonable grounds for suspecting that' the search will turn up evidence that the student has violated the law or school rules.").

291. See supra notes 280-285 and accompanying text.

292. In his concurring opinion in *T.L.O.*, Justice Blackmun formulated a rationale, which has been quoted by the majority in every subsequent "special needs" case, stressing the impracticability of complying with the ordinary probable cause requirement. See *T.L.O.*, 469 U.S. at 351 (Blackmun, J., concurring in judgment). Justice Blackmun himself interprets this criterion as tantamount to the strict necessity standard enforced in the cases involving administrative inspections and *Terry*-type detentions. Id. at 352; see O'Connor v. Ortega, 480 U.S. at 744 (Blackmun, J., dissenting) (The Court should dispense with the probable cause requirement "only when it is satisfied that there is no alternative in the particular circumstances."). Nevertheless, the Court clearly has not enforced such a strict standard in any "special needs" cases. Instead, it has been satisfied with the government's assertion that compliance with the probable cause requirement would be impracticable.
In other respects as well, *Von Raab* and *Skinner* marked new lows in the Court's descent down the slippery slope, from routine enforcement to routine non-enforcement of the probable cause requirement. Before *Von Raab* and *Skinner*, all searches and seizures of "persons"—as opposed to "houses, papers, or effects"—had to be based on some individualized suspicion. Even if the Court deemed such a search or seizure to be minimally intrusive, as in the *Terry* line of cases, it had to be founded on reasonable suspicion.

*Von Raab* and *Skinner* also made another new exception to a previously absolute individualized suspicion rule. Before these cases, the particularized suspicion rule governed any search or seizure that was justified by "special needs." Thus, these companion drug-testing cases "complete[d] the process begun in *T.L.O.* of eliminating altogether the probable-cause requirement for civil searches—those undertaken for reasons "beyond the normal need for law enforcement.""293

In *Sitz*, the Court extended the *Von Raab/Skinner* waiver of individualized suspicion to criminal searches undertaken for normal law enforcement purposes.

As Table I makes clear, *Von Raab, Skinner*, and *Sitz* each exhibit only one of the five special factors that the Court traditionally deemed a prerequisite for making an exception to the probable cause requirement. In *Von Raab* and *Skinner*, the sole factor is the search or seizure's non-criminal law enforcement purpose; in *Sitz*, it is the relatively unintrusive nature of the search or seizure. Before these three cases, the Court had never authorized an exception to the probable cause requirement on the basis of fewer than three of the special factors.

After *Sitz*, only one more step remains before the Court completely eviscerates the probable cause requirement and excuses it absent any special factors. That step would be taken were the Court to combine its holdings in *Von Raab/Skinner* and *Sitz*, eliminating the requirement that the search or seizure be brief or unintrusive in nature at the same time it eliminates the requirement that the search or seizure be for special, non-criminal law enforcement purposes.

In his *Skinner* dissent, Justice Marshall expressed his fear that the Court would abandon its previous rulings which indicated that a suspicionless search or seizure could not be both highly intrusive and conducted for law enforcement purposes. The Court allowed the drug test results obtained in *Skinner* to be released to law enforcement agencies. As Justice Marshall noted, the *Skinner* Court therefore had in fact sanctioned searches and seizures that were both very intrusive and at

least potentially aimed toward criminal law enforcement.294

Besides the fact that the drunk driving roadblock searches and seizures approved in *Sitz* were relatively unintrusive, they may be distinguishable from other suspicionless searches and seizures in a further respect. Specifically, the *Sitz* opinion stressed the uniform nature of the searches and seizures—involving *every* car that passed through a checkpoint—and the fact that these searches and seizures were conducted pursuant to procedural guidelines promulgated by the State Police Department.295 For these reasons, the sobriety checkpoint searches and seizures did not merely involve the "standardless and unconstrained discretion" that the Court had stressed in invalidating other suspicionless searches and seizures.296

C. The Fourth Amendment After *Sitz*

The preceding section chronicled the Court’s accelerating tendency and present willingness to hold that a search or seizure has been

294. *Id.* at 1431 (citations omitted):

[The Federal Railroad Administration]'s regulations not only do not forbid, but, in fact, appear to invite criminal prosecutors to obtain the blood and urine samples drawn by the FRA and use them as the basis of criminal investigations and trials. . . . This is an unprecedented invitation, leaving open the possibility of criminal prosecutions based on suspicionless searches of the human body.

To be sure, the majority acknowledges . . . the possibility of criminal prosecutions, but it refuses to factor this possibility into its Fourth Amendment balancing process, stating that "the record does not disclose that [the regulations allowing prosecutors to obtain the samples] was intended to be, or actually has been, so used." This demurrer is highly disingenuous. . . . The absence of prosecutions to date—which is likely due to the fact that the FRA’s regulations have been held invalid for much of their brief history—hardly proves that prosecutors will not avail themselves of the FRA’s invitation in the future. . . . [T]he majority’s refusal to restrict the release of test results casts considerable doubt on the conceptual basis of its decision—that the “special need” of railway safety is one “beyond the normal need for law enforcement.”


296. *Id.* at 2487 (quoting Delaware v. *Prouse*, 440 U.S. 648, 661 (1979)); see also Florida v. *Wells*, 110 S. Ct. 1632 (1990) (unanimously holding that the fourth amendment was violated by opening of locked suitcase found in a car during a post arrest inventory search conducted by a Florida Highway Patrol trooper because there was no standard Highway Patrol policy regarding the opening of closed containers encountered during inventory searches).

As discussed above, see *supra* notes 38-40, 189-190 and accompanying text, despite the factors that impose some constraints on the discretion of individual officers conducting roadblock searches and seizures, the range of such discretion still remains enormous. Nevertheless, an individual officer's discretion is still less with regard to the Michigan sobriety checkpoints than it might well be with regard to other law enforcement measures. For example, roadblock stops or other suspicionless searches and seizures could be conducted on a random, rather than a uniform, basis. Any type of random search and seizure, initiated without individualized suspicion and applied non-uniformly, would magnify an individual officer's discretion, thus increasing the threat to fourth amendment values.
constitutionally commenced, even if lacking in any individualized suspicion, so long as it passes a flexible balancing test in which its law enforcement benefits are deemed to outweigh its constitutional rights costs. This trend is part of the Court's larger tendency toward evaluating many fourth amendment issues, as well as many other constitutional issues with balancing tests. All of these tests are marred by significant problems, most of which are beyond the scope of this Article. This section will confine its critique of fourth amendment balancing to an assessment of why, as a matter of fourth amendment principle and precedent, that approach cannot adequately replace the individualized suspicion requirement for determining whether a search or seizure was properly initiated.

Justice Brennan's dissent in Sitz aptly criticized the majority's facile, erroneous assumption that the fourth amendment requires only "reasonableness," measured according to a cost-benefit balancing analysis, as a basis for initiating a search or seizure:

The majority opinion creates the impression that the Court generally engages in a balancing test in order to determine the constitutionality of all seizures .... This is not the case. In most cases, the police must possess probable cause for a seizure to be judged reasonable. Only when a seizure is "substantially less intrusive" than a typical arrest is the general rule replaced by a balancing test .... [O]ne searches the majority opinion in vain for any acknowledgment that the reason for employing the balancing test is that the seizure is minimally intrusive.

Indeed, the opinion reads as if the minimal nature of the seizure ends rather than begins the inquiry into reasonableness. Once the Court establishes that the seizure is "slight," it asserts without explanation that the balance "weighs in favor of the state program." The Court ignores the fact that in this class of minimally intrusive searches, we have generally required the Government to prove that it had reasonable suspicion for a minimally intrusive seizure to be

297. The fourth amendment imposes constitutional standards governing both the inception and the execution of a search or seizure. See supra note 228 and accompanying text.


299. See Aleinikoff, Constitutional Law in the Age of Balancing, 96 YALE L.J. 943 (1987) (discussion of the history of balancing leading to the general acceptance of this methodology as legitimate by the courts today).

300. For a comprehensive critique of fourth amendment balancing, see Strossen, supra note 214.
considered reasonable. Some level of individualized suspicion is a core component of the protection the Fourth Amendment provides against arbitrary government action. By holding that no level of suspicion is necessary before the police may stop a car for the purpose of preventing drunken driving, the Court potentially subjects the general public to arbitrary or harassing conduct by the police. I would have hoped that before taking such a step, the Court would carefully explain how such a plan fits within our constitutional framework.\textsuperscript{301}

It is likely that the majority did not provide the suggested explanation because there is none; its abandonment of the individualized suspicion requirement constitutes a deviation from our constitutional framework. As discussed above,\textsuperscript{302} the absolute "probable cause" standard for initiating searches and seizures not only is enunciated in the plain language of the fourth amendment, but also is supported by historical evidence concerning the Framers' intent and by long-established Supreme Court precedent. These same sources of authority—to which, ironically, Chief Justice Rehnquist and his ideological compatriots often pay obeisance\textsuperscript{303}—establish the illegitimacy of substituting the flexible balancing test for the fourth amendment's probable cause requirement. The Court expressly recognized this fact, for example, in \textit{Dunaway v. New York}:\textsuperscript{304} "For all but... narrowly defined intrusions, the requisite 'balancing' has been performed in centuries of precedent and is embodied in the principle that seizures are 'reasonable' only if supported by probable cause."\textsuperscript{305}

Notwithstanding the powerful arguments that probable cause is an indispensable element of any constitutionally-commenced search or seizure, in recent years the Court has supplanted that requirement with a general reasonableness standard, as measured by a balancing test.\textsuperscript{306} The Court's trend toward evaluating whether searches and seizures were constitutionally initiated by the use of a balancing test parallels its trend toward answering that inquiry in the affirmative, even when

\textsuperscript{301} 110 S. Ct. at 2488-89 (Brennan, J., dissenting) (citations omitted).
\textsuperscript{302} See supra notes 222-227 and accompanying text.
\textsuperscript{303} See supra notes 74-77 and accompanying text.
\textsuperscript{304} 442 U.S. 200 (1979).
\textsuperscript{305} Id. at 214; see also \textit{New Jersey v. T.L.O.}, 469 U.S. 325, 351 (1985) (Blackmun, J., concurring) (citations omitted) (third and fourth brackets in original) (quoting \textit{United States v. Place}, 462 U.S. 696, 722 (1983) (Blackmun, J., concurring)):

"[T]he [Fourth] Amendment does not leave the reasonableness of most [searches and] seizures to the judgment of courts or government officers: the 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." 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.
\textsuperscript{306} See supra notes 81-86 and accompanying text.
the initiation was not based upon probable cause, or even upon any lesser degree of individualized suspicion. That is because evaluation under the fourth amendment balancing test almost always results in upholding the challenged search or seizure.307

Until recently, the Court expressly recognized that a balancing analysis should determine fourth amendment rights only in exceptional circumstances, precisely because of its concern that such analysis inevitably would erode those rights.308 Similarly, most of the Justices continued to espouse the "conventional interpretation" of the fourth amendment, which demanded that traditional searches and seizures, such as full-scale searches309 or arrests,310 be commenced only based on probable cause. In contrast, during the past two decades, the Court increasingly has disregarded the conventional reading and increasingly embraced the "general reasonableness" approach when evaluating police interferences with personal liberty or privacy that it viewed as less intrusive than a traditional arrest or search. An example of one of these less intrusive interferences is the "stop and frisk" evaluated under a balancing test in Terry v. Ohio.311

The Court is rapidly departing from its previous holdings that the constitutionality of commencing a search or seizure should be reviewed

307. See, e.g., Aleinikoff, supra note 299, at 965 ("Balancing in fourth amendment cases has been a vehicle primarily for weakening earlier categorical doctrines restricting governmental power to search and seize."); Greenberg, The Balance of Interests Theory and the Fourth Amendment: A Selective Analysis of Supreme Court Action Since Camara and See, 61 Calif. L. Rev. 1011, 1047 (1973) (practical effect of fourth amendment balancing is diminution of civil liberties "largely because courts seem to accept government rationales for reducing citizen protection without close scrutiny"); Wasserstrom, supra note 220, at 262 (Burger Court "has weakened ... substantive fourth amendment constraints on the police primarily by ... import[ing] the boundlessly manipulable process of cost-benefit balancing"); Note, The Civil and Criminal Methodologies of the Fourth Amendment, 93 Yale L.J. 1127, 1130 n. 17 (1984) (authored by Ronald F. Wright, Jr.) ("While it is logically possible to require probable cause or some higher level of justification in a balancing case, the Court has never done this ... ").

308. For example, in Dunaway v. New York, 442 U.S. 200 (1979), the Court declared:

"The protections intended by the Framers could all too easily disappear in the consideration and balancing of the multifarious circumstances presented by different cases, especially when that balancing may be done in the first instance by police officers engaged in the "often competitive enterprise of ferreting out crime."

Id. at 213 (quoting Johnson v. United States, 333 U.S. 10, 14 (1948)).

309. See, e.g., Winston v. Lee, 470 U.S. 753, 759 (1985) (fourth amendment "generally protects ... against official intrusions up to the point where the community's need for evidence surmounts a specified standard, ordinarily 'probable cause'"). But see supra notes 270-279 and accompanying text (discussing recent "special needs" cases).

310. See, e.g., Hayes v. Florida, 470 U.S. 811, 814-16 (1985) (nonconsensual transportation to police station and detention for fingerprinting was sufficiently like arrest to trigger probable cause requirement); Dunaway, 442 U.S. at 214-16 (probable cause is required before suspect may be transported to station for involuntary investigative detention).

under the balancing test only when it had made threshold findings of exceptional circumstances, such as the unusually important nature of the governmental interest, or the unusually minor nature of the intrusion into individual privacy. Recently, that position has been relegated largely to concurring or dissenting opinions.  

In an especially dramatic departure from traditional fourth amendment principles, on four occasions since 1985 the Court evaluated full-fledged searches and seizures—intrusions that even the majority did not attempt to describe as relatively minor—under a balancing test and allowed these substantial invasions of privacy to proceed on less than probable cause. 313 On one such occasion, when it applied the balancing approach to mass, random drug-testing of certain employees in Von Raab and Skinner, the Court permitted highly intrusive, extensive searches to proceed absent any individualized suspicion whatsoever. 314

Sobriety checkpoint searches and seizures are significantly less intrusive than the drug tests that the Court analyzed under a balancing test in Von Raab and Skinner. Therefore, in evaluating such searches and seizures under a balancing approach, Sitz arguably comport with the Court’s prior holdings that relatively unintrusive searches and seizures should be thus analyzed.

As Justice Brennan noted in Sitz, 315 however, to label a search or seizure relatively unintrusive and, hence, appropriately assessed under a balancing analysis, is to begin the analysis, not to end it. The Sitz majority jumped from its categorization of the sobriety checkpoint searches and seizures as relatively unintrusive directly to the conclusion that they could be initiated without any particularized suspicion. In so doing, the Court omitted an essential intermediate step artic-

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312. See, e.g., O'Connor v. Ortega, 480 U.S. 709, 741 (1986) (Blackmun J., dissenting) ("only when the practical realities of a particular situation suggest that a government official cannot obtain a warrant based upon probable cause without sacrificing the ultimate goals to which a search would contribute, does the Court turn to a 'balancing' test"); New Jersey v. T.L.O., 469 U.S. 325, 352 (1985) (Blackmun, J., concurring) ("The Court's implication that the balancing test is the rule rather than the exception is troubling . . . ."); id. at 356 (Brennan, J., concurring in part and dissenting in part) ("Only after finding an extraordinary governmental interest of this [exigent] kind do we—or ought we—engage in a balancing test to determine if a warrant should nonetheless be required."); United States v. Sharpe, 470 U.S. 675, 690 (1985) (Marshall, J., concurring in the judgment) ("[An investigative] stop must first be found not unduly intrusive before any balancing of the government's interest against the individual's becomes appropriate.").

313. These were the three cases in the "special needs" category, as well as the pair of drug-testing cases. See supra notes 270-285 and accompanying text.

314. See supra notes 280-285 and accompanying text.

ulated in key precedents employing the balancing analysis. The Court should have applied the balancing analysis to determine what level of suspicion should be required to institute these searches and seizures. As Justice Blackmun has explained:

Courts turn to the balancing test only when they conclude that the traditional warrant and probable-cause requirements are not a practicable alternative. Through the balancing test, they then try to identify a standard of reasonableness, other than the traditional one, suitable for the circumstances.\(^ {316} \)

In many past cases, such as Terry, the result of the Court's fourth amendment balancing analysis is a holding that the challenged search or seizure should be commenced based on reasonable suspicion. Similarly, in the three "special needs" cases described above, the conclusion of the Court's balancing analysis was that the searches and seizures at issue were required to be commenced based on reasonable suspicion. As Justice Blackmun explained, these rulings reflect the fact that, under the balancing test, "[t]he warrant and probable-cause requirements . . . continue to serve as a model in the formulation of the new standard."\(^ {317} \) Moreover, as Justice Blackmun has noted:

"It is conceivable . . . that a court, having initially decided that it is faced with a situation of "special need" that calls for balancing, may conclude after application of the balancing test that the traditional [probable cause] standard is a suitable one for the context after all.\(^ {318} \)

Accordingly, the Sitz majority defies precedent in equating the decision to examine a search or seizure under the balancing test with the conclusion that the search or seizure may be undertaken absent any individualized suspicion. In this way, the Rehnquist Court has manipulated the inherently malleable balancing approach to achieve still further erosion of the fourth amendment's central individualized suspicion requirement.\(^ {319} \)

Both the history underlying the fourth amendment and Supreme Court precedents make clear the importance of the Founders' intention to bar police interference with individual privacy and freedom on the mere chance of uncovering wrongdoing. The primary characteristics of the general warrants and writs of assistance that were so odious to the Constitution's Framers, and that the fourth amendment was expressly designed to curb, were precisely "their indiscriminate qual-


\(^ {317} \) Id. at 744 n.8 (Blackmun, J., dissenting).

\(^ {318} \) Id.

ity, their license to search Everyman without particularized cause."\(^{320}\)

Dragnet searches and seizures under general warrants were repudiated in England more than two centuries ago and met with still less favor in the colonies. James Otis denounced them as "the worst instrument of arbitrary power, the most destructive of English liberty, and the fundamental principles of law, that ever was found in an English law book."\(^{321}\) Because these general warrants authorized officials to conduct suspicionless searches and seizures, Otis declared, they conferred "a power that places the liberty of every man in the hands of every petty officer."\(^{322}\)

The Founders' hatred of indiscriminate searches and seizures played a central role in precipitating the Revolution. John Adams wrote that, when James Otis argued against general writs in 1761, "the child Independance [sic] was born."\(^{323}\)

The salient feature of all drunk driving roadblocks directly transgresses this central, historically rooted, fourth amendment prohibition on indiscriminate searches and seizures: motorists are detained and investigated without any basis to believe they have violated any laws. This identifying feature of the drunk driving roadblock sets it apart from our normal law enforcement techniques and the fourth amendment values they reflect.

American police long have deployed roadblocks on limited occasions for specific purposes, but the systematic use of roadblocks to conduct routine mass vehicle stops aimed at combating drunk driving constitutes a marked departure from previous practice. The conventional roadblock is set up to intercept kidnappers, bank robbers, or other felony suspects fleeing the scene of a crime. Conventional roadblocks occur infrequently within any jurisdiction and affect only a tiny percentage of the driving public,\(^{324}\) in contrast with drunk driving roadblocks, which have an extremely widespread impact.\(^{325}\) More fun-

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320. Wilkes v. Wood, 19 Howell St. Tr. 1153, 1167 (1763); see also 2 LEGAL PAPERS OF JOHN ADAMS 139-44 (L. Wroth & H. Zobel ed. 1965) [hereinafter LEGAL PAPERS OF JOHN ADAMS].


322. See LEGAL PAPERS OF JOHN ADAMS, supra note 320, at 141-42.

323. Id. at 107.

324. Because police operating traditional roadblocks often have some description of the cars or the passengers they are seeking, they generally neither stop all cars nor question all motorists passing through the roadblock. See, e.g., State v. Silvernail, 25 Wash. App. 185, 187, 605 P.2d 1279, 1281 (1980) (based upon information provided by burglary victim, police stopped all cars departing from certain ferry to look for persons matching description of burglars).

325. For example, drunk driving roadblocks implemented in Westchester County, New York, from January through November 1983 stopped anywhere from 1000 to 4000 vehicles...
Damently, these conventional roadblocks are consistent with traditional police efforts to apprehend specific criminal suspects (and, in the case of kidnapping, to rescue specific crime victims),\textsuperscript{326} within a certain geographic area, soon after a particular crime has been committed and reported. It would be very different if the police decided to cordon off all roads surrounding all banks to check motorists for evidence of bank robberies not specifically known to have been committed, but statistically likely to occur.\textsuperscript{327}

Drunk driving roadblocks share the fundamental characteristic of these hypothetical bank robbery roadblocks: they are aimed not at detecting identified or suspected offenders, but instead at turning up previously unidentified and unsuspected offenders and at deterring future unlawful conduct. Acceptance of drunk driving roadblocks signals approval of policing that relies upon the statistical chance of uncovering a certain percentage of violators in large groups of persons. Now that it has been accepted in the drunk driving context, such a dragnet technique could be extended to other pressing law enforcement problems, such as possession of narcotics or firearms, sexual assaults, child abuse, mugging, shoplifting, or bank robberies. There is a strong parallel between a drunk driving roadblock investigation based upon the statistical likelihood that a certain number of passing drivers will "per night. Westchester County Department of Public Safety, Sobriety Checkpoints (1981). In New York City, nightly roadblocks involving approximately 100 officers, set up at bridges and tunnels connecting Manhattan to the other boroughs, stopped 624,000 motorists between May 27, 1983, and October 16, 1983. Telephone interview with Catherine Keegan, Assistant to Joel Stahl, Commissioner of the New York Department of Transportation (Nov. 12, 1983).

\textsuperscript{326} In contrast with drunk driving roadblocks, traditional roadblocks aim at intercepting the specific perpetrators of certain ongoing or recently completed crimes that jeopardize human life. Therefore, the societal interests at stake are particularly urgent. This distinction is articulated in Justice Jackson's oft-quoted dissent in Brinegar v. United States, 338 U.S. 160, 183 (1949):

\begin{quote}
If we assume, for example, that a child is kidnaped [sic] and the officers throw a roadblock about the neighborhood and search every outgoing car, it would be a drastic and undiscriminating use of the search. The officers might be unable to show probable cause for searching any particular car. However, I should candidly strive hard to sustain such an action, executed fairly and in good faith, because it might be reasonable to subject travelers to that indignity if it was the only way to save a threatened life and detect a vicious crime. But I should not strain to sustain such a roadblock and universal search to salvage a few bottles of bourbon and catch a bootlegger.
\end{quote}

\textsuperscript{327} The rationale underlying conventional roadblocks could justify a drunk driving roadblock only if it were set up to apprehend a particular drunk driver who had already committed a felony (killing or injuring another driver), and who the police reasonably believed to be fleeing the scene of the crime along the road where the roadblock was located. See United States v. Harper, 617 F.2d 35, 40-41 (4th Cir.) (upholding stops of all vehicles on route reasonably expected to be used for escape of persons suspected of having imported 25 tons of marijuana), \textit{cert. denied}, 449 U.S. 887 (1980).
be under the influence of alcohol and, for example, a requirement that all pedestrians on a certain street submit to a frisk or magnetometer search based upon the statistical likelihood that some of them will be carrying drugs or weapons illegally.

As the Supreme Court has recognized, the long-range precedential impact of any challenged governmental action should be a factor in evaluating its lawfulness. In evaluating drunk driving roadblock investigations, policymakers and courts therefore should consider the adverse impact upon fourth amendment values of the entire genre of suspicionless, dragnet searches and seizures.

In the fourth amendment context, tolerance of any particular search or seizure has a specific, long range doctrinal impact in contracting privacy and liberty rights more generally. This is true because, since its 1967 watershed ruling in Katz v. United States, the Court has defined searches and seizures as only those governmental intrusions that invade a "reasonable expectation of privacy." Because "reasonable expectation" is defined in terms of societal standards, the more our society tolerates various forms of searches and seizures, the narrower the "reasonable expectation of privacy" will become, with the result that additional types of governmental invasions will be deemed beyond the pale of fourth amendment protection.

328. See, e.g., Boyd v. United States, 116 U.S. 616, 635 (1886) ("[T]he illegitimate and unconstitutional practices get their first footing ... by ... slight deviations from legal modes of procedure. This can only be obviated by adhering to the rule that constitutional provisions for the security of person and property should be liberally constructed."); see also West Va. State Bd. of Educ. v. Barnette, 319 U.S. 624, 641 (1943) ("[T]he First Amendment ... was designed to avoid these [totalitarian] ends by avoiding these beginnings.").


330. This phrase was derived from Justice Harlan's concurring opinion in Katz, which referred to "an actual (subjective) expectation of privacy ... that society is prepared to recognize as 'reasonable.'" Katz, 389 U.S. at 361 (Harlan, J., concurring). Since Terry v. Ohio, 392 U.S. 1, 9 (1968), subsequent opinions have adopted Justice Harlan's concurring formulation as the definitive meaning of Katz. Ironically, Justice Harlan himself later expressed doubts about the correctness of this formulation. See United States v. White, 401 U.S. 745, 786 (1971) (Harlan, J., dissenting) ("The analysis must ... transcend the search for subjective expectations ... Our expectations ... are in large part reflections of the laws that translate into rules the customs and values of the past and present.").

331. For a trenchant criticism of this standard for defining the fourth amendment's scope, see Amsterdam, supra note 208, at 384:

An actual, subjective expectation of privacy obviously has no place in a statement of ... what the fourth amendment protects. It can neither add to, nor can its absence detract from, an individual's claim to fourth amendment protection. If it could, the government could diminish each person's subjective expectation of privacy merely by announcing half-hourly on television that ... we were all forthwith being placed under comprehensive electronic surveillance. ... [T]he fourth amendment [does not] ask[ ] what we expect of government. [It] tell[s] us what we should demand of government.
Scalia made precisely this point when he dissented from the Court’s upholding of mass, suspicionless drug tests of Customs Service employees in National Treasury Employees’ Union v. Von Raab: “Those who lose . . . are not just the Customs Service employees . . . but all of us—who suffer a coarsening of our national manners that ultimately give the Fourth Amendment its content . . . .”

The increasing use of mass surveillance devices such as drunk driving roadblocks already has led the Court to rule that one such device—immigration control workplace “surveys”—does not even constitute a search or seizure subject to fourth amendment strictures.

In conducting such “surveys,” INS agents enter workplaces without advance notice to the employees and systematically question all employees about their citizenship status, asking some to produce immigration papers. If this investigation establishes probable cause that an employee is an undocumented alien, INS agents may arrest him and initiate proceedings to expel him from the United States.

How much our reasonable societal expectations of privacy have shrunk in the past two decades for the significant intrusions entailed in the INS workplace “surveys” to be deemed not to violate them is illustrated by referring to Terry v. Ohio. Although some lower courts had characterized the brief investigative stop and pat-down of a suspect’s outer clothing to locate weapons as a “stop and frisk” that was insufficiently intrusive to be subject to fourth amendment standards, the Supreme Court dismissed this “euphemistic[]” label and its resultant curtailment of fourth amendment rights. In an opinion by Chief Justice Warren, the Court declared:

> [W]henever a police officer accosts an individual and restrains his freedom to walk away, he has “seized” that person. And it is nothing less than sheer torture of the English language to suggest that a careful exploration of the outer surfaces of a person’s clothing all over his or her body in an attempt to find weapons is not a “search.”

To its credit, the Sitz Court did not dispute that the detentions and investigations conducted at sobriety checkpoints constitute searches and seizures for fourth amendment purposes. Its view that these governmental invasions of individual freedom were relatively insignificant, however, strongly affected its anemic fourth amendment

332. Von Raab, 109 S. Ct. at 1402 (Scalia, J., dissenting).
334. See id. at 218.
335. 392 U.S. 1 (1968).
336. Id. at 10.
337. Id. at 16.
scrutiny. The Court characterized this intrusion as "slight\(^3\) overall, rating the objective component as "minimal\(^3\) and dismissing the subjective component by suggesting that motorists should be less frightened or annoyed by uniform, roadblock-type stops than by stops for which they are singled out.\(^4\) In this context too, *Terry* provides a useful benchmark against which to measure the course of societal perceptions about privacy and the attendant fourth amendment standards.

*Terry*’s characterization of the intrusion resulting from a "stop and frisk" starkly contrasts with the *Sitz* majority’s characterization of the intrusion resulting from a roadblock investigation. In terms of duration, one factor that the *Sitz* majority considered in evaluating intrusiveness, the "stop and frisk" in *Terry* was probably comparably brief. It consisted of a police officer’s patting down the outer clothing of the three suspects, and seizing revolvers from the pockets of two suspects after discovering the guns during the pat-down search. A "stop and frisk" is more intrusive than a roadblock search and seizure in that it involves bodily contact between a police officer and the individual inspected. Furthermore, the Justices in the *Sitz* majority would probably view a "stop and frisk" as more subjectively intrusive because the individual does not have the purportedly comforting knowledge that all are being subjected to the same form of mass surveillance.

A roadblock search and seizure, however, arguably is as intrusive as a "stop and frisk" in several other respects. A "stop and frisk" is more confined in scope, being aimed only at the individual’s clothing; in contrast with a roadblock search, a "stop and frisk" does not entail a detailed and probing inspection of the individual’s body—his eyes, face, breath, clothing, or movements. Moreover, because of the likely presence of a weapon, which is the sole justification for a "stop and frisk," and which can more easily and objectively be detected than a state of inebriation, an officer conducting a "stop and frisk" has less discretion in defining the scope of the search than an officer conducting a roadblock search.

For the foregoing reasons, one could credibly argue that a roadblock search and seizure is more intrusive than a "stop and frisk," or at least that the two types of searches and seizures are comparably intrusive. Yet how differently the Supreme Court describes those levels of intrusiveness in *Terry* and *Sitz*! The *Sitz* majority conclusorily labels the intrusiveness of roadblock searches and seizures as "slight" or

\(^3\) *Id.* at 2486.

\(^4\) *Id.*

\(^4\) *Id.* at 2486-87 (quoting United States v. Martinez-Fuerte, 428 U.S. 543, 558 (1976)).
“minimal.” This contrasts markedly with what the *Terry* Court had to say about the intrusiveness of the comparable “stop and frisk”:

[I]t is simply fantastic to urge that such a procedure performed in public by a policeman while the citizen stands helpless ... is a “petty indignity.” It is a serious intrusion upon the sanctity of the person, which may inflict great indignity and arouse strong resentment, and it is not to be undertaken lightly.342

Because sobriety checkpoints constitute a novel, dragnet approach to law enforcement, their widespread use could initiate a vicious cycle: the more mass, suspicionless surveillance is practiced through such law enforcement techniques, the narrower will be the definition of a “reasonable expectation of privacy,” with the result that even more mass, suspicionless surveillance will be authorized, and so on. In order to forestall this downward spiral of privacy and liberty rights, state courts and policymakers should refuse to sanction suspicionless searches and seizures at drunk driving roadblocks. To do so would be consistent not only with the text, intent, and interpretive history of the fourth amendment, but also with the constitutional values it represents.343

Viewed in these terms, the argument against the wholesale detention and investigation of citizens at drunk driving roadblocks is compelling. Far from being consistent with the aims of a free and open society, these roadblocks evoke images of authoritarianism. A free and

342. *Terry v. Ohio*, 392 U.S. 1, 17 (1968). *Von Raab* and *Skinner* are the most startling manifestations of the Rehnquist Court’s devaluation of “expectations of privacy that society is prepared to recognize as legitimate” because they conclude that government-compelled extraction and chemical analyses of blood, urine, and breath samples do not constitute significant intrusions. *Skinner v. Railway Labor Executives’ Ass’n*, 109 S. Ct. 1402, 1417 (1989); *National Treasury Employees Union v. Von Raab*, 109 S. Ct. 1384, 1393-94 (1989). The Court so held despite the following aggravating factors: in both cases, the samples provided significant information about the tested individual, beyond whether he had consumed prohibited drugs, see *Skinner*, 109 S. Ct. at 1429 (Marshall, J., dissenting) (chemical analysis of body fluids may uncover medical disorders including diabetes, epilepsy, and clinical depression); in *Skinner*, the tested individuals had to urinate under the direct observation of a government agent, see id. at 1428 & n.8 (Marshall, J., dissenting), and the individuals had to provide the government with personal medical information, see id. at 1418 n.7; and in *Von Raab*, the individuals had to urinate in the presence of a government agent, albeit behind a screen. *Von Raab*, 109 S. Ct. at 1388.

343. In Professor Amsterdam’s words:

[T]he authors of the Bill of Rights had known oppressive government. ... I believe they meant to guarantee to their survivors the right to live as free from every interference of government agents as our condition would permit. ...

The ultimate question, plainly, is a value judgment. It is whether, if the particular form of surveillance practiced by the police is permitted to go unregulated by constitutional restraints, the amount of privacy and freedom remaining to citizens would be diminished to a compass inconsistent with the aims of a free and open society.

*Amsterdam, supra* note 208, at 400, 403.
open society does not authorize its police to interdict, inspect, and interrogate its citizens en masse merely because it is statistically predictable that a certain small percentage is breaking the law at any given time. To quote again Justice Stevens’ apt observation in *Sitz*, “[U]nannounced investigatory seizures are, particularly when they take place at night, the hallmark of regimes far different from ours...”

III. The Protection of Individual Rights After *Sitz*

A. Judicial Review of Claimed Individual Rights Violations

The preceding Part explained why, as a matter of constitutional language and history, the flexible and malleable balancing test is an inappropriate substitute for the categorical requirement of individualized suspicion in evaluating the constitutionality of a search or seizure. Moreover, even if this balancing methodology was not objectionable in principle, the particular manner in which the Court actually applies it is unacceptable. Even assuming that the fourth amendment only protects against searches and seizures that are not cost-justified in the sense that their effectiveness outweighs their intrusiveness, the Court regularly distorts the actual effectiveness and intrusiveness of various searches and seizures. As elaborated above, this proclivity toward exaggerating effectiveness and minimizing intrusiveness is graphically illustrated in *Sitz*.

The *Sitz* Court’s conclusory rejection of the overwhelming, uncontradicted evidence of drunk driving roadblocks’ ineffectiveness confirms that the fourth amendment balancing test is less a vehicle for genuine analysis than it is a rubric for announcing a preordained result. *Sitz* underscores that this test contains no more bite than the


   The Court finds [drunk driving roadblocks] ... draw dangerously close to what may be referred to as a police state. Here, the state agencies have ignored the presumption of innocence, assuming that criminal conduct must be occurring on the roads and highways, and have taken an “end justifies the means” approach. ... Yet a basic tenet of American jurisprudence is that the government cannot assume criminal conduct in effectuating a stop. ... Were the authorities allowed to maintain such activities ... the next logical step would be to allow similar stops for searching out other types of criminal offenders.


346. For an amplification of the basis for this conclusion, see Strossen, *supra* note 214, at 1194-1207.

347. *See supra* Part II.B.(3) & (4).
rational basis test under the equal protection or due process clauses. Use of the balancing test is a signal that the Court has decided to approve the challenged governmental measure with little genuine scrutiny. Of course, drunk driving roadblocks, as well as any other governmental program, must comply with the strictures of the equal protection clause, minimal though the Court has interpreted them to be. But by reading specific Bill of Rights guarantees as mandating only the diluted standard of judicial review entailed in the equal protection clause, the Court effectively has stripped the specific guarantees of independent force. Indeed, as detailed in the following Part of this Article, in interpreting specific Bill of Rights provisions, the Court has overemphasized relative, egalitarian concepts at the expense of more absolute, libertarian concepts.

In terms of both the standard of review applied and the scope of the substantive right enforced, the Court has read the Bill of Rights as if it essentially embodies the equal protection clause. This is an odd inversion of the "incorporation process," through which the Court traditionally has held that most of the specific Bill of Rights guarantees apply to state governments by incorporation into the fourteenth amendment's due process clause. Now, in contrast, the Court effectively holds that specific Bill of Rights guarantees apply neither to state nor federal governments, because these guarantees merely incorporate the fourteenth amendment's equal protection clause—and a diluted interpretation of it, at that.

The Rehnquist Court's integration of the equal protection clause rational basis test with the fourth amendment balancing test is indicated by the Court's emphasis in both on the concept of "reasonableness." It has long been the case that rational basis review under the equal protection clause involves only a determination that there is some "reasonable basis" for the challenged governmental judgment. Likewise, the Sitz opinion stressed that, in evaluating a fourth

348. The minimal rationality test has been used interchangeably under both clauses to evaluate regulations affecting economic or property interests. See, e.g., Williamson v. Lee Optical of Okla., 348 U.S. 483, 488 (1955) (rejecting due process and equal protection clause challenges, under deferential standard of review, to regulation affecting "business and industrial conditions").

349. See supra notes 306-307 and accompanying text (application of fourth amendment balancing test almost always results in upholding challenged search or seizure).


amendment claim, a court's inquiry should terminate once it has ascertained that the challenged measure was "reasonable." 352

The concept of "reasonableness" does not necessarily imply a low level of judicial review. In both of the foregoing contexts, however, that is how the Court has interpreted it. In the equal protection context, it has abandoned the formerly accepted understanding of reasonableness as meaning that the challenged legislative means must substantially further governmental ends that are legitimate. 353 The Court has not demanded that the government produce any evidence to support either the legitimacy of its ends or the substantiality of the means-ends connection.354 Rather, it has paid "extreme deference to imaginable supporting facts and conceivable legislative purposes." 355 In a parallel development, the Court recently has abandoned the formerly "conventional interpretation" of fourth amendment reasonableness as turning, in part, on the presence of probable cause. Instead, as illustrated in Sitz, the current version of fourth amendment reasonableness seems identical to the toothless version of equal protection reasonableness that, as aptly noted by Professor Gunther, entails "minimal scrutiny in theory and virtually none in fact." 356

Significantly, Chief Justice Rehnquist, who authored the Sitz opinion, has expressly advocated the Court's application of minimal

352. Thus the Court in Sitz noted:
This passage from Brown [outlining the components of the fourth amendment balancing test] was not meant to transfer ... to the courts the decision as to which among reasonable alternative law enforcement techniques should be employed to deal with a serious public danger. ... [F]or purposes of Fourth Amendment analysis, the choice among such reasonable alternatives remains with the [law enforcement] officials ... .

... In sum, the balance of the State's interest in preventing drunken driving, the extent to which this system can reasonably be said to advance that interest, and the degree of intrusion upon individual motorists who are briefly stopped, weighs in favor of the state program.


354. See supra note 351; McGowan v. Maryland, 366 U.S. 420, 425-26 (1961) ("State legislatures are presumed to have acted within their constitutional power ... A statutory discrimination will not be set aside if any state of facts reasonably may be conceived to justify it.")

355. Gunther, supra note 353, at 21. As an example of the minimal scrutiny applied under the equal protection and due process clauses, see McDonald v. Board of Election Comm'rs, 394 U.S. 802, 809 (1969) ("Legislatures are presumed to have acted constitutionally even if source materials normally resorted to for ascertaining their grounds for action are otherwise silent, and their statutory classifications will be set aside only if no grounds can be conceived to justify them.").

356. Gunther, supra note 353, at 8.
rationality review to all constitutional claims since he first joined the Court. Originally, his fellow Justices did not support his viewpoint; now, in *Sitz* and other important cases decided during the 1988 and 1989 Terms, this formerly isolated view has pervaded the Court’s majority opinions.

In one important respect, *Sitz* reflects an even more extreme form of judicial deference to other government decisionmakers than is reflected in equal protection clause minimal scrutiny. Equal protection challenges typically are lodged against legislation passed by either Congress or state legislatures. As noted above, it is at least arguably consistent with democratic theory and judicial review principles for courts to defer to the duly enacted measures of an elected, representative, deliberative body, such as a state legislature or the United States Congress. In contrast, the roadblock program that the Court approved in *Sitz* was rejected by the Michigan Legislature and was promulgated instead by an unelected law enforcement official, the Director of the Michigan Department of State Police. The Court’s deference to his judgment as to the purported efficacy of sobriety checkpoints, notwithstanding massive evidence to the contrary, constitutes a new high point—or, more accurately, low point—in judicial passivity. The Supreme Court even criticized the Michigan trial and intermediate appellate courts for daring to second-guess the Director’s determination to implement roadblocks, notwithstanding his own apparent second thoughts on the matter.

357. See id. at 10-11. Describing the 1971 Term, which was the first full Supreme Court Term in which then-Associate Justice Rehnquist participated, Professor Gunther observed that Rehnquist was the only Justice on that Court who supported a “cataclysmic doctrinal shift[,]” a “root-and-branch abandonment of the [Warren Court’s] interventionist new equal protection and a retreat to an extreme Holmesian deference.” Id. at 10. Alone in dissent, Justice Rehnquist “suggested so drastic a shift.... [H]e recalled the abuses of the fourteenth amendment during the *Lochner* era, urged return to the noninterventionist approach of the ‘classic’ *Slaughter-House cases*, and advocated minimal scrutiny for virtually all varieties of state laws.” Id. at 11 (citing Weber v. Aetna Casualty & Surety Co., 406 U.S. 164, 177-85 (1972) (Rehnquist, J., dissenting)).

358. See infra note 367.

359. See supra notes 29-34 and accompanying text.

360. See supra notes 25-28 and accompanying text.

361. See supra notes 46-51 and accompanying text.

362. See Michigan Dep’t of State Police v. Sitz, 110 S. Ct. 2481, 2487 (1990): Based on extensive testimony in the trial record, the [Michigan Court of Appeals] concluded that the checkpoint program failed the “effectiveness” part of the [balancing] test. . . . We think the Court of Appeals was wrong on this point as well.

The actual language from *Brown v. Texas*, upon which the Michigan courts based their evaluation of “effectiveness” . . . was not meant to transfer from politically accountable officials to the courts the decision as to which among reasonable alternative law enforcement techniques should be employed to deal with a serious
Sitz's unquestioning deference to the unsubstantiated judgment of a single, unelected law enforcement official marks the Rehnquist Court's acceptance of a new level of judicial restraint in reviewing specific constitutional rights claims. Chief Justice Rehnquist himself long has advocated just such an extreme form of judicial deference. In 1979, in Delaware v. Prouse, eight of the Justices on the Court joined in holding that the fourth amendment was violated by a police officer's random, suspicionless detention of an automobile driver to check for documentation. Rehnquist alone dissented, arguing that the majority had scrutinized the officer's conduct too strictly. He was then the lone voice on the Court urging that the same degree of judicial deference due a Congressional statute should also be paid to the determination of an individual police officer on the beat.

Now, in Sitz, Chief Justice Rehnquist has gained at least four allies for such an abdication of the appropriate judicial function in safeguarding constitutionally guaranteed individual rights. Chief Justice Rehnquist's opinion for the majority in Sitz thus marks the acceptance not only of his general view that the Court should apply minimal scrutiny to all constitutional claims, but also of his specific, associated view that the Court should defer to the decisions of individual law enforcement officials.

The low level of judicial scrutiny applied in Sitz graphically illustrates the undemanding standard of review that the Rehnquist Court has applied to constitutional rights more generally, a subject that is

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For purposes of Fourth Amendment analysis, the choice among reasonable alternatives remains with the governmental officials who have a unique understanding of, and a responsibility for, limited public resources. Neither case cited by the Court of Appeals as providing the basis for its "effectiveness" review supports the searching examination of "effectiveness" undertaken by the Michigan court.

Ironically, even the Director himself testified at trial that he was aware of no empirical evidence supporting the efficacy of sobriety checkpoints. See Sitz trial court opinion, supra note 28, at 46a-47a:

[The Director of the Michigan Department of State Police] concluded [in 1984] that [sobriety] checkpoints could be a good technique to deter drunk drivers. He admitted that at that time, however, he did not have, nor does he presently have, any empirical evidence to support this conclusion. In contrast, he was aware, statistically, that other states were achieving only low rates of drunk driving arrests by the use of this technique.

See also supra note 22 (Michigan Attorney General, who defended roadblocks in Sitz case, hinted at personal opinion that they should not be implemented).

365. Id. at 667 (Rehnquist, J., dissenting).
366. Justice Blackmun concurred only in the judgment, and his separate opinion did not elucidate his views concerning the standard of review employed in the majority opinion. See Sitz, 110 S. Ct. at 2488 (Blackmun, J., concurring in the judgment).
beyond the scope of this Article and is explored more fully elsewhere.\textsuperscript{367} The 1988-1989 Supreme Court Term was the first full term in which Justice Kennedy participated, thus consolidating the domination of Chief Justice Rehnquist and his ideological allies. A consistent theme unifying the Court's rulings on various constitutional rights during that Term was the Court's application of weakened judicial review standards. The culmination of patterns that developed over a long period, these standards give constricted scope to rights and broad deference to government decisions limiting rights. In multiple cases involving a range of constitutional rights, the Court consistently stressed its duty to respect the judgments of executive and legislative officials at the federal, state, and local levels.\textsuperscript{368} Inverting the established presumptions and burdens of proof traditionally applied in constitutional rights adjudication, the Court in effect presumed that government decisions complied with constitutional standards and imposed substantial burdens of proof upon individuals who contended that those government decisions violated their constitutional rights.\textsuperscript{369} 


\textsuperscript{369} See \textit{Webster}, 109 S. Ct. at 3057 (plurality opinion) (state regulations on woman's right to choose abortion should be upheld so long as they "permissibly further[] the State's interest in protecting potential human life"); \textit{id.} at 3077 (Blackmun, J., concurring in part and dissenting in part) (plurality's proposed test constitutes rational basis review and "non-scrutiny"); \textit{Fox}, 109 S. Ct. at 3035 (commercial speech regulations will be upheld so long as there is "a "fit" between the [government's] ends and the means chosen to accomplish those ends"). [W]e leave it to governmental decisionmakers to judge what manner of regulation may best be employed." (quoting Posadas de Puerto Rico Assocs. v. Tourism Co. of Puerto Rico, 478 U.S. 328, 341 (1986)); \textit{Ward}, 109 S. Ct. at 2759 (Court of Appeals erred in not deferring to the city's reasonable determination that its interest in controlling the sound volume of musical performances in a public park would best be served by challenged regulations, even though other regulations may have promoted this interest with less impact on performers' artistic control over sound quality); \textit{id.} at 2760 (Marshall, J., dissenting) ("[T]he majority replaces constitutional scrutiny with mandatory deference."); \textit{Michael H.}, 109 S. Ct. at 2351 (Brennan, J., dissenting) (citations omitted) (majority upheld limitations on relationship between natural father and child; "by describing the decisive question as whether [the asserted] interest is one that has been 'traditionally protected by our society,' rather than one that society traditionally has thought important... and by suggesting that our sole function is to 'discern the society's views,' the plurality acts as if the only purpose of the Due Process Clause is to..."
The Rehnquist Court’s commitment to constricted judicial review of individual rights claims continued to characterize the Court’s 1989-1990 Term and was particularly apparent in Sitz.

The Rehnquist Court’s adoption of a rational basis test for evaluating claimed personal rights infringements parallels an earlier Court’s move toward such a deferential standard of review regarding claimed economic rights infringements, thus ending the so-called “Lochner confirm the importance of interests already protected by a majority of the States.”); Thornburgh, 109 S. Ct. at 1883-84 (approving broad discretion that prison regulations gave wardens to control prisoners’ correspondence and receipt of publications; the warden could exclude materials that create “intolerable risk of disorder,” even if they are not “likely” to lead to violence, and the warden could ban an entire book even if only one page of book created such risk); Riley, 109 S. Ct. at 696 (plurality opinion) (burden of proof imposed on search victim to demonstrate that low-cruising helicopters were sufficiently uncommon that police surveillance of home and property from such helicopters violated reasonable privacy expectation protected by fourth amendment).

Perhaps the Court’s most direct acknowledgment of this deferential judicial passivity appears in Employment Division Department of Human Resources v. Smith, 110 S. Ct. 1595, 1606 (1990), in which the Court stated that adherents to minority religious beliefs would have to depend upon the political branches of government to protect them from measures burdening their beliefs. The Court stated: “[L]eaving accommodation to the political process will place at a relative disadvantage those religious practices that are not widely engaged in; but that is an unavoidable consequence of democratic government.” Id. See also United States v. Kokinda, 110 S. Ct. 3115 (1990) (upholding Postal Service regulation that prohibited solicitation on sidewalk adjoining Post Offices). In Kokinda, the Court deferred to the Postal Service’s judgment that such solicitation would disrupt “the most efficient and effective postal delivery system,” id. at 3122, even in the absence of evidence that such speech would cause more disruption than other types of speech that the Service permitted and even if the Service could accomplish its aims through less speech-restrictive measures. Id. at 3123-24; see also Cruzan v. Director, Mo. Dep’t of Health, 110 S. Ct. 2841, 2852-53 (1990) (in rejecting argument that parents of patient in persistent vegetative state could order termination of her medical treatment absent compliance with formalities required by Missouri’s Living Will statute, or clear and convincing evidence of patient’s wishes, Court expressed great deference to Missouri legislature’s pro-life policy choice).

The primary exceptions to this general pattern of deference in the 1989 and 1990 Terms were the Court’s two decisions invalidating statutes that criminalized the burning of the American flag: United States v. Eichman, 110 S. Ct. 2404 (1990) and Johnson, 109 S. Ct. 2533. See Eichman, 110 S. Ct. at 2409 (“[A]ny suggestion that the Government’s interest in suppressing speech becomes more weighty as popular opposition to that speech grows is foreign to the First Amendment.”).

Both cases were decided by 5-4 votes and both majority opinions were authored by Justice Brennan, who has since retired from the Court. The deferential view expressed by the dissenters in these cases therefore may well prevail in a future case. See, e.g., Johnson, 109 S. Ct. at 2555 (Rehnquist, C.J., dissenting) (quoting Fletcher v. Peck, 10 U.S. (6 Cranch) 87, 128 (1810) (Marshall, C.J.)):

Surely one of the high purposes of a democratic society is to legislate against conduct that is regarded as evil and profoundly offensive to the majority of people . . . .

Our Constitution wisely places limits on powers of legislative majorities to act, but the declaration of such limits by this Court “is, at all times, a question of much delicacy, which ought seldom, if ever, to be decided in the affirmative, in a doubtful case.”

As noted above, see supra note 15, the “property-liberty dichotomy,” see Gunther,
era, which had lasted for approximately a half-century. At the same time that the New Deal Court retreated from judicial activism concerning property rights claims, it inaugurated judicial activism regarding personal rights claims. Thus, in subjecting the latter type of claims to the same minimal scrutiny applied to economic rights claims, the Rehnquist Court is signaling the end of the post-Lochner era—which also lasted for approximately a half-century—and heralding another new period in Supreme Court history. A brief review of the relevant judicial landmarks should illuminate this course of the Court’s individual rights jurisprudence.

During “the constitutional revolution of 1937,” the Justices began their retreat from the activist enforcement of substantive due process claims that characterized the preceding half-century. In 1938, in United States v. Carolene Products the Court simultaneously completed its renunciation of judicial activism in support of property rights and began its announcement of judicial activism in support of personal rights. In Carolene Products, which rejected a constitutional challenge to a federal regulatory statute, the Court crystallized its new deferential posture toward laws allegedly infringing property rights.

supra note 353, at 37, is oversimplified. For an example of a defense of the dichotomy, see Cox, The Supreme Court, 1965 Term—Foreword: Constitutional Adjudication and the Promotion of Human Rights, 80 HARV. L. REV. 91 (1966). For an example of a criticism, see McCloskey, Economic Due Process and the Supreme Court: An Exhumation and Reburial, 1962 SUP. CT. REV. 34, 45-50.

The legitimacy vel non of this distinction does not affect this Article’s criticism of the Court’s low-level review of claimed infringements of specific constitutional freedoms. The point is that the Court should enforce so-called “personal” or “liberty” rights more vigorously than it now enforces such rights, not that it should enforce these rights more vigorously than it now enforces so-called “economic” or “property” rights. The relative degree of judicial scrutiny that should apply to measures infringing these arguably separable types of rights is beyond the scope of this Article. It should be noted, however, that others have argued forcefully that the Court’s enforcement of economic or property rights is insufficiently rigorous. See, e.g., Gunther, supra note 353.

373. The era takes its name from the landmark case, Lochner v. New York, 198 U.S. 45 (1905).


376. 304 U.S. 144 (1938).
The new rule required that legislation affecting property interests generally was to be upheld so long as it had a "rational basis."

At the same time that *Carolene Products* solidified the Court's new deferential posture toward legislation encroaching on property interests, it initiated a newly activist posture toward legislation encroaching on personal rights. In Footnote Four—perhaps the most celebrated footnote in all the pages of the U.S. Reports—the Court delineated several exceptions to the limited form of judicial review it had just embraced with regard to due process challenges to legislation affecting economic concerns: "There may be narrower scope for operation of the presumption of constitutionality when legislation appears on its face to be within a specific prohibition of the Constitution, such as those of the first ten amendments. . . ."

Slightly more than a half-century later, the Court in *Sitz* has abandoned the path that it embarked upon in *Carolene Products* Footnote Four and that it vigorously pursued under the leadership of Chief Justices Warren and Burger. The Rehnquist Court has rejected this vigorous form of judicial review in the context of safeguarding specific Bill of Rights guarantees, and instead has subsumed laws that infringe on those rights within the purview of the broad, deferential presumption of constitutionality that it accords other governmental measures.

The highly deferential form of judicial review exercised in *Sitz* is tantamount to a rubber-stamp for challenged rights-restricting measures. It thus appears that the Court has abandoned its post-New Deal role as the primary guardian of individual personal rights. This development parallels the Court's abandonment, at the end of the *Lochner* era, of its previous role as a primary guardian of individual property rights. In future years, *Sitz* may well come to be regarded as ending

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378. *Id.* at 152 n.4. This famous footnote also suggested two other types of legislation that might be subjected to rigorous judicial scrutiny:

It is unnecessary to consider now whether legislation which restricts those political processes which can ordinarily be expected to bring about repeal of undesirable legislation, is to be subjected to more exacting judicial scrutiny under the general prohibitions of the Fourteenth Amendment than are most other types of legislation. . . .

Nor need we enquire whether similar considerations enter into the review of statutes directed at particular religious, or national, or racial minorities: whether prejudice against discrete and insular minorities may be a special condition, which tends seriously to curtail the operation of those political processes ordinarily to be relied upon to protect minorities, and which may call for a correspondingly more searching judicial inquiry.

*Id.* (citations omitted).
an era of judicial activism in defense of one set of rights, just as *West Coast Hotel Co. v. Parrish* is viewed as ending an earlier era of judicial activism on behalf of another set of rights.\(^{380}\)

### B. Misery Loves Company: The Overemphasis of Relative Levels of Protection and Underemphasis of Absolute Levels of Protection

*Sitz* heralds a new epoch of limited Supreme Court protection of individual rights insofar as it manifests a new, limited institutional role for the Court, and a new, narrowed construction of Bill of Rights guarantees. As previously observed,\(^{381}\) the substantive, as well as the institutional, facet of the Court's narrowed role in enforcing individual rights closely mirrors its equal protection clause jurisprudence.

Part II of this Article discussed *Sitz* as the culmination of the Court's abandonment of the central fourth amendment guarantee that searches and seizures must be based on individualized suspicion and its emphasis instead on the amendment's auxiliary guarantee that every search or seizure will be based on an equal degree of (non)suspicion. In this respect, *Sitz* manifests a broader trend in the Court's individual rights jurisprudence. Not only in the fourth amendment context, but also in construing other Bill of Rights provisions, the Court has overemphasized the requirement that individuals receive equal treatment with respect to protected rights. Correspondingly, it also has downplayed absolute constitutional guarantees that individuals receive some minimum threshold treatment with respect to such rights. Moreover, it has enforced only a formal concept of equality that does not provide meaningful protection against actual discrimination in the exercise of constitutional rights. Because the equal protection clause already guarantees de jure equality in the exercise of rights, this reading of specific Bill of Rights guarantees deprives them of independent significance.\(^{382}\)

\(^{379}\) 300 U.S. 379 (1937).

\(^{380}\) See Petition for Rehearing, Employment Div., Dep't of Human Resources v. Smith, 110 S. Ct. 1595 (1990), reh'g denied, 58 U.S.L.W. 3770 (June 4, 1990), at 6, n.3 [hereinafter Petition for Rehearing]:


\(^{381}\) See *supra* notes 348-352 and accompanying text.

The following section details the Court’s tendency, culminating in *Sitz*, to overemphasize relative constitutional protections at the expense of absolute constitutional protections in its fourth amendment jurisprudence. It then summarizes the corresponding trends in the Court’s interpretation of the first amendment’s free speech and free exercise clauses. The Court also issued a decision during its 1989-1990 Term with respect to each of these constitutional guarantees. These cases, coupled with *Sitz*, exemplify the larger pattern of relative rights preempting absolute ones.

(1) Fourth Amendment

The Court’s steady erosion of the fourth amendment’s particularized suspicion requirement can be understood as its substitution of an essentially relative, egalitarian vision of the fourth amendment—and, indeed, of individual rights guarantees more generally—for a more absolutist, libertarian vision. The fourth amendment absolutely guarantees certain liberties, as do other constitutional provisions. It is an egalitarian corollary to this fundamental libertarian proposition that each constitutional provision prohibits the government from protecting or invading rights on an arbitrary or discriminatory basis. Although this egalitarian corollary is important, it is by no means coextensive with, and thus cannot supplant, the basic libertarian protection. Yet, the Court’s reductionist revision of the fourth amendment and other constitutional guarantees has done just this. In the fourth amendment context, the regression in the Court’s view of the protected right can be outlined as follows:

*Libertarian proposition:* All searches and seizures must be based on some degree of individualized suspicion.

*Egalitarian corollary:* All like searches and seizures must be based on the same degree of individualized suspicion.

*Reductionist redefinition:* All like searches and seizures must be based on the same degree of individualized suspicion, including the absence of individualized suspicion.

Chief Justice Rehnquist’s majority opinion in *Sitz* embraces the notion that uniform, mass searches and seizures are, in effect, pre-

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argument that free exercise claims should be subject to rational basis review). The *Hobbie* Court held that """"[s]uch a test . . . relegates a serious First Amendment value to the barest level of minimum scrutiny that the Equal Protection Clause already provides."""" *Id.* (quoting Bowen v. Roy, 476 U.S. 693, 727 (1986) (O’Connor, J., concurring in part and dissenting in part)); *see also* Petition for Rehearing, *supra* note 380, at 11-12 (Court’s reinterpretation of free exercise clause “drastically restricts [its] meaning . . . , making it a stepchild of the . . . Equal Protection Clause[]”").
sumptively constitutional. Specifically, he concludes that such searches and seizures are not subjectively intrusive, due to their nondiscriminatory nature. In the context of the Court's toothless approach to fourth amendment balancing, such a conclusion essentially is outcome determinative and assures the Court's validation of the search and seizure. Given the Court's minimal scrutiny of the other components of the fourth amendment balancing analysis—objective intrusiveness and effectiveness—a finding that a challenged search or seizure is not subjectively intrusive will doom the fourth amendment challenge. That was the effect of this finding in Sitz itself.

It is ironic that Chief Justice Rehnquist endorses the notion that the uniform nature of searches and seizures is of such great constitutional moment, since he had previously derided that very idea. In Sitz, Chief Justice Rehnquist's opinion approvingly quotes a passage from United States v. Martinez-Fuerte, in which the Court had upheld routine suspicionless immigration control checkpoint stops. In the quoted passage, Martinez-Fuerte distinguished these immigration checkpoint stops from the random, suspicionless immigration control stops conducted by officers on roving patrol, which the Court previously had invalidated in United States v. Brignon-Ponce. The Martinez-Fuerte opinion specifically stated:

[W]e view checkpoint stops in a different light because the subjective intrusion—the generating of concern or even fright on the part of lawful travelers—is appreciably less in the case of a checkpoint stop. . . . "At traffic checkpoints the motorist can see that other vehicles are being stopped, he can see visible signs of the officers' authority, and he is much less likely to be frightened or annoyed by the intrusion."

In analogizing the drunk driving roadblock stops challenged in Sitz to the immigration checkpoint stops upheld in Martinez-Fuerte, Chief Justice Rehnquist stressed the fact that "uniformed police officers stop every approaching vehicle" as a factor that reduced the subjective intrusiveness of roadblock detentions and thereby supported their constitutionality.

It is ironic that Chief Justice Rehnquist essentially supports the view that searches and seizures become more constitutional as more

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384. See Sitz, 110 S. Ct. at 2489 (Brennan, J., dissenting) ("[T]he [majority] opinion reads as if the minimal nature of the seizure ends rather than begins the inquiry into reasonableness").
386. 422 U.S. 873 (1975).
387. Martinez-Fuerte, 428 U.S. at 558 (quoting United States v. Ortiz, 422 U.S. 891, 894-95 (1975)).
388. Sitz, 110 S. Ct. at 2487.
individuals are subjected to them. As the lone dissenter in *Delaware v. Prouse*, Justice Rehnquist actually mocked the majority's suggestion that the mass or uniform nature of a search or seizure might have positive fourth amendment implications. In invalidating a police officer's random, suspicionless stopping of a car to check its vehicle registration and the driver's license, the *Prouse* majority had disapproved "sporadic and random stops of individual vehicles making their way through city traffic." In dictum, however, the majority condemned "those stops occasioned by roadblocks where all vehicles are brought to a halt or to a near halt, and all are subjected to a show of the police power of the community." Dissenting in *Prouse*, Justice Rehnquist stingingly criticized the flawed reasoning that led his brethren to endorse mass, roadblock-type detentions:

Because motorists, apparently like sheep, are much less likely to be "frightened" or "annoyed" when stopped en masse, a highway patrolman needs neither probable cause nor articulable suspicion to stop all motorists on a particular thoroughfare, but he cannot without articulable suspicion stop less than all motorists. The Court thus elevates the adage "misery loves company" to a novel role in Fourth Amendment jurisprudence.

Of course, Justice Rehnquist used the argument that mass suspicionless stops are constitutionally indistinguishable from random suspicionless stops to conclude in *Prouse* that all such stops were permissible. This conclusion, however, was based on Justice Rehnquist's narrow conception of the substantive rights protected by the fourth amendment. Specifically, he did not view the fourth amendment as automatically barring any suspicionless searches or seizures. Rather, he urged the Court to defer to a law enforcement officer's exercise of discretion in effecting any search or seizure, including one lacking particularized suspicion, and to review that judgment under a passive balancing test. But Justice Rehnquist obviously did not view the equality factor as being of independent constitutional significance, capable of validating searches and seizures that would otherwise be un-

390. Id. at 657.
391. Id.
392. Id. at 664 (Rehnquist, J., dissenting); see also id. at 666 (quoting majority opinion at 657):

[T]he Court does not say that these [fourth amendment] interests can never be infringed by the State, just that the State must infringe them en masse rather than citizen by citizen. To comply with the Fourth Amendment, the State need only subject all citizens to the same "anxiety" and "inconvenience" to which it now subjects only a few.
393. See id. at 667.
constitutional for failure to satisfy the absolute, substantive standards imposed by the fourth amendment. For those with a more generous vision of the substantive content of fourth amendment guarantees, and especially for those who would include a protection against suspicionless searches and seizures, the logic of Justice Rehnquist's reasoning compels the conclusion that all such searches and seizures are unconstitutional. 394

It is therefore somewhat surprising that Sitz relies so heavily on the majority opinion in Prouse. Why did Chief Justice Rehnquist succumb in Sitz to the "reasoning" which he had so corrosively assailed in Prouse? The Chief Justice probably still believes that the distinction between random and uniform searches is constitutionally irrelevant, and that even random suspicionless searches could pass fourth amendment muster. The Sitz case, however, did not present the question whether suspicionless random searches are constitutional, and the Chief Justice may simply have avoided an issue unnecessary to the resolution of the case at hand.

The Rehnquist Court reads the fourth amendment as mandating only relative equality of (non)justification for initiating searches and seizures, rather than some absolute justification. This reading flies in the face of constitutional language and history. As discussed above, 395 the history underlying the fourth amendment demonstrates that the Framers specifically intended to bar any indiscriminate search or seizure unless it was justified by particularized suspicion. In his classic article on the fourth amendment, Professor Anthony Amsterdam articulated the twin evils of indiscriminate searches and seizures:

Indiscriminate searches or seizures might be thought to be bad for either or both of two reasons. The first is that they expose people and their possessions to interferences by government when there is no good reason to do so. The concern here is against unjustified searches and seizures: it rests upon the principle that every citizen is entitled to security of his person and property unless and until an adequate justification for disturbing that security is shown. The second is that indiscriminate searches and seizures are conducted at the discretion of executive officials, who may act despotically and capriciously in the exercise of the power to search and seize. This latter

394. This, for example, was Justice Marshall's view in Skinner, in which the majority had upheld mass, suspicionless blood tests, despite the Court's holding in Schmerber v. California, 384 U.S. 757 (1966), that a blood test of an individual must be based on particularized suspicion: "Exactly why a blood test which, if conducted on one person, requires a showing of at least individualized suspicion may, if conducted on many persons, be based on no showing whatsoever, the majority does not—and cannot—explain." Skinner, 109 S. Ct. at 1428 (Marshall, J., dissenting).

395. See supra notes 221-235 and accompanying text.
concern runs against \textit{arbitrary} searches and seizures: it condemns the petty tyranny of unregulated rummagers.\footnote{Amsterdam, \textit{supra} note 208, at 411.} 

Recently, the Supreme Court has emphasized the second inherent evil in indiscriminate searches and ignored the first; it has sought to forestall \textit{arbitrary} searches and seizures, yet it has permitted \textit{unjustified} searches and seizures. This trend, epitomized in \textit{Sitz}, ignores the fourth amendment's first and foremost concern for protecting autonomy, privacy, and freedom from unjustified governmental interference, no matter how uniformly and routinely carried out.\footnote{This paramount purpose was perhaps best expressed by Justice Brandeis in the now famous dissent in \textit{Olmstead v. United States}: [The Fourth and Fifth Amendments] conferred, as against the government, the right to be let alone—the most comprehensive of rights and the right most valued by civilized men. To protect that right, every unjustifiable intrusion by the government upon the privacy of the individual, whatever the means employed, must be deemed a violation of the [Fourth] Amendment. 277 U.S. 438, 478-79 (1928) (Brandeis, J., dissenting).}

The Supreme Court's evaluation of a search or seizure's subjective intrusiveness manifests both the Court's tendency to overemphasize the relative right not to be subjected to searches and seizures on an arbitrary or discriminatory basis and its complementary tendency to undervalue the absolute right not to be subjected to searches and seizures without specific justification. This pattern is illustrated by \textit{Sitz}. In assessing the subjective intrusiveness of a search or seizure, the Court primarily focuses on whether individuals are, or would perceive themselves to be, arbitrarily or discriminatorily singled out by the police.\footnote{See Delaware \textit{v. Prouse}, 440 U.S. 648, 655-61 (1979); United States \textit{v. Martinez-Fuerte}, 428 U.S. 543, 558-60 (1976); United States \textit{v. Ortiz}, 422 U.S. 891, 895-96 (1975).} 

The Court presumes that individuals who perceive themselves as victims of arbitrariness or discrimination will define the search or seizure as especially intrusive.\footnote{\textit{Id.} 400. \textit{See, e.g., Ortiz}, 422 U.S. at 894-95: [T]he circumstances surrounding a checkpoint stop and search are far less intrusive than those attending a roving patrol stop... At traffic checkpoints the motorist can see that other vehicles are being stopped, he can see visible signs of the officers' authority, and he is much less likely to be frightened... by the intrusion.} Conversely, the Court presumes that individuals who perceive that they are being subjected to the same treatment as every other similarly situated individual will define the police encounter as relatively unintrusive.\footnote{\textit{Id.}} By committing itself to this vision of subjective intrusiveness, the Court overemphasizes the fourth amendment's purpose of limiting arbitrary or discriminatory searches and seizures and neglects the amendment's equally important purpose of preventing unjustified or unfounded searches and seizures.
The Court's conception of subjective intrusiveness is centered on equal protection values that are peripheral to the fourth amendment's central concern for limiting the role of the police in the everyday lives of ordinary citizens. Rather than asking whether a challenged police practice infringes on citizens' privacy and freedom, the Court asks whether it is implemented uniformly. That a practice might comport with equality concerns, however, does not assure its consistency with fourth amendment concerns. The fourth amendment's paramount purpose is to protect individuals from unjustified governmental intrusion in the form of Big Brother's surveillance. Surely, such protection is no less important—indeed, one could argue that it is even more important—when the surveillance is conducted on a mass or uniform basis.

Ironically, the formal equality enforced in the Rehnquist Court's fourth amendment jurisprudence does not assure actual equality or nondiscrimination. That concept prohibits patently discriminatory search and seizure measures, but it does not prohibit all search and seizure measures that may have a discriminatory impact. For example, in *Sitz*, the majority indicated a concern about circumscribing the discretion of officers conducting sobriety checkpoints in order to minimize the risk that this power could be wielded in an arbitrary fashion. Yet, the majority's consideration of this factor began and ended with the observation that the Michigan guidelines articulated neutral criteria for the conduct of roadblock searches and seizures. The majority, however, was not concerned that the substantial discretion accorded to roadblock officers under those criteria would allow them to select drivers for more extensive investigations on the basis of arbitrary or invidious characteristics. Justice Brennan made this point in his dissent in *Martinez-Fuerte*. There he noted that the Court's


402. This approach mirrors the Court's interpretation of the equal protection clause itself as prohibiting only de jure or intentionally discriminatory measures, but not measures that result in de facto discrimination through their disparate adverse impact on certain groups. See, e.g., Washington v. Davis, 426 U.S. 229, 239 (1976).

For an argument that this approach reflects an unduly narrow view of the equal protection clause and the concept of equality, see Lawrence, *The Id, the Ego, and Equal Protection: Reckoning with Unconscious Racism*, 39 Stan. L. Rev. 317 (1987) (arguing that the two major theories for equal protection clause strict scrutiny—to correct distortions in the democratic process and to avoid stigma—are implicated when a challenged measure reflects unconscious racism, as fully as when it is intentionally racist). Even under the Court's relatively limited vision of equality, a government measure's discriminatory impact upon a particular group may help to prove that the measure was intentionally discriminatory. The discriminatory effect is relevant in establishing a violation of equality principles, therefore, even if it is not dispositive of the matter. See, e.g., Rogers v. Lodge, 458 U.S. 613, 618-20 (1982).

403. See supra notes 39-40, 189-192 and accompanying text.
decision, which upheld suspicionless searches and seizures at immigration checkpoints, conferred broad discretion upon officers staffing the checkpoints and thus would "inescapably discriminate against citizens of Mexican ancestry and Mexican aliens lawfully in this country. . . ." In sum, the Rehnquist Court's reading of the fourth amendment as protecting only against discriminatory searches and seizures—but not against unjustified ones—does not even assure non-discrimination.

(2) First Amendment

The Court's free speech and free exercise jurisprudence has undergone contractions similar to those characterizing its fourth amendment jurisprudence. In these first amendment areas the Court also has overemphasized an egalitarian concept of relative protection at the expense of a libertarian concept of absolute protection. This tendency is prominently illustrated by two decisions from the Court's 1989-1990 Term, United States v. Kokinda and Employment Division, Department of Human Resources v. Smith. These cases construe the first amendment as guaranteeing only that invasions of free speech and free exercise will not be made on an overtly or intentionally discriminatory basis. They do not, however, construe the first amendment either as prohibiting all such invasions outright or as prohibiting any such invasions that are discriminatory in effect.

a. Free Speech Clause

In Kokinda, the Court continued its recent application of the "public forum doctrine" to allow the government to deny access, or to terminate previously granted access, to public property for expressive purposes. The only limitation on the government's prero-

404. 428 U.S. at 572 (Brennan, J., dissenting); see also United States v. Brignoni-Ponce, 422 U.S. 873, 889-90 (1975) (Douglas, J., concurring in the judgment) (arguing that even allowing searches and seizures on "reasonable suspicion"—let alone without any particularized suspicion—would give police officers sufficient discretion to act arbitrarily or discriminatorily):

In [a Ninth Circuit decision], the Border Patrol officers encountered a man driving alone in a station wagon which was "riding low"; stopping the car was held reasonable because the officers suspected that aliens might have been hidden beneath the floorboards. The vacationer whose car is weighted down with luggage will find no comfort in these decisions; nor will the many law-abiding citizens who drive older vehicles that ride low because their suspension systems are old or in disrepair. The suspicion test has indeed brought a state of affairs where the police may stop citizens on the highway on the flimsiest of justifications.


The Fourth Amendment and Free Speech Rights

The Fourth Amendment protects against discriminatory as well as unjustified searches and seizures, the free speech clause protects against discriminatory as well as unjustified denials of expressive opportunities. Yet, in its public forum decisions, the Rehnquist Court has overemphasized the First Amendment’s relative guarantee of equal access to public property for expressive purposes, to the exclusion of the absolute guarantee of some such access. In effect, it has said that the only right an individual has is not to be given less protection than other individuals, but that all may be equally unprotected. Furthermore, the Court employs a formalistic notion of equality that prohibits only facially discriminatory government regulations, but tolerates other regulations that are discriminatory in effect. The Court, therefore, does not even ensure equal nonprotection, let alone equal protection, of free speech rights on public property.

Ironically, the public forum doctrine initially was introduced into free speech law as a vehicle for expanding expressive liberties. Its basic premise was that on certain types of public property, such as streets, parks, and sidewalks, the government had to grant access to speech and other expressive activities. As originally enunciated, the public forum doctrine embodied a basic libertarian proposition that all individuals have an absolute right of access to certain government property for expressive purposes (subject to neutral “time, place and manner

407. See, e.g., Perry Educ. Ass’n v. Perry Local Educators’ Ass’n, 460 U.S. 37, 46 (1983) (Except for public property that the government voluntarily opens to expressive use, the government may impose on its property any speech-restrictive regulations that are reasonable and are “not an effort to suppress expression merely because public officials oppose the speaker’s view.”).

408. The Court held in Kokinda:

Even conceding that the forum here [(a public sidewalk outside a Post Office building)] has been dedicated to some First Amendment uses, and thus is not a purely nonpublic forum, ... regulation of the reserved nonpublic uses would still require application of the reasonableness test.

Thus, the regulation at issue ... must be reasonable and “not an effort to suppress expression merely because public officials oppose the speaker's view.”

Indeed, “[c]ontrol over access to a nonpublic forum can be based on subject matter and speaker identity so long as the distinctions drawn are reasonable in light of the purpose served by the forum and are viewpoint neutral.”


restrictions"). Early in the doctrine's history, the Court recognized an egalitarian corollary to this basic libertarian proposition: that the government could not deny access to its property, for expressive purposes, on the basis of the speaker's identity or the speaker's message.

Just as the fourth amendment's central libertarian prohibition of indiscriminate searches recently has been reduced to its egalitarian corollary, so too, the equivalent truncation has occurred with respect to the public forum doctrine. For example, the public forum doctrine, which was introduced into free speech theory to expand speech rights, lately has been used to contract such rights.

The Court has distorted the public forum doctrine, using it to guarantee no particular minimum degree of free speech access to government property, but rather to guarantee mere equality of access. According to the Court, the government has no absolute obligation to make its property available to any speaker for expressive purposes. Instead, the government has no obligation at all in this area unless it voluntarily chooses to open its property for some expressive purposes. Then, and only then, does the government incur an obligation not to discriminate among speakers or messages. In other words, the government must simply treat all would-be speakers alike. If it grants access to some, it must not deny access to others on a manifestly discriminatory basis. But it need not grant access to any.

Moreover, this notion was eloquently expressed in Justice Roberts' frequently quoted dictum in 

Hague, 307 U.S. at 515:

Wherever the title of streets and parks may rest, they have immemorially been held in trust for the use of the public and, time out of mind, have been used for purposes of assembly, communicating thoughts between citizens, and discussing public questions. Such use of the streets and public places has, from ancient times, been a part of the privileges, immunities, rights, and liberties of citizens.

See, e.g., Mosley, 408 U.S. at 92. In Mosley the Court held that an ordinance prohibiting nonlabor picketing on a public sidewalk near a school violated the first amendment because it discriminated against speech based on its content: "[A]bove all else, the First Amendment means that government has no power to restrict expression because of its message, its ideas, its subject matter, or its content." Id. at 95-96.

Justice Brennan noted this ironic development in his Kokinda dissent: "Ironically, these public forum categories—originally conceived of as a way of preserving First Amendment rights—have been used in some of our recent decisions as a means of upholding restrictions on speech." Kokinda, 110 S. Ct. at 3127 (Brennan, J., dissenting) (citations omitted).

The newly optional nature of free speech access to government property is clear from the Court's remarks in Kokinda:

The Postal Service has not expressly dedicated its sidewalks to any expressive activity. . . . To be sure, individuals or groups have been permitted to leaflet, speak, and picket on postal premises, but . . . "[t]he government does not create a public forum by . . . permitting limited discourse, but only by intentionally opening a nontraditional forum for public discourse. . . ."

Id. at 3121 (quoting Cornelius v. NAACP Legal Defense and Educ. Fund, 473 U.S. 788, 802 (1985) and Perry, 460 U.S. at 46) (citations omitted).
it may deny access on a basis that effectively discriminates against certain speakers or ideas.

The Court's regression in construing the public forum doctrine can be schematically outlined as follows:

Libertarian proposition: The government must grant access to its property for expressive purposes.

Egalitarian corollary: The government must not deny access to its property for expressive purposes on discriminatory bases.

Reductionist redefinition: The government may deny access to its property for expressive purposes on nondiscriminatory bases.

Kokinda graphically illustrates the Court's "equal nonprotection" approach to the public forum doctrine. In what Justice Brennan aptly labelled a "farce" of the intendedly speech-protective public forum doctrine, the Court distorted that doctrine into a basis for denying speech rights on a type of government property that—along with streets and parks—traditionally had been deemed a "quintessential" public forum: a public sidewalk.

In a classic boot-strapping argument, the Court "reasoned" that because the United States Postal Service had issued a regulation prohibiting any solicitation on sidewalks adjoining Post Office buildings, such sidewalks should be classified as "nonpublic forums" where the government could freely enforce almost any restriction on access for expressive purposes. In other words, the government could deny access to speech because it had denied such access!

The Court imposed only two, minimal limitations on the government's power to impose speech restrictions on sidewalks adjoining Post Offices, or other public property classified as nonpublic forums: such restrictions must be "reasonable" and may not constitute "an effort to suppress expression merely because public officials oppose the speaker's view." Apparently, the government may "suppress expression" on such property "because public officials oppose the speaker's view," so long as that is not the officials' only motivation.

In Kokinda, the Court did more than just relegate freedom of speech to the minimal degree of protection afforded by rational basis review. Even worse, it applied that standard in a particularly lackluster fashion, deferred to the determinations of the United States Postal

414. Id. at 3139 (Brennan, J., dissenting).


416. See Kokinda, 110 S. Ct. at 3121.

Service, and in effect presumed the constitutionality of the Service's determinations.\textsuperscript{418} In each of these respects, Kokinda's judicial passivity in enforcing the free speech clause mirrors Sitz's passivity in enforcing the fourth amendment.\textsuperscript{419}

Even assuming arguendo that the postal regulations were appropriately reviewed in Kokinda under a rational basis standard, they still should have been invalidated as unreasonable. The regulation was unreasonable particularly in its discrimination among categories of speech and speakers. The dissent in Kokinda noted that in contrast with its categorical ban on solicitation, "[t]he Postal Service does not subject to the same categorical prohibition many other types of speech presenting the same risk of disruption as solicitation, such as soapbox oratory, pamphleteering, distributing literature for free, or even flag-burning."\textsuperscript{420} In fact, those who solicit money may well be less likely to disrupt post office services than those who engage in permitted types of speech.\textsuperscript{421}

\begin{footnotesize}
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\item \textsuperscript{418}Id. at 3122-24. The Court stressed that the purpose of the forum is "to accomplish the most efficient and effective postal delivery system" and that the purpose of the Postal Service's restrictions on speech is to "ensure the most effective and efficient distribution of the mails." \textit{Id.}
\item This is a striking inversion of classic principles governing speech on public property. Under the established approach, the government could be required to make some sacrifice in the efficiency with which it pursued its goals because it was required to use measures that were least intrusive on free speech rights. For example, in Schneider v. State, 308 U.S. 147, 162-63 (1939), the Court held that the government could not pursue its goal of maintaining litter-free streets by banning leafletting. Rather, the Court held, the government had to utilize a measure that was less intrusive on free speech rights, such as punishing those who engaged in littering, even if that measure was less effective in accomplishing the government's goal. \textit{Id.} at 162. In short, free speech was deemed more important than government efficiency.
\item Kokinda establishes a reverse hierarchy. Not only is the government entitled to utilize the most efficient and the most effective measures for pursuing its goals, but also individuals are denied the right to government measures that intrude least upon their free speech. See Kokinda, 110 S. Ct. at 3122 ("The Government's decision to restrict access to a nonpublic forum need only be \textit{reasonable}; it need not be the most reasonable or the only reasonable limitation.") (quoting Cornelius, 473 U.S. at 808).
\item \textsuperscript{419} See supra notes 151-187 and accompanying text.
\item \textsuperscript{420} Kokinda, 110 S. Ct. at 3137 (Brennan, J., dissenting).
\item \textsuperscript{421} Stressing the regulations' inconsistencies, Justice Brennan observed: [S]olicitors may be quite unlikely to attract much of an audience, because public requests for money are often ignored. Certainly, solicitors are less likely to draw a crowd, and thus to disrupt postal functions, than are eloquent orators or persons distributing popular magazines for free. Under the regulation, a group may stage a political rally to call attention to the problem of drug abuse and draw hundreds or even thousands of persons to the area just outside the entrance to the post office, because there is no general prohibition on large gatherings on postal premises. But since there is a categorical ban on solicitation, the group would be unable to ask a single member of the public for a contribution to advance its cause. \textit{Id.} (footnote omitted).
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\end{footnotesize}
The Court's validation in *Kokinda* of this irrational and inconsistent Postal Service rule illustrates how its sterile overemphasis on formal equality strips constitutional guarantees of their real meaning. The Court purports to preserve in the public forum doctrine at least the protection against the discriminatory exclusion of *some* speech, if not a more absolute protection against the exclusion of *any* speech. Yet, by deferring to government regulators and presuming that their speech restrictions are "reasonable," the Court approves restrictions that, in actual effect, *do* discriminate against certain categories of speakers and certain types of messages, without any rational justification.

In other recent cases, the Court has gone so far as to sustain restrictions that the dissenting Justices believe discriminate against certain viewpoints, the central evil against which the free speech clause guards. The fact that these cases purported to apply the public forum doctrine dramatically demonstrates the Rehnquist Court's dis-

422. *See* Police Dep't of Chicago *v.* Mosley, 408 U.S. 92, 95 (1972): "[A]bove all else, the First Amendment means that government has no power to restrict expression because of its message, its ideas, its subject matter, or its content."

423. In *Cornellius v. NAACP Legal Defense and Educ. Fund*, 473 U.S. 788 (1985), the Court held that an annual charitable fundraising drive conducted in the federal workplace during working hours was not a limited public forum, although for almost 20 years it had been open to any tax-exempt, nonprofit, charitable organization that was supported by public contributions and provided direct health and welfare services to individuals. The Court therefore applied only minimal scrutiny to a 1983 Executive Order, which for the first time excluded from the fundraising drive "[a]gencies that seek to influence the outcomes of elections or the determination of public policy through political activity or advocacy, lobbying, or litigation on behalf of parties other than themselves." *Id.* at 795 (quoting Executive Order No. 12,404, § 1(b), 3 C.F.R. 151 (1984), amending Executive Order No. 12,353, § 2(b)(3)). The Court held that the exclusion of advocacy groups survived the low-level scrutiny it deemed applicable, reasoning that the avoidance of controversy is a valid ground for restricting speech in a nonpublic forum. *Id.* at 808-11.

The *Cornellius* dissenters viewed this exclusion as patently viewpoint-based. Justice Blackmun noted: "Government employees may hear only from those charities that think that charitable goals can best be achieved within the confines of existing social policy and the status quo. The distinction is blatantly viewpoint-based...." *Id.* at 835 (Blackmun, J., dissenting). Justice Stevens, also dissenting, added that "the arguments advanced in support of the exclusion are so plainly without merit that they actually lend support to an inference of bias." *Id.* at 835 (Stevens, J., dissenting).

In *Perry Education Association v. Perry Local Educators' Association*, 460 U.S. 37 (1983), the Court held that school mail facilities did not constitute a limited public forum, even though they were open to a union that had been certified as the teachers' exclusive bargaining representative, had previously been open to a rival union, and had periodically been open to civic and church organizations. *Id.* at 47-48. Because of its conclusion that these facilities constituted a nonpublic forum, the Court held that the school could bar the rival union from using them. *Id.* at 48. According to the four *Perry* dissenters, this selective exclusion constituted viewpoint discrimination that should be prohibited even in a nonpublic forum. *See id.* at 57 (Brennan, J., dissenting).
tortion of this supposedly speech protective doctrine. In sum, although
the Rehnquist Court has reduced the public forum doctrine to a guar-
antee of formal nondiscrimination or equality, the Court is not even
adequately protecting equality values. It tolerates arbitrary and dis-
criminatory restrictions on speech, as well as unjustified restrictions.

b. Free Exercise Clause

The domination in the Court’s public forum free speech analysis
of the formalistic equality concept at the expense of absolute pro-
tections or meaningful equality also is seen in the Court’s recent free
exercise clause jurisprudence. The Rehnquist Court’s “equal non-pro-
tection” approach to the free exercise clause is illustrated by the Court’s
most recent free exercise decision, Employment Division, Department
of Human Resources v. Smith.424 In Smith, the Court ruled that as
long as the government does not overtly or intentionally discriminate
against adherents of particular religious beliefs when it enacts a gen-
erally applicable law, the free exercise clause does not insulate such
adherents from complying with the law, even at the cost of violating
sincere religious beliefs.425 In so ruling, the Court abandoned the ac-
cepted understanding of the free exercise clause as providing some
absolute protection against government measures that substantially
burden sincere religious belief.426

425. Id. at 1599-1600 (quoting U.S. Const. amend. I):
[T]he “exercise of religion” often involves not only belief . . . but the performance
of (or abstention from) physical acts . . . [A] state would be “prohibiting the free
exercise [of religion]” if it sought to ban such acts or abstentions only when they
are engaged in for religious reasons, or only because of the religious belief that they
display. . . .
. . . [I]f prohibiting the exercise of religion . . . is not the object . . . but merely
the incidental effect of a generally applicable and otherwise valid provision, the First
Amendment has not been offended.
See also id. (implying that the free exercise clause would prohibit only criminal law that is
“specifically directed” at particular religious practice).
426. This previously accepted interpretation of the free exercise clause is exemplified in
Wisconsin v. Yoder, 406 U.S. 205 (1972), in which the Court held that the free exercise clause
required the state to exempt from its compulsory education requirement Amish children whose
parents’ sincere religious beliefs would have been violated by maintaining their children in
school beyond age 13. The Court in Yoder noted:
[T]here are areas of conduct protected by the Free Exercise Clause of the First
Amendment and thus beyond the power of the State to control, even under
regulations of general applicability . . .
. . . A regulation neutral on its face may, in its application, nonetheless offend
the constitutional requirement for government neutrality if it unduly burdens the
free exercise of religion.
Id. at 219-20.
This further regression in individual rights analysis, parallel to the regressions described above in fourth amendment and free speech doctrines, also can be summarized as follows:

**Libertarian proposition:** All individuals have the right to free exercise of their religions without being subject to government measures that substantially burden that exercise.

**Egalitarian corollary:** All individuals have the right to equal treatment by the government in terms of their free exercise rights.

**Reductionist redefinition:** All individuals have the right to equal treatment by the government in terms of being subject to uniformly applicable, facially nondiscriminatory measures. It is, however, irrelevant whether, as applied to particular religious exercises, any such measure might have a substantially burdensome effect.

Traditionally, the free exercise clause was viewed as guaranteeing some absolute degree of freedom from government burdens on religious exercises, regardless of how equally or widely dispersed those burdens might be and regardless of whether the government imposed those burdens inadvertently rather than intentionally.\(^4\) The Supreme Court consistently has held that the free exercise clause requires the government to exempt an individual from a general legal obligation if it would substantially burden the individual’s free exercise of religious beliefs, unless a nonexemption policy would survive strict judicial scrutiny—i.e., the government could show that, due to the exemptions, it could not substantially achieve a goal of compelling importance.\(^4\)

A leading case in establishing this understanding of free exercise rights was *Sherbert v. Verner*.\(^4\) In *Sherbert*, the Court held that a

\(^4\) See, e.g., *Smith*, 110 S. Ct. at 1608 (O’Connor, J., concurring in judgment) (citations omitted) (“The First Amendment ... does not distinguish between laws that are generally applicable and laws that target particular religious practices. ... Our free exercise cases have all concerned generally applicable laws that had the effect of significantly burdening a religious practice.”); *Yoder*, 406 U.S. at 214-20; *Cantwell v. Connecticut*, 310 U.S. 296, 304-07 (1940).

\(^4\) See, e.g., *Hernandez v. Commissioner*, 109 S. Ct. 2136, 2148 (1989) (“The free exercise inquiry asks whether government has placed a substantial burden on the observation of a central religious belief or practice and, if so, whether a compelling governmental interest justifies the burden.”); *Hobbie v. Unemployment Appeals Comm’n*, 480 U.S. 136, 141 (1987) (Laws burdening religion “must be subjected to strict scrutiny and could be justified only by proof by the State of a compelling interest.”); United States v. *Lee*, 455 U.S. 252, 257-58 (1982) (“The state may justify a limitation on religious liberty by showing that it is essential to accomplish an overriding governmental interest.”); *Thomas v. Review Bd.*, 450 U.S. 707, 718 (1981) (“The state may justify an inroad on religious liberty by showing that it is the least restrictive means of achieving some compelling state interest.”); *Yoder*, 406 U.S. at 215 (“[O]nly those interests of the highest order and those not otherwise served can overbalance legitimate claims to the free exercise of religion.”); *Sherbert v. Verner*, 374 U.S. 398, 406 (1963) (generally applicable regulation can be applied to religious objector only if “some compelling state interest ... justifies the substantial infringement of appellant’s First Amendment right.”).

state was required to exempt a Sabbath observer from the general obligation of being available for Saturday work as a precondition for receiving unemployment compensation. The Court made clear that the free exercise clause was not satisfied by the mere fact that the state had treated all individuals equally with respect to their free exercise rights, insofar as all individuals were subject to the Saturday work requirement. Nor did the Court deem the free exercise clause to be satisfied by the mere fact that the state had not intentionally discriminated against Sabbatarians in crafting its rules governing unemployment compensation. It was undisputed that the state simply had not considered the differential adverse impact that the facially nondiscriminatory requirement would have on adherents of certain religious beliefs. In *Sherbert*, the Court underscored that the free exercise clause assured an absolute right to freedom from any substantial burden on the exercise of one's beliefs, no matter how equally or inadvertently that burden might have been imposed. That right could be limited only if the government could satisfy the heavy burden of proving that exempting the religiously burdened individual from the general obligation would prevent it from substantially achieving an objective of compelling importance. After *Sherbert*, the Court consistently enforced these free exercise clause principles in a line of cases that culminated in 1987 with *Hobbie v. Unemployment Appeals Commission*.

In the past several Terms, however, the Court has issued a series of decisions that were inconsistent with this absolutist, libertarian version of the free exercise clause, and has suggested instead an egalitarian revision. This new direction was signaled, for example, in *Lyng v. Northwest Indian Cemetery Protective Association*, *Bowen v. Roy*, and *Goldman v. Weinberger*. The hints of a retrenchment

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430. *Id.* at 403-04.
431. *Id.* at 404-06.
432. *Id.* at 406-09.
433. *Id.* at 408-09.
435. 485 U.S. 439, 451 (1988) (rejecting free exercise challenge to federal government's logging and road construction activities on lands sacred to several Native American tribes, even though it was undisputed that these activities "could have devastating effects on traditional Indian religious practices").
436. 476 U.S. 693 (1986) (rejecting free exercise challenge to federal benefits statute requiring benefit applicants and recipients to supply their Social Security numbers, despite claim by Native American parents that it would violate their religious beliefs to obtain and provide Social Security number for their daughter).
437. 475 U.S. 503 (1986) (rejecting free exercise challenge to Air Force regulations that forbade the wearing of a yarmulke by an ordained Orthodox Jewish rabbi who was a
that had been sounded in these earlier cases became a clarion call in *Smith*. *Smith* held that, notwithstanding the free exercise clause, states may prohibit sacramental peyote use by members of the Native American Church, and thus deny unemployment benefits to Church members discharged for such use.\(^{438}\)

In each of the earlier narrowing cases, the Court had cited a particular reason for not applying to the challenged, religiously burdensome measure the strict scrutiny it had applied in *Sherbert* and its progeny.\(^{439}\) Not until *Smith*, however, did the Court issue the general holding that strict scrutiny is an inappropriately rigorous standard for reviewing government measures that substantially burden religious freedom. In so holding, the Court has materially constricted free exercise freedoms. Thus, paralleling the pattern in *Sitz* and *Kokinda*, *Smith*’s substantive diminution of Bill of Rights freedoms is accomplished in tandem with the adoption of a newly passive, deferential mode of judicial review.

The Court’s abandonment of meaningful judicial scrutiny was particularly startling in *Smith* since the government had never challenged the strict standard that, consistent with longstanding Supreme Court precedent, the courts below had applied. Therefore, this subject was not addressed in the parties’ briefs or in oral argument. The briefs and argument were confined to the sole issue on which the Supreme Court granted review: whether the state’s failure to exempt the sacramental use of peyote by members of the Native American Church from its general laws criminalizing the use of various drugs, including peyote, survived strict judicial scrutiny.\(^{440}\)

Never, throughout the protracted history of the litigation in *Smith*—which was before the Supreme Court on a previous occasion\(^{441}\)—had any court or party argued that the challenged state commissioned Air Force officer working as a clinical psychologist on an Air Force base, despite his sincere belief that he had a religious obligation to wear it).\(^ {438}\) Employment Div., Dep’t of Human Resources v. Smith, 110 S. Ct. 1595 (1990).

\(^{439}\) In both *Roy* and *Lyng*, the Court expressly distinguished *Sherbert* on the ground that the first amendment does not “require the Government *itself* to behave in ways that the individual believes will further his or her spiritual development.... The Free Exercise Clause simply cannot be understood to require the Government to conduct its own internal affairs in ways that comport with the religious beliefs of particular citizens.” *Roy*, 476 U.S. at 699; accord *Lyng*, 485 U.S. at 449-50. In *Goldman*, the Court emphasized the tradition of judicial deference to military regulations. See *Goldman*, 475 U.S. at 507 (“Our review of military regulations challenged on First Amendment grounds is far more deferential than constitutional review of similar laws or regulations designed for civilian society.”).


\(^{441}\) See *Smith*, 110 S. Ct. at 1598 (describing procedural history). The Supreme Court’s previous decision in *Smith* is reported at 485 U.S. 660 (1988).
action, which clearly imposed a substantial burden on the religious exercises of Native American Church members, should be reviewed under a less exacting standard than strict scrutiny. Yet, without the benefit of briefs or oral arguments, the majority, sua sponte, refused to assess the state’s nonexemption under a strict scrutiny standard and apparently even refused to review that nonexemption under any standard at all. The Court merely announced a new per se rule that “an individual’s religious beliefs [do not] excuse him from compliance with an otherwise valid law prohibiting conduct that the State is free to regulate,” notwithstanding the free exercise clause.442

In Smith, the Court reduced the free exercise clause to a mere guarantee of formally equal treatment by the government. So long as a governmental rule on its face applies equally to all religious beliefs and that rule was not intentionally designed to have an adverse impact on particular religious beliefs, then it is constitutionally irrelevant that the rule in fact has such an adverse impact. The religious believers whose free exercise rights are in fact—albeit inadvertently—burdened differentially by a facially neutral rule are deprived of any constitutional recourse. This sterile view of the free exercise clause severely cripples its ability to protect members of minority religious groups. As Justice O’Connor noted in her concurring opinion, which excoriated the plurality’s abrogation of the established free exercise clause standards:

[F]ew States would be so naive as to enact a law directly prohibiting or burdening a religious practice as such. . . . If the First Amendment is to have any vitality, it ought not be construed to cover only the extreme and hypothetical situation in which a State directly targets a religious practice.444

442. Smith, 110 S. Ct. at 1600.
443. The plurality’s sweeping revision of free exercise clause jurisprudence was without the benefit of briefs or oral arguments. It was the basis for a petition for rehearing that was jointly filed by a broad array of constitutional scholars, religious organizations, and other individuals and groups. Petition for Rehearing, supra note 380, at 5-6:

Because the Court’s far-reaching holding resolved an issue not briefed by the parties, because recent research on the history of the Free Exercise Clause demonstrates that the broader reading of the Clause rejected by the Court . . . was contemplated by the Framers of the First Amendment, and because assertions that the Court has “never held” that the Free Exercise Clause requires government to justify unintended burdens on free exercise must come as a surprise to the federal and state courts, state attorneys general, and treatise writers who have uniformly read this Court’s Free Exercise decisions from as far back as at least Sherbert v. Verner, as holding precisely that, a rehearing is appropriate.

The Court denied this petition for rehearing. Smith, 110 S. Ct. 1595, reh’g denied, 110 S. Ct. 2605 (1990).

444. Smith, 110 S. Ct. at 1608 (O’Connor, J., concurring in judgment). Justice O’Connor
Justice O'Connor concluded that the majority’s new rule “‘relegates a serious First Amendment value to the barest level of minimum scrutiny that the Equal Protection Clause already provides.” As previously noted, however, this equal protection standard does not even afford meaningful guarantees of equality and nondiscrimination regarding religious freedom. Members of the Native American Church are treated with formal equality vis-à-vis members of other faiths, insofar as all are subject to criminal prosecution for using controlled substances. Yet, only the Native American Church members are forced to choose between possible criminal punishment and abiding by the commands of their religious faith. They alone, in effect, are coerced by the government to choose between violating their religious beliefs or paying the heavy price of possible incarceration for abiding by those beliefs.

The Smith majority opinion candidly acknowledges that its reasoning would eliminate the free exercise clause’s role as the guarantor of religious liberty for adherents of minority religions, relegating their freedom to the good will of legislative majorities. Moreover, the Smith majority admits that “leaving accommodation to the political process will place at a relative disadvantage those religious practices that are not widely engaged in. . . .” That this observation is an understatement is indicated by the fact that Smith itself, as well as two other recent cases in which the Court has rejected free exercise clause claims—Bowen and Lyng—all involved formally neutral government measures that severely undermined the free exercise rights of Native Americans. The plurality’s conclusory response that discriminatory truncation of the constitutional rights of minority groups is the “unavoidable consequence of democratic government” shirks the Court’s historic responsibility to avoid such consequences.

Further observed: “There is nothing talismanic about neutral laws of general applicability or general criminal prohibitions, for laws neutral toward religion can coerce a person to violate his religious conscience or intrude upon his religious duties just as effectively as laws aimed at religion.”

445. Id. at 1608 (quoting Hobbie v. Unemployment Appeals Comm’n, 480 U.S. 136, 141-

446. See Smith, 110 S. Ct. at 1610 (O’Connor, J., concurring in judgment) (“A State that makes criminal an individual’s religiously motivated conduct burdens that individual’s free exercise of religion in the severest manner possible, for it ‘results in the choice to the individual of either abandoning his religious principle or facing criminal prosecution.’”) (quoting Braunfeld v. Braun, 366 U.S. 599, 605 (1961) (plurality opinion)).

447. See id. at 1606.

448. Id.

449. Id.

450. Indeed, this false conclusion led Justice O’Connor to remark:
It is worth recalling the frequently quoted words of Justice Jackson in *West Virginia Board of Education v. Barnette*, which was a landmark case in establishing not only religious liberty, but also the Supreme Court's special role in protecting Bill of Rights freedoms more generally:

The very purpose of a Bill of Rights was to withdraw certain subjects from the vicissitudes of political controversy, to place them beyond the reach of majorities and officials and to establish them as legal principles to be applied by the courts. One's right to life, liberty, and property, to free speech, a free press, freedom of worship and assembly, and other fundamental rights may not be submitted to vote; they depend on the outcome of no elections.

In *Smith*, this eloquent statement of central constitutional principle is relegated to Justice O'Connor's concurring opinion, rather than being cited by the majority. Even more disturbing, the majority opinion twice relies on *Minersville School District v. Gobitis*, the long since discredited decision that rejected the religious freedom claims of Amish schoolchildren. Even the Court that decided *Gobitis* considered it so clearly erroneous that it overruled the decision, with only one dissent, just three years later in *Barnette*. It is an ominous sign that, in citing *Gobitis*, the *Smith* majority does not even note the fact that this decision was subsequently overruled; much less does the *Smith* majority abide by the fundamental principles enunciated in the landmark decision overruling *Gobitis*. This is yet another clear manifestation of the trends evident in *Sitz*, *Kokinda*, and other recent Rehnquist Court decisions. The Court is abdicating its role as the protector of individual rights, especially for members of minority groups, and is interpreting those rights in an unprecedentedly narrow fashion.

**Conclusion: The Bottom of the Slope**

Chief Justice Rehnquist's majority opinion in *Sitz* epitomized the newly narrowed attitude that under his leadership the Supreme Court has displayed both toward its institutional role in protecting consti-
INDIVIDUAL RIGHTS AFTER \textit{Sitz}\footnote{See \textit{Webster v. Reproductive Health Servs.}, 109 S. Ct. 3040, 3076-77 (1989) (Blackmun, J., concurring in part and dissenting in part) (plurality's proposed test for reviewing restrictions on abortion constitutes rational basis review and "non-scrutiny").}

tutional rights and toward the substantive content of those rights. This opinion marks a new low in the Court's recent tendency to ignore the fourth amendment's textually and historically rooted guarantee against searches and seizures that are not justified by some particularized suspicion. For the first time in its history, the Court is permitting the government to subject a high percentage of the populace—potentially every driver in the country—to groundless searches and seizures of a personal nature in order to pursue criminal law enforcement goals.

As if this acceptance of a mass surveillance approach to law enforcement problems was not frightening enough, \textit{Sitz} has broader, long-range implications that transcend the fourth amendment sphere. It signals the Court's shift from strict scrutiny to minimal scrutiny in evaluating measures allegedly infringing specific personal freedoms enumerated in the Bill of Rights. The Court thus rejects the thrust of \textit{Carolene Products} Footnote Four, which outlined its special role in enforcing Bill of Rights guarantees. It instead espouses the same judicial restraint in reviewing claimed infringements of those specific, personal guarantees as it previously had reserved for claimed infringements of the general property rights protected under the due process and equal protection clauses.

Paralleling its deferential scrutiny—or, more accurately, non-scrutiny\footnote{See \textit{Webster v. Reproductive Health Servs.}, 109 S. Ct. 3040, 3076-77 (1989) (Blackmun, J., concurring in part and dissenting in part) (plurality's proposed test for reviewing restrictions on abortion constitutes rational basis review and "non-scrutiny").}—of governmental measures infringing upon Bill of Rights freedoms, the Rehnquist Court has constricted its conception of the scope of these freedoms, a trend that \textit{Sitz} exemplifies. Rather than adhering to established views of the fourth amendment and other Bill of Rights provisions as ensuring some absolute level of protection for various personal liberties, \textit{Sitz} and other recent decisions espouse a diminished view of these provisions as merely ensuring that individuals not be subject to patent, intentional discrimination in the level of protection—or lack of protection—they receive.

Thus, after \textit{Sitz}, no American has the right to be free from suspicionless searches and seizures. Instead, we must be content in the knowledge that everyone else will also be subject to suspicionless searches and seizures. Likewise, after \textit{Kokinda} and \textit{Smith}, no American has the right to engage in expressive activity on government property or to be exempted from government measures that substantially burden our religious freedom. Instead, we must be content in the knowledge that the government may not single us out in denying expressive access to its property solely because it disagrees with our ideas,
and that the government may not pass a measure that specifically and intentionally singles out our religious beliefs for impairment.

In his dissenting opinion in *Delaware v. Prouse* in 1979, then-Associate Justice Rehnquist ridiculed the majority’s suggestion that suspicionless searches and seizures of automobile passengers that were conducted on a mass scale could be constitutionally justified on the ground that they were imposed uniformly upon many motorists, even though it had invalidated a suspicionless search of an individual motorist. He acerbically observed that the majority had “elevate[d] the adage ‘misery loves company’ to a novel role in Fourth Amendment jurisprudence.”457 Ironically and frighteningly, under Rehnquist’s ideological leadership as Chief Justice, the Court has elevated that adage to an even more exalted status, applicable not only to the fourth amendment, but also to the Bill of Rights more generally.

457. 440 U.S. at 664 (Rehnquist, J., dissenting).