

JUSTICE BREYER’S FOURTH AMENDMENT JURISPRUDENCE

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INTRODUCTION

The Fourth Amendment¹ is “the most commonly implicated aspect of the Constitution” as well as “the most frequently litigated part.”² Therefore, it is often difficult for a judge to remain consistent in his Fourth Amendment views, and to also have his Fourth Amendment opinions line up with his overall constitutional outlook.³ Supreme Court Justice Stephen G. Breyer,⁴ a member of the Supreme Court since August 3, 1994,⁵

¹ The Fourth Amendment provides that the “right of the people to be secure in their persons, houses, papers, and effects, against unreasonable searches and seizures, shall not be violated.” U.S. CONST. amend. IV.

² Thomas K. Clancy, *The Irrelevancy of the Fourth Amendment in the Roberts Court*, 85 CHI.-KENT L. REV. 191, 192 (2010) (emphasis omitted).

³ Most scholars agree that the Supreme Court’s Fourth Amendment decisions over the years have resulted in “incomparable incoherence.” Note, *The Fourth Amendment’s Third Way*, 120 HARV. L. REV. 1627, 1627 (2007); see, e.g., Lloyd L. Weinreb, *Your Place or Mine? Privacy of Presence Under the Fourth Amendment*, 1999 SUP. CT. REV. 253, 253 (1999) (describing Fourth Amendment jurisprudence as “shifting, vague, and anything but transparent”).

⁴ After receiving his law degree from Harvard Law School in 1964, Breyer clerked for Justice Arthur Goldberg of the Supreme Court of the United States. *Stephen G. Breyer, Associate Justice*, SUPREME COURT OF THE U.S., <http://www.supremecourt.gov/about/biographies.aspx> (last visited May 14, 2012). He was a professor and lecturer at Harvard University Law School from 1967 to 1994. *Id.* From 1990 until 1994, Breyer

has managed to remain relatively consistent in his two majority opinions⁶ and most of his thirteen dissents or concurrences⁷ in the area of Fourth Amendment law. Several of Breyer's decisions, however, are inconsistent in that they do not align with his usual constitutional and Fourth Amendment views, but these decisions can at least be explained by other considerations. On the other hand, there are a few of Breyer's decisions that completely lack consistency and provide little insight into why Breyer ruled the way he did. Although one could possibly square away these outliers with Breyer's usual constitutional and Fourth Amendment jurisprudence, doing so is quite a strain.

Breyer believes that there are “two overarching goals of our democratic Constitution: to protect negative liberty, meaning freedom from government constraint, and to protect active liberty, meaning the ability to participate in governance” and the ability to trace a governmental decision back to the people.⁸ It is this second aspect that Breyer attributed great significance to in the

served as a judge of the United States Court of Appeals for the First Circuit. *Id.* He was nominated by President Clinton as a justice of the Supreme Court in 1994. *Id.*

⁵ *Id.* At the time of his Supreme Court confirmation, Breyer was considered an expert in the area of administrative and regulatory law, but he had “written little or nothing about constitutional issues, including matters of constitutional interpretation.” Ken I. Kersch, *Justice Breyer's Mandarin Liberty*, 73 U. CHI. L. REV. 759, 759 (2006) (reviewing STEPHEN BREYER, *ACTIVE LIBERTY* (2005)). Since joining the Supreme Court bench, however, Breyer has gradually developed his own views on constitutional law. Cass R. Sunstein, *Justice Breyer's Democratic Pragmatism*, 115 YALE L.J. 1719, 1720 (2006) (reviewing STEPHEN BREYER, *ACTIVE LIBERTY* (2005)).

⁶ *Illinois v. Lidster*, 540 U.S. 419 (2004); *Illinois v. McArthur*, 531 U.S. 326 (2001).

⁷ *Davis v. United States*, 131 S. Ct. 2419, 2436 (2011) (Breyer, J., dissenting); *Arizona v. Gant*, 556 U.S. 332, 354 (2009) (Breyer, J., dissenting); *Herring v. United States*, 555 U.S. 135, 157 (2009) (Breyer, J., dissenting); *Scott v. Harris*, 550 U.S. 372, 387 (2007) (Breyer, J., concurring); *Hudson v. Michigan*, 547 U.S. 586, 604 (2006) (Breyer, J., dissenting); *Georgia v. Randolph*, 547 U.S. 103, 125 (2006) (Breyer, J., concurring); *Brosseau v. Haugen*, 543 U.S. 194, 201 (2004) (Breyer, J., concurring); *Hiibel v. Sixth Judicial Dist. Court of Nev.*, 542 U.S. 177, 196-97 (2004) (Breyer, J., dissenting); *United States v. Flores-Montano*, 541 U.S. 149, 156 (2004) (Breyer, J., concurring); *Bd. of Educ. v. Earls*, 536 U.S. 822, 838 (2002) (Breyer, J., concurring); *Bond v. United States*, 529 U.S. 334, 339 (2000) (Breyer, J., dissenting); *Wyoming v. Houghton*, 526 U.S. 295, 307 (1999) (Breyer, J., concurring); *Minnesota v. Carter*, 525 U.S. 83, 103 (1998) (Breyer, J., concurring in the judgment).

⁸ James E. Ryan, *Does It Take A Theory? Originalism, Active Liberty, and Minimalism*, 58 STAN. L. REV. 1623, 1625-26 (2006) (internal quotation marks omitted) (reviewing STEPHEN BREYER, *ACTIVE LIBERTY* (2005) and CASS R. SUNSTEIN, *RADICALS IN ROBES: WHY EXTREME RIGHT-WING COURTS ARE WRONG FOR AMERICA* (2005)); see STEPHEN BREYER, *ACTIVE LIBERTY* 3-34 (2005).

several books he has written, emphasizing that “judicial review . . . should be undertaken with close reference to active liberty.”⁹ In other words, Breyer believes that judges should practice judicial modesty and defer to the decisions of the political branches.¹⁰ Statistically, it appears that Breyer has held true to his statement. Several studies conducted in 2005 have shown that Breyer, more so than any other justice on the Rehnquist Court, had the highest percentage of votes to uphold congressional acts¹¹ and executive decisions.¹²

In light of Breyer's active liberty jurisprudence, he argues that constitutional individual liberty cases require an emphasis on the use of two unique interpretive tools—what Breyer calls values and proportionality.¹³ The first tool, values, requires determining the basic underlying values of the constitutional provision and ensuring that the solution reflects those values.¹⁴ According to Breyer, a determination of values is equivalent to using the interpretive tools of purpose and consequences.¹⁵ To determine the provision's purpose, the judge must ask what the Framers sought to protect when drafting the amendment, while also taking into consideration changing circumstances.¹⁶ Breyer has stated that he

⁹ Sunstein, *supra* note 5, at 1720; see BREYER, ACTIVE LIBERTY, *supra* note 8, at 5.

¹⁰ Paul Gewirtz, *The Pragmatic Passion of Stephen Breyer*, 115 YALE L.J. 1675, 1680 (2006) (reviewing STEPHEN BREYER, ACTIVE LIBERTY (2005)).

¹¹ See, e.g., Lori A. Ringhand, *Judicial Activism: An Empirical Examination of Voting Behavior on the Rehnquist Natural Court*, 24 CONST. COMMENT. 43, 48 (2007); Paul Gewirtz & Chad Golder, Editorial, *So Who Are the Activists?*, N.Y. TIMES, July 6, 2005, at A23.

¹² Thomas J. Miles & Cass R. Sunstein, *Do Judges Make Regulatory Policy? An Empirical Investigation of Chevron*, 73 U. CHI. L. REV. 823, 826 (2006).

¹³ STEPHEN BREYER, MAKING OUR DEMOCRACY WORK 160 (2010). It is important to note that Breyer is not stating that the tools of proportionality and values are the only interpretive tools a judge should have in his tool kit when examining constitutional provisions. BREYER, ACTIVE LIBERTY, *supra* note 8, at 115. Breyer explains that other tools should be used in constitutional interpretation, including “language, history, tradition, [and] precedent.” *Id.* at 8. He believes, however, that judges in such cases should *emphasize* proportionality and values. *Id.*

¹⁴ BREYER, ACTIVE LIBERTY, *supra* note 8, at 115.

¹⁵ BREYER, MAKING OUR DEMOCRACY WORK, *supra* note 13, at 162. Scholars have noted that Breyer's emphasis on purpose and consequences is what separates him from originalists, like his fellow member of the bench, Justice Antonin Scalia. See, e.g., Michael W. McConnell, *Active Liberty: A Progressive Alternative to Textualism and Originalism?*, 119 HARV. L. REV. 2387, 2398 (2006) (reviewing STEPHEN BREYER, ACTIVE LIBERTY (2005)).

¹⁶ BREYER, MAKING OUR DEMOCRACY WORK, *supra* note 13, at 165-66.

considers “individual constitutional provisions as embodying certain basic purposes, often expressed in highly general terms.”¹⁷ For instance, Breyer believes one of the underlying values or purposes of the Fourth Amendment is the protection of privacy.¹⁸ Once the judge comes up with a proposed interpretation, he must again use his values tool to ask whether the likely consequences of his decision “are more likely to further than to hinder achievement of the provision’s purpose.”¹⁹

The tool of proportionality²⁰ comes into play when important constitutional rights and interests clash.²¹ Proportionality involves asking whether the restriction on the constitutional right “is proportionate to, or properly balances, the need.”²² This analysis requires a three-part enquiry. First, the judge must use the values tool to determine the underlying value of the particular constitutional provision.²³ The judge must then determine whether the restriction furthers a competing and compelling state interest and whether that interest imposes a burden on the constitutional value.²⁴ If it does, the judge must determine whether the restriction, in its efforts to further the compelling state interest, “disproportionately burdens the interest the

¹⁷ BREYER, ACTIVE LIBERTY, *supra* note 8, at 115.

¹⁸ BREYER, MAKING OUR DEMOCRACY WORK, *supra* note 13, at 162.

¹⁹ *Id.* at 92.

²⁰ *Id.* at 160. Breyer explains that a proportionality analysis is needed in individual liberty cases because the constitutional provisions setting forth these rights are not absolute and must be reconciled with “competing rights and interests.” *Id.* Moreover, the language of the Constitution is not always clear. *Id.* For instance, the term “unreasonable searches’ in the Fourth [Amendment] . . . does not itself describe its scope.” *Id.* In addition to the language’s lack of clarity, the Court has the daunting task of applying the language to difficult constitutional issues. For example, “[h]ow does the Fourth Amendment apply to the police department’s use of barriers created to stop all cars and search for drugs?” *Id.* Also, “practical problems” often emerge with individual liberty cases, further preventing an easy answer. *Id.* at 161. Lastly, the proportionality analysis helps “the public accept as legitimate the Court’s unpopular decisions.” *Id.* at 162.

²¹ *Id.* at 163.

²² *Id.* at 164.

²³ *Id.* at 165.

²⁴ *Id.* at 167. Breyer also recommends that the judge inquire into whether there is a “less burdensome, similarly effective way to further [the] objective”; however, in most instances, there will probably be no “obvious” answer. *Id.* at 169. When this is the case, the judge must initiate the third part of the proportionality analysis, which Breyer considers to be a “balancing question.” *Id.*

[constitutional provision] seeks to protect.”²⁵ If the burden is proportionate, the restriction is constitutional.²⁶

While the proportionality analysis may at first blush appear *judge empowering*, Justice Breyer argues that it is *legislator empowering*—and, therefore, a promotion of active liberty.²⁷ He believes that courts are less equipped to try to investigate and find answers to “facts and fact-related judgments.”²⁸ Thus, when using the proportionality analysis, judges are required to “accept reasonable legislative determinations” in regard to whether the restriction achieves its objectives—i.e., furthers a compelling state interest.²⁹

In addition, Breyer considers his values tool to be in line with the promotion of active liberty: “[F]ocus on purpose seeks to promote active liberty by insisting on [constitutional] interpretations . . . that are consistent with the people’s will. Focus on consequences, in turn, allows us to gauge whether and to what extent we have succeeded in facilitating workable outcomes which reflect that will.”³⁰

In regard to the area of privacy, Breyer has specifically argued for narrow judicial rulings not only for purposes of promoting active liberty, but due to the complex nature of privacy and the circumstances surrounding it.³¹ First of all, there are multiple values underlying the value of privacy itself, often resulting in disagreement on what privacy values should be emphasized.³² For instance, privacy can invoke values related to an individual’s right to be left alone, the ability to share information, or the right to have one’s personal liberty and

²⁵ *Id.* at 169 (emphasis omitted).

²⁶ *Id.*

²⁷ *Id.* at 170; BREYER, ACTIVE LIBERTY, *supra* note 8, at 115.

²⁸ BREYER, MAKING OUR DEMOCRACY WORK, *supra* note 13, at 168.

²⁹ *Id.* at 170. Breyer believes the alternatives to the proportionality analysis are either judges basing their decisions on their own personal beliefs (an “intuitive balancing”) or on the law at the time the constitutional provision was passed. *Id.* Breyer finds neither of these approaches to be viable because there would ultimately be no reason for the public to accept decisions based on irrational reasoning such as these. *Id.* As Breyer asks, “[w]hy should the public find acceptable such complete reliance on either an eighteenth-century alternative or an unexplained judicial intuition?” *Id.*

³⁰ BREYER, ACTIVE LIBERTY, *supra* note 8, at 115.

³¹ *Id.* at 66, 72.

³² *Id.* at 66-67.

property protected.³³ While one can weigh these values differently, Breyer maintains that at the heart of any such value lays an individual's dignity, "and almost all Americans accept the need for legal rules to protect that dignity."³⁴ Second, rapid changes in technology have made the current protections of privacy uncertain.³⁵ Third, it is unclear what interests are to be balanced and how they are to be balanced "in light of uncertain predictions about the technological future."³⁶

Breyer argues that these privacy related problems "together with the process of democratic resolution counsels a special degree of judicial modesty and caution" in privacy-related cases.³⁷ In other words, judges should issue narrow rulings and "focus[] upon the particular circumstances present in the case" in order to prevent "short-circuiting, or preempting, the 'conversational' lawmaking process," in which answers to these complex issues "bubble up from below."³⁸ Moreover, debates in the area of privacy law are *ongoing*, and are ones that citizens actually do participate in.³⁹

I. BREYER'S CONSISTENCY

A. *The Proportionality Analysis in Action*

As discussed above, Breyer argues for a proportionality analysis in constitutional individual liberty cases. Therefore, one would presume that Breyer employs this analysis in all of his Fourth Amendment opinions. In reality, Breyer has used this analysis in two of his opinions⁴⁰ and agreed with its use by the majority in two other cases, but wrote his own opinion for other

³³ *Id.* at 67.

³⁴ *Id.*

³⁵ *Id.* at 68.

³⁶ *Id.* at 69.

³⁷ *Id.* at 71.

³⁸ *Id.* at 70-72.

³⁹ *Id.* at 70-71, 72. Another reason Breyer finds narrow rulings in this area of law of such importance is that they allow a court to mention concerns it has in dicta, which can then lead to the political branches changing the law, "tailoring [the law] to take account of current technological facts." *Id.* at 72. A broader ruling, on the other hand, might prevent legislative action "in ways now unforeseeable." *Id.* at 73.

⁴⁰ *Illinois v. Lidster*, 540 U.S. 419 (2004); *Bd. of Educ. v. Earls*, 536 U.S. 822, 838 (2002) (Breyer, J., concurring).

reasons.⁴¹ Breyer has also used balancing test language, but did not actually employ the test, in two other decisions.⁴²

Breyer used the proportionality analysis in his concurrence in *Board of Education v. Earls*, although he did not directly call it this.⁴³ Instead, Breyer (and the majority) used what in Fourth Amendment jurisprudence is called the balancing test.⁴⁴ The balancing test can determine whether a search or seizure is reasonable, and it requires the balancing of four factors: (1) the individual's interest, (2) the government's interest, (3) the character of the intrusion, and (4) the necessity for the intrusion.⁴⁵ The Court often employs this test where an intrusion serves a special need, or more accurately, an intrusion that serves a "governmental interest[] that [is] not primarily [a] traditional law enforcement interest[]."⁴⁶

The Court will also use this test if, in determining whether the Fourth Amendment applies to a search, it concludes that the individual has a diminished expectation of privacy.⁴⁷

⁴¹ *Scott v. Harris*, 550 U.S. 372, 387 (2007) (Breyer, J., concurring); *Wyoming v. Houghton*, 526 U.S. 295, 307 (1999) (Breyer, J., concurring).

⁴² *Illinois v. McArthur*, 531 U.S. 326 (2001); *Bond v. United States*, 529 U.S. 334, 339 (2000) (Breyer, J., dissenting).

⁴³ 536 U.S. at 838. Breyer notes that the Court does not always use the term "proportionality analysis," but ultimately, the Court still performs the same or a similar analysis—comparing the harm to the underlying value with the need. BREYER, *MAKING OUR DEMOCRACY WORK*, *supra* note 13, at 164, 170.

⁴⁴ *Earls*, 536 U.S. at 839. The balancing test is one of the five principal models courts use to determine whether a search or seizure is reasonable under the Fourth Amendment. THOMAS K. CLANCY, *THE FOURTH AMENDMENT: ITS HISTORY AND INTERPRETATION* 470 (2008). The other models include the warrant preference model, the individualized suspicion model, the totality of the circumstances test, and the common law as of 1791 plus balancing test. *Id.* at 470-71.

⁴⁵ CLANCY, *supra* note 44, at 495; *see, e.g.*, *MacWade v. Kelly*, 460 F.3d 260 (2d Cir. 2006).

⁴⁶ CLANCY, *supra* note 44, at 501. Law enforcement interests that courts have found to fall within the special needs doctrine include vehicle checkpoints and "the maintenance of order in public schools." *Id.*

⁴⁷ *Id.* at 62. Before a court determines whether a search or seizure is reasonable, it must first ask whether the search or seizure invades the individual's protected interest. *Id.* at 3. If the answer is no, then the Fourth Amendment does not apply. *Id.* at 3-4. For instance, Breyer argued in his *Bond v. United States* dissent that the defendant did not have a reasonable expectation that strangers would not touch and squeeze his overhead luggage; therefore, the Fourth Amendment did not apply when a police officer conducted a "similar tactile inspection." 529 U.S. 334, 340 (2000) (Breyer, J., dissenting). On the other hand, Breyer argued in his *Minnesota v. Carter* concurrence in the judgment that two men visiting a friend for two and a half hours while they

In *Earls*, high school students claimed their school's ability to conduct suspicionless urinalysis drug tests of any student participating in extracurricular activities was a violation of the Fourth Amendment.⁴⁸ Breyer agreed with the majority that the policy was constitutionally reasonable pursuant to the special needs doctrine, but he wrote his own opinion to "emphasize several underlying considerations."⁴⁹ Breyer stressed that there was a serious national problem of drug use in schools.⁵⁰ Partially deferring to the political branches on this finding, Breyer cited several studies, including ones conducted by the White House National Drug Control Strategy and the Department of Health and Human Services, all noting that drug use in the school system is more prevalent and dangerous than ever.⁵¹ Moreover, as a preparer of "pupils for citizenship in the Republic," Breyer argued that schools have a responsibility to address this issue.⁵² In regard to the interest of the individual, Breyer argued that students do not have a full expectation of privacy.⁵³ Breyer found the character of the intrusion to be minimally intrusive because public meetings were held on the proposed policy⁵⁴ and students had the right to object to the testing.⁵⁵ Lastly, Breyer concluded that the search was effective because it provided the student with a

packaged cocaine at his kitchen table did have a reasonable expectation of privacy. 525 U.S. 83, 103 (1998) (Breyer, J., concurring in the judgment).

⁴⁸ *Earls*, 536 U.S. at 825 (majority opinion).

⁴⁹ *Id.* at 839 (Breyer, J., concurring).

⁵⁰ *Id.*

⁵¹ *Id.*

⁵² *Id.* at 840 (quoting *Bethel Sch. Dist. No. 403 v. Fraser*, 478 U.S. 675, 681 (1986)).

⁵³ *Id.* While Breyer did not do so in this case, the Court usually looks at both the objective and subjective aspects of the intrusion upon the individual's interests. CLANCY, *supra* note 44, at 497.

⁵⁴ Breyer noted that some students found the procedure to be "seriously embarrass[ing]," while others thought it was "no more intrusive than a routine medical examination." *Earls*, 536 U.S. at 841 (Breyer, J., concurring). However, Breyer gave great weight to the fact that the school allowed the community an opportunity to voice their opinions on the policy wherein little objection was made. *Id.* One can assume that Breyer found this meeting to be important because it is an example of active liberty. See BREYER, ACTIVE LIBERTY, *supra* note 8, at 70-71 ("Serious complex legal change is often made in the context of a national conversation . . . [that] takes place through meetings . . .").

⁵⁵ *Earls*, 536 U.S. at 841 (Breyer, J., concurring). Refusing to take the test would result in the student not being allowed to participate in the extracurricular activity; however, Breyer saw this as a marginal punishment compared to the alternative of expulsion. *Id.*

“nonthreatening reason to decline [a] friend’s drug-use invitations”—not wanting to be prohibited from engaging in an extracurricular activity.⁵⁶ In addition, using a different reasonableness model, like the individualized suspicion model, would be too subjective, resulting in certain students unfairly being targeted for testing.⁵⁷

The balancing test Breyer used in *Earls* is consistent with the proportionality analysis that he argues the Court should use in individual liberty cases.⁵⁸ In *Earls*, Breyer was essentially asking whether the restriction (the suspicionless urinalysis policy), in its efforts to further the compelling state interest (protecting children from the national problem of drug use in schools), disproportionately burdened the interest the constitutional provision seeks to protect (privacy). In answering this question, Breyer also looked at the efficacy of the policy in furthering the state interest and the character of the intrusion. The only thing that Breyer added to the mix in *Earls*, which he did not mention in his proportionality analysis, is that the extent to which the constitutional value (privacy) being implicated can vary. With the balancing test, the underlying value is still privacy, but more specifically, it is an expectation of privacy.⁵⁹ Furthermore, there is a “hierarchy of privacy interests: reasonable expectations of privacy that society is prepared to recognize as legitimate have . . . the greatest protection; diminished expectations of privacy are more easily invaded; and subjective expectations of privacy that society is not prepared to recognize as legitimate have no protection.”⁶⁰

⁵⁶ *Id.* at 840-41.

⁵⁷ *Id.* at 841.

⁵⁸ Cf. Christopher Slobogin, *Proportionality, Privacy, and Public Opinion: A Reply to Kerr and Swire*, 94 MINN. L. REV. 1588, 1590 (2010) (arguing that *Earls* departed from the usual proportionality “idea that the more privacy-invading or autonomy-limiting a police action is, the more justification the government must show before it may be carried out”). Breyer’s opinion, however, does not appear to be inconsistent with the idea of proportionality because the students had a reduced expectation of privacy, which reduced the level of privacy invasion. Furthermore, student drug use was considered a very important government interest. *Earls*, 536 U.S. at 839 (Breyer, J., concurring).

⁵⁹ CLANCY, *supra* note 44, at 496.

⁶⁰ *Id.* A concern with the expectation of privacy framework is that “government intention and action, if sufficiently well publicized, colors a citizen’s constitutionally cognizable privacy expectations.” Peter S. Greenberg, *The Balance of Interests Theory*

Most importantly, the balancing test is consistent with the legislative empowering nature of the proportionality analysis, therefore making it consistent with Breyer's active liberty views. With the erosion of the last two factors of the test over the years, the balancing test now "often involves an assessment of the relative strength of the governmental and individual interests, with the Court's thumb pressing heavily on the government's side of the scale."⁶¹ Moreover, even if the last two factors are used, the court is deferential to the political branches in regard to the policy's effectiveness in furthering the state interest.⁶²

Perhaps Fourth Amendment case law shaped Breyer's proportionality analysis for individual liberty cases. The language Breyer uses to describe his proportionality analysis is quite similar to that in *Terry v. Ohio*⁶³ and *Camara v. Municipal Court*,⁶⁴ the first two Supreme Court decisions to use the balancing test as a measure of reasonableness within the meaning of the Fourth Amendment.⁶⁵ The *Terry* Court stated: "[T]here is no ready test for determining reasonableness other than by balancing the need to search (or seize) against the invasion which the search (or seizure) entails."⁶⁶ Breyer seems to be arguing for just that in his proportionality analysis when he states that the restriction on the constitutional right must be "proportionate to, or properly balance[], the need."⁶⁷

Pursuant to the special needs doctrine, Breyer also used the balancing test in one of his two majority opinions, making it

and the Fourth Amendment: A Selective Analysis of Supreme Court Action Since Camara, 61 CALIF. L. REV. 1011, 1026 (1973).

⁶¹ CLANCY, *supra* note 44, at 495 (citation omitted).

⁶² *Id.* at 503.

⁶³ 392 U.S. 1 (1968).

⁶⁴ 387 U.S. 523 (1967).

⁶⁵ CLANCY, *supra* note 44, at 490.

⁶⁶ *Terry*, 392 U.S. at 21 (quoting *Camara*, 387 U.S. at 536-37) (parentheticals added by *Terry* Court).

⁶⁷ BREYER, MAKING OUR DEMOCRACY WORK, *supra* note 13, at 164. Breyer is not the only person to have this view of proportionality. In fact, it appears that his opinions on the topic have helped shape other views on Fourth Amendment proportionality analysis. See CHRISTOPHER SLOBOGIN, PRIVACY AT RISK: THE NEW GOVERNMENT SURVEILLANCE AND THE FOURTH AMENDMENT 21 (2007) (arguing that courts should measure the reasonableness of a search or seizure by a proportionality principle—whether the strength of the search or seizure's "justification is roughly proportionate to the level of intrusion associated with the police action").

consistent with his proportionality analysis and his active liberty views. In *Illinois v. Lidster*, police officers arrested the petitioner for drunk driving during a stop at a highway checkpoint they set up to obtain information about a hit-and-run accident that occurred a week earlier on the same highway.⁶⁸ After having determined that individualized suspicion was not required due to the special needs doctrine,⁶⁹ Breyer examined the reasonableness of the seizure.⁷⁰ Breyer explained that in determining reasonableness, the Court must balance the governmental interest, the individual interest, the efficacy of the intrusion in furthering the governmental interest, and the extent to which the individual interest was intruded upon.⁷¹ The relevant governmental concern, or as Breyer called it in this case—the public interest—was “grave,” because the police were investigating the cause of a death.⁷² Breyer considered the stop to “advance[] this grave public concern to a significant degree.”⁷³ The stop occurred about one week after the death, at the same time (around midnight on a Saturday), and near the same location of the accident.⁷⁴ Yet again, Breyer gave deference to the political branches when he stated that the police *believed* “motorists routinely leaving work after night shifts at nearby industrial complexes might have seen something relevant” on the night the crime occurred, and furthermore, might be driving the same route a week later during the checkpoint.⁷⁵ Under the individual

⁶⁸ *Illinois v. Lidster*, 540 U.S. 419, 422 (2004).

⁶⁹ *Id.* at 423-27. Breyer concluded that no individualized suspicion was required because, unlike *Indianapolis v. Edmond*, the checkpoint in this case was not set up for “general crime control purposes—i.e., to detect evidence of ordinary criminal wrongdoing” on the part of the seized motorists. *Id.* at 423 (internal quotation marks omitted). Instead, the police set up the checkpoint for the purpose of seeking out information about a crime committed by another. *Id.* According to Breyer, even in the absence of the *Edmond* rule, individualized suspicion was not necessary in this case because the Fourth Amendment does not provide full protection to an individual in a vehicle, and the checkpoint was minimally intrusive. *Id.* at 424-25.

⁷⁰ *Id.* at 427.

⁷¹ *Id.*

⁷² *Id.*

⁷³ *Id.*

⁷⁴ *Id.* at 427.

⁷⁵ *Id.* Justice Stevens, on the other hand, declined to give deference to the police in determining whether the intrusion was effective in furthering the governmental interest. *Id.* at 428 (Stevens, J., concurring in part and dissenting in part). He wrote in his dissenting opinion:

interest factor, Breyer concluded that motorists do not have an expectation of privacy that is commensurate with one that a person has while in his home.⁷⁶ Lastly, Breyer found the seizure to be minimally intrusive on the individual's diminished expectation of privacy.⁷⁷

While Breyer did not use the balancing test in his other majority opinion, *Illinois v. McArthur*, he used language very similar to that used when employing the balancing test.⁷⁸ In this case, McArthur's wife requested the presence of two police officers while she moved her belongings out of the trailer she lived in with her husband.⁷⁹ As the wife left, she informed the police standing outside that her husband had marijuana in the house.⁸⁰ Because McArthur would not allow the police to search the trailer, the officers prevented him from reentering until one of them could obtain a search warrant.⁸¹ After two hours of waiting outside, and only allowing McArthur to briefly reenter while one of the officers stood at the doorway watching him, the police obtained a

[T]he likelihood that questioning a random sample of drivers will yield useful information about a hit-and-run accident that occurred a week earlier is speculative at best. To be sure, the sample in this case was not entirely random[.] . . . but there is no evidence in the record that the police did anything to confirm that the nearby businesses in fact had shift changes at or near midnight on Saturdays, or that they had reason to believe that a roadblock would be more effective than, say, placing flyers on the employees' cars.

Id. at 429.

⁷⁶ *Id.* at 424 (majority opinion).

⁷⁷ *Id.* at 427. From an objective stance, persons only had to wait a few minutes in line, and the questioning by the police only lasted a few seconds. *Id.* Furthermore, the questioning part only consisted of the police seeking information and then handing out a flyer. *Id.* at 427-28. According to Breyer, from a subjective viewpoint, the checkpoint was not likely to cause anxiety, because police stopped "all vehicles systematically." *Id.* at 428. Several justices have criticized the stance that "the more systematic and open the intrusion, the more acceptable it is." CLANCY, *supra* note 44, at 497; *see, e.g., Delaware v. Prouse*, 440 U.S. 648, 664 (1979) (Rehnquist, J., dissenting) (internal quotation marks omitted) (condemning the theory that "motorists, apparently like sheep, are much less likely to be frightened or annoyed when stopped en masse").

⁷⁸ *Illinois v. McArthur*, 531 U.S. 326 (2001).

⁷⁹ *Id.* at 328.

⁸⁰ *Id.* at 329.

⁸¹ *Id.*

warrant.⁸² During the search, the police found marijuana and drug paraphernalia.⁸³

Breyer dispensed with the usual warrant requirement due to exigent circumstances,⁸⁴ and concluded that the search was reasonable and constitutional.⁸⁵ Using balancing test language, Breyer stated: “[R]ather than employing a *per se* rule of unreasonableness [due to the lack of a warrant], we balance the privacy-related and law enforcement-related concerns to determine if the intrusion was reasonable.”⁸⁶ Breyer also stated that there was necessity for the intrusion, and that the nature of the intrusion was “tailored to th[e] need, being limited in time and scope.”⁸⁷ Considering Breyer’s “organized, and well written” style,⁸⁸ one could argue that Breyer actually intended to discuss each of the factors used in the balancing test, because it aligns with his proportionality analysis and active liberty views.

Breyer also used similar balancing language in his *Bond v. United States* dissent.⁸⁹ This case boiled down to the question of whether a bus passenger had a protected interest in his soft-sided luggage, an enquiry that had to be made in order to determine whether the Fourth Amendment even applied.⁹⁰ Breyer argued that the added privacy protection achieved by not allowing police officers to intrude “where other strangers freely tread” did not “justify the harm worked to law enforcement.”⁹¹ In other words, the restriction properly balanced the need.

Why would Breyer discretely drop proportionality language in cases involving a reasonable expectation of privacy enquiry and

⁸² *Id.*

⁸³ *Id.*

⁸⁴ “When faced with special law enforcement needs, diminished expectations of privacy, minimal intrusions, or the like, the Court has found that certain general, or individual, circumstances may render a warrantless search or seizure reasonable.” *Id.* at 330.

⁸⁵ *Id.* at 331.

⁸⁶ *Id.*; see also Tracey Maclin, *Let Sleeping Dogs Lie: Why the Supreme Court Should Leave Fourth Amendment History Unabridged*, 82 B.U. L. REV. 895, 931 (2002) (noting Breyer’s use of a balancing formula in *McArthur*).

⁸⁷ *McArthur*, 531 U.S. at 331.

⁸⁸ Ken I. Kersch, *The Synthetic Progressivism of Stephen G. Breyer*, in REHNQUIST JUSTICE: UNDERSTANDING THE COURT DYNAMIC 241, 243 (Earl M. Maltz ed., 2003).

⁸⁹ *Bond v. United States*, 529 U.S. 334, 339 (2000) (Breyer, J., dissenting).

⁹⁰ *Id.* at 339.

⁹¹ *Id.* at 342.

the exigent circumstance exception to the warrant requirement?⁹² The best explanation can be summed up in Breyer's own words: "Proportionality involves balancing, which the Court has sometimes tried to minimize."⁹³ It seems Breyer is attempting to adhere to his views of proportionality and active liberty without raising any eyebrows by other members of the Court.

B. Narrow Rulings

It is unclear why Breyer chose not to employ the balancing test in the remainder of his Fourth Amendment opinions. Why would he state in his book, *Making Our Democracy Work*, that constitutional individual liberty cases require an emphasis on values and proportionality,⁹⁴ and then fail to follow his own preaching in the majority of his Fourth Amendment decisions? There are several possible answers to this question. First, Breyer has admitted that "proportionality is complex and difficult to apply in practice."⁹⁵ Perhaps, the intricate nature of Fourth Amendment law, combined with the complexity of the proportionality analysis, is too much to handle in most cases. The most plausible answer, however, is that Breyer felt bound to use one of the other four reasonableness models.⁹⁶

While Breyer has failed to consistently adhere to the proportionality analysis, the underlying purpose of proportionality—the protection and promotion of active liberty (i.e., deference to the political branches)—is a theme throughout most of his Fourth Amendment decisions. First of all, in the fifteen Fourth Amendment opinions Breyer has written as a

⁹² Some scholars have noted that the Court has "entered onto the slippery slopes of balancing and proportionality in assessing . . . exigent circumstances." Richard S. Frase, *What Were They Thinking? Fourth Amendment Unreasonableness in Atwater v. City of Lago Vista*, 71 *FORDHAM L. REV.* 329, 396 (2002). *But see* *Georgia v. Randolph*, 547 U.S. 103, 125 (2006) (Breyer, J., concurring) (an exigent circumstance case in which Breyer did not balance factors or use balancing test language).

⁹³ BREYER, *MAKING OUR DEMOCRACY WORK*, *supra* note 13, at 164.

⁹⁴ *Id.* at 160. As Ken Kersch has explained, a few days before Breyer's Senate hearings on his nomination, the press asked the White House about whether Breyer "believed in any transcendent constitutional principles that he would put beyond balancing." Kersch, *supra* note 88, at 241.

⁹⁵ BREYER, *MAKING OUR DEMOCRACY WORK*, *supra* note 13, at 170.

⁹⁶ *See* *Illinois v. McArthur*, 531 U.S. 326, 330 (2001) (stating that with some exceptions, seizures are unreasonable unless pursuant to a *warrant*).

Supreme Court Justice, he has ruled in favor of the government in ten of those cases.⁹⁷ But there are also several more specific applications of Breyer's active liberty jurisprudence one can find in his Fourth Amendment decisions. For instance, Breyer argues in multiple Fourth Amendment opinions for narrow rulings limited to specific factual circumstances, because broader rulings "would interfere with any ongoing democratic policy debate."⁹⁸

Breyer emphasized narrow rulings in his concurrence in *Scott v. Harris*.⁹⁹ Using the balancing test, the majority held that a police officer's attempt to stop "a dangerous high-speed car chase that threatens the lives of innocent bystanders does not violate the Fourth Amendment, even when it places the fleeing motorist at risk of serious injury or death."¹⁰⁰ Breyer agreed with the majority, but argued that its holding was too "absolute," because the determination of whether there is a Fourth Amendment violation in a high-speed chase depends upon a "kaleidoscope of facts," which a *per se* rule may not take into consideration.¹⁰¹

Breyer attaches so much importance to the facts that, in one case, he decided the outcome based almost entirely on the specific facts, and nothing more. In Breyer's *Minnesota v. Carter* concurrence in the judgment, relying on factual assumptions,¹⁰² he concluded that the defendants had a reasonable expectation of privacy but that their Fourth Amendment rights were not violated.¹⁰³

⁹⁷ The cases in which Breyer did not rule in favor of the government include: *Davis v. United States*, 131 S. Ct. 2419, 2436 (2011) (Breyer, J., dissenting); *Herring v. United States*, 555 U.S. 135, 157 (2009) (Breyer, J., dissenting); *Hudson v. Michigan*, 547 U.S. 586, 604 (2006) (Breyer, J., dissenting); *Georgia v. Randolph*, 547 U.S. 103, 125 (2006) (Breyer, J., concurring); *Hiibel v. Sixth Judicial Dist. of Nev.*, 542 U.S. 177, 196-97 (2004) (Breyer, J., dissenting).

⁹⁸ BREYER, ACTIVE LIBERTY, *supra* note 8, at 73. Breyer's commitment to focusing on the facts can also be seen in his opinions regarding other areas of constitutional law. *Kersch*, *supra* note 88, at 249.

⁹⁹ 550 U.S. 372, 387 (2007) (Breyer, J., concurring).

¹⁰⁰ *Id.* at 373. (majority opinion).

¹⁰¹ *Id.* at 388, 389 (Breyer, J., concurring) (quoting *Dirrane v. Brookline Police Dept.*, 315 F.3d 65, 70 (1st Cir. 2002)).

¹⁰² Breyer stated that he "would answer the question on the basis of . . . factual assumptions derived from the evidentiary record." 525 U.S. 83, 103 (1998) (Breyer, J., concurring).

¹⁰³ *Id.* at 103-04. Breyer also argued in two sentences of the opinion that loosely analogous case law supported his conclusion. *Id.* at 104. In the last paragraph of the opinion, almost as an afterthought, Breyer also pointed out that there was a practical

Not only do narrow rulings require a judge to focus on the facts of the case, they also require an avoidance of the application of bright-line rules.¹⁰⁴ Therefore, in several of his Fourth Amendment opinions, Breyer sets forth his distaste for the use of rules that do not require case-by-case justification.¹⁰⁵ This disdain is shown in *Georgia v. Randolph*, a case involving the warrantless search of a defendant's home for drugs after his wife gave permission to search, while the defendant, who was also present, refused to consent to the search.¹⁰⁶ Breyer agreed with the majority's holding that the physically present resident's objection to the police's entry rendered the search unreasonable.¹⁰⁷ Most of his concurrence, however, focused on discrediting the dissent's argument for a bright-line rule that would "always f[ind] one tenant's consent sufficient to justify a search without a warrant."¹⁰⁸ Instead of a bright-line rule, Breyer argued that the Court must examine the totality of the circumstances before ruling on the reasonableness of an intrusion.¹⁰⁹ While the circumstances in this case resulted in the Court finding the search unreasonable, if the circumstances were different, the outcome would have changed as well.¹¹⁰

reason for not finding an unreasonable search—allowing police officers to confirm an informant's tip in an unintrusive way. *Id.* at 105-06. Even in the absence of these two arguments, it is unlikely Breyer would have ruled otherwise due to his heavy reliance on the facts.

¹⁰⁴ A bright-line rule is "[a] single, familiar standard . . . [that] guide[s] police officers" in executing searches and seizures, and is generally used when the police lack the time or expertise to balance interests. CLANCY, *supra* note 44, at 542 (alterations in original) (quoting *New York v. Belton*, 453 U.S. 454, 458 (1981)). Such a rule is "applied to all cases of [a certain] type, regardless of particular factual variations." Wayne R. LaFare, *The Fourth Amendment in an Imperfect World: On Drawing "Bright Lines" and "Good Faith,"* 43 U. PITT. L. REV. 307, 322-23 (1982) (quoting ERWIN GRISWOLD, *SEARCH AND SEIZURE: A DILEMMA OF THE SUPREME COURT* 47 (1975)).

¹⁰⁵ See Richard A. Posner, *Justice Breyer Throws Down the Gauntlet*, 115 YALE L.J. 1699, 1715 (2006) (reviewing STEPHEN BREYER, *ACTIVE LIBERTY* (2005)) (noting Breyer's avoidance of bright-line rules).

¹⁰⁶ *Georgia v. Randolph*, 547 U.S. 103, 107 (2006).

¹⁰⁷ *Id.* at 125 (Breyer, J., concurring).

¹⁰⁸ *Id.*; see also Amanda Jane Proctor, *Breaking Into the Marital Home to Break Up Domestic Violence: Fourth Amendment Analysis of "Disputed Permission,"* 17 AM. U. J. GENDER SOC. POL'Y & L. 139, 156 (2009) ("Breyer's concurrence in *Randolph* contends that the Fourth Amendment does not insist upon bright-line rules . . .").

¹⁰⁹ *Randolph*, 547 U.S. at 126 (Breyer, J., concurring).

¹¹⁰ *Id.* at 126. An example of a change of circumstance that would have changed the outcome is "the risk of an ongoing crime or other exigent circumstance." *Id.*

Breyer believes an insistence upon clear, bright-line rules “can exact a high constitutional price” and is not worth any resulting administrative gains.¹¹¹ He admits that a lack of clarity requires judges (and the police) to exercise their own judgment, but “[a] Supreme Court opinion, based on examples, discussing how, and why, the standard applies to the cases before” the Court would provide the necessary guidance.¹¹²

Breyer, however, has not always stayed clear of bright-line rules in his Fourth Amendment cases. Breyer approved of the adoption of a bright-line rule in *Wyoming v. Houghton*, but he argued this was really a narrow ruling.¹¹³ In this case, the majority used the balancing test to conclude that when a police officer has probable cause to search a vehicle, he can also search the occupants’ belongings (e.g., a purse) in the vehicle that are capable of hiding the object of the search.¹¹⁴ Breyer wrote his own concurrence largely for the purpose of clarifying that this “bright-line rule will authorize only a limited number of searches that the law would not otherwise justify.”¹¹⁵ This is because when a police officer has probable cause to search a vehicle, he will often have probable cause to search the containers within it.¹¹⁶ Breyer also pointed out limitations to this bright-line rule.¹¹⁷ According to Breyer, it only applies to searches of containers within vehicles, and does not apply to searches of individuals within the car.¹¹⁸ Breyer’s preference for a fact-based analysis emerged at the end of his concurrence when he specified that if the facts had been different, and the purse had been attached to the individual, the police may not have been able to inspect the purse.¹¹⁹

¹¹¹ BREYER, ACTIVE LIBERTY, *supra* note 8, at 128.

¹¹² *Id.* at 129.

¹¹³ *Wyoming v. Houghton*, 526 U.S. 295, 307 (1999) (Breyer, J., concurring).

¹¹⁴ *Id.* at 307 (majority opinion).

¹¹⁵ *Id.* (Breyer, J., concurring).

¹¹⁶ *Id.*

¹¹⁷ *Id.* at 307-08; *see also* Patricia A. Dulinski, *Wyoming v. Houghton: With Scalia in the Driver’s Seat, Is the Supreme Court on the Road to a “Public Place” Exception?*, 30 SETON HALL L. REV. 578, 595-96 (2000) (discussing Breyer’s suggestion of the narrow authorization of the bright-line rule and its limitations).

¹¹⁸ *Houghton*, 526 U.S. at 308 (Breyer, J., concurring).

¹¹⁹ *Id.*

C. Relying on the Common Law as of 1791

Also consistent with his views of active liberty, Breyer has argued that in the area of privacy, an originalist “approach [does] not necessarily value the reasons for judicial hesitation, thereby taking inadequate account of ongoing legislative processes and consequently leading to premature judicial interference with legislative development.”¹²⁰ These arguments regarding the shortcomings of originalism are present in his Fourth Amendment opinions. For instance, Breyer wrote his own concurrence in *Houghton* not only to emphasize that the applicable bright-line rule would only authorize a small number of searches, but also to distance himself from the majority’s holding that the common law was dispositive in this case.¹²¹ Justice Scalia wrote for the majority, and argued that in light of historical evidence, the search of the passenger’s personal belonging was reasonable because the Framers of the Fourth Amendment would have found it to be reasonable.¹²² Scalia reasoned that since Congress passed a law in the late eighteenth century allowing “customs officials to search any ship or vessel without a warrant if they had probable cause to believe that it contained goods subject to a duty[.] . . . Congress intended customs officers to open shipping containers when necessary.”¹²³ Therefore, the police could search a container within a vehicle that they had probable cause to believe was concealing the object of the search.¹²⁴ Breyer, on the other hand, stated in his concurrence that “history is meant to inform, but not automatically to determine, the answer to a Fourth Amendment question.”¹²⁵

This is not to say that Breyer never examines the common law when determining whether a search or seizure is reasonable.

¹²⁰ BREYER, ACTIVE LIBERTY, *supra* note 8, at 131.

¹²¹ *Houghton*, 526 U.S. at 308 (Breyer, J., concurring).

¹²² *Id.* at 300 (majority opinion).

¹²³ *Id.* at 300-01.

¹²⁴ *Id.* at 301. Although Scalia found the historical evidence to be dispositive in this case, he also performed the traditional balancing test. *Id.* at 303. This two-step model for measuring reasonableness is referred to as the common law as of 1791 plus balancing test. CLANCY, *supra* note 44, at 507.

¹²⁵ *Houghton*, 526 U.S. at 307 (Breyer, J., concurring); *see, e.g.*, Maclin, *supra* note 86, at 928 (noting that Breyer has often opposed history controlling a Fourth Amendment case).

With Breyer, however, it is *one factor amongst several* that the Court must take into consideration.¹²⁶ In his dissent in *Hudson v. Michigan*, Breyer spent a portion of his opinion claiming that the common law supported the reasonableness of a search of a person's home, partially depending on whether the police knocked and announced their presence before entering.¹²⁷ Perhaps he did this only to discredit Scalia's majority opinion, which did not mention the common law, but merely analyzed the costs and benefits of excluding the evidence.¹²⁸ After all, it makes little sense that the justice who argues for looking to the common law when analyzing Fourth Amendment cases did not do so in this case.

D. A Clear Case of Active Liberty

Another similarity between Breyer's Fourth Amendment jurisprudence and his views of active liberty are found in his concurrence in *United States v. Flores-Montano*.¹²⁹ The Supreme Court unanimously held in this case that customs officials at the international border have the authority to conduct suspicionless searches, including the disassembling and inspection of a vehicle's fuel tank.¹³⁰ While Breyer agreed with the majority, he wrote a three sentence concurrence to emphasize his deference to the political branches.¹³¹ Breyer explained that there was an administrative requirement that Customs keep track of all the border searches, and he noted that this "should help minimize concerns that gas tank searches might be undertaken in an abusive manner."¹³² By stating such, Breyer gave deference to the police and set forth the notion that the restriction did not disproportionately burden the constitutional interest.

¹²⁶ BREYER, ACTIVE LIBERTY, *supra* note 8, at 115.

¹²⁷ *Hudson v. Michigan*, 547 U.S. 586, 629-30 (2006) (Breyer, J., dissenting). Breyer noted that the knock and announce rule "was agreed upon by [s]everal prominent founding-era commentators, and was woven quickly into the fabric of early American law." *Id.* at 605-06 (internal citations and quotation marks omitted).

¹²⁸ *Id.* at 595-99 (majority opinion).

¹²⁹ 541 U.S. 149, 156 (2004) (Breyer, J., concurring).

¹³⁰ *Id.* at 155 (majority opinion).

¹³¹ *Id.* at 156 (Breyer, J., concurring).

¹³² *Id.*

II. BREYER'S LACK OF CONSISTENCY

A. *Negative Liberty*

Breyer's remaining Fourth Amendment opinions do not line up with his stated views of judicial modesty and promotion of active liberty. For instance, in *Herring v. United States*, Breyer discarded his usual aversion to bright-line rules.¹³³ In this case, the Court held that the exclusionary rule¹³⁴ does not apply when police errors, such as incorrect record keeping, are the result of "isolated negligence attenuated from the arrest," instead of "systemic error or reckless disregard of constitutional requirements."¹³⁵ Breyer, on the other hand, argued that a good faith exception should not apply in cases involving police record-keeping errors.¹³⁶ More importantly, he stated that applying the exclusionary rule for such errors was "far easier for courts to administer than the [Court's] case-by-case, multifaceted inquiry into the degree of police culpability."¹³⁷

This opinion lacks little, if any, connection to active liberty. Breyer is arguing for a bright-line rule that is neither limited to the particular circumstances present in the case nor favors the government. Most likely, Breyer ruled the way he did because of a different form of liberty that he only briefly mentions in his books—negative liberty, or protecting citizens from governmental interference in their lives.¹³⁸ Breyer probably realized that a broad reading of the majority's holding could result in "a dramatic restriction in the application of the exclusionary rule,"¹³⁹ which would ultimately encourage major governmental interference into

¹³³ 555 U.S. 135, 157 (2009) (Breyer, J., dissenting).

¹³⁴ The exclusionary rule prohibits the government from introducing evidence that was obtained in violation of the Fourth Amendment. Clancy, *supra* note 2, at 200. As discussed *infra*, it does not apply for every violation.

¹³⁵ *Herring*, 555 U.S. at 137, 147.

¹³⁶ *Id.* at 158 (Breyer, J., dissenting).

¹³⁷ *Id.*

¹³⁸ BREYER, ACTIVE LIBERTY, *supra* note 8, at 5. Breyer briefly stated in both the beginning and end of *Active Liberty* that a judge's promotion of active liberty does not "involve ignoring the protection the Constitution grants fundamental (negative) liberties." *Id.* at 132.

¹³⁹ Clancy, *supra* note 2, at 203.

the lives of individuals, especially *unlawful* governmental interference.¹⁴⁰

Breyer's negative liberty view regarding the exclusionary rule is also seen in *Brosseau v. Haugen*.¹⁴¹ In his concurrence, Breyer questioned the *Saucier* rule, requiring lower courts to determine the constitutionality issue (i.e., whether there was a violation of the plaintiff's Fourth Amendment rights) before turning to the qualified immunity issue in civil damage suits against government agents.¹⁴² Instead, Breyer opined that lower courts should be allowed to skip to the second question in appropriate cases.¹⁴³ Breyer argued that the current procedure could result in the protection of an incorrect constitutional decision from further review due to dismissal of the case after the court's determination that the defendant is entitled to qualified immunity.¹⁴⁴ In other words, the *Saucier* rule could result in unlawful government behavior being sheltered from review.

Breyer also focused on the protection of negative liberty in his *Davis v. United States* dissent.¹⁴⁵ Breyer disagreed with the majority's decision not to suppress evidence found during a search that complied with binding precedent but the Court later overruled.¹⁴⁶ Specifically, in this case, police conducted a search in reasonable reliance on binding precedent, the *Belton* rule, which allowed the police to always search the passenger compartment of a vehicle contemporaneous to the lawful arrest of an occupant, without a showing by the police that the arrestee posed a threat to their safety.¹⁴⁷ This rule, however, was overturned by *Arizona v. Gant* while the *Davis* case was pending.¹⁴⁸ While the majority considered the search to be in violation of *Gant*, it found the

¹⁴⁰ See *Hudson v. Michigan*, 547 U.S. 586, 608, 609 (2006) (Breyer, J., dissenting) (noting that the purpose of the exclusionary rule is "the deterrence of unlawful government behavior," and without it, "police know that they can ignore the Constitution's requirements without risking suppression of evidence discovered after an unreasonable entry").

¹⁴¹ 543 U.S. 194, 201 (2004) (Breyer, J., concurring).

¹⁴² *Id.*

¹⁴³ *Id.*

¹⁴⁴ *Id.* at 202.

¹⁴⁵ 131 S. Ct. 2419, 2436 (2011) (Breyer, J., dissenting).

¹⁴⁶ *Id.* at 2422 (majority opinion).

¹⁴⁷ *Id.* at 2424.

¹⁴⁸ *Id.* at 2426.

exclusionary rule did not apply due to the good-faith exception (i.e., the police conduct lacked the requisite culpability in order to trigger the exclusionary rule).¹⁴⁹ Breyer made several arguments for why the majority's holding was incorrect, including the fact that the new exclusionary exception for the police's good-faith belief that their conduct is in line with binding precedent, combined with *Herring's* "simple, isolated negligence" exception, will completely swallow the exclusionary rule.¹⁵⁰ And, according to Breyer, without the exclusionary rule, there is no Fourth Amendment.¹⁵¹

While Breyer argues for judicial modesty or restraint¹⁵² in privacy law (which is, thereby, a promotion of active liberty), he clearly has not done so in these cases involving the exclusionary rule. Perhaps Michael W. McConnell put it best when he explained that a restrained judge will stray from his judicial modesty only in a relatively clear case.¹⁵³ For Breyer, the relatively clear case is one in which the continued existence of the exclusionary rule is threatened.

B. Out of Left Field

Breyer's dissent in *Arizona v. Gant* has no relation to negative liberty or the exclusionary rule, and the only aspect linking it to active liberty is that Breyer argued in favor of the government.¹⁵⁴ In this case, Breyer argued for the broad bright-line *Belton* rule, which as mentioned previously, always allowed the search of a vehicle's passenger compartment contemporaneous to the lawful arrest of an occupant.¹⁵⁵ Breyer clarified that he *would* look for a better rule if he *could*, because the *Belton* rule was not always used for the purpose it was meant to serve (i.e.,

¹⁴⁹ *Id.* at 2428.

¹⁵⁰ *Id.* at 2438-39 (Breyer, J., dissenting) (internal quotation marks omitted).

¹⁵¹ *Id.*

¹⁵² Michael W. McConnell defines judicial restraint as a decision that "defers to democratic decisionmaking." McConnell, *supra* note 15, at 2399.

¹⁵³ *Id.* at 2400.

¹⁵⁴ *Arizona v. Gant*, 556 U.S. 332, 353 (2009) (Breyer, J., dissenting).

¹⁵⁵ *Id.* at 354. The majority, on the other hand, concluded that *Belton* only allowed such a search when "the arrestee is within reaching distance of the passenger compartment at the time of the search or it is reasonable to believe the vehicle contains evidence of the offense of arrest." *Id.* at 351 (majority opinion).

ensuring the safety of the police and the preservation of evidence).¹⁵⁶ But because this was not a matter of first impression, he was bound by *stare decisis*.¹⁵⁷

Another of Breyer's decisions that lacks the theme of active liberty is his *Hiibel v. Sixth Judicial District* dissent.¹⁵⁸ Breyer disagreed with the majority's upholding of a state statute that required a person who had been stopped based on reasonable suspicion to disclose his name to the police officer.¹⁵⁹ What is most strange about the opinion is that the majority used the balancing test to uphold the statute, but Breyer, on the other hand, chose not to give deference to the state legislature.¹⁶⁰ He explained that the government failed to provide any evidence that the settled precedent "invalidat[ed] laws that compel[led] responses to police questioning" and thus, "significantly interfered with law enforcement."¹⁶¹ Again, Breyer argued for *stare decisis*.¹⁶²

Interestingly, Michael W. McConnell notes in his examination of Breyer's book, *Active Liberty*, that "*stare decisis* . . . plays no explicit role in Justice Breyer's interpretive approach. Indeed, he mentions precedent only in passing."¹⁶³ Most likely, Breyer chose not to focus on *stare decisis* in his book because it "is a weak link in constitutional theory across the board. All too often it is employed selectively and arbitrarily."¹⁶⁴ Therefore, Breyer probably used the *stare decisis* argument in these two cases as a means to an end. The end result for *Gant* was allowing the government to win.¹⁶⁵ It is far from clear why Breyer wanted the end result he argued for in *Hiibel*—one that was in the government's disfavor and gave no deference to the legislature. Perhaps this opinion was based on negative liberty. But, if this

¹⁵⁶ *Id.* at 354 (Breyer, J., dissenting).

¹⁵⁷ *Id.* at 354-55.

¹⁵⁸ 542 U.S. 177, 197 (2004) (Breyer, J., dissenting).

¹⁵⁹ *Id.* at 197.

¹⁶⁰ *Id.* at 199. Richard Posner has raised the argument that Breyer's "democratic credentials are placed in question" when he joins opinions to invalidate state legislation. Posner, *supra* note 105, at 1714.

¹⁶¹ *Hiibel*, 542 U.S. at 197, 199 (Breyer, J., dissenting).

¹⁶² *Id.* at 197.

¹⁶³ McConnell, *supra* note 15, at 2398.

¹⁶⁴ *Id.* at 2414.

¹⁶⁵ *Arizona v. Gant*, 556 U.S. 332, 354-55 (2009) (Breyer, J., dissenting).

were the case, why was the somewhat similar case of *Gant* not also based upon negative liberty?

McConnell makes an argument that adherence to stare decisis can be consistent with active liberty.¹⁶⁶ He explains that the reason a judge adheres to precedent is not because the Supreme Court decided the case.¹⁶⁷ It is due to the fact that the precedent has been accepted by the public.¹⁶⁸ McConnell states:

Whatever may have been their original legal merit, these decisions have been accepted by the nation. Legislatures do not pass laws in defiance of these decisions; commentators do not attack their reasoning (except as an academic exercise, which serves a different purpose than provoking their reconsideration); people have forgotten they ever were controversial. This overwhelming public acceptance constitutes a mode of popular ratification, which gives these decisions legitimacy and authority under the theory of active liberty.¹⁶⁹

While McConnell makes an interesting argument for stare decisis being consistent with active liberty, Breyer never mentions this consideration in his books. More importantly, trying to find a relation between these two ideas is strained, at least in Breyer's decisions, because "he not infrequently votes to overturn precedents."¹⁷⁰ Therefore, these two decisions may just be ones that came from left field.

CONCLUSION

There seems to be a common thread of active liberty woven throughout a large part of Justice Breyer's Fourth Amendment tapestry, therefore aligning with his overall constitutional views. This thread is especially present in his application of the balancing test, or in some cases, his use of balancing test language. In other cases, where Breyer chose not to use the

¹⁶⁶ McConnell, *supra* note 15, at 2417.

¹⁶⁷ *Id.*

¹⁶⁸ *Id.*

¹⁶⁹ *Id.*

¹⁷⁰ *Id.* at 2398. Breyer's practice of overturning precedent is not inconsistent with his deference to the political branches, because the Court is merely overturning its own decision.

balancing test, the active liberty thread reveals itself in: (1) his narrow rulings, where he focuses upon the facts of the case and attempts to avoid the application of bright-line rules; (2) his avoidance of reliance on the common law as of 1791; and (3) his deference to the political branches. Still, in other cases, the thread exists where, although Breyer agrees with the application of a bright-line rule, he writes a separate opinion to emphasize the narrowness of that rule.

This is not to say that the active liberty thread has been used in all of Breyer's Fourth Amendment opinions. In some cases, the thread is blatantly absent. In several of these cases that lack the active liberty theme, Breyer focuses on negative liberty—a different form of liberty than that of active liberty, but one that is equally as important, if not more. This negative liberty has been used by Breyer in Fourth Amendment cases involving the exclusionary rule. In Breyer's eyes, without this rule, there could be no Fourth Amendment tapestry. On the other hand, despite the importance he attaches to the exclusionary rule, Breyer does not see it as rooted in the Constitution, but merely as a prudential doctrine created by the Court.¹⁷¹ Without a constitutional grounding, the exclusionary rule's existence is in jeopardy.¹⁷²

There are also two Breyer opinions where one must scratch one's head and wonder why Breyer ruled the way he did. In both of these cases, Breyer bases his arguments on stare decisis, which provides little insight into Breyer's thought process since stare decisis is typically used arbitrarily and as a means to an end.

Justice Breyer has agreed with Justice O'Connor's statement that "a constitutional judge's initial decisions leave 'footprints' that the judge, in later decisions, will almost inevitably follow."¹⁷³ Although, a review of his Fourth Amendment jurisprudence indicates that Breyer will occasionally stray from his usual path.

Anna C. Sweat

¹⁷¹ See Clancy, *supra* note 2, at 202-03 (noting that Breyer argued in his *Hudson* dissent that the exclusionary rule was one of necessary deterrence, leaving the rule "without a constitutional grounding").

¹⁷² *Id.*

¹⁷³ BREYER, ACTIVE LIBERTY, *supra* note 8, at 119-20.