SUPREME COURT OF THE UNITED STATES

No. 91–2019

MINNESOTA, PETITIONER *v.* TIMOTHY DICKERSON

ON WRIT OF CERTIORARI TO THE SUPREME COURT OF MINNESOTA

[June 7, 1993]

JUSTICE SCALIA, concurring.

I take it to be a fundamental principle of constitutional adjudication that the terms in the Constitution must be given the meaning ascribed to them at the time of their ratification. Thus, when the Fourth Amendment provides that "[t]he right of the people to be secure in their persons, houses, papers, and effects, against *unreasonable searches and seizures*, shall not be violated" (emphasis added), it "is to be construed in the light of what was deemed an unreasonable search and seizure when it was adopted," *Carroll* v. *United States*, 267 U. S. 132, 149 (1925); see also *California* v. *Acevedo*, 500 U. S. ___, ___ (1991) (slip op., at 3–4) (SCALIA, J., concurring in judgment). The purpose of the provision, in other words, is to preserve that degree of respect for the privacy of persons and the inviolability of their property that existed when the provision was adopted —even if a later, less virtuous age should become accustomed to considering all sorts of intrusion "reasonable."

My problem with the present case is that I am not entirely sure that the physical search—the "frisk"—that produced the evidence at issue here complied with that constitutional standard. The decision of ours that gave approval to such searches, *Terry* v. *Ohio*, 392 U. S. 1 (1968), made no serious attempt to determine compliance with traditional standards, but rather, according to the style of this Court at the time, simply adjudged that such a search was "reasonable" by current estimations. *Id.*, at 22–27.

There is good evidence, I think, that the "stop" portion of the *Terry* "stop-and-frisk" holding accords with the common law—that it had long been considered reasonable to detain suspicious persons for the purpose of demanding that they give an account of themselves. This is suggested, in particular, by the so-called night-walker statutes, and their common-law antecedents. See Statute of Winchester, 13 Edw. I, Stat. 2, ch. 4 (1285); Statute of 5 Edw. III, ch. 14 (1331); 2 W. Hawkins, Pleas of the Crown c. 13, §6, p. 129 (8th ed. 1824) ("It is holden that this statute was made in affirmance of the common law, and that every private person may by the common law arrest any suspicious night-walker, and detain him till he give a good account of himself"); 1 E. East, Pleas of the Crown ch. 5, §70, p. 303 (1803) ("It is said . . . that every private person may by the common law arrest any suspicious night-walker, and detain him till he give a good account of himself"); see also M. Dalton, The Country Justice ch. 104, pp. 352–353 (1727); A. Costello, Our Police Protectors: History of the New York Police 25 (1885) (quoting 1681 New York City regulation); 2 Perpetual Laws of Massachusetts 1788–1798, ch. 82, §2, p. 410 (1797 Massachusetts statute).

I am unaware, however, of any precedent for a physical search of a person thus temporarily detained for questioning. Sometimes, of course, the temporary detention of a suspicious character would be elevated to a full custodial arrest on probable cause—as, for instance, when a suspect was unable to provide a sufficient accounting of himself. At *that* point, it is clear that the common law would permit not just a protective "frisk," but a full physical search incident to the arrest. When, however, the detention did not rise to the level of a full-blown arrest (and was not supported by the degree of cause needful for that purpose), there appears to be no clear support at common law for physically searching the suspect.

See Warner, The Uniform Arrest Act, 28 Va. L. Rev. 315, 324 (1942) ("At common law, if a watchman came upon a suspiciously acting nightwalker, he might arrest him and then search him for weapons, but he had no right to search before arrest"); Williams, Police Detention and Arrest Privileges—England, 51 J. Crim. L., C. & P. S. 413, 418 (1960) ("Where a suspected criminal is also suspected of being offensively armed, can the police search him for arms, by tapping his pockets, before making up their minds whether to arrest him? There is no English authority . . . .").

I frankly doubt, moreover, whether the fiercely proud men who adopted our Fourth Amendment would have allowed themselves to be subjected, on mere *suspicion* of being armed and dangerous, to such indignity—which is described as follows in a police manual:

> "Check the subject's neck and collar. A check should be made under the subject's arm. Next a check should be made of the upper back. The lower back should also be checked.
>
> "A check should be made of the upper part of the man's chest and the lower region around the stomach. The belt, a favorite concealment spot, should be checked. The inside thigh and crotch area also should be searched. The legs should be checked for possible weapons. The last items to be checked are the shoes and cuffs of the subject." J. Moynahan, Police Searching Procedures 7 (1963) (citations omitted).

On the other hand, even if a "frisk" prior to arrest would have been considered impermissible in 1791, perhaps it was considered permissible by 1868, when the Fourteenth Amendment (the basis for applying the Fourth Amendment to the States) was adopted. Or perhaps it is only since that time that concealed weapons capable of harming the interrogator quickly and from beyond arm's reach have become common

—which might alter the judgment of what is "reasonable" under the original standard. But technological changes were no more discussed in *Terry* than was the original state of the law.

If I were of the view that *Terry* was (insofar as the power to "frisk" is concerned) incorrectly decided, I might—even if I felt bound to adhere to that case—vote to exclude the evidence incidentally discovered, on the theory that half a constitutional guarantee is better than none. I might also vote to exclude it if I agreed with the original-meaning-is-irrelevant, good-policy-is-constitutional-law school of jurisprudence that the *Terry* opinion represents. As a policy matter, it may be desirable to *permit* "frisks" for weapons, but not to *encourage* "frisks" for drugs by admitting evidence other than weapons.

I adhere to original meaning, however. And though I do not favor the mode of analysis in *Terry*, I cannot say that its result was wrong. Constitutionality of the "frisk" in the present case was neither challenged nor argued. Assuming, therefore, that the search was lawful, I agree with the Court's premise that any evidence incidentally discovered in the course of it would be admissible, and join the Court's opinion in its entirety.