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California v. Acevedo: The Court establishes one rule to govern all automobile searches and opens the door to another "frontal assault" on the warrant requirement

I. INTRODUCTION

The Supreme Court has long struggled with the vexatious issue of the automobile exception to the Fourth Amendment's warrant requirement.[1] The Court once again attempted to clarify this "intolerably confusing"[2] area last Term in *California v. Acevedo*.[3] *Acevedo* held that police may search all containers found in an automobile, without a warrant, whether they have probable cause directed specifically at a container within a vehicle, or generally at the vehicle itself.[4] This holding eliminated an anomaly in the Court's Fourth Amendment jurisprudence[5] and established one rule governing all automobile searches. However, in addition to refining the law of automobile searches and seizures, the Court created another, more disturbing anomaly and may have laid the logical groundwork for the eventual elimination of the warrant requirement for searches conducted outside the home.

Part II of this Comment examines the history and evolution of the automobile exception. Part III recounts the facts, ruling, and reasoning of *Acevedo*. Part IV assesses the potentially significant repercussions of the anomaly *Acevedo* created. This part analyzes Justice Scalia's concurring opinion on how the anomaly should be

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

2 Robbins v. California, 453 U.S. 420, 430 (1981) (Powell, J., concurring).

3 111 S. Ct. 1982 (1991).

4 *Id.* at 1991.

5 *See* discussion *infra* parts II.C., IV. The Court's precedents permitted the police to search a closed container found within a vehicle only when they had probable cause to believe that contraband was contained somewhere inside the vehicle. Then, if they happened to discover a closed container they could open it without a warrant. Conversely, if the police had probable cause to search a specific container that happened to be located inside an automobile, they could not open it without a warrant.

dealt with in light of the warrant requirement's history. It also suggests that the Court, using *Acevedo*'s rationale, can cripple much of the warrant requirement's effectiveness by limiting its applicability to private homes. Part V concludes that the potentially wide applications of *Acevedo*'s logical implications could be the first step in removing the warrant requirement for searches conducted outside the home.

II. THE ORIGIN AND EVOLUTION OF THE AUTOMOBILE EXCEPTION

The Supreme Court has repeatedly reaffirmed the "cardinal principle that 'searches conducted outside the judicial process, without prior approval by a judge or magistrate are per se unreasonable under the Fourth Amendment—subject to a few specifically established and well-delineated exceptions.'"[6] One of these exceptions was specifically established in *Carroll v. United States*[7] and subsequently became known as the automobile exception. Since its inception in *Carroll* to its current form in *Acevedo*, the automobile exception has undergone significant transformations as its underlying justifications have been modified and refined.

A. *The Original Justification and Its Expansion*

The automobile exception was born 67 years ago in *Carroll v. United States*. In *Carroll*, government agents had probable cause to believe that a car driven by George Carroll was transporting intoxicating liquors in violation of the National Prohibition Act. The agents stopped defendant's car, conducted a warrantless search, and discovered 68 bottles of whiskey and gin behind the seats' upholstery. Defendants[8] were convicted of transporting intoxicating liquor. On appeal they argued that the warrantless search and seizure violated their Fourth Amendment rights.

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6 Mincey v. Arizona, 437 U.S. 385, 390 (1978) (quoting Katz v. United States, 389 U.S. 347, 357 (1967) (footnote omitted)). For an explanation of why reasonableness alone has been considered insufficient to support a search, see *infra* notes 58-59 and accompanying text.

7 267 U.S. 132 (1925).

8 John Kiro, a passenger of Carroll's, was also charged and convicted of transporting intoxicating liquor. *Id.* at 132.

Writing for the Court, Chief Justice Taft extensively reviewed the history of the National Prohibition Act.[9] He concluded that Congress clearly intended to distinguish between the necessity for a search warrant when searching a private dwelling and the necessity for a search warrant when searching a road vehicle.[10] Congress did not require a warrant in the latter case, while a warrant was a condition precedent to a lawful search in the former. After discussing similar distinctions in Congressional legislation passed between 1789 and 1899,[11] the Court held that the impracticability of obtaining a warrant, before a mobile vehicle could be moved out of the jurisdiction, justified such disparate treatment.[12]

An automobile's inherent mobility made the procurement of a warrant impractical and constitutionally allowed the police, upon probable cause,[13] to dispense with the warrant requirement in an automobile search. The Court emphasized this point, warning that "[i]n cases where the securing of a warrant is reasonably practicable, it must be used."[14] The impracticability of obtaining a warrant, therefore, provided the sole justification for ushering the automobile exception into the Court's Fourth Amendment jurisprudence.

The impracticability justification took on new meaning in *Chambers v. Maroney*.[15] The issue presented was whether police could take an automobile, believed to contain contraband, to the

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9 267 U.S. at 143-47.

10 The legislative history indicated that Congress intended to require a search warrant only when a law enforcement officer searched a private dwelling, thereby leaving the way open for warrantless searches of mobile vehicles. *Id.* at 147.

11 *Id.* at 150-53.

12 The Court held that:

> [T]he guaranty of freedom from unreasonable searches and seizures by the Fourth Amendment has been construed, practically since the beginning of government, as recognizing a necessary difference between a search of a store, dwelling house, or other structure in respect of which a proper official warrant readily may be obtained and a search of a ship, motor boat, wagon, or automobile for contraband goods, where it is not practical to secure a warrant, because the vehicle can be quickly moved out of the locality or jurisdiction in which the warrant must be sought.

Id. at 153.

13 The Court noted that such warrantless searches had to be based upon probable cause. "The measure of legality . . . is . . . that the seizing officer shall have reasonable or probable cause for believing that the automobile which he stops and seizes has contraband . . . therein." *Id.* at 155-56.

14 *Id.* at 156.

15 399 U.S. 42 (1970).

police station before proceeding with the warrantless search *Carroll* authorized. The Court recognized that "[a]rguably, because of the preference for a magistrate's judgment, only the immobilization of the car should be permitted until a search warrant is obtained; arguably, only the 'lesser' intrusion is permissible until the magistrate authorizes the 'greater.'"[16] Once police had immobilized the car and subjected it to their complete control at the station, it was, of course, no longer impractical to obtain a warrant.

Nevertheless, the Court refused to determine which search was the greater intrusion and which was the lesser, holding that "[f]or constitutional purposes, we see no difference between, on the one hand, seizing and holding a car before presenting the probable cause issue to a magistrate and, on the other hand, carrying out an immediate search without a warrant."[17] *Carroll* would have permitted the warrantless search of the car, based upon probable cause, when it was initially stopped; therefore, the police could search the same car based upon the same probable cause after following the reasonable course of taking it back to the station.[18]

The *Chambers* ruling expanded the automobile exception by allowing police to search a car without judicial authorization, even when the car is under the exclusive control of the police and it would not be impractical to obtain a warrant. The government would seek to further extend this ruling by attempting to apply it to all personal property interests outside the home.

B. *The Court Rejects the Frontal Assault*

The warrant requirement's durability was directly challenged in *Chadwick v. United States.*[19] In *Chadwick* government agents had probable cause to believe that a footlocker, which defendants placed in a car trunk, contained contraband. Before the car was started, the agents arrested the defendants, seized the car with the footlocker still inside the trunk, and took it to the Federal Building. An hour and a half after the arrests, with the footlocker under the government's exclusive control, the agents conducted a

16 *Id.* at 51.

17 *Id.* at 52. The police in *Chambers* did neither; they took the car back to the police station before proceeding with a warrantless search.

18 The Court noted that it was not unreasonable to take the car back to the station because all its occupants were arrested in a dark parking lot. Under these circumstances an immediate search would have been both impractical and unsafe. *Id.* at 52 n.10.

19 433 U.S. 1 (1977).

warrantless search of its contents and found a large amount of marijuana inside.[20]

The Court unanimously rejected the government's argument that the Fourth Amendment's Warrant Clause protected only interests traditionally associated with the home.[21] The Court also rejected the government's alternative contention that the rationale of the automobile exception cases permitted the warrantless search of the luggage.[22]

In dismissing the government's analogy between mobile personal property and automobiles, the Court added another justification for the automobile exception: automobiles are surrounded by a reduced expectation of privacy.[23] By contrast, "a person's expectations of privacy in personal luggage . . . [are] substantially greater than in an automobile" and thus deserve the greater protection that a warrant provides.[24]

Nor did the footlocker's mobility justify circumventing the warrant requirement. Once the agents had it "under their exclusive control, there was not the slightest danger that the footlocker or its contents could have been removed before a valid search warrant could be obtained."[25] This is not always true for automobiles, because secure storage facilities may not be available and an automobile's size and mobility make it susceptible to theft and intrusion by vandals.[26]

In *Chambers* the Court was unwilling to decide whether an immediate search of an automobile or its seizure and immobilization pending the issuance of a warrant was the greater intrusion upon Fourth Amendment values; given probable cause to search,

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20 *Id.* at 4-5.

21 *Id.* at 6-11. Justice Blackmun filed a dissenting opinion in which Justice Rehnquist joined, but agreed with the Court's analysis on the applicability of the Warrant Clause. *See id.* at 17 (Blackmun, J., dissenting).

22 *Id.* at 11-13.

23 "One has a lesser expectation of privacy in a motor vehicle because its function is transportation and it seldom serves as one's residence or the repository of personal effects . . . . It travels public thoroughfares where both its occupants and its contents are in plain view." *Id.* at 12 (quoting Cardwell v. Lewis, 417 U.S. 583, 590 (1974) (plurality opinion)). Other factors contributing to this reduced expectation of privacy include registration and licensing requirements, regulation of the condition and manner in which motor vehicles may be operated on public highways, and official inspections. 433 U.S. at 13.

24 *Id.* at 13. The Court pointed out that the factors which reduce an automobiles privacy, *see supra* note 22, are inapplicable to luggage. *Id.*

25 *Id.*

26 *Id.* at 13 n.7.

both choices were constitutionally acceptable.[27] The principal privacy interest in a footlocker or other piece of luggage, however, lies in its contents, which are not exposed to public view. Consequently, the search of its interior is "a far greater intrusion into Fourth Amendment values" than its seizure and impoundment.[28]

The Court was again asked to expand the automobile exception two years later in *Arkansas v. Sanders*.[29] The issue was whether police must first obtain a warrant before searching luggage taken from an automobile properly stopped and searched.[30] Police had probable cause to believe that the defendant's suitcase contained marijuana when he placed it in a taxi's trunk and drove away. The cab was stopped, the suitcase was opened, and marijuana was discovered. The State contended that the automobile exception validated the warrantless search.[31]

The Court recalled the two reasons for the distinction between automobiles and other private property. "First, . . . the inherent mobility of automobiles often makes it impractical to obtain a warrant. In addition, the configuration, use, and regulation of automobiles often may dilute the reasonable expectation of privacy that exists with respect to differently situated property."[32] Since neither reason for permitting the warrantless search of automobiles applied to luggage,[33] there was "no greater need for warrantless searches of luggage taken from automobiles than of luggage taken from other places."[34] Therefore, the Court found "no justification for the extension of *Carroll* . . . to . . . one's personal luggage merely because it was located in an automobile lawfully stopped by police."[35]

The third case inviting the Court to extend the automobile exception to cover closed containers found within automobiles was

27 *See supra* text accompanying notes 16-17.

28 433 U.S. at 13 n.8.

29 442 U.S. 753 (1979).

30 *Id.* at 754.

31 *Id.* at 762.

32 *Id.* at 761 (citations omitted).

33 Once the officers had seized the luggage and had it within their exclusive control there was nothing impractical about obtaining a warrant. And luggage, being a common repository for one's personal effects, is intimately associated with the expectation of privacy. *Id.* at 762 (citations omitted).

34 *Id.* at 764.

35 *Id.* at 765.

Robbins v. California.[36] For the third time in five years, the Court declined to accept the invitation.

In *Robbins*, police officers opened two packages wrapped in green opaque plastic, finding bricks of marijuana in each. Reaffirming *Chadwick* and *Sanders*, the plurality held that "a closed piece of luggage found in a lawfully stopped car is constitutionally protected to the same extent as are closed pieces of luggage found anywhere else."[37] Because closed containers manifest a reasonable expectation of privacy, all such containers were protected by the Warrant Clause of the Fourth Amendment unless a container "so clearly announce[d] its contents . . . [they were] obvious to an observer."[38]

By the end of 1981, then, the automobile exception had thrice been confined strictly to automobiles. After *Chadwick*, however, the original impracticability justification of *Carroll* was augmented by the reasonable-expectation-of-privacy rationale. Automobiles are principally used for transportation, not as repositories for personal effects; the expectation of privacy associated with automobiles is, therefore, much lower than that associated with other personal property.

Notwithstanding the inherent mobility of closed containers taken from lawfully stopped automobiles, they did not share an automobile's general characteristic of reduced privacy and could not be searched on the basis of probable cause alone.[39] The reduced expectation of privacy surrounding automobiles thus became the principal reason for the automobile exception. In the wake of *Chadwick*, *Sanders*, and *Robbins* it appeared as though the general principle requiring a warrant before closed packages and containers could be opened would remain inviolable in the face of the automobile exception's attempted encroachments upon it.

C. *Absolute Protection for Containers Curtailed*

The year after it decided *Robbins*, the Court again addressed the scope of a search conducted under the automobile exception. In *United States v. Ross*[40] police officers had probable cause to be-

36 453 U.S. 420 (1981) (plurality opinion).

37 *Id.* at 425.

38 *Id.* at 428.

39 *See supra* notes 19-38 and accompanying text.

40 456 U.S. 798 (1982).

lieve that defendant Ross was selling narcotics from his car's trunk. After stopping his vehicle, an officer opened the trunk, found a closed paper bag, opened it and discovered heroin.[41] Ross argued that under *Chadwick* and *Sanders* the warrantless search exceeded the permissible scope of the automobile exception and thus violated the Fourth Amendment.[42]

The Court distinguished *Chadwick* and *Sanders* by observing that in neither of those cases "did police have probable cause to search the vehicle or anything within it except the footlocker in the former case and the green suitcase in the latter."[43] Neither of those cases involved the automobile exception, "because the police there had probable cause to search the double-locked footlocker and the suitcase respectively before either came near an automobile."[44]

In *Ross*, on the other hand, the "police officers had probable cause to search [the] entire vehicle."[45] Relying upon this distinction, the Court overruled the plurality decision in *Robbins* and held that:

> [T]he scope of the warrantless search authorized by [the automobile] exception is no broader and no narrower than a magistrate could legitimately authorize by warrant. If probable cause justifies the search of a lawfully stopped vehicle, it justifies the search of every part of the vehicle and its contents that may conceal the object of the search.[46]

The reasonable expectation of privacy that *Chadwick*, *Sanders*, and *Robbins* found intimately associated with every closed container yielded to the law-enforcement interest of carrying out an immediate search.

Ross legalized the warrantless search of closed containers found within automobiles only when the police had probable cause to believe that contraband was contained somewhere within the vehicle. Because a search warrant would carry the legal authority to open containers inside an automobile, where the object of the search would likely be found, the scope of a warrantless search

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41 The police also discovered a pistol in the glove compartment and a zippered red leather pouch, containing $3,200 cash, in the trunk. *Id.* at 801.

42 *Id.* at 801-02.

43 *Id.* at 814.

44 *Id.* at 816 (citing Robbins v. California, 453 U.S. 420 (Stevens, J., dissenting)).

45 456 U.S. at 817.

46 *Id.* at 825.

was just as broad.[47] However, when police had probable cause to search only a particular container within an automobile, and not the automobile generally, *Chadwick* and *Sanders* operated to require a warrant before a lawful search could proceed.

The original impracticability justification would not support extending the automobile exception to closed containers, even when the general search was supported by probable cause. Once police seize a container and bring it within their exclusive control, there is nothing impractical about obtaining the approval of a neutral and detached magistrate before searching it. Nor would the post-*Chadwick* rationale of a reduced reasonable expectation of privacy permit such a search, because closed containers are closely associated with the reasonable expectation of privacy.[48] Despite these apparent inconsistencies, the Court found that the law enforcement interest in an immediate search outweighed any privacy interests in the bag and again extended the automobile exception[49] — paving the way for a greater extension in *Acevedo.*

III. THE ACEVEDO DECISION

A. *The Facts and Ruling*

On October 30, 1987, police officers observed Charles Stephen Acevedo leave an apartment, known to contain marijuana, carrying a small brown paper bag.[50] The bag was the size of a wrapped marijuana package. Acevedo placed it in his car and started to drive away. The officers stopped the car, opened the trunk and the bag, and discovered the marijuana.[51]

Acevedo's motion to suppress the marijuana was denied, but the California Court of Appeal reversed.[52] Because the officers' probable cause was directed specifically at the bag, rather than at the automobile generally, the court concluded that the case was controlled by *Chadwick,* not *Ross.*[53] The officers could lawfully seize the paper bag based upon their probable cause, but under *Chadwick* they could not open it without first obtaining a warrant. After the California Supreme Court denied the State's petition for

47 *Id.* at 820-21 (footnote omitted).
48 *See supra* notes 23-24 and accompanying text; *see also supra* note 33.
49 456 U.S. at 823.
50 California v. Acevedo, 111 S. Ct. 1982, 1984 (1991).
51 *Id.* at 1985 (footnote omitted).
52 People v. Acevedo, 216 Cal. App. 3d 586, 265 Cal. Rptr. 23 (1990).
53 111 S. Ct. at 1985.

review, the U.S. Supreme Court granted certiorari to reexamine the law applicable to closed containers in automobiles.[54]

The Court's analysis relied heavily on *Ross*, which "distinguished the *Carroll* doctrine from the separate rule that governed the search of closed containers"[55] and "took the critical step of saying that closed containers in cars could be searched without a warrant because of their presence within the automobile."[56] *Ross* rejected *Chadwick*'s distinction between containers and cars, concluding that the expectation of privacy in one's vehicle equals one's expectation of privacy in a container.[57]

The Court agreed with the *Ross* dissenters[58] that a container found after a general search of an automobile and a container found in a car after a limited search for the container are equally easy for the police to store and for the suspect to hide or destroy.[59] Finding "no principled distinction in terms of either the privacy expectation or the exigent circumstances between the paper bag found by the police in *Ross* and the paper bag found by the police here,"[60] the Court ruled that the warrantless search of Acevedo's bag was consistent with the Fourth Amendment.

B. *The Court's Rationale*

The Court reasoned that the attempt to differentiate between a container for which the police were specifically searching and a container which they coincidentally came across during a general automobile search provided only minimal protection for privacy and impeded effective law enforcement.[61] The Court offered several reasons for that conclusion.

First, "[t]he line between probable cause to search a vehicle and probable cause to search a package in that vehicle is not always clear, and separate rules . . . may enable the police to broaden their power to make warrantless searches and disserve privacy interests."[62] This is so because "[i]f the police know that

54 111 S. Ct. at 1985.

55 *Id.* at 1986.

56 *Id.* at 1987.

57 "[T]he privacy interests in a car's trunk or glove compartment may be no less than those in a movable container."
456 U.S. at 823.

58 *Id.* at 839-40 (Marshall, J., dissenting).

59 111 S. Ct. at 1988.

60 *Id.*

61 *Id.* at 1989.

62 *Id.* at 1988.

they may open a bag only if they are actually searching the entire car, they may search more extensively than they otherwise would in order to establish the general probable cause required by *Ross*."[63]

Law enforcement agents may not, however, "conduct a more intrusive search in order to justify a less intrusive one"[64] because probable cause is determined at the outset of the search. Any evidence found during an otherwise unlawful search does not serve to retroactively justify that search.[65] Similarly, if a defendant contends that a search was illegal because the police searched an entire vehicle when they had probable cause only to search a particular package, the reviewing court will look to the totality of the circumstances, as they existed *before* the search was commenced, to determine whether the police actually had the general probable cause *Ross* requires.[66]

Second, "[l]aw enforcement officers may seize a container and hold it until they obtain a warrant,"[67] and "since the police . . . have probable cause to seize the property, we can assume that a warrant will be routinely forthcoming in the overwhelming majority of cases."[68] This argument proves far too much.

If the *Ross* rule provided only minimal protection for privacy, then the Warrant Clause generally, when applied in public places, also provides only minimal protection. Police can always seize personal property located anywhere outside a private dwelling based upon probable cause, and since such property will be seized upon probable cause, a warrant should be routinely forthcoming. Privacy will not be greatly protected by the warrant requirement, because the police will eventually be able to search the property seized. On the other hand, the time and expense in terms of lost resources of having to procure a warrant will be a heavy burden on law enforcement.

This logic ignores the central purpose of the Fourth Amendment: to require a neutral and detached magistrate to assess the

63 *Id.*

64 *Id.* at 1989.

65 *See, e.g.*, United States v. Di Re, 332 U.S. 581, 595 (1948); Byars v. United States, 273 U.S. 28, 29-30 (1927).

66 *See* United States v. Johns, 469 U.S. 478, 482-83 (1985) (holding that police had probable cause to search the entire truck although they chose not to).

67 111 S. Ct. at 1989 (citing United States v. Chadwick, 433 U.S. 1, 13 (1977)).

68 *Id.* (quoting Arkansas v. Sanders, 442 U.S. 753, 770 (1979) (Blackmun, J., dissenting).

reasonableness of the proposed search by reviewing the officer's determination of probable cause.[69] The Court has repeatedly held that while the warrant requirement imposes a burden on law-enforcement, and trained professionals usually make reliable assessments in determining the existence of probable cause to conduct a search, "these factors are outweighed by the individual interest in privacy that is protected by advance judicial approval."[70]

Third, "police often will be able to search containers without a warrant, despite the *Chadwick—Sanders* rule, as a search incident to a lawful arrest."[71] The Court claimed that under *New York v. Belton*[72] "the same probable cause to believe that a container holds drugs will allow the police to arrest the person transporting the container and search it."[73]

This reasoning would greatly expand *Belton*, in which the justification for stopping the car and arresting the driver was unrelated to the subsequent search. If the Court is going to extend the "search incident to arrest" doctrine by allowing police to arrest suspects based solely upon probable cause to believe that a suspect's package contains contraband, and then allow a search of that package, the purpose and protection of the Warrant Clause will be effectively abolished in all situations outside private homes. Why would a law enforcement officer merely seize a package, hold it, and await a magistrate's approval to search it, when that officer can arrest the suspect, based only upon probable cause to believe that the package contains contraband, and conduct an immediate search?

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69 *See, e.g.*, Johnson v. United States, 333 U.S. 10, 13-14 (1948) holding that:

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

Id.

70 California v. Acevedo, 111 S. Ct. 1982, 1995 (1991) (Stevens, J., dissenting).

71 *Id.* at 1989.

72 453 U.S. 454 (1981). *Belton* held that:

> [W]hen a policeman has made a lawful custodial arrest of the occupant of an automobile, he may, as a contemporaneous incident of that arrest, search the passenger compartment of that automobile. It follows from this conclusion that the police may also examine the contents of any containers found within the passenger compartment.

Id. at 460 (footnote omitted).

73 111 S. Ct. at 1989.

Fourth, "the search of a paper bag intrudes far less on individual privacy than does the incursion sanctioned long ago in *Carroll*."[74] Upholstery of an automobile is not, however, a repository for personal effects in which one has a reasonable expectation of privacy. Until *Acevedo*, or at least until *Ross*, closed containers and other items of personal property were cloaked with such an expectation. If they are no longer associated with a reasonable expectation of privacy, the principal reason for treating them differently from automobiles disappears and police can now conduct warrantless searches of such personal property.

Finally, "[t]he *Chadwick—Sanders* rule is the antithesis of a clear and unequivocal guideline."[75] The Court pointed out that the state courts and the federal courts of appeals had been reversed in their Fourth Amendment holdings twenty-nine times since *Ross*.[76]

The Court has definitely accomplished its purpose of making the application of the automobile exception clear and unequivocal — it now applies to everything in any way associated with an automobile. "We conclude that it is better to adopt one clear-cut rule to govern automobile searches and . . . . the *Carroll* doctrine set forth in *Ross* now applies to all searches of containers found in an automobile."[77] In its efforts to clarify and simplify the automobile exception's application, *Acevedo* may have done much more: it may have marked the beginning of the Warrant Clause's demise in public places.

IV. ONE ANOMALY GIVES WAY TO ANOTHER

The Court concluded its analysis by criticizing the *Chadwick—Sanders* rule for allowing fortuity and coincidence to determine the outcome of Fourth Amendment cases.[78] The old rule created "an anomaly such that the more likely police are to discover drugs in a container, the less authority they have to search it."[79] The Court eradicated this anomaly by expanding the

74 *Id.* Prohibition agents slashed the upholstery of Carroll's automobile.

75 *Id.* at 1990.

76 *Id.*

77 *Id.* at 1991.

78 "Until today, this Court has drawn a curious line between the search of an automobile that coincidentally turns up a container and the search of a container that coincidentally turns up in an automobile. The protections of the Fourth Amendment must not turn on such coincidences." *Id.*

79 *Id.* at 1990. If police strongly suspected that a certain container contained con-

automobile exception to create "one rule to govern all automobile searches."[80] The anomaly was eliminated; police could now search all containers seized from automobiles based upon probable cause alone. However, another, more troubling anomaly was born.

In his dissent Justice Stevens noted the inception of this perplexing anomaly:

> [S]urely it is anomalous to prohibit the search of a briefcase while the owner is carrying it exposed on a public street yet to permit a search once the owner hasplaced the briefcase in the locked trunk of his car. One's privacy interest in one's luggage can certainly not be diminished by one's removing it from a public thoroughfare and placing it—out of sight—in a privately owned vehicle. Nor is the danger that evidence will escape increased if the luggage is in a car rather than on the street.[81]

Analyzing the issue by focusing on the closed container and applying, as Justice Stevens did, the traditional rationales undergirding the automobile exception—impracticability and the reduced expectation of privacy—the warrantless search of Acevedo's paper bag should have been unconstitutional. Yet the traditional rationales should also have barred the warrantless search in *Ross*.[82] Ostensibly, mobile personal property loses its separate identity when placed inside an automobile and any privacy interests an owner may have in its contents yield to the broad scope of the automobile exception.[83] But as Justice Stevens pointed out, this analysis also creates an anomaly which, just as the

traband before it was placed into an automobile, they could not search it without first obtaining a warrant. On the other hand, if police suspected that contraband was contained somewhere in a vehicle generally and during a search of that vehicle came across a container, they could immediately search its contents.

80 *Id.* at 1991.

81 *Id.* at 2001 (Stevens, J., dissenting).

82 *See supra* text accompanying notes 47-48.

83 This would be the most innocuous interpretation of *Acevedo.* Under this interpretation the analysis focuses on the automobile. The closed container, losing its separate identity, simply merges into the vehicle and they both become one. The traditional rationales of impracticability and reduced expectation of privacy then apply to permit the warrantless search of the vehicle and everything in it, including closed containers. However, by repudiating the reasonable expectation of privacy distinction between automobiles and other personal property, the Court seems to be focusing its analysis on the container itself. *See infra* part IV.A., B. In that case, the Court's rationale would seem to support the constitutionality of warrantless searches of all mobile personal property seized outside a private home. *Id.*

Chadwick—Sanders rule did, allows the protections of the Fourth Amendment to turn on fortuity and coincidence.[84]

By emasculating the reasoning of *Chadwick* and *Sanders, Ross* laid the foundation for *Acevedo. Acevedo* rejected *Chadwick*'s distinction between automobiles and other personal property, as applied in *Sanders.* By renouncing that crucial distinction, the Court appeared to focus its analysis on the container rather than the automobile and thereby open the door to another frontal assault on the warrant requirement. The anomaly *Acevedo* brought to life and its potential resolution will illustrate this point.

A. *Justice Scalia's Proposed Resolution*

In his concurring opinion Justice Scalia recognized the newly created anomaly and proposed a method of resolving it and other such anomalies in the Court's Fourth Amendment jurisprudence. He discussed the historical struggle "between imposing a categorical warrant requirement and looking to reasonableness alone" to determine what searches were prohibited by the Fourth Amendment.[85] Although the warrant requirement had rhetorically prevailed by the late 1960s, it has since "become so riddled with exceptions that it [is] basically unrecognizable."[86] In this context, Justice Scalia viewed *Acevedo* not as a "momentous departure, but rather as merely the continuation on an inconsistent jurisprudence" that should be made consistent "by returning to the first principle that the 'reasonableness' requirement of the Fourth Amendment affords the protection the common law afforded."[87]

Justice Scalia argued that "the supposed 'general rule' that a warrant is always required does not appear to have any basis in the common law . . . and confuses rather than facilitates any attempt to develop rules of reasonableness in light of changed legal circumstances, as the anomaly eliminated and the anomaly created

84 Law enforcement agents may not search a package being carried in public on the basis of probable cause alone, unless the Court is serious about tremendously extending the search incident to arrest doctrine; they may, however, search the same package under the automobile exception as soon as it is placed in a car.

85 111 S. Ct. at 1992 (Scalia, J., concurring).

86 *Id.* The Court has used the intricate body of law regarding reasonable expectation of privacy largely as a means of creating numerous exceptions to the warrant requirement. Thus the Court can denominate a search "not a Fourth Amendment 'search' and therefore not subject to the general warrant requirement." *Id.* at 1993.

87 *Id.* at 1993 (citation omitted).

by today's holding both demonstrate."[88] He would resolve such anomalies by holding that "the search of a closed container, outside a privately owned building, with probable cause to believe that the container contains contraband, and when it in fact does contain contraband, is not one of those searches whose Fourth Amendment reasonableness depends upon a warrant."[89]

Obviously, Justice Scalia focused his analysis directly on the container and would explicitly abandon the warrant requirement as a prerequisite to searches of personal property seized in public places. His concurrence and the Court's rationale place the warrant requirement's continued viability in serious jeopardy.

B. *How Would the Court Resolve Its Anomaly?*

If *Chadwick* were argued today, how would the Court rule? Justice Scalia has already declared himself, and we can apply *Acevedo*'s reasoning to gain some insight into the factors the Court would focus upon and how it would rule.

The *Chadwick* Court disallowed the warrantless search of the footlocker because of the greater expectation of privacy associated with luggage and other closed containers when compared to automobiles.[90] Both *Ross* and *Acevedo* have renounced that distinction.[91] If the reasonable expectation of privacy in a vehicle is equal to the reasonable expectation of privacy in a closed container, why limit the warrantless search of such containers to those found in vehicles?

The logical implications of the Court's rationale in *Acevedo* argue for permitting the warrantless search of mobile personal property taken from public places. Certainly there is no material difference, in terms of privacy expectations, between a closed container or package when it is being transported on the street and when it is being transported in a car. Nor is there any material difference in terms of the impracticability of obtaining a warrant or the ability of police to hold and store the item pending the issuance of a warrant.

Acevedo pointed out several reasons why the rule requiring police to obtain a warrant before searching a closed container taken from an automobile provided only minimal protection for

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88 *Id.*

89 *Id.* at 1994.

90 *See supra* notes 23-24 and accompanying text.

91 *See supra* notes 56-57 and accompanying text.

privacy and impeded effective law enforcement.[92] To the extent that those reasons apply outside the automobile context,[93] they also support the warrantless search of any closed container taken from a public place.

First, all law enforcement agents may seize an item of personal property in a public place based upon probable cause and hold it until they can obtain a warrant.[94] Because the seizure will have been based upon probable cause, the Court contends that presumably a warrant will be routinely forthcoming in the overwhelming majority of cases and the agents will eventually be able to search the property anyway.[95] An immediate search would be far less burdensome on law-enforcement, while providing only marginally less protection for privacy.

Second, on many occasions law-enforcement officers will be able to search, as a search incident to arrest, the item seized from a public place without a search warrant.[96] This is especially so if the Court is serious about its interpretation of *Belton*.[97] That would mean that the same probable cause that a container holds contraband would allow police to arrest the individual transporting it and search the container incident to that arrest.[98] No compelling reason would limit such searches incident to arrest to the automobile context.

Finally, why is it a greater burden upon law enforcement to obtain a warrant to search a container taken from an automobile, than to obtain a warrant to search a container taken from anywhere else? The same delays and costs of the warrant procedure apply in both cases.

Using *Acevedo*'s reasoning, one can make a strong argument that warrantless searches of all closed containers and packages seized in public places do not violate the Fourth Amendment. The

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92 *See supra* part III.B.

93 Nothing in the Court's opinion would limit its reasoning to automobiles.

94 California v. Acevedo, 111 S. Ct. 1982, 1989 (1991) (citing United States v. Chadwick, 433 U.S. 1, 13 (1977)).

95 *Id.* (quoting Arkansas v. Sanders, 442 U.S. 753, 770 (1979) (Blackmun, J., dissenting)).

96 *Id.*

97 *See supra* note 70 and accompanying text.

98 It is unlikely that the Court will extend the search incident to arrest doctrine this far. The original justification for sanctioning searches incident to arrests was for the officer's protection and to prevent the suspect from destroying relevant evidence. *See* Chimel v. California 395 U.S. 752 (1969). Such an extension would certainly render the application of the Warrant Clause outside the home void.

warrant requirement provides minimal protection for privacy; police can detain a suspect's personal property while they procure a warrant and will eventually be able to search it anyway. Additionally, police may often be able to conduct warrantless searches incident to arrest. The burden on law enforcement of being required to obtain a warrant—in terms of lost time and resources—together with the minimal privacy protection the Warrant Clause provides, tips the balance in favor of allowing warrantless searches of closed containers taken from public places, just as it argued for allowing warrantless searches of closed containers taken from automobiles in *Acevedo*.[99]

V. CONCLUSION

The automobile exception has been extended as far as logic will allow and perhaps a bit further. A forcible argument can now be made that the rationales for the automobile exception should be applied to other forms of personal property seized from public places. The first frontal assault on the warrant requirement, launched in *Chadwick*, failed because it was held that one has a reasonable expectation of privacy in luggage, packages, and other closed containers, but not in automobiles. *Acevedo* laid this distinction to rest; the door is now wide open to another frontal assault upon the Warrant Clause.

It has been argued above that *Acevedo*'s reasoning will logically support the extension of the automobile exception's rationales outside the automobile context. Justice Scalia has already declared his willingness to abandon the traditional warrant requirement. With the logical implications of decisions like *Acevedo*, the full Court cannot be far behind.

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99 *See supra* part III.B.